

Constitutional Cases 2008: An Overview

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Constitutional Cases 2008: An Overview

Patrick J. Monahan and James Yap*

I. INTRODUCTION

This volume of the *Supreme Court Law Review*, which consists of papers presented at Osgoode Hall Law School's 12th Annual Constitutional Cases Conference held on April 17, 2009, examines the constitutional decisions of the Supreme Court of Canada released in the calendar year 2008.¹ The Court handed down a total of 74 judgments in 2008,² just 12 (or 16 per cent) of which were constitutional cases. The majority of the constitutional cases (10 of 12 cases) were Charter cases,³ while the remaining two cases dealt with federalism issues.⁴ In no case released during calendar 2008 did the Court decide an Aboriginal constitutional issue.⁵

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¹ A case is defined as a "constitutional case" if the decision of the Court involves the interpretation or application of a provision of the "Constitution of Canada", as defined in s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² Supreme Court of Canada, *Bulletin of Proceedings: Special Edition, Statistics 1998-2008*, available online at <<http://www.scc-csc.gc.ca/stat/html/index-eng.asp>>.

³ *Canada (Justice) v. Khadr*, [2008] S.C.J. No. 28, [2008] 2 S.C.R. 125 (S.C.C.) [hereinafter "*Khadr*"]; *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] S.C.J. No. 39, [2008] 2 S.C.R. 326 (S.C.C.) [hereinafter "*Charkaoui II*"]; *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23, [2008] 1 S.C.R. 761 (S.C.C.) [hereinafter "*Lake*"]; *R. v. M. (A.)*, [2008] S.C.J. No. 19, [2008] 1 S.C.R. 569 (S.C.C.) [hereinafter "*M. (A.)*"]; *R. v. B. (D.)*, [2008] S.C.J. No. 25, [2008] 2 S.C.R. 3 (S.C.C.) [hereinafter "*B. (D.)*"]; *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.); *R. v. Kang-Brown*, [2008] S.C.J. No. 18, [2008] 1 S.C.R. 456 (S.C.C.) [hereinafter "*Kang-Brown*"]; *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter "*Kapp*"]; *R. v. Wittwer*, [2008] S.C.J. No. 33, [2008] 2 S.C.R. 235 (S.C.C.); *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, [2008] S.C.J. No. 15, [2008] 1 S.C.R. 383 (S.C.C.). *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "*Charter*"].

⁴ *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] S.C.J. No. 7, [2008] 1 S.C.R. 131 (S.C.C.) [hereinafter "*620 Connaught*"]; *Confédération des syndicats nationaux v. Canada (Attorney General)*, [2008] S.C.J. No. 69, [2008] 3 S.C.R. 511 (S.C.C.) [hereinafter "*CSN*"].

⁵ In *Kapp*, *supra*, note 3, Bastarache J. wrote a lone concurring opinion in which he took into account s. 25 of the Charter. The majority, however, did not rule on the s. 25 issue.

Of the 10 Charter cases, seven were unanimous, while both federalism cases were unanimous. Despite the unusually low number of constitutional judgments released, several of these decisions were potentially highly significant. This significance is reflected in the generally high success rate for constitutional claims — Charter claims were successful in seven of 10 cases, and federalism claims succeeded in one of two cases.

The 2008 term also saw a return to a number of statistical trends from which the Court had strayed in 2007. The 2007 term had revealed a Court that was more divided and saw a significant dip in both the number of appeals heard and the number of judgments released. This past year, however, saw a return to the general statistical trends established by the McLachlin Court in all these categories. In 2008, the Court was unanimous in 76 per cent of cases, matching the McLachlin Court average, whereas in 2007 it had been unanimous in only 62 per cent of cases. The Court also heard 82 appeals in 2008 (as opposed to 53 in 2007), close to the McLachlin Court yearly average of 80; and it also issued 74 appeal judgments (58 in 2007), approaching the McLachlin Court yearly average of 82.

In retrospect, therefore, 2007 appears to have been a statistical anomaly.

II. CHARTER CASES

The Court was particularly receptive to Charter claims in 2008. Seven of 10 cases (70 per cent) succeeded, the highest success rate since 1985.⁶ In contrast, since McLachlin J. was elevated to Chief Justice on January 7, 2000, Charter claimants have been successful in 57 out of 124 cases (46 per cent). However, if 2008 is counted together with 2007, where Charter claimants were successful in just three of 12 cases (25 per cent), then the two-year success rate works out to 45 per cent — consistent with the McLachlin Court average. So it seems yet another downward trend from 2007 was balanced out in 2008.

⁶ A Charter claim is treated as being successful when the claimant receives some form of relief under s. 24 of the Charter, or where a statute or other legal rule is declared to be inconsistent with the Constitution of Canada under s. 52 of the *Constitution Act, 1982*.

1. Equality Rights — *R. v. Kapp*

Kapp is the most significant equality rights decision since *Law v. Canada (Minister of Employment and Immigration)*⁷ almost a decade earlier. In August 1998, a group of mainly non-Aboriginal commercial fishers staged a protest fishery at the mouth of the Fraser River during a special 24-hour period reserved for Aboriginal fishers designated by their bands under a communal fishing licence. This communally held licence, which authorized three Aboriginal bands to grant use of the licence to designated individual band members, was issued as part of a federal program introduced in 1992, after the Supreme Court of Canada's decision in *R. v. Sparrow*.⁸ When, as anticipated, the protest fishers were charged with fishing at a prohibited time, they sought declarations that the communal fishing licence and related regulations and policies were unconstitutional under section 15(1) of the Charter.

Although they were initially successful in Provincial Court, the British Columbia Supreme Court allowed the Crown's appeal and entered a conviction, which was subsequently upheld by the Court of Appeal. On appeal to the Supreme Court of Canada, the Court unanimously dismissed the appeal in two separate concurring opinions. Notably, an eight-member majority led by the Chief Justice and Abella J. upheld the impugned government action under section 15(2). In doing so, they not only clarified the interpretation and operation of section 15(2), they also took the opportunity to fundamentally restructure the proper analytical approach to section 15(1).

In *Andrews v. Law Society of British Columbia*,⁹ the Court had identified two chief indicators of discrimination under section 15(1): perpetuating pre-existing disadvantage and stereotyping. A decade later, in *Law*, the Court suggested instead that the analysis of discrimination could be framed in terms of impact on the claimant's "human dignity", having regard to four contextual factors: (1) pre-existing disadvantage; (2) the relationship between the differential treatment and the claimant group's reality; (3) any ameliorative purpose or effects; and (4) the nature of the interest affected.

In *Kapp*, however, the Court observed that this approach has led to considerable difficulties. For instance, the majority acknowledged criticism that human dignity, the touchstone from *Law*, is an "abstract

⁷ [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.).

⁸ [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.).

⁹ [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

and subjective notion”¹⁰ and difficult to apply as a legal test. Further, they noted that it has imposed an additional burden on claimants, and moreover has sometimes led to an overly formalistic approach “in the form of an artificial comparator analysis focussed on treating likes alike”.¹¹ It is thus more appropriate, they stressed, to conceive of *Law* as an affirmation of the approach to substantive equality set out in *Andrews*, rather than as the formulation of a new and distinctive legal test under section 15(1).

Accordingly, the four contextual factors cited in *Law* as indicators of human dignity “should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* — combating discrimination”, defined through the dual concepts of (1) perpetuating disadvantage or prejudice; and (2) imposing disadvantage on the basis of stereotyping.¹²

Thus, the Court has effectively discarded the concept of “human dignity” introduced in *Law*, re-affirming the primacy of the *Andrews* test.

Meanwhile, the majority judgment of the Chief Justice and Abella J. also brought much-needed clarification to section 15(2). They noted the complementary roles of subsections 15(1) and 15(2) in achieving the central purpose of combating discrimination: section 15(1) *prevents* governments from making distinctions on enumerated or analogous grounds that promote or perpetuate discrimination, while section 15(2) *enables* governments to enact measures to proactively combat existing discrimination. Thus, they reasoned, section 15(2) should be seen neither as an interpretive aid to section 15(1) (as the Court had previously, albeit tentatively, held in *Lovelace v. Ontario*¹³), nor as an exception to its operation, but as an independently operative complement. Specifically, the government may elide altogether the necessity to conduct a section 15(1) analysis by demonstrating that an impugned program meets the criteria of section 15(2). In other words, if a section 15 claimant shows that there has been a distinction made on an enumerated or analogous ground, section 15(2) allows the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional —

¹⁰ *Kapp, supra*, note 3, at para. 22.

¹¹ *Id.*

¹² *Id.*, at paras. 24 and 25.

¹³ [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.). There, Iacobucci J. emphasized that “I do not foreclose the possibility that s. 15(2) may be independently applicable to a case in the future” (at para. 100) and “we may well wish to reconsider this matter at a future time in the context of another case” (at para. 108).

regardless of the section 15(1) analysis. In this way, subsections 15(1) and 15(2) “work together to promote the vision of substantive equality that underlies s. 15 as a whole”.¹⁴ This approach also avoids “the symbolic problem of finding a program discriminatory before ‘saving’ it as ameliorative”.¹⁵

With respect to the actual criteria of section 15(2), the Court chose to adopt a deferential purpose-based test. A program does not violate the section 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. As the actual language of section 15(2) suggests, it is the legislative purpose rather than the actual effect of the program that is the paramount consideration. Thus, the government need not demonstrate any actual ameliorative effect. However, neither can the government invoke the protection of this provision simply by issuing a bald declaration that a particular program has an ameliorative purpose — this purpose must also clear a “rationality” hurdle. That is, the reviewing court must also be satisfied that it is rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose.

Justice Bastarache, issuing a lone concurring opinion, endorsed the majority’s reformulation of the section 15 analysis, but would have disposed of the appeal entirely on the basis of section 25 instead.

Kapp is a welcome clarification and simplification of equality law. It eliminates “human dignity” as a legal test and avoids a “checklist” approach to the *Law* analysis, opting instead for a principle-based approach anchored in the central purpose of section 15 — combating discrimination in the form of perpetuating pre-existing disadvantage or stereotyping.

Additionally, the new test should also put to rest speculation that surfaced in the 1990s that only traditionally disadvantaged groups could bring claims under section 15. The *Andrews* test clearly identifies stereotyping as one of the twin branches of discrimination, along with pre-existing disadvantage. Stereotyping is something that may occur in the absence of a pre-existing disadvantage. Thus, there is no reason to suggest that only traditionally disadvantaged groups can bring equality claims, as groups that cannot lay claim to a pre-existing disadvantage

¹⁴ *Kapp, supra*, note 3, at para. 16.

¹⁵ *Id.*, at para. 40.

may still allege discrimination on the grounds of stereotyping. The government could, of course, still foreclose this claim under section 15(2) by demonstrating a proper ameliorative purpose.

2. Sniffer-Dog Cases

The Court also decided two important section 8 cases dealing with sniffer-dog searches: *R. v. Kang-Brown* and the companion case of *R. v. M. (A.)*. These cases raised the question of what grounds the police require before they are “authorized by law” to conduct a sniffer-dog search. The Court voted to exclude the evidence in both cases, but ruled that the police may lawfully conduct sniffer-dog searches for drugs on the basis of a “reasonable suspicion”. However, the Court was badly split in these decisions and longer-term implications for the use of dogs for drug searches remain unclear.

In *Kang-Brown*, an undercover Royal Canadian Mounted Police officer was staking out a bus terminal when a passenger alighting from a bus aroused his suspicion by engaging him in an “elongated stare”. The officer subsequently engaged the passenger in conversation and asked permission to see his bag. The passenger agreed and knelt down to show the contents of his bag. The officer then reached his hand out to actually take hold of the bag, and as he did so the passenger pulled the bag away and became agitated, at which point the officer signalled another officer who was accompanied by a dog. As the dog approached, it immediately indicated the presence of drugs to its handler.

In *M. (A.)*, Sarnia police accepted a standing invitation from a high school principal to bring sniffer dogs to search the school whenever they wished. As the police searched the school, students were instructed by the principal to remain in their classrooms to maintain order. During the course of the search, drugs were found in a backpack belonging to the accused which was lying unattended in the school gymnasium.

In both these cases, the key issue to be settled was whether and in what circumstances the police have a common law power to conduct a warrantless sniffer-dog search. In the test set out in *R. v. Collins*,¹⁶ one of the constitutional requirements for a warrantless search is that it be authorized by law. As no statute has as of yet been enacted to govern the use of sniffer dogs by police, the question became whether a warrantless sniffer-dog search was authorized at common law.

¹⁶ [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

Justice LeBel, joined by Fish, Abella and Charron JJ. in both cases, voted to retain the existing common law standard of “reasonable and probable grounds” to determine the lawfulness of any police search, including sniffer-dog searches. They demurred from creating a specialized common law framework governing the use of sniffer dogs, deeming it a matter more appropriately addressed by the legislature. Accordingly, they found that both searches were conducted in violation of section 8 of the Charter and voted to exclude the evidence.

Justice Binnie, joined by the Chief Justice in both cases, argued that because the practice of using sniffer dogs in Canada had become so widespread and well established, leaving the matter to Parliament “ducks a practical and immediate problem facing law enforcement”.¹⁷ Noting the Court’s obligation to adjust the common law incrementally as needed, he reasoned that imposing a “reasonable and probable grounds” requirement on sniffer-dog searches for drugs would render sniffer dogs superfluous and unnecessary, as in such circumstances the police would ostensibly have grounds to obtain an actual search warrant. Thus, he concluded that the police are authorized at common law to conduct a warrantless sniffer-dog search for drugs on the basis of a “reasonable suspicion”. Applying this standard, however, he found in both cases that the searches were conducted in the absence of “reasonable suspicion” and were therefore unreasonable. Like LeBel J., he voted in both cases to exclude the evidence under section 24(2) of the Charter.

Justice Deschamps dissented in the disposition of both cases, and was joined each time in her reasons by Rothstein J. In *Kang-Brown*, however, she endorsed Binnie J.’s articulation of the standard applicable to warrantless sniffer-dog searches for drugs as one of reasonable suspicion. However, she took issue with Binnie J.’s application of the standard, arguing that his interpretation of reasonable suspicion sets the evidentiary requirements

so high that this standard is equivalent to that of reasonable grounds to believe, and is accordingly redundant. ... I cannot imagine a fact situation that would, on Binnie J.’s analysis, while satisfying the evidentiary requirements for reasonable suspicion, fail to satisfy the requirements for reasonable grounds to believe.¹⁸

She found that the police did properly search the accused’s bag on the basis of a reasonable suspicion, and would have admitted the evidence.

¹⁷ *Kang-Brown*, *supra*, note 3, at para. 21.

¹⁸ *Id.*, at para. 205.

In *M. (A.)*, Deschamps J. found that the claim did not clear the threshold section 8 requirement of reasonable expectation of privacy, due to circumstances such as the controlled environment of a school's property, the school's drug problem, the fact that the backpack was unattended and in plain view, and the minimal intrusiveness of the search. She therefore found no violation of section 8 in that case and would have admitted the evidence accordingly.

Finally, Bastarache J. also endorsed the standard of reasonable suspicion championed by his four colleagues, but went even further. He found that a reasonable suspicion need not attach to an individual, but may also attach to a particular activity or location. For instance, he wrote, there is an "ongoing reasonable suspicion about drug activity occurring at this country's airports and bus and train depots".¹⁹ Thus, the police may conduct a sniffer-dog search for drugs on the basis of such a "generalized suspicion". Accordingly, in *Kang-Brown*, Bastarache J. found that the police properly conducted their search on the basis of an individualized suspicion, but it would have been equally permissible for them to have performed the search on the basis of a generalized suspicion.

In *M. (A.)*, conversely, Bastarache J. found that the police had no basis for a reasonable individualized suspicion, and neither did a generalized suspicion attach to the school. He would nevertheless have admitted the evidence on the grounds that doing so would not bring the administration of justice into disrepute under section 24(2).

Clearly, these cases caused deep divisions within the Court. In the final tally, the Court voted 6-3 to exclude the evidence in both cases, but voted 5-4 to establish a common law police power to conduct sniffer-dog searches for drugs on the basis of a reasonable suspicion, with Binnie J. and the Chief Justice casting the swing votes either way.

There was, moreover, deep disagreement as to how the standard of reasonable suspicion should be applied. There appeared to be some consensus that reasonable suspicion entails some tangible, objectively ascertainable facts to support an expectation that an individual is possibly engaged in criminal activity. However, that is where all agreement ended — the indeterminacy of the reasonable suspicion standard was reflected in the different ways it was applied. Justice Binnie found that the standard was not met in either case, Deschamps J. found that it was met in *Kang-Brown* and unnecessary to apply in *M. (A.)*, and Bastarache J. found that it was met in *Kang-Brown* but not met in *M. (A.)*. Furthermore,

¹⁹ *M. (A.)*, *supra*, note 3, at para. 173.

Deschamps J. sharply criticized Binnie J.'s application of the standard, declaring it to be so strict as to essentially conflate reasonable suspicion with reasonable and probable grounds.

A further complication is that the standard may shift depending on the abilities of the individual sniffer dog in question. As LeBel J. observed in his reasons in *Kang-Brown*,

the record remains singularly bereft of useful information about sniffer dogs. The available information is in essence limited to the facts that they are used for investigative purposes in a variety of circumstances and that police officers believe in their overall reliability and to the praise of a particular dog deployed at the Calgary bus station.²⁰

As such, Binnie J. acknowledged that the reasonableness of a sniffer-dog search will depend on the track record of the individual animal in question, noting that

dogs, being living creatures, exhibit individual capacities that vary from animal to animal. While a false positive may be rare for [the sniffer dog in *M. (A.)*], it is not thus with all dogs. The importance of proper tests and records of particular dogs will be an important element in establishing the reasonableness of a particular sniffer-dog search.²¹

This adds additional uncertainty to the standard with respect to sniffer-dog searches.

As such, the sniffer-dog cases may well induce further litigation in an attempt to resolve this indeterminacy and define the applicable standard more concretely. These cases also establish that any judicial or common law standard is likely to prove problematic in practice and, accordingly, there is a clear need for Parliament to step in and establish a legislative framework for the use of sniffer dogs. The first difficulty is that the Court is badly divided on the applicable legal and constitutional standard that should govern the use of sniffer dogs. Moreover, even where members of the Court agree on the legal standard to be applied, they are likely to disagree on the application of that standard to the facts of a particular case. This indicates that in future litigation, counsel and lower courts will have extreme difficulty in developing and consistently applying a test for the use of sniffer dogs. Only legislative action by Parliament will be able to supply the consistency and predictability needed for the use of this important law enforcement tool.

²⁰ *Kang-Brown*, *supra*, note 3, at para. 15.

²¹ *M. (A.)*, *supra*, note 3, at para. 84.

3. Canada in the Global Community

Three cases decided in 2008 — *Khadr*, *Lake* and *Charkaoui II* — raised the issue of Canada's role internationally. The most significant of these was *Khadr*, where the Court sharply restricted the effect of the ruling in *R. v. Hape*,²² handed down just one year earlier.

Omar Khadr, a Canadian detainee at the controversial U.S. detention facility at Guantanamo Bay, had been interviewed by Canadian Security Intelligence (“CSIS”) agents at the facility and subsequently applied under section 7 for disclosure of the records of those interviews, which had been shared with U.S. authorities.

The government argued that the Charter did not apply to the conduct of Canadian agents operating outside Canada, relying on the ruling in *Hape*. In *Hape*, the Court had stated that, as a general principle, the Charter cannot apply to govern the actions of Canadian state actors in matters that fall (as the facts of *Khadr* did) within the exclusive territorial jurisdiction of another sovereign state.

The Court had also speculated, however, that Canadian state actors may nevertheless be prohibited under the Charter from participating in activities sanctioned by foreign law where such participation would place Canada in violation of its international human rights obligations.

In *Khadr*, the Court seized on these remarks to open a narrow exception to the rule in *Hape*. Noting that the United States Supreme Court had already ruled that circumstances surrounding the Guantanamo Bay process violated both the *Geneva Conventions*²³ and the internationally protected right of *habeas corpus*,²⁴ the Court found that Canada's participation in the process would indeed place it in breach of its binding international obligations. Thus, when government officials shared records of the interviews with U.S. officials, thereby becoming participants in the process, they became bound by the Charter. Accordingly, they came under an obligation to disclose the records to

²² [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292 (S.C.C.).

²³ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S. 31, Can. T.S. 1965 No. 20 [“*First Geneva Convention*”]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85, Can. T.S. 1965 No. 20 [“*Second Geneva Convention*”]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287, Can. T.S. 1965 No. 20 [“*Third Geneva Convention*”]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20 [“*Fourth Geneva Convention*”].

²⁴ *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

Mr. Khadr in order to “mitigate the effect of Canada’s participation”²⁵ in a process that violated Canada’s international obligations.

In many ways, it is surprising for the Court to have significantly narrowed its ruling in *Hape* so soon after its release. This may reflect lingering discomfort within the Court over what had been a somewhat contentious point.²⁶ However, it would still be grossly premature to begin eulogizing *Hape* at this juncture. Recently, the Court denied leave to appeal in the case of *Amnesty International Canada v. Canada (Canadian Forces)*,²⁷ in which the Federal Court of Appeal had applied *Hape* to rule that the Charter does not apply to Canadian Forces in Afghanistan in respect of the treatment of prisoners of war and other detainees. Specifically, Desjardins J.A. observed that *Khadr* does not signal that the Charter applies *automatically* if there has been a breach of international human rights law — rather, “all the circumstances in a given situation must be examined before it can be said that the Charter applies”.²⁸ Thus, the ruling in *Hape* clearly remains very much alive and well.

Another effect of the *Khadr* decision is that it also firmly entrenches the role of international human rights law in Charter litigation. Before, international human rights law was mainly relevant to Charter litigation merely as an interpretive aid²⁹ — interesting and persuasive, but not necessarily instrumental to the outcome. Now, international human rights law has become a central element in Charter litigation involving Canadian officials acting abroad. Canadian lawyers contemplating such

²⁵ *Khadr*, *supra*, note 3, at para. 34.

²⁶ In *Hape*, *supra*, note 22, four members of the Court concurred in the disposition of the majority but distanced themselves from the broad constitutional pronouncements in LeBel J.’s opinion. Notably, Binnie J. wrote a brief set of reasons in which he protested that the case did not afford “a proper springboard for such sweeping conclusions” (at para. 182). See Patrick Monahan & James Gotowiec, “Constitutional Cases 2007: An Overview” (2008) 42 S.C.L.R. (2d) 3, at 12-14.

²⁷ [2008] F.C.J. No. 1700, 385 D.L.R. (4th) 741 (Fed. C.A.). Interestingly, Binnie J. in his dissent in *Hape* had referenced this litigation, pending before the Federal Court at the time, to sound a warning that the majority pronouncements in *Hape* would prematurely foreclose arguments in other cases that may come before the Court.

²⁸ *Id.*, at para. 20.

²⁹ See, for instance, *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038, at 1056-57 (S.C.C.), where the majority stated the principle that “the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”. This principle was recently re-affirmed and applied by the Court in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391, at para. 70 (S.C.C.) [hereinafter “*Health Services*”].

claims may very well now be required to familiarize themselves with international human rights law.

Coming in somewhat of a contrast to *Khadr*, meanwhile, was the Court's ruling in *Lake*. There, the Court adopted a deferential standard of review in upholding the Minister of Justice's decision that a Canadian citizen's extradition does not violate the Charter, citing the Minister's superior expertise with respect to Canada's international obligations and relationships with foreign governments. This is notable because the office of Minister, of course, is not of a juridical but a political nature, sensitive to political interests and considerations. To entrust such an actor with *legal* determinations as paramount as an individual's Charter rights signals the Court's unwavering commitment to affording the executive substantial unfettered discretion in the realm of interstate cooperation, the adverse ruling in *Khadr* notwithstanding.

In *Charkaoui II*, meanwhile, the Court held that section 7 imposes upon CSIS a duty to retain and disclose notes from interviews conducted with the claimant, in the course of proceedings relating to the security certificate issued against him under section 77(1) of the *Immigration and Refugee Protection Act*.³⁰ CSIS had provided mere summaries of the interviews and had tried to argue that the notes could not be disclosed as they had been destroyed pursuant to CSIS internal policy. However, the Court ruled that these summaries were not sufficient, and that the destruction of the operational notes was a breach of both section 12 of the *Canadian Security and Intelligence Service Act*³¹ and of the duty of procedural fairness under section 7 of the Charter.

4. Young Offenders

Finally, the Court also had occasion to decide an important case with respect to young offenders. *B. (D.)* struck down certain sentencing provisions under the *Youth Criminal Justice Act*,³² whereby youths convicted of certain serious offences would automatically receive an adult sentence, unless they could show they should receive a youth sentence. The Court split 5-4 in the disposition of the case, but was unanimous in holding that the presumption of diminished moral blameworthiness of children is a principle of fundamental justice.

³⁰ S.C. 2001, c. 27, s. 77(1).

³¹ R.S.C. 1985, c. C-23, s. 12.

³² S.C. 2002, c. 1.

III. FEDERALISM CASES

Just two federalism cases were handed down in 2008. The most significant of these was *CSN*, which adopted an expansive interpretation of Parliament's power in relation to unemployment insurance, under section 91(2A) of the *Constitution Act, 1867*.³³ This was significant since it meant that various "active measures" in the *Employment Insurance Act*,³⁴ such as an employment service, training, work-sharing programs, wage subsidies and job creation partnerships, were also all valid. In a judgment written by LeBel J., the Court unanimously affirmed that the unemployment insurance power must be interpreted generously, and not limited to simply taking passive responsibility for paying benefits to Canadian workers during periods where they are not working. This generous interpretation is essentially another illustration of the Court's "living tree" doctrine, originally formulated in *Edwards v. Canada (Attorney General)*,³⁵ which requires that the Constitution be interpreted as an organic document that must be adapted to changing circumstances and needs.

The Court in *CSN* also held that provisions in the Act delegating to the Governor in Council the power to set employment insurance premiums for certain years were, in effect, an attempt to delegate the power to tax without expressly so providing. Thus, the provisions were inconsistent with section 53 of the *Constitution Act, 1867*, which provides that the power to tax may only be delegated expressly.³⁶ However, the Court suspended its declaration of invalidity in relation to these provisions for 12 months, and Parliament should be able to enact remedial legislation that will retroactively authorize the collection of the premiums in question.

The other federalism case decided in 2008 also dealt with the application of section 53 of the *Constitution Act, 1867*. In *620 Connaught*, an alcohol licensing levy imposed by the Minister of Canadian Heritage was found to be in pith and substance a regulatory charge and a valid exercise of federal jurisdiction over national parks under section 92(1A). It was not, therefore, a tax and there was no inconsistency with the requirements of section 53.

³³ 30 & 31 Vict., c. 3 (U.K.); *CSN*, *supra*, note 3.

³⁴ S.C. 1996, c. 23.

³⁵ [1930] A.C. 124 (P.C.).

³⁶ See *Re Eurig Estate*, [1998] S.C.J. No. 72, [1998] 2 S.C.R. 565 (S.C.C.).

IV. VOTING PATTERNS

In 2008, the judges were unanimous in nine of 12, or 75 per cent, of the constitutional cases they heard. All three of the dissents occurred in Charter cases. Two of these cases were actually the companion cases of *M. (A.)* and *Kang-Brown*, where the Court split along identical lines. Justices Bastarache, Deschamps and Rothstein dissented in the disposition of both these cases, and the same three judges dissented once again in *B. (D.)*, this time joined by Charron J. All of these dissents were issued in criminal cases, and all three went against the Charter claimant.

Justices Bastarache, Deschamps, and Rothstein thus cast three dissenting votes each in 2008, while Charron J. cast one. The Chief Justice and Binnie, LeBel, Fish and Abella JJ. had no dissents.

This is in stark contrast to 2007, where it was Binnie, LeBel and Fish JJ. who were the most active dissenters at three each, with Abella J. weighing in at two. Justices Bastarache, Charron and Rothstein, meanwhile, had no dissents, while the Chief Justice and Deschamps J. had one each. In 2007, all dissenting votes cast went in favour of the Charter claimant, except for Deschamps J.'s opinion in *Health Services*.³⁷

V. CONCLUSION

Overall, the Court has shown that it is not too timid to boldly revisit legal principles that it had recently settled if it sees a need to do so (see *Kapp* and *Khadr*). It also demonstrates a continued willingness to subject law enforcement activities to indeterminate legal tests (see *M. (A.)* and *Kang-Brown*, the sniffer-dog cases), which may well produce further work for the Court in future.

Further, although the Court showed great deference to government in cases like *Lake* and *CSN*, they also displayed in *B. (D.)* that they remain perfectly capable of being assertive in relation to Parliament where necessary.

The dying days of 2008 also saw the appointment of a new Puisne Justice, Thomas Albert Cromwell, formerly of the Nova Scotia Court of Appeal, who replaces the now-retired Bastarache J. This appointment came in the midst of the swirling political drama that gripped the nation at the end of 2008. In the spring of 2008, Bastarache J. had unexpectedly announced his retirement from the Court and, in September, the Prime

³⁷ *Supra*, note 29.

Minister nominated Cromwell J.A. from the Nova Scotia Court of Appeal as his putative replacement. Initially, the Conservative government intended to confirm the nomination through the rigorous consultative process (involving public questioning by Members of Parliament) that it had adopted for Rothstein J.'s appointment.³⁸ However, in the midst of a constitutional crisis and facing a serious threat to its survival, the Conservative government elected to cut short the consultative process and quietly push the nomination through, rather than risk being toppled from power before it could consummate the nomination. Despite the surrounding circumstances, however, the appointment itself did not arouse any particular controversy.

The retirement of Bastarache J. signals the departure of a member of the Court who had taken a quite distinctive approach to constitutional interpretation in general and Charter interpretation in particular. Justice Bastarache was a strong proponent of the language rights provisions in the Charter and had also written a variety of judgments over the years taking an expansive approach in certain cases involving fundamental freedoms under section 2. In contrast, Bastarache J. had tended to adopt a somewhat narrower approach in the interpretation of the legal rights provisions in sections 7 to 14, allowing governments and particularly law enforcement agencies greater room for manoeuvre. His departure and the appointment of Cromwell J. may well prove important to the overall philosophy and direction of the Court in the years ahead.

³⁸ See <<http://www.justice.gc.ca/eng/scc-csc.html>>.

