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Citation Information

Monahan, Patrick J. and Yap, James. "Constitutional Cases 2009: An Overview." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 51. (2010).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol51/iss1/1>

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Constitutional Cases 2009: 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 13th Annual Constitutional Cases Conference held on April 16, 2010, examines the constitutional decisions of the Supreme Court of Canada released in the calendar year 2009.¹ The Court issued judgment in 70 cases in 2009,² 17 (or 24 per cent) of which were constitutional cases. The majority of the constitutional cases (15 of 17 cases) were *Canadian Charter of Rights and Freedoms* cases,³ while the remaining two cases dealt with federalism is-

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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 1999-2009*, available online <<http://www.scc-csc.gc.ca/stat/index-eng.asp>> [hereinafter "Statistics"].

³ *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"]; *C. (A.) v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, [2009] 2 S.C.R. 181 (S.C.C.) [hereinafter "*C. (A.)*"]; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37 [2009] 2 S.C.R. 567 (S.C.C.) [hereinafter "*Hutterian Brethren*"]; *DesRochers v. Canada (Industry)*, [2009] S.C.J. No. 8, [2009] 1 S.C.R. 194 (S.C.C.) [hereinafter "*DesRochers*"]; *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, [2009] 1 S.C.R. 222 (S.C.C.) [hereinafter "*Ermineskin*"]; *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, [2009] 3 S.C.R. 640 (S.C.C.) [hereinafter "*Grant v. Torstar*"]; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295 (S.C.C.) [hereinafter "*GVTA*"]; *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] S.C.J. No. 47, [2009] 3 S.C.R. 208 (S.C.C.) [hereinafter "*Nguyen*"]; *R. v. Bjelland*, [2009] S.C.J. No. 38, [2009] 2 S.C.R. 651 [hereinafter "*Bjelland*"]; *R. v. Godin*, [2009] S.C.J. No. 26, [2009] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Godin*"]; *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353 (S.C.C.) [hereinafter "*Grant*"]; *R. v. Harrison*, [2009] S.C.J. No. 34, [2009] 2 S.C.R. 494 (S.C.C.) [hereinafter "*Harrison*"]; *R. v. Patrick*, [2009] S.C.J. No. 17, [2009] 1 S.C.R. 579 (S.C.C.) [hereinafter "*Patrick*"]; *R. v. Shepherd*, [2009] S.C.J. No. 35, [2009] 2 S.C.R. 527 (S.C.C.) [hereinafter "*Shepherd*"]; *R. v. Suberu*, [2009] S.C.J. No. 33, [2009] 2 S.C.R. 460 (S.C.C.) [hereinafter "*Suberu*"]; *Ravndahl v. Saskatchewan*, [2009] S.C.J. No. 7, [2009] 1 S.C.R. 181 (S.C.C.) [hereinafter "*Ravndahl*"].

sues.⁴ One of the Charter cases, *Ermineskin*, also dealt with Aboriginal constitutional issues.⁵

The release of 70 judgments in 2009 is the second-lowest output in a decade (after the somewhat anomalous total of 58 judgments released in 2007). This reflects what has been a general downward trend in terms of the annual output of the Court over the last 10 years. Notably, the Court in 2009 also recorded its highest average time lapse between hearing and judgment over the same period,⁶ which suggests a move towards a more deliberative approach to adjudication, taking more time to release fewer decisions.

Of the 15 Charter cases, a number of the Court's decisions broke significant new ground, both in terms of the definition of substantive Charter rights as well as in terms of the application of the *Oakes* test⁷ under section 1. In contrast, the decisions in relation to federalism and Aboriginal issues were less significant, and did not involve any significant shifts in the Court's jurisprudence. We begin by considering the Court's Charter analysis in 2009, focusing on those cases that represented the most significant departure from previous jurisprudence.

II. CHARTER CASES

Six of the 15 Charter claims disposed of by the Court (40 per cent) succeeded in 2009.⁸ After a spike in 2008 which saw an unusually high 70 per cent of Charter claims succeed, this figure returns closer to the average rate under the McLachlin Court, which has allowed 63 of 139 Charter claims for an overall success rate of 45 per cent during the decade.

⁴ *Chatterjee v. Ontario (Attorney General)*, [2009] S.C.J. No. 19, [2009] 1 S.C.R. 624 (S.C.C.) [hereinafter "*Chatterjee*"]; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] S.C.J. No. 53, [2009] 3 S.C.R. 407 (S.C.C.) [hereinafter "*Consolidated Fastfrate*"].

⁵ *Ermineskin*, *supra*, note 3.

⁶ The average time lapse from hearing to judgment in 2009 was 7.4 months, up from 4.8 months in 2008. See Supreme Court of Canada, *Statistics 1999 to 2009, Bulletin of Proceedings: Special Edition*, at 4, online: <<http://www.scc-csc.gc.ca/stat/pdf/doc-eng.pdf>>.

⁷ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

⁸ 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*. The exception here is *Grant v. Torstar*, which has been included in this category because of the prominent role of the Charter in the reasoning, even though it does not technically fall under the criteria set out above.

1. Arbitrary Detention/Exclusion of Evidence — *R. v. Grant*, *R. v. Suberu*, *R. v. Harrison* and *R. v. Shepherd*

In July, the Court released a set of four highly anticipated companion cases that brought significant reforms to the law on exclusion of evidence under section 24(2), and, to a lesser extent, on detention under sections 9 and 10. Leading this series of cases was *Grant*. There, a group of officers patrolling a school zone in Toronto's east end engaged the accused in conversation while obstructing his path. Upon being asked whether he had anything on his person that he should not, the accused replied that he had a firearm, at which point he was arrested and searched. The accused argued that a firearm subsequently found on his person was obtained in violation of sections 8, 9 and 10(b) of the Charter and should be excluded from evidence under section 24(2).

The question of whether the accused's Charter rights were violated depended on whether his questioning had constituted a "detention" within the meaning of sections 9 and 10 of the Charter. As the Supreme Court had held in *R. v. Therens*,⁹ a detention for the purposes of the Charter may be either physical or psychological. The accused here had not been subjected to any physical constraint, and so the pivotal question became whether he had been psychologically detained.

The Court took this opportunity to elaborate on the definition of psychological detention. In *Therens*, the Court established that psychological detention occurs where "the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist".¹⁰ However, in *Grant*, the Chief Justice and Charron J. writing for the majority noted that this form of detention has eluded precise definition.¹¹ They thus attempted to inject greater clarity and precision into the *Therens* test for psychological detention¹² by identifying three relevant factors to be considered:

To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the

⁹ [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

¹⁰ *Id.*, at 644.

¹¹ The Chief Justice and Charron J. wrote an opinion that was concurred in by LeBel, Fish and Abella JJ.; Binnie J. wrote separate concurring reasons proposing a different approach to the definition of "detention" under ss. 9 and 10, while Deschamps J. wrote concurring reasons proposing a different test for the exclusion of evidence under s. 24(2).

¹² That is, in the absence of a statutory or other legal compulsion to comply with a direction or demand.

state of the liberty of choice, the court may consider, *inter alia*, the following factors:

- a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
- b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.¹³

This seems a helpful set of factors that provides structure and definition to the question of whether a “detention” has occurred for Charter purposes.¹⁴ The analysis is “claimant centred”, in that it focuses on whether a reasonable person, in the claimant’s circumstances, would conclude that he or she had been deprived of his or her liberty. This approach seems appropriate given the fact that the question to be determined in this case is whether the individual in question has been “psychologically detained”.

Upon applying this framework, the Chief Justice and Charron J. found that the accused in this case was indeed subjected to a psychological detention and that his Charter rights were therefore infringed; the majority then shifted their inquiry to whether the evidence so obtained should be excluded under section 24(2). Here, too, they carried out a re-configuration of the existing law, this time introducing a new test that has the potential to significantly alter the landscape on the exclusion of evidence obtained in violation of the Charter.

In *R. v. Collins*,¹⁵ Lamer J. had identified nine circumstantial factors to be considered in determining whether the admission of evidence obtained in violation of the Charter would bring the administration of justice into disrepute. He further organized these factors into three broader categories: factors relating to trial fairness, factors relating to the

¹³ *Grant, supra*, note 3, at para. 44.

¹⁴ Note, however, that in the companion case of *Suberu, supra*, note 3, discussed below, the Court divided on the application of the new *Grant* test on detention, suggesting that the application of this framework may still prove to be a matter of difficulty.

¹⁵ [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.) [hereinafter “*Collins*”].

seriousness of the Charter violation, and factors relating to the effect of excluding the evidence on the long-term repute of the administration of justice. As a guideline, he noted that where the admission of evidence would impact the fairness of the trial, the evidence should generally be excluded.

Ten years later, *R. v. Stillman*¹⁶ further developed the analysis on the critical but rather enigmatic concept of trial fairness by focusing on the distinction between conscriptive evidence (in which “an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples”)¹⁷ and non-conscriptive evidence (*i.e.*, evidence that does not have this conscriptive character). Under this approach, evidence classified as conscriptive, as well as evidence that is “derivative” in the sense that it was discovered as a result of conscriptive evidence, was usually said to render the trial unfair and generally excluded, unless it was otherwise discoverable.

In *Grant*, however, the majority noted that the emphasis on trial fairness in the *Collins/Stillman* framework had unintentionally rendered the exclusion of non-discoverable conscriptive evidence nearly automatic in subsequent jurisprudence. In their eyes, this appeared incongruous with the wording of section 24(2), which specifies that the determination must be made “having regard to all the circumstances”. The Chief Justice and Charron J. thus implemented a new framework for the analysis of exclusion under section 24(2) that is less categorical and affords greater flexibility.

Under the new approach, the test developed in *Collins* and *Stillman* has been replaced by a simpler, more fluid balancing test. Now, the governing test proceeds by weighing three factors: (1) the seriousness of the offending state conduct; (2) the impact of the breach on the accused’s Charter-protected interests; and (3) society’s interest in the adjudication of the case on its merits. Through considering these three factors, the judge must ultimately determine whether, in all the circumstances, the admission of evidence would bring the administration of justice into disrepute. Meanwhile, many of the factors which had played a prominent role under the *Collins/Stillman* framework are now merely subsumed into one of these factors; for instance, discoverability is now an issue to be

¹⁶ [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.) [hereinafter “*Stillman*”].

¹⁷ *Id.*, at para. 80.

considered when weighing the impact of the breach on the accused's Charter-protected interests.

In an attempt to provide further definition and clarity to this framework, the majority judgment proceeded to comment on its application to different kinds of evidence. In relation to statements obtained from the accused in violation of the Charter, the Court reaffirmed the presumption that such improperly obtained statements ought generally to be excluded under section 24(2). The Court pointed to the fact that the common law had traditionally treated statements of the accused differently from other statements, and that obtaining statements from the accused in breach of the Charter tended to engage concerns over inappropriate police conduct. On the other hand, the Court concluded that no such presumptive rule should apply to bodily evidence, such as DNA and breath samples. In the Court's view, the taking of a bodily sample does not necessarily trench on the accused's autonomy in the same way as may the unlawful taking of a statement. In advocating for a more flexible approach in relation to such evidence, the Court signalled an increased willingness to entertain the admission of such evidence.

The Court also elaborated on the factors that come into play in relation to so-called "derivative" evidence — that is, evidence discovered as a result of an unlawfully obtained statement. The Court noted that under the previous *Collins/Stillman* framework, physical evidence that would not have been discovered but for an inadmissible statement had generally been excluded. The Court proposed greater scope for admissibility of such derivative evidence; provided that the evidence is reliable and was discovered as a result of a good faith infringement, it is appropriate to admit it. On the other hand, where the evidence resulted from "deliberate and egregious police conduct that severely impacted the accused's protected interests", even reliable evidence could properly be excluded.¹⁸

Applying this test in *Grant*, the majority reasoned under the first factor that the Charter breach was not abusive or in bad faith, but concluded that the impact on the accused's Charter interests (the second factor) was significant, noting in particular that the accused would not have been searched or detained but for his self-incriminatory statements. However, in light of the reliability of the evidence, the majority determined that society's interest in adjudication on the merits, the third factor, was high and that the evidence should therefore be admitted.

¹⁸ *Grant, supra*, note 3, at para. 127.

The new approach in *Grant* significantly shifts the Court in the direction of favouring the admissibility of evidence obtained as a result of a Charter breach. It also indicates that trial judges are entitled to deference in their determinations on admissibility issues. This is important since, otherwise, the flexibility inherent in a balancing test could provoke significant appellate litigation over the meaning and application of the test to the facts of particular cases. While the new approach is not without risks (as the Court itself notes),¹⁹ on balance this more flexible approach avoids the difficulties that had been noted in the previous jurisprudence while still ensuring appropriate protection for the rights of the accused.

The second case in this group was *Harrison*, in which the accused was driving through Ontario in a vehicle registered in Alberta that, in conformity with Alberta law (but inconsistent with the law for Ontario-registered vehicles), had no front licence plate. The police officer was not initially aware that the vehicle was registered in Alberta and activated his roof lights to pull it over. He then became aware that the vehicle was an Alberta-registered vehicle but decided to pull it over anyway because “abandoning the detention may have affected the integrity of the police in the eyes of observers”. The officer found that the accused’s licence was suspended, arrested him and proceeded to search the vehicle (even though a search did not seem related to or warranted by the licence suspension.) During the course of this search, 35 kilograms of cocaine were found in boxes in the rear of the vehicle.

The Chief Justice, writing for the majority, applied the new three-factor *Grant* test for the exclusion of evidence under section 24(2) and reasoned that although the evidence was reliable and the offence serious, this did not outweigh the seriousness of the police misconduct. Unlike in *Grant*, the police here were not operating in circumstances of “considerable legal uncertainty”.²⁰ The police conduct in stopping and searching the accused’s vehicle without any semblance of reasonable grounds reflected a “blatant disregard for *Charter* rights” and was aggravated by the trial judge’s finding that the police officer’s in-court testimony was misleading.²¹ While the evidence was reliable and the crime a serious

¹⁹ The Chief Justice and Charron J. noted the risk that police may improperly obtain statements that they know to be inadmissible in order to find derivative evidence which they believe may be admissible. The Court noted that judges should refuse to admit evidence where there is “reason to believe the police deliberately abused their power to obtain a statement which might otherwise lead them to such evidence”. *Grant, id.*, at para. 128.

²⁰ *Grant, id.*, at para. 140.

²¹ *Harrison, supra*, note 3, at paras. 26-27.

one, the majority of the Court concluded that the police misconduct in this instance required that the justice system disassociate itself from flagrant breaches of Charter rights and that the evidence be excluded.²²

Suberu, meanwhile, saw the Court split on the subject of psychological detention. There, the police had apprehended the accused's associate at the scene of the crime. The accused attempted to slip away unnoticed, remarking to an officer as he passed, "[h]e did this, not me, so I guess I can go." The officer, however, followed him outside and said, "[w]ait a minute. I need to talk to you before you go anywhere."²³ Analyzing this interaction, the majority judgment written by the Chief Justice²⁴ pointed to the preliminary investigative nature of the encounter, as well as the fact that the officer made no move to physically obstruct the accused, to find that the accused had not been detained. The Chief Justice distinguished between "preliminary questioning of bystanders" (with which an individual is not legally compelled to comply) and focused interrogation of a suspect. While the precise dividing line between these two kinds of interactions may be difficult to draw in particular cases, the interaction with the accused in this case was more in the nature of preliminary investigative questioning and did not amount to detention. Justice Binnie, in dissent, pointed to the actual underlying substance of the words exchanged:

Constable Roughley was replying to Mr. Suberu, who had essentially said, "Can I leave?", by essentially saying, "No". It was clear to Mr. Suberu that he was not free to go "anywhere" and any reasonable person in that position would have come to the same conclusion.²⁵

He would have found a violation of sections 9 and 10(b) and, along with Fish J., would have excluded the subsequently obtained statement under section 24(2).

Taken together, these cases signal a modest shift by the current Court favouring greater leeway for law enforcement discretion and, conversely, a slight narrowing of the scope of applicable Charter protections. The Court seems concerned to avoid categorical interpretations of the rele-

²² Justice Deschamps, however, dissented strenuously, arguing that "[t]o acquit someone who is charged with trafficking in 35 kilograms (77 pounds) of cocaine with a market value of \$2,463,000 to \$4,575,000 owing to the exclusion of evidence is likely to have a long-term impact on the repute of the administration of justice." *Id.*, at para. 69.

²³ *Suberu*, *supra*, note 3, at para. 9.

²⁴ The Chief Justice wrote an opinion that was concurred in by LeBel, Deschamps, Abella and Charron JJ.; Binnie and Fish JJ. each wrote dissenting opinions.

²⁵ *Suberu*, *supra*, note 3, at para. 56.

vant Charter provisions which might result in probative and reliable evidence being excluded, even in circumstances where the Charter breach might have been relatively minor or incidental. This is certainly an understandable concern; however, one possible danger with this balancing framework is that it tends to involve a significant measure of discretion on the part of the trier of fact, which can in turn introduce uncertainty and unpredictability into the trial process. It will be particularly important for appellate courts, including the Supreme Court of Canada, to resist the temptation to second-guess the exercise of discretion by trial judges on evidentiary questions; otherwise the result will be to increase the costs and delays inherent in the criminal trial process.

2. Freedom of Religion

The Court handed down two significant freedom of religion cases this past year, with the Charter claims in both cases being unsuccessful. In the first of these cases, *Hutterian Brethren*, the Alberta government eliminated a regulatory exemption that allowed religious objectors to obtain driver's licences without having their photograph taken. The Wilson Colony of Hutterian Brethren challenged the elimination of the exemption on grounds that the requirement to have their photographs taken violated their religious beliefs. The Hutterite Brethren are a rural, religious-based community who believe that willingly having their photograph taken is a violation of the Second Commandment. The absence of an exemption meant that none of their members would be able to secure driver's licences. They further argued that it was important that at least some members of the community be licensed to drive to local centres to obtain goods and services necessary to the Colony, in order that they be able to maintain the rural, semi-autonomous lifestyle integral to their social, cultural and religious identity.

The Court readily accepted that the regulation eliminating the exemption infringed the Colony's section 2(a) rights and, therefore, the focus of the analysis was on justification under section 1. To this end, the Alberta government argued that the universal photo requirement was a demonstrably justified measure required in order to reduce the risk of identity theft in the province (through the misuse of driver's licences).

As usual, the Court had little trouble finding that the government's objective was "pressing and substantial". The case therefore came to be decided on the proportionality test, and it was here that the Court split 4-3.

Although there was also some disagreement over the minimal impairment step, it was the hitherto little-used third branch of the proportionality test, the balancing of deleterious and salutary effects, that became the “decisive”²⁶ factor in *Hutterian Brethren*.

The Chief Justice, writing on behalf of Binnie, Deschamps and Rothstein JJ., noted that identity theft is a serious and growing problem and that drivers’ licences could be and are used for purposes of identity theft. A new facial recognition data bank was aimed at reducing the risk of this type of fraud, but the effectiveness of the data bank was dependent on a comprehensive photo requirement, whereby all valid licences were to be associated with a photo in the data bank. The Chief Justice accepted the government’s contention that the universal photo requirement conferred a “significant gain”²⁷ on the government’s efforts to prevent identity theft, and that this was a “pressing and substantial” objective for purposes of the Charter section 1 analysis. She also concluded that the limit was reasonably tailored to the pressing and substantial government goal, in the sense that any of the alternative measures proposed for consideration would have significantly compromised the government’s objective and thus were not appropriate for consideration at the minimal impairment stage.²⁸

This represented a somewhat novel approach to the minimal impairment branch of the *Oakes* analysis. In previous cases, the Court had been willing to consider alternatives that may well have compromised the achievement of the government’s objectives (while at the same time reasoning that the government should be accorded a “margin of appreciation” or degree of deference in order to ensure that the existence of such alternatives did not thereby result in a finding that the impugned measure failed to satisfy the *Oakes* test).²⁹ Here the Chief Justice clarifies that in considering whether there are alternatives to the impugned measure for purposes of the minimal impairment analysis under section 1, only measures that “substantially satisfy the government’s objective” are appropriate for consideration.³⁰

²⁶ *Hutterian Brethren*, *supra*, note 3, at para. 78.

²⁷ *Id.*, at para. 80.

²⁸ The primary alternative proposed was a continued exemption from the photo requirement for those objecting on religious grounds, with the licence stamped with the words “not to be used for identification purposes” *id.*, (at para. 13).

²⁹ See generally the analysis of this issue in Peter Hogg, *Constitutional Law of Canada* (looseleaf edition) (Toronto: Carswell), s. 38.11(b) [hereinafter “Hogg”].

³⁰ *Hutterian Brethren*, *supra*, note 3, at paras. 59-61.

The Chief Justice went on to consider the final stage of the *Oakes* analysis, in which the Court is asked to weigh whether the overall effects of the law on the claimants' rights are disproportionate, given the government's objectives. Under this branch of the analysis, the "real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law".³¹ The Chief Justice reasoned that the salutary effects of the law were significant, in the sense of enhancing the security of the driver's licensing scheme. She also concluded that although the photo requirement would impose additional costs and inconvenience, it would not deprive the Hutterian Brethren of a meaningful choice as to their religious practice. For example, the Chief Justice argued that the community could hire people with driver's licences, or otherwise arrange third party transport to town for necessary services. In this sense, the benefits of the measure outweighed its deleterious effects.

Meanwhile, Abella J., the leading voice in dissent, took issue with much of the majority's reasoning on proportionality.³² She was less ready to accept the government's assertions that the rule change would help prevent identity theft, noting that "[t]here is, in fact, no evidence from the government to suggest that the Condition Code G licences in place for 29 years as an exemption to the photo requirement, caused any harm at all to the integrity of the licensing system."³³ On the other hand, in her estimation, the majority opinion understated the harm caused to the Hutterites' way of life, failing to "appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community".³⁴

A review of the Supreme Court's decision in *Hutterian Brethren* provides interesting insight into why the third branch of the *Oakes* proportionality test has tended to be largely ignored by the Court in the past.³⁵ The delicate balancing of competing societal interests carried out by both majority and dissenting judges reflects the same kinds of broad policy questions more typically faced by lawmakers. In fact, it is precisely for this reason that the courts have tended to focus on those parts of the *Oakes* test that measures the fit between the objective of the law and the measures chosen to achieve that objective; although requiring the

³¹ *Id.*, at para. 76.

³² Justice LeBel wrote a separate opinion, concurring with Abella J. while adding his own commentary on s. 1 of the Charter, while Fish J. indicated that he agreed with both Abella and LeBel JJ.'s opinions.

³³ *Id.*, at para. 156.

³⁴ *Id.*, at para. 167.

³⁵ Professor Hogg notes that the "proportionality" branch of *Oakes* has rarely been used and, in his view, is redundant. See Hogg, *supra*, note 29, at s. 38-12.

exercise of discretion by the courts, this kind of means-ends analysis is bounded in the sense that it is directed at assessing whether the legislature's own objectives are being achieved effectively. In contrast, under the final, proportionality analysis of *Oakes*, the issue is essentially whether the legislature made a wise (or, conversely, an ill-informed) choice in enacting the impugned measure. There seems little reason to prefer the views of judges on such essentially political questions to those of legislators, since the judiciary can claim no special expertise in assessing the wisdom of political choices by legislatures and governments. It will thus be interesting to observe whether the emphasis placed on the final branch of the proportionality test in *Hutterian Brethren* is taken up in future cases, or whether the Court reverts to its traditional focus on minimal impairment as the linchpin of section 1 analysis.

The other significant freedom of religion decision handed down in 2009 was *C. (A.) v. Manitoba*. There, the Court upheld a provision allowing a court to order that a child under 16 receive a blood transfusion over that child's religious objections. Section 25(8) of Manitoba's *Child and Family Services Act*³⁶ empowers the court to authorize any course of medical treatment that it considers to be in the best interests of the child. Where that child is over the age of 16, he or she has the right to refuse treatment unless the court is satisfied that the child lacks the capacity to understand the information relevant to the decision or to appreciate the consequences of the decision. Where that child is under the age of 16, however, no such right exists.

In *C. (A.)*, the principal claimant was a 14-year-old Jehovah's Witness and Crohn's disease patient who suffered an episode of gastrointestinal bleeding. Medical personnel overseeing her treatment prescribed a blood transfusion in order to save her life. When the claimant refused to consent to this treatment, the Director of Child and Family Services requested and obtained a treatment order under section 25(8) of the CFSA. The treatment was administered within hours and the child recovered. Nevertheless, the child and her parents appealed the order, arguing that the provision was unconstitutional under sections 2(a), 7 and 15(1) of the Charter.

Justice Abella, writing this time for the majority, rejected the claimants' arguments. She agreed with the claimants that "there is no constitutional justification for ignoring the decision-making capacity of

³⁶ C.C.S.M. c. C80 [hereinafter "CFSA"].

children under the age of 16 when they are apprehended by the state”.³⁷ However, she noted that although the CFSA theoretically empowers the court to order a child under 16 to undergo treatment contrary to his or her wishes even if he or she can establish the relevant mental capacity, this does not mean that the child’s level of mental capacity is entirely irrelevant to the determination.

Drawing inspiration from the “mature minor” doctrine at common law,³⁸ Abella J. reasoned that the “best interests of the child” standard under section 25(8) of the CFSA must be interpreted to accord weight to a young person’s views to a degree commensurate with his or her maturity. Such maturity is assessed “a sliding scale of scrutiny, with the adolescent’s views becoming increasingly determinative depending on his or her ability to exercise mature, independent judgment”.³⁹ Relevant factors include the nature, purpose and utility of the recommended treatment; the potential impact of the young person’s lifestyle, family relationships and broader social affiliations on his or her ability to exercise independent judgment; and the existence of any emotional or psychiatric vulnerabilities. Interpreted in such a way, Abella J. concluded, the court’s power to order treatment under section 25(8) of the CFSA was compliant with section 2(a), section 7 or section 15(1) of the Charter.

3. Freedom of Expression

Two other decisions released in 2009 addressed the right to freedom of expression under section 2(b). In *Grant v. Torstar*, the Court significantly modified the law of defamation to provide greater protection for communications on matters of public interest. In 2001, the principal plaintiff, a major financial contributor to the Ontario Progressive Conservative Party and long-time personal friend of then-Premier Mike Harris, was seeking various government approvals for a proposed golf course at a time when the integrity of the approval process was being called into question in the media. The *Toronto Star* published an article in which a local resident was quoted as saying, “Everyone thinks it’s a done deal because of Grant’s influence — but most of all his Mike Harris

³⁷ *C. (A.)*, *supra*, note 3, at para. 29.

³⁸ See, e.g., *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3 All E.R. 402 (H.L.).

³⁹ *C. (A.)*, *supra*, note 3, at para. 22.

ties.”⁴⁰ The author had on several occasions sought to interview the plaintiff to allow him to address local residents’ concerns, but was repeatedly rebuffed. Instead, the plaintiff sued the defendants for defamation.

Recognizing its duty to, from time to time, “take a fresh look at the common law and re-evaluate its consistency with evolving societal expectations through the lens of *Charter* values”,⁴¹ the Court looked to the principles governing the protection of freedom of expression under the Charter, and specifically “whether the traditional defences for defamatory statements of fact curtail freedom of expression in a way that is inconsistent with Canadian constitutional values”.⁴² The Chief Justice, writing for a court unanimous on this point, noted that communications on matters of public interest engage the importance of free expression to the proper functioning of democratic governance as well as the search for truth, two of the three rationales for the constitutional protection of the right to free expression.⁴³ However, the traditional defences to defamation, she found, did not afford sufficient protection to such communications:

[T]o insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public’s interest to know may never see the light of day.⁴⁴

In light of this, the Chief Justice concluded that the current law did not give adequate weight to the constitutional value of freedom of expression, and that the high level of protection afforded to the competing value of protection of reputation was “not justifiable”.⁴⁵

⁴⁰ *Grant v. Torstar*, *supra*, note 3, at para. 16.

⁴¹ *Id.*, at para. 46.

⁴² *Id.*, at para. 41.

⁴³ *Id.*, at paras. 47-52.

⁴⁴ *Id.*, at para. 53.

⁴⁵ *Id.*, at para. 65.

To address this deficiency, the Court introduced into Canadian defamation law a new defence of responsible communication on matters of public interest. To establish this defence, the publisher must show first that the publication was on a matter of public interest, and second, that the publication of the defamatory communication was responsibly made. The second question is to be assessed having regard to a number of factors including (a) the seriousness of the allegation; (b) the public importance of the matter; (c) the urgency of the matter; (d) the status and reliability of the source; (e) whether the plaintiff's side of the story was sought and accurately reported; (f) whether the inclusion of the defamatory statement was justifiable; (g) whether the defamatory statement's public interest lay in the fact that it was made rather than in its truth; and (h) any other relevant circumstances.

Procedurally, meanwhile, the Court determined (Abella J. dissenting on this point) that it is for the jury, and not the judge, to decide at the second stage of the test whether the publication was responsibly made.

The new defence of responsible journalism unveiled in *Grant v. Torstar* is a welcome development, as it is likely to foster significantly more flexibility in media reporting of potentially defamatory statements. Notably, while both the English courts and the Ontario Court of Appeal had addressed the same issue by adopting a defence of responsible journalism, the defence developed by the Supreme Court in *Grant v. Torstar* protects responsible *communication*. In an age where the ready accessibility of electronic media for both users and publishers has drastically decentralized the nature of public discourse and dissemination of information, and resulted in a proliferation of pseudo-journalistic websites, blogs and other online sources, a defence of responsible communication better reflects the full diversity of public interest statements that merit protection from defamation suits. Thus, the decision in *Grant v. Torstar* illustrates the Court's ability to adapt the common law not only to evolving Charter values but also to the broad societal changes that often accompany rapid advances in technology.

In *GVTA*, 2009's other freedom of expression case, the Canadian Federation of Students — British Columbia Component (CFS) and the British Columbia Teachers' Federation (BCTF) challenged a policy imposing a blanket ban on political advertising on buses. In a unanimous decision, the Court found that the ban violated section 2(b) and could not be justified under section 1. In particular, the policy failed to satisfy the rational connection test — the transit authorities had sought to justify the policy with the objective of fostering “a safe, welcoming public transit

system”⁴⁶ — as well as the proportionality requirement.⁴⁷ Given the skepticism with which courts have invariably viewed blanket bans on communications of a certain type in the past,⁴⁸ this result is consistent with previous jurisprudence on freedom of expression and does not break significant new ground.

4. Voting Patterns

Two-thirds of the Supreme Court’s constitutional decisions in 2009 were unanimous, similar to the overall unanimity rate for the Supreme Court’s decisions during the year.⁴⁹ Among those decisions that involved a split in the Court, Binnie⁵⁰ and Fish⁵¹ JJ. were the most frequent dissenters with three each. Justice Abella registered two dissenting votes⁵² and LeBel⁵³ and Deschamps⁵⁴ JJ. one each. With the exception of Deschamps J.’s lone dissent in *Harrison*, all dissenting votes cast in 2009 went in favour of the Charter claimant.

These figures continue some individual voting trends that have emerged over the past years. Since 2007, the Chief Justice and Binnie, LeBel, Fish and Abella JJ. have only registered dissenting votes in Charter cases in favour of the rights claimant, while Deschamps, Charron and Rothstein JJ. have only cast dissenting votes in the opposite direction.⁵⁵ These trends have also continued intact into 2010 thus far, with Abella J. dissenting in favour of the Charter claimants in *R. v. National Post*⁵⁶ and *Toronto Star Newspapers Ltd. v. Canada*,⁵⁷ Binnie, LeBel and Fish JJ. doing the same in *R. v. Cornell*,⁵⁸ and Deschamps, Rothstein and Charron JJ. combining to dissent in favour of the government in *R. v. Morelli*.⁵⁹ De-

⁴⁶ *GVTA*, *supra*, note 3, at para. 76.

⁴⁷ *Id.*, at paras. 76-77.

⁴⁸ See, e.g., *Ramsden v. Peterborough (City)*, [1993] S.C.J. No. 87, [1993] 2 S.C.R. 1084 (S.C.C.).

⁴⁹ Of the constitutional cases decided in 2009, 65 per cent were unanimous, as compared with 63 per cent that were unanimous among the 70 judgments issued over the course of the year.

⁵⁰ *C. (A.)*, *supra*, note 3; *Bjelland*, *supra*, note 3; *Suberu*, *supra*, note 3.

⁵¹ *Bjelland*, *id.*; *Hutterian Brethren*, *supra*, note 3; *Suberu*, *id.*

⁵² *Bjelland*, *id.*; *Hutterian Brethren*, *id.*

⁵³ *Hutterian Brethren*, *id.*

⁵⁴ *Harrison*, *supra*, note 3.

⁵⁵ See Patrick Monahan & James Yap, “Constitutional Cases 2008: An Overview” (2009) 47 S.C.L.R. (2d) 3, at 16.

⁵⁶ [2010] S.C.J. No. 16, 2010 SCC 16 (S.C.C.).

⁵⁷ [2010] S.C.J. No. 21, 2010 SCC 21 (S.C.C.).

⁵⁸ [2010] S.C.J. No. 31, 2010 SCC 31 (S.C.C.).

⁵⁹ [2010] S.C.J. No. 8, 2010 SCC 8 (S.C.C.).

spite these tendencies, however, the fact remains that there is a high degree of consensus among the Canadian Supreme Court. There is no evidence of any fundamental ideological or jurisprudential divide on our highest Court, in contrast with the Supreme Court of the United States, which tends to feature much greater division and even apparent acrimony in the opinions of the justices of the Court.

One additional matter of significance is that of the 15 Charter decisions released in 2009, only two were decided by a full nine-judge roster.⁶⁰ This is because the others were heard before newly appointed Cromwell J. assumed office on December 22, 2008. Although the cause is certainly understandable, it is obviously undesirable for difficult cases to be resolved by less than a nine-person bench. With the Court now at full strength, it is hoped that the Supreme Court will ensure that significant constitutional cases are heard by a full nine-person bench.

III. FEDERALISM CASES

As in 2008,⁶¹ the Court released just two federalism decisions in 2009. In *Consolidated Fastfrate*, the Court was asked to decide whether employees of freight forwarding companies were subject to federal or provincial labour relations legislation. Freight forwarding companies typically operate by organizing individual packages into larger shipments. They then send these shipments to their destinations in other provinces using third-party carriers and, upon arrival, the shipments are deconsolidated and delivered. In this way, freight forwarding companies generate profit by offering individual consumers access to economies of scale which they could not otherwise access. The difficulty this arrangement raises, from a federalism perspective, is that no employee of the freight forwarding company actually crosses an interprovincial boundary, yet conceived at a higher level of abstraction the company's business is to accept a shipment in one province and deliver it to the intended recipient in another, essentially effecting an interprovincial conveyance of that shipment. This raises the question of whether this undertaking falls within the exception enumerated in section 92(10)(a) of the *Constitution Act, 1867* (providing for federal jurisdiction over interprovincial

⁶⁰ *Godin*, *supra*, note 3; *Grant*, *supra*, note 3.

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

undertakings),⁶² a question which a divided Court resolved in favour of provincial jurisdiction.

Justice Rothstein, writing for six members of the Court,⁶³ drew upon historical context, strict textual analysis and jurisprudential authority to limit the exception in section 92(10)(a) to those undertakings that *physically* connect the provinces through transport. Justice Rothstein noted that the freight forwarders' operations are entirely intraprovincial; while they contract with third-party shippers who transport good across provincial borders, the freight forwarders themselves do not physically operate interprovincially. Writing for the three dissenting members of the Court,⁶⁴ Binnie J. argued that any historical emphasis on physical connections between provinces was merely a reflection of contemporary economic realities that have since evolved, urging his colleagues to adopt a flexible approach that accounts for shifting business models and methods of commerce:

In an era where contracting out elements of a service business is commonplace, the modalities of how a truly interprovincial transportation operation “undertakes” to move its customers’ freight from one part of Canada and deliver it to another should not contrive to defeat federal jurisdiction. Checkerboard provincial regulation is antithetical to the coherent operation of a single functionally integrated indivisible national transportation service.⁶⁵

In *Chatterjee*, meanwhile, the Court disposed of a challenge to provincial legislation providing for the forfeiture of proceeds of unlawful activity. In a unanimous opinion, Binnie J. wrote that the legislation was in pith and substance validly related to property and civil rights within the province pursuant to section 92(13). It was thus permitted to exert incidental effects on criminal law and procedure, and did not “introduce

⁶² Section 92 of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), provides:
92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

.

10. Local Works and Undertakings other than such as are of the following Classes: —
(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

⁶³ Justice Rothstein’s opinion was concurred in by LeBel, Deschamps, Abella, Charron and Cromwell JJ.

⁶⁴ Chief Justice McLachlin and Fish J. joined Binnie J. in his dissent.

⁶⁵ *Consolidated Fastfrate*, *supra*, note 4, at para. 83.

an interference with the administration of [the *Criminal Code* forfeiture] provisions”⁶⁶ such as to engage the doctrine of federal paramountcy.

It is notable that provincial jurisdiction prevailed in both federalism decisions in 2009. This is a modest departure from recent Supreme Court jurisprudence which has tended to favour federal competence. This is particularly the case with *Consolidated Fastfrate*, in which federal jurisdiction over freight forwarders was negated. In contrast, in *Chatterjee* the effect of the decision was to favour overlapping or concurrent provincial and federal jurisdiction, which is consistent with the Court’s modern approach to federalism analysis.

IV. ABORIGINAL CASES

In 2009’s sole Aboriginal constitutional case, *Ermineskin*, the Court unanimously ruled that the Crown’s fiduciary duty did not encompass the obligation to invest Indian bands’ money. The claimant bands, who had surrendered their interests in the oil and gas under their reserves in order for the Crown to enter into arrangements with third parties to exploit the resources for profit, argued that the Crown’s fiduciary obligation required it to act as a prudent investor would, that is, to invest the oil and gas royalties in a diversified portfolio. The claim in this case was distinct from other breach of duty claims which have tended to argue that the Crown, through some positive action, has acted in a manner inconsistent with its fiduciary obligations to Aboriginal peoples; here it was the failure to act (*i.e.*, by not investing the funds so as to earn an investment return) that was said to constitute a breach of fiduciary duty. Examining both the text and the “oral terms”⁶⁷ of the governing treaty, Rothstein J. ruled that there was no treaty right to investment by the Crown, and as such section 35(1) was not engaged. It was thus open to the government to pass legislation placing constraints upon the nature of the Crown’s fiduciary obligations with respect to the investment of royalty moneys, and this is exactly what Rothstein J. found it had done. Examining the governing legislative framework — consisting of provisions of the *Indian Act*,⁶⁸ the *Financial Administration Act*⁶⁹ and the *Indian Oil and Gas*

⁶⁶ *Johnson v. Alberta (Attorney General)*, [1954] S.C.J. No. 10, [1954] S.C.R. 127, at 138 (S.C.C.).

⁶⁷ *Ermineskin*, *supra*, note 3, at paras. 53-56.

⁶⁸ R.S.C. 1985, c. I-5.

⁶⁹ R.S.C. 1985, c. F-11.

*Act*⁷⁰ — Rothstein J. determined that the Crown was in fact not permitted under the legislation to invest the funds, and that it was therefore not in breach of its fiduciary duty in not doing so.

V. CONCLUSION

In recent years, the Court has increasingly adopted a balancing framework for the analysis of Charter rights. A balancing framework tends to favour complex tests with a significant number of competing factors, which are then “balanced” or traded off against each other. Moreover, in such a framework, it is generally considered that no single factor or consideration is determinative and, instead, each case turns on a consideration of the various factors in light of the particular circumstances of the case.

Certainly the experience of the past year is consistent with this trend. Whether weighing the right to be secure from unreasonable search and seizure against the “societal scourge” of gun crime⁷¹ in *Grant*, or setting off a religious community’s self-sufficient identity against the need to prevent identity theft in *Hutterian Brethren*, the Court spent much of its time in constitutional decisions performing a delicate balancing of competing interests. As demonstrated by the new test for exclusion of evidence unveiled in *Grant*, the Court continues to show a strong preference for complex balancing tests, as opposed to more categorical approaches.

Overall, there does appear to be an emerging consensus on what might be termed “Charter fundamentals”, that is, the overall framework within which Charter analysis should proceed. At the same time, the increasing resort to balancing frameworks with competing factors and tests gives rise to concerns over complexity and predictability. In particular, given the oft-repeated assertion that various competing factors need to be applied in a case-by-case manner and that no single factor is determining or controlling, the risk that arises is that the application of complex balancing tests will produce overly long and complex trials and the substantial risk of reversal on appeal. This increases the costs of Charter litigation both to individual litigants and to society as a whole. The Court needs to be sensitive to these broader cost considerations, which are relevant and appropriate even within the rights-based framework that continues to develop and evolve under the Charter.

⁷⁰ R.S.C. 1985, c. I-7.

⁷¹ *Grant*, *supra*, note 3, at para. 139.