

## 2013: Constitutional Cases in Review

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### Citation Information

Lawrence, Sonia. "2013: Constitutional Cases in Review." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 67. (2014).

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# 2013: Constitutional Cases in Review

Sonia Lawrence\*

## I. INTRODUCTION

This paper reviews the constitutional decisions released by the Supreme Court of Canada in 2013, with an eye to both the forest and the trees. It aims to not only indicate the specific issues taken up by the Court and how they were resolved, but also to explore the relationships and disconnects between the decisions and what they reveal about a variety of relationships: relationships between current and past decisions; between the judges and the constitutional text; between the justices of the Court who may have different interpretations of the Constitution; and of course between the Court and the Parliament subjected to this form of judicial review. The resulting paper cannot be more than a snapshot, since the sample is bracketed by somewhat arbitrary calendar dates, but it presents a picture of a Court which may well be in the process of entering uncharted waters — waters which are somewhat less hospitable, if no more fraught, than those they have traversed in the past.

The Court released 74 judgments in 2013, consistent with the recent past and only one less than last year. Of these, 11 were clearly “constitutional” cases, the same number as last year, representing about 15 per cent of the total. Nine of the 11 cases were Charter<sup>1</sup> cases, one considered section 35 Aboriginal rights, and one was a division of powers case involving the doctrines of interjurisdictional immunity and federal paramountcy. These numbers are broadly consistent with the Supreme Court’s recent past.<sup>2</sup> Like last year, in only two of the Charter

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\* Associate Professor, Osgoode Hall Law School. I am grateful for the able assistance of Osgoode 3L Nav Purewal and IL Jeanine Tang in the preparation of this draft paper, and for the opportunity to talk with colleagues across the country in person and via technological innovations, about these cases and all things constitutional. I am particularly indebted to my colleagues Professors Jamie Cameron and, especially, Benjamin Berger. All errors are my own.

<sup>1</sup> *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”].

<sup>2</sup> See the numerical assessments in Jamie Cameron, “The McLachlin Court and the Charter in 2012” in J. Cameron, B.L. Berger & S. Lawrence, eds. (2013) 63 S.C.L.R. (2d) 15; Patrick

cases were the claimants successful (about 22 per cent). The division of powers claim failed, and the section 35 claim brought by the Manitoba Métis Federation was a substantial, although not complete, success. Five of the appeals were completely dismissed<sup>3</sup> and one was substantially dismissed.<sup>4</sup> Four were allowed in part,<sup>5</sup> and only once was the decision of the court below entirely overturned.<sup>6</sup>

Unanimous opinions dominated the constitutional cases, coming in seven out of 11 cases in 2013. There were multiple opinions in only four,<sup>7</sup> and dissenting opinions in only three.<sup>8</sup> The work of writing reasons was relatively evenly distributed (in fact, in these constitutional cases, the judge who authored or co-authored the most sets of reasons, whether majority, dissent or concurrence, was Karakatsanis J., famously tagged by *The Globe and Mail* in 2013 as “struggling to make an impact”<sup>9</sup>). As for voting blocs, the revelation that Fish and LeBel JJ. both sat for all 11 cases and signed on to the same opinions in all 11 is interesting, but in a year where there were so many unanimous decisions in these constitutional cases, the significance of this observation should not be

Monahan & Chanakya Sethi, “Constitutional Cases 2011: An Overview” in J. Cameron & S. Lawrence, eds. (2012) 58 S.C.L.R. (2d) 1.

<sup>3</sup> *R. v. Levkovic*, [2013] S.C.J. No. 25, 2013 SCC 25, [2013] 2 S.C.R. 204 (S.C.C.), Fish J. [hereinafter “*Levkovic*”]; *R. v. Vu*, [2013] S.C.J. No. 60, 2013 SCC 60, [2013] 3 S.C.R. 657 (S.C.C.), Cromwell J. [hereinafter “*Vu*”]; *R. v. Chehil*, [2013] S.C.J. No. 49, 2013 SCC 49, [2013] 3 S.C.R. 220 (S.C.C.), Karakatsanis J. [hereinafter “*Chehil*”]; *R. v. MacKenzie*, [2013] S.C.J. No. 50, 2013 SCC 50, [2013] 3 S.C.R. 250 (S.C.C.), Moldaver J. [hereinafter “*MacKenzie*”]; *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, 2013 SCC 47, [2013] 3 S.C.R. 157 (S.C.C.), Abella J. [hereinafter “*Divito*”].

<sup>4</sup> *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] S.C.J. No. 62, 2013 SCC 62, [2013] 3 S.C.R. 733 (S.C.C.), Abella and Cromwell JJ. [hereinafter “*United Food*”].

<sup>5</sup> *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14, [2013] 1 S.C.R. 623 (S.C.C.), McLachlin C.J.C. and Karakatsanis J. [hereinafter “*Manitoba Metis*”]; *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, 2013 SCC 11, [2013] 1 S.C.R. 467 (S.C.C.), Rothstein J. [hereinafter “*Whatcott*”] (allowed in part); *Quebec (Attorney General) v. A*, [2013] S.C.J. No. 5, 2013 SCC 5, [2013] 1 S.C.R. 61 (S.C.C.), LeBel J. [hereinafter “*Quebec v. A*”] (allowed in part); *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.), McLachlin C.J.C. [hereinafter “*Bedford*”] (partially upheld).

<sup>6</sup> See Appendix A for a complete list of the 2013 constitutional cases.

<sup>7</sup> *Quebec v. A*, *supra*, note 5; *Manitoba Metis*, *supra*, note 5; *Divito*, *supra*, note 3; *MacKenzie*, *supra*, note 3.

<sup>8</sup> *Quebec v. A*, *id.*; *Manitoba Metis*, *id.*; *MacKenzie*, *id.*

<sup>9</sup> “A Supreme Court Justice struggles to make an impact”, Editorial, *The Globe and Mail* (April 3, 2013), online: <<http://www.theglobeandmail.com/globe-debate/editorials/a-supreme-court-justice-struggles-to-make-an-impact/article10748372/>>.

overstated.<sup>10</sup> There are other ways of looking at the way that the judges lined up, but it is very difficult to draw conclusions based on such a small number of cases and such a (relatively) large number of unanimous decisions. That said, it is notable that things have not changed significantly from reviews of the Court's constitutional output in the recent past.

On the numbers, this was not a blockbuster year for the Supreme Court constitutional case watchers. The Court largely upheld the courts below, largely dismissed rights-based challenges against state law, and is making a habit of consensus. Yet there are ways to see the constitutional year at the Supreme Court as more eventful than the numbers suggest. After some years of relative calm, the consensus on section 15 shattered with *Quebec v. A*. The decision in *Manitoba Métis* illustrated other fissures, and is almost certainly the case which has led to the Chief Justice's recent assertions that the era of the Charter is over and the era of reconciliation has begun. Among the less notable cases were the potential powder keg but actual non-event that was *Levkovic*, the status quo-preserving division of powers cases *Marine Services International Ltd. v. Ryan Estate*<sup>11</sup> and *Divito*, one of the few cases with a significant split (over whether or not section 6 is engaged), albeit one which finishes up as a concurrence.

There were momentous happenings quite apart from the cases. The resignation of Justice Fish in August 2013, followed by the Harper government's October appointment of The Honourable Marc Nadon, then a supernumerary judge of the Federal Court of Appeal, set in motion a series of events still unfinished, events which may open a new stage in the relationship between Canadians, their government and their highest Court. The political, legal and constitutional mess created by this appointment was unprecedented, shocking and even scandalous, especially for a court that has, thus far, quite successfully negotiated the treacherous waters of constitutional supremacy. The slow, miserable trickle of new bad news, a daily drip of new humiliations, steadily undermined the reputation of the Court, and actively affected the ability of the institution to fulfil its responsibilities. Justice Nadon — already sworn in — had to be barred from the Supreme Court building. Eventually, it became clear that the Court would actually have to hear argument on the question of whether Justice Nadon was qualified to sit in the upstairs chamber at 500 Wellington. The Justices, and in particular the Chief Justice as the public face of the Court,

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<sup>10</sup> *Quebec v. A*, *supra*, note 5, *Manitoba Metis*, *supra*, note 5 (majorities); *MacKenzie*, *supra*, note 3 (dissent); *Divito*, *supra*, note 3 (concurrence).

<sup>11</sup> [2013] S.C.J. No. 44, 2013 SCC 44 (S.C.C.) [hereinafter "*Ryan Estate*"].

put on brave if somewhat peeved faces and soldiered on as a team of eight. They continued hearing cases, and they continued to release judgments.

In September, the companion cases of *Chehil* and *MacKenzie* were released, along with another search and seizure case, *Vu*.<sup>12</sup> These cases show the Court's efforts to sort out the constitutional significance of very different kinds of technologies — sniffer dogs in the first cases, smart phones and computers in the last. Technology (cameras and websites) also featured in the next release, a section 2(b) case arising out of a strike at the West Edmonton Mall Casino, in which the Court struck down Alberta's privacy protection legislation and offered a vigorous defence of collective bargaining regimes.<sup>13</sup> Finally, in December, the Court offered the decision in *Bedford*, arguably the most significant case of the year, a unanimous decision striking down three sections of the *Criminal Code* after a challenge by three sex workers on the basis of section 7 of the Charter.<sup>14</sup> The review of the cases that follows takes a chronological approach — the cases are considered in the order in which they were released, from January 2013 to December 2013. The cases do not get equal treatment. Some — *Ryan Estate* and *Divito*, for instance — are dealt with quickly. Both are interesting but ultimately either unsurprising (*Ryan Estate*) or seem to be the wrong case in which to resolve the interesting issue they raise (*Divito*). Others are explored in more depth, including *Bedford*, *Quebec v. A* and *Manitoba Metis*, because of my sense that they are cases which matter in terms of both the specific doctrines and the general hints they offer about the direction of the Court. Other articles in this volume will look at the cases in the context of specific doctrinal areas. This article, on the other hand, considers them as a set on their own, the Supreme Court's Constitutional cases of 2013.

Broadly, two themes worth following emerge from these cases. The first is the way that the notion of choice surfaces in both *Quebec v. A*<sup>15</sup> (the first constitutional case of the year) and *Bedford*<sup>16</sup> (the last). The vastly different way that choice is analyzed by the majority in *Quebec v. A* and the unanimous Court in *Bedford* highlights the pivotal role the concept can play in Charter analysis, since choice and ideas about the state's role in creating equality (or the conditions of equality) are critical

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<sup>12</sup> *Supra*, note 3.

<sup>13</sup> *United Food*, *supra*, note 4.

<sup>14</sup> *Supra*, note 5. *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>15</sup> *Supra*, note 5.

<sup>16</sup> *Supra*, note 5.

points in a rights analysis that can seem fixed on the protection of individual freedom from state coercion.

The second and related theme is the always relevant question of the relationship between courts and legislature, in particular, the question of deference to the decisions of the legislature.<sup>17</sup> Despite the media narrative, especially in early 2014, framing a court at war with the government and Prime Minister of the day, few of these cases challenge the government in a serious way. Even the striking down of the Act challenged in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*<sup>18</sup> was done in such a way as to respect the role of the government in crafting law and policy. The number of cases in which claimants lost, a list which includes *Ryan Estate*<sup>19</sup> and *Divito*,<sup>20</sup> is long. I would read many of last year's cases as relatively deferential, which leads me to ask, where are the (small c) citizens in the dominant media narrative of Court versus Parliament? Why is the Court's non-championing of constitutional claimants not a similar kind of news? One answer is that these cases tend to maintain the status quo (although this would not apply, for instance, to the cases from early 2014 such as *Reference re Supreme Court Act, ss. 5 and 6*<sup>21</sup> or *Reference re Senate Reform*<sup>22</sup>) and so may seem less newsworthy. Another may be about the doctrinal strength of the arguments, of course, and a third would point to the rules of leave to appeal and right to appeal to the Supreme Court, which require the Court to hear a large number of appeals from criminal convictions which are, arguably, neither doctrinally strong nor of particular importance or interest. That all these possibilities exist, though, means that Supreme Court watchers should be cautious about supporting a narrative framing that posits a fundamentally conflictual relationship between the Court and the government. Cherrypicking cases to support that view not only distorts the record

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<sup>17</sup> I am interested here in deference writ large, deference that might emerge in a number of places, for instance, in setting the scope of the case, in delineating the nature of the rights under the Charter, in applying the *Oakes* test (*R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.)) (which is the zone of a very particular set of deference questions), and in working through the appropriate remedy where one is called for. As such, I am interested in more than just what the Court explicitly describes as deference — or its opposite.

<sup>18</sup> [2013] S.C.J. No. 62, 2013 SCC 62 (S.C.C.).

<sup>19</sup> *Supra*, note 11.

<sup>20</sup> *Supra*, note 3.

<sup>21</sup> [2014] S.C.J. No. 21, 2014 SCC 21 (S.C.C.) [hereinafter "*Nadon*"].

<sup>22</sup> [2014] S.C.J. No. 32, 2014 SCC 32 (S.C.C.) [hereinafter "*Senate Reference*"].

looking backward, but, because of the way it influences all the players, may shift the course going forward.

It is possible to mine some of this year's cases, in particular *Quebec v. A* and *Manitoba Metis Federation*, for hints about how the Court chooses when to unleash the power it holds by virtue of its role as interpreter of the Constitution — and when it decides it is better muffled. Given the events of early 2014, with the release of the *Nadon* decision and the *Senate Reference*, the question of when and how the Court assesses the constant need to maintain its power and legitimacy in the eyes of the governments of the day and the Canadian public bears additional attention. The review that follows focuses somewhat on *Quebec v. A*, *Manitoba Metis* and *Bedford*, as well as *Whatcott*. The other nine cases get a shorter treatment, not because they are doctrinally unimportant, but because the lessons they offer seem more doctrinally confined to a relatively narrow area of the law and are most useful in the context of that field (for instance, *United Food*<sup>23</sup> contains strong language about the value of collective bargaining regimes and freedom of expression, but the constitutional problem raised in that case is relatively cut and dried). This approach is possible in part because of the work of other authors who analyze the cases in their doctrinal contexts, in this volume, in past volumes, and elsewhere.

## II. THE CASES, FROM JANUARY TO DECEMBER 2013

### 1. Section 15(1): *Quebec (Attorney General) v. A*

The first constitutional case of 2013 foreshadowed the coming year in a number of ways, but was also a significant anomaly. To take the anomaly first, the case produced four judgments, fracturing the Court in a way that was not repeated in any other constitutional case this year, and harks back to much earlier section 15 cases, most notably the trilogy of 1995.<sup>24</sup> Less uniquely, the Charter claimant lost, which, given that this was a section 15 claim, is even less surprising. Like *Bedford*,<sup>25</sup> which formed the other bookend on the 2013 Charter cases, this case had more than enough in it to interest the media. A family law dispute between one of Quebec's most

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<sup>23</sup> *Supra*, note 4.

<sup>24</sup> *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.); *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.); *Thibaudeau v. M.N.R.*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.).

<sup>25</sup> *Supra*, note 5.

high-profile couples, an immigrant from Brazil and the Québécois self-made billionaire she met on a beach when she was 17. The case, despite the anonymity of the style of cause, was made for public consumption.<sup>26</sup>

A's claim was a section 15 challenge to the Quebec *Civil Code*'s exclusion of *de facto* spouses from spousal support and property division.<sup>27</sup> Five judges found that this was a violation, in three sets of reasons,<sup>28</sup> while three agreed with LeBel J. that there was no violation.<sup>29</sup> At section 1, the fracture deepened, with McLachlin C.J.C. finding justification, Abella J. finding for the claimant, Deschamps, Cromwell, and Karakatsanis JJ. finding one of the provisions (property division) justified, and the others, of course, avoiding the section 1 analysis altogether.

The splits do not follow any particular easy-to-discern patterns. While all of the women found a violation, there was substantial disagreement among them at section 1. And, while two of the Quebec judges found no violation, the other found at least one unjustified violation. Another feature of the judgment is the way that the position of the Chief Justice, which moves from a finding that the section 15 claim is made out to a finding that the violation is justified at section 1, ultimately decides the outcome.

What it all boils down to is a loss for the litigant. It seems unlikely that Abella J.'s majority decision on section 15, which shifts the discrimination analysis from a focus on attitudes, prejudices and stereotypes to a focus on effects and adverse differential impact,<sup>30</sup> heralds a new era for section 15.<sup>31</sup> The judges who agreed with LeBel J. took the position that the regime in the *Code Civil* was designed to respect the free will not only of B, but of A herself. The Chief Justice's section 15 concurring reasons do not take Abella J.'s approach to clearing out the detritus of the stereotypes and prejudiced language (although the Chief Justice does claim to be in concert with Abella J.). The Chief Justice uses

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<sup>26</sup> *Quebec v. A*, *supra*, note 5. The case in fact has a nickname, but after some helpful conversations with Professor Margot Young (UBC) and the other members of the online roundtable (see *infra*, note 40) on the meaning behind that nickname, I will avoid it.

<sup>27</sup> *Civil Code of Québec*, CCQ-1991, c. 64, arts. 401-585.

<sup>28</sup> (1) Justice Abella; (2) McLachlin C.J.C.; and (3) Deschamps, Cromwell and Karakatsanis JJ.

<sup>29</sup> Justices Fish, Rothstein and Moldaver.

<sup>30</sup> *Quebec v. A*, *supra*, note 5, at para. 332.

<sup>31</sup> For a more complete treatment of this case, see Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" in J. Cameron, B.L. Berger & S. Lawrence, eds. (2013) 63 S.C.L.R. (2d) 261; see also Robert Leckey, "Developments in Family Law: The 2012-2013 Term" (2014) 64 S.C.L.R. (2d) 241.



that language, and the language from *Law*<sup>32</sup> of correspondence and reasonable rights holders, to make her point. The third set of reasons finding a violation, from Deschamps, Cromwell and Karakatsanis JJ., points to the historical disadvantage perpetuated by the rule in arguing that the violation has occurred even though there was no intent to stigmatize the unmarried. Thus only Abella J. saw this case as a vehicle to repairing perceived problems in the section 15 analysis the Court has been using.

At section 1, the positions shift or harden. Justice Abella finds that the violation of section 15 fails both minimal impairment and proportionality under *Oakes*, whereas the Chief Justice offers a deeply deferential analysis to the Quebec legislature and finds the exclusion fully justified. Taking a mixed approach, the third group of judges finds that the exclusion of *de facto* spouses from property division is fully justified, but that the exclusion from spousal support fails at minimal impairment, since it fails to minimally impair the rights of the vulnerable person in a relationship of financial interdependence, a person for whom the “choice” to marry did not really exist.<sup>33</sup>

It is a relief to see both Abella J. and the set of three concurring judges addressing directly the question of choice as it applies to marriage. The notion that marriage is a choice has always seemed odd, since of course marriage represents an agreement to marry. Not-marriage, however, may represent a mutual decision to not-marry, or it might, as the evidence suggests it did here, represent one party’s refusal to marry and the other’s wish to marry. In such a situation, one of the two “choices” is validated: the choice to “not-marry”.<sup>34</sup> The suggestion that the Quebec legislature might have considered a scheme in which couples could agree to opt out of support and property obligations as a way of respecting autonomy (of which so much is made in this decision) while respecting the interests of the vulnerable spouse in a relationship of interdependence, is enthusiastically made by Abella J. but derided by the Chief Justice because it would not serve the goals of the Quebec legislature, namely “maximizing choice and autonomy for couples in

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<sup>32</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.).

<sup>33</sup> *Quebec v. A*, *supra*, note 5, at para. 360.

<sup>34</sup> *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, 2004 SCC 65, [2004] 3 S.C.R. 357 (S.C.C.), Binnie J.; *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84, 2002 SCC 83, [2002] 4 S.C.R. 325 (S.C.C.), Bastarache J.

Quebec”.<sup>35</sup> As she did in *Hutterian Brethren*, the Chief Justice takes an approach at minimal impairment that refuses to consider any outcome other than the one “the legislature seeks to achieve”.<sup>36</sup> In this case, that goal is achieved by keeping the state out altogether. It would not be achieved in a scheme that required couples to agree and take positive action.<sup>37</sup> There is a benefit in being free to choose whether one wants a relationship which offers no rights, and imposes no obligations.

Chief Justice McLachlin’s approach to section 1 strikes a discordant note when compared with her decision at section 15. Remember when we used to be able to say that decisions found to be discriminatory at section 15 will rarely be found justified through the section 1 analysis?<sup>38</sup> The considerations which informed that statement are nowhere in evidence in the Chief Justice’s reasons. The minimal impairment approach used by the Chief Justice offers significant deference to the government goal that *resulted* in the discrimination.<sup>39</sup> Finally, the Chief Justice’s approach to the question at section 1 seems to read out — entirely — the context in which these decisions are made, a context in which the financial imbalances between spouses are heavily gendered. Hester Lessard describes the reasons of LeBel J. as illustrating how “choice language” serves as “‘ideological glue’ ... binding the twin pillars of classical liberalism — formal equality and negative liberty — to a conception of conjugality and property rights rooted in a conservative and patriarchal tradition”.<sup>40</sup> The Chief Justice’s description of this scheme as one that avoids paternalism, given the many arguments that it supports patriarchy, is one which may prove helpful in sketching her ideological commitments to gender equality on the one hand and a kind of libertarianism on the other.

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<sup>35</sup> *Quebec v. A*, *supra*, note 5, at para. 379 (*per* Abella J.) and at para. 442 (*per* McLachlin C.J.C.).

<sup>36</sup> *Id.*; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 54 (S.C.C.), McLachlin C.J.C. [hereinafter “*Hutterian Brethren*”].

<sup>37</sup> *Quebec v. A*, *supra*, note 5, at para. 443.

<sup>38</sup> *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, 34 B.C.L.R. (2d) 273, at para. 28 (S.C.C.), Wilson J.

<sup>39</sup> *Hutterian Brethren*, *supra*, note 36; Benjamin L. Berger, “Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*” in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (2d) 25.

<sup>40</sup> Hester Lessard, “Eric & Lola Roundtable: Hester Lessard – Knotted & Glued”, online: (2013) The Institute for Female Legal Studies at Osgoode <<http://ifls.osgoode.yorku.ca/2013/05/eric-lola-roundtable-hester-lessard-knotted-glued/>>.

Commentators have noted that the various articulations of the Quebec legislature's goal in excluding *de facto* spouses are perhaps at odds with the reality. In particular, McGill's Robert Leckey argues that looking at the provisions in their broader context reveals the way that public law in Quebec does treat cohabitants as mutually supporting. It is only in the private law context that we see this concern for validating the autonomy of unmarried couples.<sup>41</sup> At this point, the relevance of the issue that came into sharp focus over the appointment of Justice Nadon much later in the year surfaces — this is a Quebec case, and most of the reasons in this case are freighted with references to Quebec particularities. Both the long history set out by LeBel J. in his section 15 analysis, and the federalism-inflected deference of the Chief Justice's section 1 approach indicate that it was Quebec specificities that drove all the judges who denied the claim, although at different points in the analysis. It will almost certainly prove difficult to extract a general rule about section 15 from this case, where judges claim to agree when they seem to disagree, where disagreements are so fundamental, where the validity of choice as a concept is so deeply contested, where the question of Quebec looms in ways acknowledged and not, and where the deeply gendered context of economic dependency post relationship breakdown is left largely unexplored. Nothing new for section 15, but this is not a decision that helps with strategic choices in litigation. Once again we will be waiting for a brave — or foolhardy — claimant in order to get another chance at understanding the Supreme Court's approach to section 15.

## 2. Section 2(a): *Saskatchewan (Human Rights Commission) v. Whatcott*

*Whatcott*,<sup>42</sup> a challenge to the *Saskatchewan Human Rights Code*,<sup>43</sup> brought together religious freedom, homophobia, freedom of speech, and Human Rights Codes — issues often gathered under the rubric of “clash of rights”.<sup>44</sup> This clash, usually between religious and equality rights, has

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<sup>41</sup> Robert Leckey, “Eric & Lola Roundtable: Robert Leckey responds on choice”, online: (2013) The Institute for Female Legal Studies at Osgoode <<http://ifls.osgoode.yorku.ca/2013/05/eric-lola-roundtable-robert-leckey-responds-on-choice/>>.

<sup>42</sup> *Supra*, note 5.

<sup>43</sup> S.S. 1979, c. S-24.1.

<sup>44</sup> For more focused treatment of *Whatcott*, see Mark J. Freiman, “Hate Speech and the Reasonable Supreme Court of Canada” in J. Cameron, B.L. Berger & S. Lawrence, eds. (2014) 63 S.C.L.R. (2d) 295.

become a standard media trope, but the challenge of understanding the ways in which the two rights co-exist is also reflected in two major issues that bubbled up and festered in 2013: the Parti Québécois' proposed "Charter of Values",<sup>45</sup> and the efforts of Trinity Western University,<sup>46</sup> a private Christian evangelical institution in Kamloops, British Columbia, to establish a law school that would operate under a code of conduct banning homosexual activity by all students, faculty and staff.

The decision in *Whatcott* captures two ongoing controversies in political spheres. The first is a debate over the utility and legitimacy of human rights commissions, and the second is increasing fear and fascination about religion versus equality controversies among the Canadian public. However, the release of the decision in *Whatcott* early in the year may have served to diffuse rather than fan the flames of both of these disputes, since it does little more than confirm the position that Canadian courts have taken on hate speech in *R. v. Keegstra*<sup>47</sup> and *Ross v. New Brunswick School District No. 15*<sup>48</sup> in the 1990s.<sup>49</sup>

*Whatcott*'s homophobic flyers were distributed by hand to homes in Regina and Saskatoon, and complaints were filed with the Saskatchewan Human Rights Commission. The Tribunal held that the flyers contravened section 14(1)(b) of the *Saskatchewan Human Rights Code*, which prohibits material that "exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground". The Tribunal further held that section 14(1)(b) constituted a reasonable limit on *Whatcott*'s section 2(a) and 2(b) rights under the Charter. The Supreme Court upheld these parts of the Tribunal's ruling in a unanimous, 207-paragraph decision written by Rothstein J.<sup>50</sup>

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<sup>45</sup> Richard Bourhis, "Quebec's Charter remains a solution in search of a problem", *The Globe and Mail* (January 14, 2014), online: <<http://www.theglobeandmail.com/globe-debate/quebecs-charter-remains-a-solution-in-search-of-a-problem/article16310595/>>.

<sup>46</sup> Cristin Schmitz, "Lawyers in Ontario reject TWU approval", *The Lawyers Weekly* (May 9, 2014), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=2133>>.

<sup>47</sup> [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1 (S.C.C.), Dickson C.J.C. [hereinafter "*Keegstra*"].

<sup>48</sup> [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825, 171 N.B.R. (2d) 321, La Forest J. [hereinafter "*Ross*"].

<sup>49</sup> See, for instance, the arguments made in Cara Faith Zwibel, "Reconciling Rights: The *Whatcott* Case as Missed Opportunity" in J. Cameron, B.L. Berger & S. Lawrence, eds. (2014) 63 S.C.L.R. (2d) 313.

<sup>50</sup> The Tribunal found that all four of the flyers violated s. 14 of the *Saskatchewan Human Rights Code*. The Supreme Court upheld two of those findings but found the other two unreasonable.

The decision begins by setting out the test for hate speech, an objective test that focuses on the effect of such expression on the audience and the objective of preventing discrimination, a test which requires that the material in question reach the “extreme” end of the spectrum of hatred. Under this approach, it is clear that section 14(1)(b) does constitute an infringement on the right to freedom of expression. At section 1, the portion of section 14(1)(b) after the word “hatred” — “ridicules, belittles or otherwise affronts the dignity” — was found to fail the rational connection test because it simply could not be reconciled with the test for hate speech. This rather rare rational connection failure comes as no surprise to most followers of human rights regulations and section 2(b), and the remainder of the section has a smooth passage through the minimal impairment and proportionality parts of the *Oakes* test. The final balancing in particular took the approach of earlier cases in describing hate speech as a degraded form of speech in terms of the purpose of section 2(b) protections. Political speech it may be, but in being restrictive and exclusionary, it is speech that aims to shut down dialogue rather than promote it. Thus section 14 aims to protect vital political discourse against marginal forms of expression that harm the values that section 2(b) sets out to protect.

Whatcott had argued that the provision was overbroad on a number of other grounds. One of these arguments engaged the distinction between sexual acts and sexual orientation. The Court’s approach was not to deny the distinction, but rather to focus on the clear effect of hate speech about behaviours that are associated with — and often only with — a group defined by sexual orientation. Another overbreadth argument pointed to the lack of any intent requirement in the Code. The Court again took an approach that avoided sweeping pronouncements in favour of describing the goals of the government in passing the Code in a nuanced, careful way. The Court held that truthful statements could be hate speech, even when they are stated in ways that did not intend to harm, but also that there is no constitutional requirement on the part of the legislature to allow such speech, especially when to do so would in a great many cases “gut the prohibition of effectiveness”.<sup>51</sup> The legislature is still, says the *Whatcott* decision, entitled to protect vulnerable groups via minimal infringements of freedom of expression.

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<sup>51</sup> *Whatcott*, *supra*, note 5, at para. 143.

The section 2(a) question, which raised issues with less of a history at the Supreme Court, was somewhat anticlimactically dealt with in 12 paragraphs. While the Court agreed that the speech in question did engage section 2(a) protection (the Commission had argued that it should not), the section 1 analysis that followed closely tracked that applied in the expression claim. That is, the prohibition captures only hate speech. It does not, therefore, capture all “preaching” against homosexuality, only forms of expression that constitute hate speech.<sup>52</sup> One single paragraph suffices to sever the language of “ridicules, belittles or otherwise affronts the dignity of ...”, already lost in the section 2(b) claim in any event, and to declare that section 14(1)(b) is a reasonable limit on section 2(a).<sup>53</sup> The remainder of the case addresses the application of section 14(1)(b) by the Tribunal in *Whatcott*’s case, a non-constitutional issue that I will not cover here.

Twenty-one interveners participated in this case. Only two of these were Attorneys General (Saskatchewan and Alberta). Four were Human Rights Commissions (Canada, Alberta, Ontario, Northwest Territories and Yukon together). The remainder included a Bar Association, faith groups, and groups representing women, African Canadians, sexual minorities, women, Indigenous people and journalists. It is these 21 interveners, not the decision in this case, that indicates the importance of this issue to both sides, and the extent to which the case was widely understood to be at least as much, if not more, about religious freedom than freedom of expression. *Whatcott* indicates that the Supreme Court has no particular interest in moving away from approaches to hate speech that have, in many ways, served to highlight the difference between the Canadian Charter and approaches to freedom of speech in the United States. This seems likely to be tested repeatedly both in the Supreme Court and in the court of public opinion over the next few years.

### **3. Aboriginal Rights: *Manitoba Metis Federation Inc. v. Canada* (Attorney General)**

Over the past year, the current Chief Justice has at least twice suggested that the era of the Charter is, if not ending, then at least being eclipsed by a new and pressing constitutional challenge, that of section 35

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<sup>52</sup> *Id.*, at para. 163.

<sup>53</sup> *Id.*, at para. 164.

Aboriginal rights and reconciliation.<sup>54</sup> The implication that our relationship with the Charter is approaching maturity is an intriguing one. But the change she sees is not reflected in the caseload of the highest Court.<sup>55</sup> The only case which raised constitutional section 35 rights this year was *Manitoba Metis Federation*,<sup>56</sup> and this decision is thus in some ways best evidence we have with which to investigate the Chief Justice's assertion that conceptualizing and operationalizing reconciliation between pre-existing Aboriginal societies and the assertion of Canadian sovereignty will supersede the definition and protection of Charter rights in the future work of the Supreme Court.<sup>57</sup> The chronology and public statements of McLachlin C.J.C. support the inference that confronting the less than honourable behaviours of the founders of the nation as revealed in this case was critical in developing her view that reconciliation would increasingly define the work of the Supreme Court.

This case has its origins, like all section 35 cases, long ago. The Métis claimed that the federal government failed to fulfil its fiduciary duty in dealing with promises made to the Métis of Manitoba. The case is constitutional in two ways. First, a constitutional document, the *Manitoba Act, 1870*,<sup>58</sup> is the basis for the claim. Sections 31 and 32 of that Act, passed after the Red River Rebellion, set out promises to distribute land to Métis children and to recognize existing landholdings. Second, the majority decision (McLachlin C.J.C. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ., with Rothstein and Moldaver JJ. dissenting) recognizes a failure to act in accordance with the honour of the Crown, a concept that is engaged by section 35.

The claim made by the Manitoba Metis Federation raised the question of the honour of the Crown, alleged a breach of fiduciary duty,

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<sup>54</sup> Joseph Breaun, "‘Reconciliation’ with First Nations, not the Charter of Rights & Freedoms, will define the Supreme Court in coming years, Chief Justice says", *National Post* (March 13, 2014) online: <<http://news.nationalpost.com/2014/03/13/reconciliation-with-first-nations-not-the-charter-of-rights-freedoms-will-define-the-supreme-court-in-coming-years-chief-justice-says/>>; Beverley McLachlin, "Defining Moments: The Canadian Constitution" Supreme Court of Canada (February 5, 2013), online: <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-02-05-eng.aspx>>.

<sup>55</sup> I do not mean to suggest that she is wrong, merely that what she is describing is not a quantitative claim, at least in terms of appellate case law. There are a variety of reasons, including the efforts of courts to push section 35 and other disputes between First Nations and the Crown into negotiation and hence out of courtrooms, the rules for "as of right" appeals which bump up the number of Charter/criminal cases heard by the Court, and many others, which help explain the breakdown of constitutional cases in terms of numbers.

<sup>56</sup> *Supra*, note 5.

<sup>57</sup> *Id.*

<sup>58</sup> S.C. 1870, c. 3 [reprinted in R.S.C. 1985, App. II, No. 8].

asked for declarations on both those points, argued that the Federation should be granted public interest standing, and asserted that limitations and the doctrine of laches should not apply to this claim. These claims had no success either at trial or at the appellate level.

The majority granted the Federation public interest standing, issued a declaration that Canada “failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown”,<sup>59</sup> and found that neither the law of limitations nor the doctrine of laches could bar the Métis claims. Rejected were the claims based on breach of fiduciary duty and on section 32 of the *Manitoba Act, 1870*.

The case was heard in the last month of 2011 and was not released until March 2013,<sup>60</sup> but it begins, as the majority writes, in some time period before the 17th century.<sup>61</sup> Paragraphs 20 through 31 (at least) read almost like a script treatment, conjuring up a vision of the land as it was then and the changes which swept over it as 1870 approached. The facts of this case are the history of Canada before it was Canada — as it was increasingly asserted to be “Canada”.

The crux of the claims that found success in this appeal are the errors and delays created by the Canadian government’s efforts to implement the promise in section 31 of the *Manitoba Act* to distribute 1.4 million acres of land to Métis children. After 15 years, the process was over, but in that time some children had received not land, but scrip-redeemable-for-land, Manitoba had passed legislation enabling the buying of land by speculators, and much of the distributed land had been sold.

Some parts of *Manitoba Metis* are instructive with respect to the many questions raised by the inclusion of the Métis in section 35, questions that were answered in part by the 2003 decision in *Powley*.<sup>62</sup> The Métis interest in the lands to be distributed by sections 31 and 32 of the *Manitoba Act, 1870* is not an “Aboriginal interest” in land, because the land was not held communally and could be alienated.<sup>63</sup> Once the land is determined to be held as something other than an Aboriginal interest, the first attempt to establish a fiduciary duty and then its breach has failed.<sup>64</sup> The second attempt, to establish a fiduciary duty on the basis of a government undertaking, also

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<sup>59</sup> *Supra*, note 5, at para. 154.

<sup>60</sup> With the result that while Deschamps J. was present at the hearing she took no part in the judgment since she resigned in August 2012.

<sup>61</sup> *Manitoba Metis*, *supra*, note 5, at para. 21.

<sup>62</sup> *R. v. Powley*, [2003] S.C.J. No. 43, 2003 SCC 43 (S.C.C.).

<sup>63</sup> *Manitoba Metis*, *supra*, note 5, at para. 56.

<sup>64</sup> *Id.*, at para. 59.



fails. But the claims that rest on the honour of the Crown, the ultimate purpose of which is “the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty” succeed, because the honour of the Crown “recognizes the impact of the ‘superimposition of European laws and customs’” on nations which were “never conquered” and “yet ... became subject to a legal system that they did not share”.<sup>65</sup>

The majority provides a primer on the honour of the Crown: its theoretical and historical underpinning, when it is engaged, and the duties it imposes.<sup>66</sup> In this particular situation, the honour of the Crown is an obligation engaged because of the placement of a promise to the Métis of Manitoba within a constitutional document. Section 31 is described as having a “treaty-like history and character”, containing “solemn promises”, “legal obligations of the highest order”.<sup>67</sup> The Crown, its honour engaged, had a duty of “diligent, purposive fulfillment” and it failed to meet that duty.<sup>68</sup> The critical elements of the failure are set out in the reasons: delay in allotments,<sup>69</sup> the impact of delay on sales to speculators (rather than the failure to prevent sales to speculators),<sup>70</sup> and delay in the issuance of scrip (demonstrating a persistent pattern of inattention).<sup>71</sup> It was, according to the majority, the delay and inattention, rather than the specific practices of, for instance, allowing the sale of land, or random allotment, that constitute the failure to meet the duty.

A final issue raised in *Manitoba Metis* relates to whether the equitable doctrine of laches could bar the claim. The majority alludes to this “rapidly evolving area of law” as a way of illustrating why these claims should be heard now and why the notion of acquiescence (critical to laches) is inappropriately applied to this situation:

[I]t is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. As it is, the Métis commenced this claim before s. 35 was entrenched in the Constitution, and long before the honour of the Crown was elucidated in *Haida Nation*. It is difficult to see how this could constitute acquiescence in equity.<sup>72</sup>

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<sup>65</sup> *Id.*, at paras. 66-67.

<sup>66</sup> *Id.*, at paras. 66-74.

<sup>67</sup> *Id.*, at para. 92.

<sup>68</sup> *Id.*, at paras. 94, 97.

<sup>69</sup> *Id.*, at para. 110.

<sup>70</sup> *Id.*, at para. 117.

<sup>71</sup> *Id.*, at para. 123.

<sup>72</sup> *Id.*, at para. 149.

The sweeping language of the majority decision contrasts sharply with the dissent of Rothstein and Moldaver JJ., who argue that the majority decision has created a “common law constitutional obligation” that is unpredictable,<sup>73</sup> unclear,<sup>74</sup> and unconstrained by limitation periods.<sup>75</sup> In fact, the decision of Rothstein J. appears to be suspicious or contemptuous of the portentous phrasing and language used by the majority, in particular, the description of the facts of the case as a “rift in the national fabric”,<sup>76</sup> a phrase Rothstein J. mockingly repeats no less than four times, including twice in one paragraph. The dissenting judges would leave the question of how to respond to our current recognition that past behaviour of the Canadian government has been “inappropriate, offensive or even appalling”<sup>77</sup> to the government. Courts, according to this view, have no role to play in “historical social policy claims”.<sup>78</sup> The majority judges are gently chided for being in over their heads: “While the resolution of historical injustice is clearly an admirable goal, the creation of a judicial exemption from limitations periods for such claims is not an appropriate solution.”<sup>79</sup>

The majority’s decision in this case indicates in tone as much as in outcome the extent to which they see critical, foundational constitutional issues where the dissent sees “historical social policy claims”.<sup>80</sup> How far the majority judges will be willing to take this view, and to what extent they will hold the current state responsible for addressing these past actions, is what we will be watching over the next decades and centuries.

#### 4. Section 7 (Liberty, Vagueness): *R. v. Levkovic*

*Levkovic*<sup>81</sup> had the potential to fire up the somewhat dormant debate over abortion and abortion rights.<sup>82</sup> In the end, this connection was

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<sup>73</sup> *Id.*, at para. 161, *per* Rothstein J. dissenting.

<sup>74</sup> *Id.*, at para. 204.

<sup>75</sup> *Id.*, at para. 156.

<sup>76</sup> *Id.*, at paras. 140, 215, 228, 263 (*per* McLachlin C.J.C.). In addition, paras. 230 and 267 contain the phrase “national fabric”.

<sup>77</sup> *Id.*, at para. 264.

<sup>78</sup> *Id.*, at para. 265.

<sup>79</sup> *Id.*, at para. 267; calling the majority’s exception “virtually limitless in scope, relying, as it does, on a social policy appeal to restore our national fabric rather than accepted legal principles”.

<sup>80</sup> *Id.*, at para. 265.

<sup>81</sup> *Supra*, note 3.

resisted in the relatively short 75-paragraph judgment, and we are no closer to a Supreme Court pronouncement on the precise contours of the right to abortion than we were in January 1988 when the *Morgentaler* decision striking down the *Criminal Code* provisions related to abortion was handed down.<sup>83</sup> Ms. Levkovic's challenge started when the remains of a baby were found in an apartment she had recently left. The cause of death of the child could not be determined, nor could forensic evidence show whether there had been a live birth (as opposed to a stillbirth or miscarriage). Levkovic gave a statement admitting she had given birth, but did not indicate the baby was alive at birth. She was charged under section 243 of the *Criminal Code*: "Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence ...".<sup>84</sup>

At trial, she launched a section 7 "vagueness" challenge based on liberty and security of the person, raising a variety of arguments. At the Supreme Court, many of these arguments were not in play.<sup>85</sup> What was left was the liberty claim based in vagueness, which the Court dismissed in reasons penned by Fish J. Where Levkovic had argued that the section required reporting all failed pregnancies on pain of criminal prosecution, Fish J. "solved" the problem by reading down the ambit of the statute so that the "pre-birth" aspect would apply only to "*child that has reached a stage of development where, but for some external event or circumstances, it would likely have been born alive.*"<sup>86</sup>

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<sup>82</sup> See for instance, the commentary and controversy over the closing of New Brunswick's Morgentaler clinic, the only free-standing abortion clinic in that province: CBC News, "Abortion clinic's closure focuses debate on women's health", June 9, 2014, online: <<http://www.cbc.ca/news/canada/new-brunswick/abortion-clinic-s-closure-focuses-debate-on-women-s-health-1.2669311>>; Kelly Grant, "Outside big cities, abortion services still hard to find" *The Globe and Mail*, May 29 2014, online: <<http://www.theglobeandmail.com/life/health-and-fitness/health/maritimers-show-mixed-emotions-in-lost-access-to-abortion-services/article18902996/>>. See also the media coverage and reaction to Liberal Party of Canada Leader Justin Trudeau's May 2014 statement that Liberal MPs must always "vote in favour of a woman's fundamental rights", and subsequent clarifications. Josh Wingrove, "Future Liberal MPs must be 'pro-choice,' Trudeau says", *The Globe and Mail*, May 7, 2014, online: <<http://www.theglobeandmail.com/news/politics/future-liberal-mps-must-be-pro-choice-trudeau-says/article18530161/>>; Leslie McKinnon, "Justin Trudeau's abortion stance leaves Liberal ranks in confusion", CBC News, May 21, 2014, online: <<http://www.cbc.ca/1.2648752>>.

<sup>83</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

<sup>84</sup> R.S.C. 1985, c. C-46, s. 243.

<sup>85</sup> The overbreadth arguments had failed at first instance and at the Court of Appeal and were not raised at the Supreme Court.

<sup>86</sup> *R. v. Levkovic*, *supra*, note 3, at para. 13 (italics in original).

This solution differed from the approach of the trial judge (overturned by the Court of Appeal), who had severed the word “before” from section 243, saying that it was not possible to identify a point on the gestational spectrum when a fetus becomes “the body of a child”.<sup>87</sup> It is clear from the trial decision (which, for instance, contains the heading, “The Crime of Abortion”) that the history of section 243 was a key part of the applicant’s claim that the provision was part of a set of offences which attempted to control reproduction, and to criminalize abortion.<sup>88</sup> The Court of Appeal overturned the remedy of severance, arguing that section 243 could be interpreted by reference to the Old Bailey case of *R. v. Berriman*, and that case’s focus on viability or “chance of life” as the moment at which a fetus becomes a child and thus the birth (whether live or still) becomes subject to section 243.<sup>89</sup>

The Supreme Court found the *Berriman* test to be both too fixed (it suggested seven months was an age at which a fetus was unlikely to be born alive), and too speculative (“might have been born alive”).<sup>90</sup> It repaired these failings by choosing as the appropriate test the one described above, one which asks whether it was “likely” that there would have been a live birth.<sup>91</sup> The claimant argued that the need for “medical evidence” to determine whether the statute applies violated section 7 vagueness requirements because ordinary laypeople cannot ascertain when their conduct has crossed into the territory of the criminal law.<sup>92</sup> Pointing to the use of breathalyzers and to the occasional complications around causation that arise in murder cases, the Court held that the need for medical/scientific expert evidence “to help the court determine whether the elements are made out on the facts of a particular charge” (rather than to define the elements of the offence) is ordinary and not grounds for finding a vagueness violation.<sup>93</sup>

In fact the outcome of *Levkovic* appears to break little new ground, and the selection of the “likelihood” test as well as the decision not to consider *Levkovic*’s submission that liberty and security were violated

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<sup>87</sup> *R. v. Levkovic*, [2008] O.J. No. 3746, 235 C.C.C. (3d) 417, 178 C.R.R. (2d) 285 (Ont. S.C.J.), *per* Hill J.

<sup>88</sup> See heading before para. 53 in *Levkovic*, *id.*

<sup>89</sup> *R. v. Levkovic*, [2010] O.J. No. 5252, 2010 ONCA 830, at para. 114 (Ont. C.A.); *R. v. Berriman* (1854), 6 Cox C.C. 388.

<sup>90</sup> *Levkovic*, *supra*, note 3, at paras. 51, 54.

<sup>91</sup> *Id.*, at para. 54.

<sup>92</sup> *Id.*, at para. 70.

<sup>93</sup> *Id.*, at para. 73.

by the requirement that women disclose the “natural end of a failed pregnancy” made this case much less than it might have been with respect to abortion.<sup>94</sup> More interesting, I think, than the outcome is the sanitization of the judgment at the Supreme Court level, the scrubbing of the long history of the section and of any mention of “viability” and all but one mention of the word “abortion”.<sup>95</sup> Despite the fact that these issues constituted the basis of Ms. Levkovic’s arguments, the Supreme Court buries them deep. What this signals is unclear — it could be that the Court does not believe this section can in any way interfere with the right as set out in *Morgentaler*. Or, it could be a concern that the case was not the right one in which to take up questions of the point in a pregnancy when abortion might constitute, in some way, a crime. The result therefore resolves Ms. Levkovic’s claim in a distinctly unsatisfying way, revealing a host of important and interesting questions only to awkwardly avoid them. Ms. Levkovic was sent back for a new trial.

##### 5. Division of Powers (Interjurisdictional Immunity, Federal Paramountcy): *Marine Services International Ltd. v. Ryan Estate*

*Ryan Estate*<sup>96</sup> is the only interjurisdictional immunity case, and the only paramountcy case, of 2013, but it appears to add nothing to existing doctrines. The tragedy which precipitated the case contrasts with the tranquil recitation of existing doctrine with which it is resolved. The two Ryan brothers died after their fishing boat capsized, and their estates planned to sue the boat builder via the *Marine Liability Act*,<sup>97</sup> although they had already received compensation via the *Workplace Health, Safety and Compensation Act*.<sup>98</sup> Section 44 of the WHSCA eliminates rights of action where compensation is available under the Act. The constitutional questions raised by the meeting of the MLA and the WHSCA are whether interjurisdictional immunity applies to render section 44 of the WHSCA inapplicable, or whether federal paramountcy applies to render WHSCA’s section 44 inoperable to the extent it conflicts with the MLA.

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<sup>94</sup> *Id.*, at para. 30. Note that there were no interveners on this case other than the Attorney General of Canada and the Criminal Lawyers’ Assn.

<sup>95</sup> *Id.* See, at para. 44: “The phrase ‘before, during or after birth’ leaves no room for doubt in this regard. Indeed the parties agree that in its application to a *child that died before birth*, s. 243 applies only to stillbirths — not to miscarriages or abortions. ...” (emphasis in original)

<sup>96</sup> *Supra*, note 11.

<sup>97</sup> S.C. 2001, c. 6 [hereinafter “MLA”].

<sup>98</sup> R.S.N.L. 1990, c. W-11 [hereinafter “WHSCA”].

This fairly standard division of powers situation was resolved in standard ways.<sup>99</sup> In line with recent case law, the decision penned by the team of Karakatsanis and LeBel JJ. made short work of the interjurisdictional immunity claim. Citing *Canadian Western Bank v. Alberta*,<sup>100</sup> the decision notes that courts should consider interjurisdictional immunity only in those cases where precedent might support it.<sup>101</sup> In this situation, *Ordon Estate v. Grail*<sup>102</sup> offers the requisite support since it placed “maritime negligence law” at the core of Parliament’s jurisdiction over maritime law, and thus barred the use of Ontario statutes that would have allowed claims that were not available under the *Canada Shipping Act*.<sup>103</sup>

*Ordon Estate*, in other words, might seem to support the Ryan estates in their claim that interjurisdictional immunity should render the WHSCA bar on actions inapplicable. However, the decision briskly rejects that possibility, which was accepted at the appellate level, by holding that although maritime negligence law is indeed a “vital part” or “core” of the federal power, it was not “impaired” by the WHSCA. Referring to the language of McLachlin C.J.C. in *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*,<sup>104</sup> the reasons in *Ryan Estate* conclude: “Although s. 44 of the WHSCA has the effect of regulating a maritime negligence law issue, it neither alters the uniformity of Canadian maritime law nor restricts Parliament’s ability to determine who may possess a cause of action under the *MLA*.”<sup>105</sup> The reasons pay particular attention to the fact that decades of case law support the application of workers’ compensation schemes to the maritime context.<sup>106</sup> *Ordon Estate* is treated as superseded by the language in *Canadian Western Bank* and *COPA* wherein the standard for

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<sup>99</sup> There were also some questions of statutory interpretation and administrative law/standard of review raised in this case, but those are not covered in this brief treatment. They were resolved in favour of upholding the decision of the Newfoundland and Labrador Workplace Health, Safety and Compensation Commission.

<sup>100</sup> [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), Binnie and LeBel JJ. [hereinafter “*Canadian Western Bank*”].

<sup>101</sup> *Ryan Estate*, *supra*, note 11, at para. 49, LeBel and Karakatsanis JJ.

<sup>102</sup> [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437, 40 O.R. (3d) 639 (S.C.C.), Iacobucci and Major JJ. [hereinafter “*Ordon Estate*”].

<sup>103</sup> R.S.C. 1985, c. S-9 [now repealed].

<sup>104</sup> [2010] S.C.J. No. 39, 2010 SCC 39 (S.C.C.) [hereinafter “*COPA*”].

<sup>105</sup> *Ryan Estate*, *supra*, note 11, at para. 62; *COPA*, *id.*

<sup>106</sup> *Ryan Estate*, *id.*, at para. 63.

interjurisdictional immunity success clearly required impairment of the federal core and not merely some “effect”.<sup>107</sup>

The paramountcy analysis relies on a particular interpretation of the MLA to hold that there is neither an operational conflict between the two statutes, nor a frustration of the federal purpose via the operation of section 44 of the WHSCA. The absence of conflict is revealed in the way that section 6(2) of the MLA allows claims from dependants where the deceased would have been entitled to bring an action if they had survived. Yet, in the case of the Ryan brothers, the Court notes that had they survived they would have received compensation through WHSCA and thus been subject to the statutory bar on any additional compensation in section 44 of that Act.<sup>108</sup> The Court notes the relationship between WHSCA and the MLA is paralleled by the relationship between other workers compensation schemes and the MLA. Some of these schemes are federal Acts, which allows the Court to use the modern rule of statutory interpretation that presumes against the enactment of inconsistent Acts to argue that in fact Parliament intended that the MLA accommodate statutory bars in provincial Acts such as the WHSCA.<sup>109</sup>

Turning finally to the “frustration of the federal purpose” test, the decision takes a confident tone in declaring that the MLA was designed to permissively (“may” bring an action”) open maritime negligence law to new claimants, a purpose not frustrated by the WHSCA’s non-tort-based compensation scheme.<sup>110</sup>

The Supreme Court’s approach to other cases in which a federal statute was permissive and a provincial statute restrictive or prohibitive, such as *Law Society of British Columbia v. Mangat*,<sup>111</sup> resulted in the invocation of paramountcy on the frustration of purpose test. But in this case, the permissive MLA, and in particular the way section 6(2) opens

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<sup>107</sup> *Id.*, at para. 64.

<sup>108</sup> *Id.*, at para. 83; the Court notes the fundamental difference between workers’ compensation schemes and the law of tort, further bolstering the point that the reference in s. 6(2) of the MLA to those who would have been entitled to bring a tort claim cannot apply to those who would have received compensation under a workers’ compensation scheme that contains a statutory bar to claims in tort.

<sup>109</sup> *Ryan Estate, id.*, at para. 81: “If this Court were to conclude that s. 6(2) of the MLA did not accommodate the statutory bar in s. 44 of the WHSCA, it would necessarily be saying that s. 6(2) of the MLA also does not accommodate the statutory bars in the GECA and the MSCA. Based on the presumption of consistency, this cannot be”.

<sup>110</sup> *Id.*, at para. 84.

<sup>111</sup> [2001] S.C.J. No. 66, [2001] 3 S.C.R. 113, 2001 SCC 67 (S.C.C.), Gonthier J.

up the category of potential beneficiaries, is not frustrated but arguably furthered by the provincial scheme as a whole.

In the end, this case offers little that is remarkable, except for the economical way in which, with only 86 paragraphs, it turns all the claims — upheld at the provincial appellate court — to dust, in a way that solidifies recent trends protecting provincial legislation from the use of both operability (federal paramountcy) and applicability (interjurisdictional immunity). Looking forward to the 2014 cases, it will be interesting to see whether this approach to interjurisdictional immunity continues in the nervously anticipated outcome of the appeal in *Tsilhqot'in Nation v. British Columbia*.<sup>112</sup>

#### **6. Section 6(1): *Divito v. Canada (Public Safety and Emergency Preparedness)***

The main lesson from this section 6 claim is the lack of consensus on the scope of section 6 protections, an ongoing issue that is neither resolved by the decision in *Divito*,<sup>113</sup> nor particularly clarified. *Divito* challenged the refusal of the Minister of Public Safety to approve a request under the *International Transfer of Offenders Act*,<sup>114</sup> for a transfer to Canada to serve the remainder of the sentence imposed by the U.S. court. While Abella J. for the majority finds section 6 is not engaged at all, LeBel and Fish JJ. (joined by the Chief Justice and concurring in the result) find section 6(1) violated by the ITOA's grants of discretion to the Minister regarding whether or not to consent to a transfer to a Canadian institution. They then find this limit justified under section 1.

The issue, then, is really about the scope of section 6(1) and how to interpret it. Justice Abella argues that to require the Canadian government to administer all foreign sentences misconstrues what section 6(1) protects, and rejects a literal reading of the “right to enter Canada”, using international law to ground her argument.<sup>115</sup> Since Canada cannot, under international law, require the return of a Canadian lawfully incarcerated by another state, the ITOA cannot be the basis for

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<sup>112</sup> [2012] B.C.J. No. 1302, 2012 BCCA 285 (B.C.C.A.), rev'd [2014] S.C.J. No. 44, 2014 SCC 44 (S.C.C.). After the completion of this paper, the Supreme Court reversed: [2014] S.C.J. No. 44, 2014 SCC 44 (S.C.C.).

<sup>113</sup> *Supra*, note 3.

<sup>114</sup> S.C. 2004, c. 21 [hereinafter “ITOA”].

<sup>115</sup> *Divito*, *supra*, note 3, at para. 39.



such a right. However, the majority did assert that the irritatingly vague if increasingly familiar “Charter values” would govern the exercise of ministerial discretion. But Divito’s appeal did not raise this issue, and so the question of how this would apply in practice was not taken up.

### 7. Section 8: *R. v. Chehil* and *R. v. MacKenzie*

*Chehil*<sup>116</sup> and *MacKenzie*<sup>117</sup> are companion cases focused on the reasonable suspicion threshold in section 8 jurisprudence. *MacKenzie* also raised a section 9 claim. In both cases, the Supreme Court majority upheld the constitutionality of the searches and the use of the sniffer dogs, last raised in 2008 around the “expectation of privacy” in particular locations. In so doing, they overturned the decisions of the trial judges in both cases.<sup>118</sup> Each case begins with a story of law enforcement suspicion on the basis of a supposed match between the accused and a courier profile. In *Chehil*, a unanimous loss for the claimant, suspicion was raised — via the experience of the officers involved — by the one-way ticket purchased by the accused, the cash payment made for the ticket, and the fact that he checked one bag.<sup>119</sup> They used a drug detection dog to run a line-up of 10 bags, including the appellant’s. The dog indicated *Chehil*’s bag and a cooler (later found to contain no drugs). In *MacKenzie*, which resulted in a 5:4 split denying the accused’s appeal, one of the two RCMP constables who pulled over *MacKenzie* (he was apparently travelling two kilometres over the posted limit) described him as “shaky ... trembling”, “sweating” and with a visibly “pulsing” carotid artery.<sup>120</sup> *MacKenzie* took asthma medication but that did not appear to help, and the officer noted “a pinkish hue” to his eyes. To the Constable, this was “probably some of the highest nervousness that I’ve seen in a traffic stop”.<sup>121</sup> *MacKenzie*, who had a completely clean record, was then questioned about his trip and appeared confused on the details. Like so

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<sup>116</sup> *Supra*, note 3.

<sup>117</sup> *Supra*, note 3.

<sup>118</sup> *R. v. Kang-Brown*, [2008] S.C.J. No. 18, 2008 SCC 18, [2008] 1 S.C.R. 456 (S.C.C.), LeBel J. [hereinafter “*Kang-Brown*”]; *R. v. M. (A.)*, [2008] S.C.J. No. 19, 2008 SCC 19, [2008] 1 S.C.R. 569 (S.C.C.), LeBel J. [hereinafter “*A.M.*”].

<sup>119</sup> *Chehil*, *supra*, note 3, at para. 8. There seems to be some dispute over whether the purchase was “last minute” (compare the headnote summary with, e.g., paras. 8 and 13 (“perhaps at the last minute”).

<sup>120</sup> *MacKenzie*, *supra*, note 3, at para. 9.

<sup>121</sup> *Id.*, at para. 11.

many other constables who testify in similar cases, Constable Sperlie had attended RCMP drug “Pipeline” courses.<sup>122</sup> Consistent with many other cases, he offered a litany of reasons for his suspicions. In addition to the symptoms of nervousness described above, he offered:

- erratic driving (slowing down to 20 kilometres per hour under the posted limit), “an overreaction with people that are trying to hide something from the police”;<sup>123</sup>
- pink eyes and tremors (consistent with use of cannabis);<sup>124</sup> and
- travel on a known drug pipeline (Calgary is a “well known source of controlled drugs”, drugs go “west to east” in Western Canada).<sup>125</sup>

Faced with these facts, the Court struggles to articulate a test that can meaningfully sift through the avalanche of common behaviours offered by every police officer ever asked to explain a stop. How can courts, at second hand, meaningfully assess the difference between ordinary and expected behaviours and responses, and the packaging of multiple behaviours and responses in a way that marks them as suspicious? The challenge is two-fold. First, of course, they must rely on the testimony of the officer. The nature of the items on the profile makes it quite easy to develop a *post hoc* list of observations to cover intuition or prejudice (the real cause of suspicion). More troubling is that even where the observations are rightfully made, the only link between these behaviours and the relevant crime (in this case drug trafficking) is one offered by law enforcement officers. It is police experts who claim that these behaviours cluster and mark situations of drug couriership. There is no suggestion that empirical tests have been conducted or any suggestion from the Court that they should be. In other words, these “profiles”, which are widely taught, may well be completely invalid in terms of their descriptive power.<sup>126</sup> Police are not required to illustrate either the

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<sup>122</sup> *Id.*, at para. 15.

<sup>123</sup> *MacKenzie, id.*, at para. 17.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See, for instance, S. Lawrence & T. Williams, “Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing” (2006) 56:4 U.T.L.J. 285, indicating the involvement of U.S. law enforcement agencies offering training to Canadian agencies involved in drug interdiction efforts. In Canada, David Tanovich has done extensive work on the problems of these profiles, particularly the way in which they rely on and create racial stereotyping. D. Tanovich, “Moving Beyond ‘Driving While Black’: Race, Suspect Description and Selection” (2005) 36 Ottawa L. Rev. 315.

reliability or the validity of their experientially based conclusions. This issue is not addressed by the Court in either *Chehil* or *MacKenzie*. Nor is the question of whether drug dogs are a sophisticated detection “device” or a convenient pretext for searches.<sup>127</sup> Instead, these cases serve merely to further define the reasonable suspicion analysis laid out in *Kang-Brown* and *A.M.* in 2008. The standard for a sniff search in these kinds of locations is possibility — not probability — a standard further justified by the minimally intrusive nature of sniff searches.

In rejecting the appeals in both *Chehil* and *MacKenzie*, the Supreme Court majority seems to have decided that there will be no scrutiny of the expertise claimed by the police. In this light, the skepticism evinced by the four dissenters in *MacKenzie* (and of course, by the trial judge in that case) is welcome:

The police cannot simply draw on their experience in the field to create broad categories of “suspicious” behaviour into which almost anyone could fall. Such an approach risks transforming the already flexible standard of reasonable suspicion into the “generalized” suspicion standard ... [C]ourts must not fail to hold police accountable when they stray from the proper exercise of their power and draw broad inferences of criminality without specific, individualized suspicion that can be objectively assessed. The constellation of facts grounding reasonable suspicion must be “based in the evidence, tied to the individual, and capable of supporting a logical inference of criminal behavior” ...<sup>128</sup>

The dissent focuses on rehabilitating the decisions made by the trial judge, and denying the assertion of the majority that the trial judge erred in a number of ways. Constable Sperlie, who made the stop in *MacKenzie*, had not in fact received significant training in detecting the signs of drug use (as opposed to the signs of drug couriering), and yet these featured in the development of his “reasonable suspicion”.<sup>129</sup> But the dissent is focused on making sure that the courts are not overly deferential to the police as police. Much less attention, relatively speaking, is paid to the problem of how the substance of police training

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<sup>127</sup> This issue has been picked up by legal commentators, along with popular blogs and even network television legal dramas. See “Mounting evidence drug- and bomb-sniffing dogs just props to justify illegal searches and seizures” (December 22, 2013), online: Dailykos.com <<http://www.dailykos.com/story/2013/12/22/1264609/-Are-drug-sniffing-and-bomb-sniffing-dogs-just-props#>>; “I Fought the Law”, *The Good Wife*, CBS Television, 2012.

<sup>128</sup> *MacKenzie*, *supra*, note 3, at para. 97, citing *Chehil*, *supra*, note 3, at para. 46.

<sup>129</sup> *MacKenzie*, *id.*, at para. 102.

programs is developed.<sup>130</sup> Needless to say, the majority does not even approach the question of the training. Why, in these cases, the Court would treat the expertise of the officers as dependent on the training they receive, when that training is not provided by institutions of higher learning or based on randomized peer-reviewed studies with acceptable levels of reliability and validity, but rather is provided by other police services and based (so it appears) largely on “experiential knowledge”, is a mystery that does not pass the sniff test.

## 8. Section 8: *R. v. Vu*

Two of 2013’s constitutional cases reflect the massive technological change that we are living through, and the way that legislation, the common law and constitutional law are scrambling to respond to new realities and concerns. Both of the cases which clearly deal with new technologies are interested in the way these technologies have an impact on privacy. *Vu*<sup>131</sup> was the first. It takes up the question of search powers, like *Chehil* and *MacKenzie*, but rather than considering the use of an old if sophisticated technology (sniffer dogs) in searches, *Vu* considers the technological devices so many of us now live with and rely on, and the way these devices can betray us by giving up massive amounts of information we may not have known they held.

*Vu* arises out of a police investigation into a marijuana grow operation. Searching a residence under a warrant regarding “theft of electricity”, the police found smartphones and a computer. The constitutional question in *Vu* is whether a smartphone is like a cupboard

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<sup>130</sup> *MacKenzie, id.*, at para. 105. See also paras. 120-121, in which the dissenting reasons take issue with some aspects of the “profile” Constable Sperlie had learned about in his “pipeline” training:

A particular driving route, on its own, is not indicative of suspicious behaviour, particularly when it is the primary route between two major cities. The trial judge noted in his reasons that “[n]o evidence was offered” to support Cst. Sperlie’s opinion that Calgary was a “known source of narcotics” and Regina a “known destination of sale” (para. 32). Although this factor should not be completely discarded, it will typically carry little weight.

There are other disturbing aspects of the case, most notably those canvassed by the majority at paras. 43-52, raising the possibility that in fact what the officers were doing that day was conducting manifestly unconstitutional random traffic stops. This possibility precisely indicates why judicial scrutiny of profiles is so critical. To the extent that they are so general as to offer consistent cover for prejudicially motivated or random traffic stops, they are a deliberate effort to circumvent Charter scrutiny.

<sup>131</sup> *Supra*, note 3.

in a house and so does not need any additional authorization for search, or whether it is something different. In *Vu*, the warrant did not specifically include computer. A unanimous Court recognized that the unique, Tardis-like properties of a computer (including a smartphone), engage unique privacy concerns in the section 8 analysis: “Computers ... compromise the ability of users to control the information that is available about them in two ways: they create information without the users’ knowledge and they retain information that users have tried to erase.”<sup>132</sup>

*Vu* does not suggest that police cannot search computers. It merely indicates that computers are a separate place for the purposes of warrants and searches. What it will do is make a difference in the procedure they must use to obtain the evidence — that is, they will have to either specifically name computer and computer-like devices in the warrant, or seize the item to preserve the information contained and seek an additional warrant to search it.<sup>133</sup> Given the ubiquity of computers and particularly smartphones, the protective impact of *Vu* going forward will at least in part depend on the warrant issuer. Another way to see *Vu* is as the tip of an iceberg of cases which raise complicated questions about precisely how law should apply to specific technologies. In particular, the Ontario case of *R. v. Fearon* raises similar, but meaningfully different issues.<sup>134</sup> Rather than a warranted search of a residence, *Fearon* arises out of a search incident to arrest. And, rather than a smart phone or a computer, it involves a “dumb phone”, a phone which had extremely limited features and, in particular, was not connected to the Internet. Still, these so-called “dumb phones” (the height of technology about 15 years ago) can keep a list of your calls, your contacts and your texts. Between a cupboard and a computer, we can draw a line. What about between a cupboard and a fitbit (a device which tracks the wearer’s exertion levels throughout the day and wirelessly updates server data)? And what of the way in which the information held by these devices (or, more accurately, often held on a server farm somewhere far away) is not, like traditional forensic evidence, the result of the picking up or dropping off of trace

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<sup>132</sup> *Id.*, at para. 43.

<sup>133</sup> For more on this case and the issues it raises, see Gerald Chan, “Life After *Vu*: Manner of Computer Searches and Search Protocols”; Steven Penney, “The Digitization of Section 8 of the Charter: Reform or Revolution?”, in this volume.

<sup>134</sup> *R. v. Fearon*, [2013] O.J. No. 704, 2013 ONCA 106 (Ont. C.A.), appeal heard and reserved May 23, 2014, [2013] S.C.C.A. No. 141 (S.C.C.) [hereinafter “*Fearon*”]. See also the recently released U.S. Supreme Court decision on the same issue, in which the U.S. justices take an approach similar to *Vu*, one which accepts the difference between these devices and other items that might be found on a person: *Riley v. California*, 573 U.S. \_\_\_\_ (2014) (slip op.).

substances, but rather is deliberately collected by private institutions? It is a relief to see that the Court does seem ready to recognize the new privacy concerns raised by these technologies, but the lag between the blistering pace of technological change and the ponderous movement of legal doctrine seems set to continue.

**9. Section 2(b): *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401***

The second appearance of the technologies now ubiquitous in our lives is in the context of a labour dispute. In this case,<sup>135</sup> it was not the state trying to get at the data of citizens, but rather the ways in which the state is making efforts to preserve zones of privacy in a world where these seem to be eroding with shocking speed. Revealed in this case, I think, is the way in which these laws may have been hastily drafted and passed — suggesting that in fact there are reasons to be wary of trying to have legal reform match the speed of technological change. It may seem at times that the rights of citizens lie on the side of privacy. But cases like this one reveal the ways in which limits on information collection may thwart important and constitutionally protected processes. When the members of United Food and Commercial Workers Union, Local 401 struck the Palace Casino at West Edmonton Mall, their lawful strike lasted 305 days. Both the Union and the employer began videotaping and photographing the picket line at the entrance. The union put up signs stating that they might post photographs of those crossing the line to <www.casinoscabs.ca>. No photographs were posted, but complaints were filed with the Alberta Information and Privacy Commissioner under Alberta's *Personal Information Protection Act*<sup>136</sup> by a number of individuals, including the vice-president of the casino and a member of the public. An adjudicator, barred by statute from considering the constitutionality of PIPA provisions, ordered the union to stop collecting personal information in the form of recordings or photographs. On judicial review, the trial judge found in favour of the union, as did the Court of Appeal, which granted a constitutional exemption from the application of PIPA to the union. There were few areas of significant difficulty for the unanimous decision (written by Abella and Cromwell JJ.).

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<sup>135</sup> *United Food, supra*, note 4.

<sup>136</sup> S.A. 2003, c. P-6.5 [hereinafter "PIPA"].

That section 2(b) was engaged was conceded by the parties. The union's recording of the picket line and of conduct around the picket line is expressive activity, as it aimed to persuade people to support the union. Likewise, "potentially using or distributing recordings of persons crossing the picketline" has an expressive purpose: "detering people from crossing the picketline and informing the public about the strike".<sup>137</sup>

On the question of whether PIPA constituted a limit on these activities, the Court was similarly untroubled. The decision notes that PIPA is much broader than the comparable federal statute,<sup>138</sup> and that PIPA contains a series of exemptions that might limit its scope.<sup>139</sup> However, none of these limitations applied to the union, which established a section 2(b) breach.<sup>140</sup> At section 1, the low hurdle of pressing and substantial objective was easily passed. In the proportionality analysis, the Court took considerable pains to illustrate "the fundamental importance of freedom of expression in the context of labour disputes",<sup>141</sup> establishing this case as the next in a line of cases that consider expression in the context of picket lines. Starting with *R.W.D.S.U. v. Dolphin Delivery Ltd.*<sup>142</sup> and developing considerably through cases like *U.F.C.W., Local 1518 v. Kmart Canada Ltd.*<sup>143</sup> and *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West)*,<sup>144</sup> the Supreme Court has recognized not only the expressive content of picketing, but the unique imperatives around communication in labour disputes. The benefits of free expression in the context of work and labour are described in some detail in this case. For instance, expression may "redress" or "alleviate" the imbalance between the economic power of the employer and the "relative vulnerability of the individual worker", facilitate "self-understanding" and facilitate the kind of discussion and debate that is in the broader interest of society.<sup>145</sup> The historical meaning of picketing and state recognition of that meaning is also canvassed, and the Court notes that the use of the kind of pressure brought by an active

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<sup>137</sup> *United Food*, *supra*, note 4, at para. 11.

<sup>138</sup> *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

<sup>139</sup> *United Food*, *supra*, note 4, at para. 16.

<sup>140</sup> *Id.*, at para. 17.

<sup>141</sup> *Id.*, at para. 29.

<sup>142</sup> [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 (S.C.C.), McIntyre J.

<sup>143</sup> [1999] S.C.J. No. 44, [1999] 2 S.C.R. 1083, 176 D.L.R. (4th) 607 (S.C.C.), Cory J.

<sup>144</sup> [2002] S.C.J. No. 7, 2002 SCC 8, [2002] 1 S.C.R. 156 (S.C.C.), McLachlin C.J.C. and LeBel J. [hereinafter "*Pepsi*"].

<sup>145</sup> *United Food*, *supra*, note 4, at para. 32; *Pepsi*, *id.*, at paras. 31 and 33.

picket “has come to be accepted as a legitimate price to pay to encourage the parties to resolve their dispute”.<sup>146</sup> To give up all this, in order to allow “individuals ... control over personal information that they expose by crossing a [public] picketline” is disproportionate.<sup>147</sup>

The section 1 analysis that we are so used to seeing, the application of the *Oakes* test as a piece of “judicial legislation”, is absent here, which is almost refreshing. Instead, the Court focuses on the question of proportionality without breaking it down into rational connection, minimal impairment and a final balance. This approach is taken without comment from the Court, and it does not look like a new era is dawning in section 1. Instead, it seems that the sheer scope of the limit imposed by PIPA renders a careful examination unnecessary.<sup>148</sup> There are no exemptions that would cover the activities of a union. Union expression is important in a wide variety of ways, and, particularly on the facts of this case, there is little to be concerned about in terms of privacy. There is simply no way that PIPA can constitute a reasonable limit on the section 2(b) rights.

The remedy here is the wholesale invalidation of PIPA, a remedy asked for by both the Information and Privacy Commissioner of Alberta and the Attorney General of Alberta.<sup>149</sup> Given the degree of overbreadth here, it seems obvious that a variety of different options for “tailoring” PIPA exist, and choosing among them is clearly not the role of the Court. The Supreme Court decision quashed the decision of the Adjudicator, and offered no constitutional exemption. In keeping with current practice — although not, I think, with Supreme Court doctrine, an issue I will take up in my later discussion of *Bedford* — the remedy is suspended for 12 months.<sup>150</sup>

*United Food*, then, is a relatively straightforward case that lends itself to a few different readings. The technological frame suggested above is one possibility, leading to a focus on the regimes put in place of late in an effort to protect privacy, and the way in which these measures may infringe some rights even as they protect others. Another frame, obviously, would focus on the strong language the Court uses to support the importance of, and the Charter-protected nature of, collective

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<sup>146</sup> *United Food, id.*, at para. 36.

<sup>147</sup> *Id.*, at para. 37.

<sup>148</sup> There are other possibilities and there may be more at stake. See, for instance, Benjamin L. Berger’s discussion of the treatment of section 1 by the majority and dissent in *Hutterian Brethren, supra*, note 36.

<sup>149</sup> *United Food, supra*, note 4, at para. 40.

<sup>150</sup> *Id.*, at para. 41.



bargaining regimes. Finally, along with *Bedford*,<sup>151</sup> this is one of only two cases in which the Charter claimant prevailed this year, and it is notable that all of the courts involved agreed that the Charter had been breached and that the statute in question, PIPA, was overbroad and could not be saved at section 1. The only change between the Alberta Court of Appeal decision and the Supreme Court decision is in the area of remedy.

#### **10. Section 7 (Life, Security of the Person): *Canada (Attorney General) v. Bedford***

Finally, at the end of the year, with the drama of the Nadon appointment and hearing at a fever pitch, members of the Court must have been relieved they had the chance to unleash their decision in *Bedford* right before most of the country took a break for the holidays. Talk about changing the narrative. Despite feverish anticipation — this was a decision that the media had no difficulty selling as a “happening” — it is fair to say that the Supreme Court’s unanimous decision to strike down all three of the challenged provisions of the *Criminal Code*<sup>152</sup> — caught almost everyone off-guard. This decision is remarkably concise and focused. It never veers from a narrow point: the provisions challenged in *Bedford* created dangers for sex workers. The language of the decision was sharply critical of the role the provisions played in increasing the vulnerability of sex workers, particularly in the context of the murders of female sex workers from Vancouver’s Downtown East Side that garnered significant attention across the country and in some ways clearly primed the Court to accept the arguments made by the litigants themselves. The federal government’s attempts to discredit the testimony of the workers themselves and to move the spotlight to the third parties who actually inflict the physical harm directly, all failed to make any headway. If we had to guess which of the cases from 2013 will be seen as a critical moment from the vantage point of the future, at this point, most of the money would be on *Bedford*. What it will mean, though, is still up in the air, as we wait for the “dialogue” to play out.

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<sup>151</sup> *Supra*, note 5.

<sup>152</sup> Sections 197 and 210: Keeping a Common Bawdy-House; s. 212(1)(j): Living on the Avails of Prostitution; s. 213(1)(c): Communicating in a Public Place. Four sections are listed, but s. 197 is the interpretation provision for Part VII: Disorderly Houses, Gaming and Betting and is relevant only because it defines “bawdy house”.

Doctrinally, the case has at least three interesting features. First, the treatment of *stare decisis* in the case. The decision sets a standard for revisiting decisions, since some of the issues raised by the *Bedford* litigants were decided in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*.<sup>153</sup>

In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.<sup>154</sup>

This solution to the question of what *stare decisis* on *Charter* claims might mean has gained increasing importance in this third decade of the *Charter*, and the test set out in *Bedford* (which the Court described as “not an easy one to reach”<sup>155</sup>). By clearly holding that constitutional rights cannot be subordinate to the common law principle of *stare decisis*, this decision sets the stage for cases already in the pipeline,<sup>156</sup> and for what might be filling the docket over the next few decades. The question now becomes not just “what new issues might arise?” but also “what old issues might bear reconsideration?”

Once past this threshold, the case raised, doctrinally, questions of choice and causation. These points were raised by the federal government, in an attempt to make an argument that the dangers and risks which formed the core of the case were not in fact caused by the *Criminal Code* provisions at issue, but by the actions of third parties — the criminal behaviour of people who inflict physical harm on sex workers. In this case, in contrast to *Quebec v. A* (which of course is set in a very different context), we see the Court taking on facile arguments about choice in wonderful ways.<sup>157</sup> The Attorneys General (Ontario and Canada) take some heat in the decision for their shared positions about the causal connection between the law and the harms the Court is recognizing. Both claim “choice — and not the law — is the real cause of their injury”.<sup>158</sup>

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<sup>153</sup> [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, [1990] 4 W.W.R. 481 (S.C.C.), McLachlin C.J.C.

<sup>154</sup> *Bedford*, *supra*, note 5, at para. 42.

<sup>155</sup> *Id.*, at para. 44.

<sup>156</sup> *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577, Dickson C.J.C.

<sup>157</sup> *Bedford*, *supra*, note 5, paras. 79-92.

<sup>158</sup> *Id.*, at para. 79.

In response, the Court presents a relatively complete picture of the complexity of choice and sex work. It is, in many ways, this picture which makes debates over sex work so fraught — some choose it, while others cannot be said to do so.<sup>159</sup>

A somewhat odd bicycle analogy, stating that the government could not prevent a cyclist from wearing a helmet and then absolve itself because it was the cyclist's choice to ride that created the danger, puts the finishing touches on the Court's response.<sup>160</sup> This analogy seems to cabin the scope of the Court's interest in choice. It suggests, for instance, that dealers of controlled substances would not be in a position to raise a similar argument, because of the unlawful nature of the underlying activity. But this paragraph also raises another possibility, one which engages the choice and role not of the seller but of the buyer. That is, if the government chooses to make the purchasing of sex illegal, in what ways does that shift the section 7 analysis of the impact on sex workers? It seems unlikely that the decision to make purchasing or selling *per se* illegal would make a material difference to the harms and risks that seem to drive the judgment in *Bedford*. Yet once the activity is illegal, does anything change? Does everything change? This question is addressed by Professors Hughes, MacDonnell and Pearlston in "Explaining the Appeal of Asymmetrical Criminalization",<sup>161</sup> where they conclude:

In short, *Bedford* sends conflicting messages about the constitutionality of Parliament's options. Deference is owed to Parliament, and yet a violation of constitutional rights in respect of a single claimant is sufficient to ground a successful *Charter* claim. This seems to place an extremely stringent standard on government. It also makes it very difficult to predict whether a future *Charter* claim would succeed. It is almost certain that a law criminalizing purchasers would not be overbroad. This would leave the principles of arbitrariness and gross disproportionality. In deciding whether a new law was grossly disproportional, the Court might be forced to choose between its commitment to protecting individual rights claimants and recognizing the difficulty government faces in designing a legislative

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<sup>159</sup> *Id.*, at para. 86.

<sup>160</sup> *Id.*, at para. 87.

<sup>161</sup> Julia Hughes, Vanessa MacDonnell & Karen Pearlston "Explaining the appeal of asymmetrical criminalization: Julia Hughes (UNB), Vanessa MacDonnell (Ottawa) & Karen Pearlston (UNB) on options, *Bedford*, and the role of legal professionals" (2014), online: The Institute for Feminist Legal Studies at Osgoode <<http://ifls.osgoode.yorku.ca/2014/02/explaining-the-appeal-of-asymmetrical-criminalization-jula-hughes-unb-vanessa-macdonnell-ottawa-karen-pearlston-unb-on-options-bedford-and-the-role-of-legal-professionals/>> (citations omitted).

scheme that is effective and yet constitutional. As we have noted, an arbitrariness argument might be more promising.<sup>162</sup>

The final doctrinal point this paper will make on *Bedford* has to do with the remedy — or rather, the decision to suspend the remedy for a full year. In the last three paragraphs of the case, having accepted and described the harms that these laws cause — having raised the spectre of serial killer Robert Pickton in that analysis — and having determined that the provisions must be struck down, the Court addresses the question of suspension.<sup>163</sup> Against the interim rights violations that will result if the decision is suspended, the Court weighs “a concerned public”. Having earlier in the judgment noted that the provisions at issue appear to mainly attempt to protect those who sell sex from exploitation and address public nuisance concerns, the Chief Justice does not explain the nature of the public concern, nor does she indicate how it meets the familiar thresholds for suspension of declarations.<sup>164</sup> She does not, here, describe precisely what those “many Canadians” would be greatly concerned about. But it is enough to justify “increased risk” to the women the Court was earlier so concerned about, because although “[n]either alternative is without difficulty”, the declaration of invalidity is suspended.<sup>165</sup> It is difficult, if not impossible, to imagine how any of these concerns might meet the tests and concerns described in cases like *Manitoba Language Rights* (where the doctrine of *necessity* grounds the decision to suspend the declaration)<sup>166</sup> or *Schachter* (“[w]hile delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the institution of the legislature under s. 52.”).<sup>167</sup>

As I submit this paper in the early summer of 2014, there are indications that the federal government will release new legislation within weeks.<sup>168</sup> The fierce struggle among the different sides of this

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<sup>162</sup> *Id.*

<sup>163</sup> *Bedford*, *supra*, note 5, at paras. 168-169.

<sup>164</sup> *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.) [hereinafter “*Manitoba Language Rights*”]; *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.) [hereinafter “*Schachter*”].

<sup>165</sup> *Bedford*, *supra*, note 5, at para. 169.

<sup>166</sup> *Supra*, note 164, at paras. 85-107 (see, for instance, at para. 90: “Nonetheless, the necessity cases on insurrectionary governments illustrate the more general proposition that temporary effect can be given to invalid laws where this is necessary to preserve the rule of law”).

<sup>167</sup> *Supra*, note 164, at para. 80.

<sup>168</sup> On June 4, 2014, The Minister of Justice, Peter MacKay, introduced Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General*

debate suggests that the introduction of draft legislation will almost certainly mean new legal challenges. We are a long way from the “end” of this story. The engagement of levels of government beyond the federal also seems possible, along with the raising of new constitutional questions beyond the Charter.<sup>169</sup> The issues raised by this case will be with us in law and politics and on the streets, for some time to come.

### III. CONCLUSION: 2013 AS PRELUDE

The massive media focus on the Court’s relationship with the Harper government, prompted by the release of the *Senate Reference* and the *Nadon* decision in early 2014, suggests that 2013 will get overlooked, or seen as a potential source of evidence and material towards untangling the controversies of 2014. *Manitoba Metis* and *Bedford*, and perhaps *Quebec v. A*, are almost self-evidently important cases, and other cases will reveal important facets as time passes. *Manitoba Metis* and *Bedford* are cases which are far from over and will present significant challenges to the federal government. *Bedford*, in particular, has the potential to take us into new constitutional waters, since the government seems determined to find a way to curtail the sale of sex. When you combine that position with the way that the current government has not hesitated to publicly cast aspersions on the Chief Justice and by extension the Supreme Court,<sup>170</sup> I think that where we end up (perhaps by political design) is on the path which leads, among other places, to the invocation of section 33. If we are entering a new constitutional era, as the Chief Justice has suggested, one which focuses on section 35 and reconciliation, what will be the other features of this era? We have, for some time now, felt relatively comfortable about section 33 and its place in our system of constitutional supremacy. A case like *Bedford*, when followed by the issues and cases which dominated the early part of 2014,

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of *Canada v. Bedford and to make consequential amendments to other Acts*, 41st Parl., 2nd Sess., 2014 (Second reading (Senate), as of October 9, 2014).

<sup>169</sup> Arguably, division of powers litigation has been as important a site for this struggle as the Charter. *Goldwax v. Montréal (City)*, [1984] S.C.J. No. 55, [1984] 2 S.C.R. 525 (S.C.C.); *R. v. Westendorp*, [1983] S.C.J. No. 6, [1983] 1 S.C.R. 43, 144 D.L.R. (3d) 259 (S.C.C.), McLachlin C.J.C.

<sup>170</sup> “Marc Nadon: The PMO vs. The Chief Justice” *Maclean’s*, online: <<http://www.macleans.ca/politics/marc-nadon-prime-ministers-office-vs-the-chief-justice/>>; “Peter MacKay escalates feud with Supreme Court, suggesting top court overstepped on Nadon” *National Post*, online: <<http://news.nationalpost.com/2014/05/06/peter-mackay-escalates-feud-with-supreme-court-suggesting-top-court-overstepped-on-nadon/>>.

should prompt us to think more about section 33. What are the political and doctrinal features of the period from 1982 to now which led to the relative dormancy of this clause?<sup>171</sup> Are those features stable? When we go beyond the purely doctrinal to delve into the question of the appropriate roles of courts and legislatures, how these are shaped by the Constitution and in turn how they shape the development of the modern Canadian state, some Supreme Court cases from the past develop into revealing markers of new trends and narratives in this ongoing relationship.

APPENDIX A: 2013 CONSTITUTIONAL CASES AT THE  
SUPREME COURT OF CANADA

STYLE OF CAUSE	MAJORITY	DISSENT
<i>Quebec (Attorney General) v. A</i> , [2013] S.C.J. No. 5, 2013 SCC 5 (S.C.C.)	<b>LeBel</b> , Fish, Rothstein, Moldaver <i>Concurring in result:</i> <b>McLachlin</b>	<i>in Result:</i> <b>Abella</b> <i>in Part in Result:</i> <b>Deschamps</b> , Cromwell, Karakatsanis
<i>Saskatchewan (Human Rights Commission) v. Whatcott</i> , [2013] S.C.J. No. 11, 2013 SCC 11 (S.C.C.)	<b>Rothstein</b> , McLachlin, LeBel, Fish, Abella, Cromwell	
<i>Manitoba Metis Federation Inc. v. Canada (Attorney General)</i> , [2013] S.C.J. No. 14, 2013 SCC 14 (S.C.C.)	<b>McLachlin &amp; Karakatsanis</b> , LeBel, Fish, Abella, Cromwell	<b>Rothstein</b> , Moldaver
<i>R. v. Levkovic</i> , [2013] S.C.J. No. 25, 2013 SCC 25 (S.C.C.)	<b>Fish</b> , McLachlin, LeBel, Abella, Rothstein, Cromwell, Moldaver	
<i>Marine Services International Ltd. v. Ryan Estate</i> , [2013] S.C.J. No. 44, 2013 SCC 44 (S.C.C.)	<b>LeBel &amp; Karakatsanis</b> , McLachlin, Fish, Abella, Rothstein, Cromwell, Moldaver, Wagner	

<sup>171</sup> For an excellent treatment of the clause, though now very dated, see Tsvi Kahana, “The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter” (September 2001) 44(3) Canadian Public Administration 255. More recently, see David Snow, “Notwithstanding the Override: Path Dependence, Section 33, and the Charter” (2009) 8(1) *Innovations: A Journal of Politics* 1 (discussing the “demonization” of s. 33 by, among other discourses and institutional actors, Prime Ministers).

STYLE OF CAUSE	MAJORITY	DISSENT
<i>Divito v. Canada (Public Safety and Emergency Preparedness)</i> , [2013] S.C.J. No. 47, 2013 SCC 47 (S.C.C.)	<b>Abella</b> , Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner <i>Concurring Reasons: LeBel &amp; Fish</i> , McLachlin	
<i>R. v. MacKenzie</i> , [2013] S.C.J. No. 50, 2013 SCC 50 (S.C.C.)	<b>Moldaver</b> , Abella, Rothstein, Karakatsanis, Wagner	<b>LeBel</b> , McLachlin, Fish, Cromwell
<i>R. v. Chehil</i> , [2013] S.C.J. No. 49, 2013 SCC 49 (S.C.C.)	<b>Karakatsanis</b> , McLachlin, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Wagner	
<i>R. v. Vu</i> , [2013] S.C.J. No. 60, 2013 SCC 60 (S.C.C.)	<b>Cromwell, McLachlin, LeBel, Fish, Abella, Rothstein, Moldaver</b> , Karakatsanis, Wagner	
<i>Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401</i> , [2013] S.C.J. No. 62, 2013 SCC 62 (S.C.C.)	<b>Abella &amp; Cromwell</b> , McLachlin, LeBel, Fish, Rothstein, Moldaver, Karakatsanis, Wagner	
<i>Canada (Attorney General) v. Bedford</i> , [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.)	<b>McLachlin</b> , LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner	

Other cases which might be of interest:

- *R. v. Ryan*, [2013] S.C.J. No. 3, 2013 SCC 3 (S.C.C.) (section 7 invoked but not basis for decision)
- *Wood v. Shaeffer*, [2013] S.C.J. No. 71, 2013 SCC 71 (S.C.C.) (section 10(b) right to counsel raised by interveners but not considered by the Court)
- *Conseil scolaire francophone de la Colombie-Britannique v. C. (B.)*, [2013] S.C.J. No. 42, 2013 SCC 42 (S.C.C.) (part of a broader section 23 claim, but section 23 not dispositive)
- *R. v. Telus*, [2013] S.C.J. No. 16, 2013 SCC 16 (S.C.C.) (values underpinning section 8 raised, but case not decided on section 8)