

## Constitutional Cases 2010: An Overview

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# Constitutional Cases 2010: An Overview

Patrick Monahan\* and Chanakya Sethi\*\*

## I. INTRODUCTION

This volume of the Supreme Court Law Review, which consists of papers presented at Osgoode Hall Law School's 14th Annual Constitutional Cases Conference held on April 15, 2011, examines the constitutional decisions of the Supreme Court of Canada released in the calendar year 2010.<sup>1</sup> The Court handed down 69 judgments last year, the second-lowest number over the last 10 years.<sup>2</sup> Constitutional cases, however, made up an unusually high 36 per cent of the Court's docket in 2010 (25 of the 69 decisions), representing an approximately 50 per cent increase over the average in recent years.<sup>3</sup> It was a significant year, with important decisions concerning Charter remedies, freedom of speech, the right to counsel, the division of powers, and the interpretation of First Nations treaties. A large majority of the constitutional cases (17 of 25 cases) concerned Charter rights.<sup>4</sup> Federalism cases made up 20 per cent (5 of 25

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

<sup>2</sup> The Court decided 70 cases in 2009, 74 in 2008 and 58 in 2007; its 10-year average is 77. Supreme Court of Canada, *Bulletin of Proceedings: Special Edition, Statistics 2000-2010*, online: <<http://www.scc-csc.gc.ca/stat/html/index-eng.asp>> [hereinafter "*Statistics Bulletin*"].

<sup>3</sup> In 2007, constitutional cases made up 28 per cent of decisions (16 of 58); in 2008, 16 per cent (12 of 74); in 2009, 24 per cent (17 of 70).

<sup>4</sup> *R. v. S. (J.Z.)*, [2010] S.C.J. No. 1, 2010 SCC 1, [2010] 1 S.C.R. 3 (S.C.C.) [hereinafter "*JZS*"]; *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, 2010 SCC 3, [2010] 1 S.C.R. 44 (S.C.C.) [hereinafter "*Khadr IP*"]; *R. v. Nasogaluak*, [2010] S.C.J. No. 6, 2010 SCC 6, [2010] 1 S.C.R. 206 (S.C.C.) [hereinafter "*Nasogaluak*"]; *R. v. Beaulieu*, [2010] S.C.J. No. 7, 2010 SCC 7, [2010] 1 S.C.R. 248 (S.C.C.) [hereinafter "*Beaulieu*"]; *R. v. Morelli*, [2010] S.C.J. No. 8, 2010 SCC 8, [2010] 1 S.C.R. 253 (S.C.C.) [hereinafter "*Morelli*"]; *R. v. National Post*, [2010] S.C.J. No. 16, 2010 SCC 16, [2010] 1 S.C.R. 477 (S.C.C.) [hereinafter "*National Post*"]; *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, 2010 SCC 21, [2010] 1 S.C.R. 721 (S.C.C.) [hereinafter

cases) of the judgments,<sup>5</sup> followed by Aboriginal law cases, which made up the remaining 12 per cent (3 of 25 cases).<sup>6</sup>

Though the Court has generally reduced or held steady the time it takes to consider leave applications and to schedule hearings, the average time taken to render a decision after a hearing now stands at 7.7 months — a new record after last year's high of 7.4 months.<sup>7</sup> Taken together with the downward trend in the number of cases heard, it would appear the Court is adopting a more deliberative approach to its decision-making, taking more time to release fewer decisions.

As usual, the Chief Justice remains the most prolific author of constitutional judgments, crafting a total of 13 opinions, including nine majority opinions, more than twice any other justice.<sup>8</sup> On the other end of the spectrum, however, Deschamps, Fish and Cromwell JJ. authored just one majority constitutional opinion each and Rothstein J. authored none. The three Quebec justices — LeBel, Deschamps, Fish JJ. — were the principal authors of dissents in 2010, with four such opinions each.

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<sup>5</sup> “*Torstar*”; *R. v. Conway*, [2010] S.C.J. No. 22, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.) [hereinafter “*Conway*”]; *Ontario (Public Safety and Security) v. Criminal Lawyers’ Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, [2010] 1 S.C.R. 815 (S.C.C.) [hereinafter “*CLA*”]; *R. v. Nolet*, [2010] S.C.J. No. 24, 2010 SCC 24, [2010] 1 S.C.R. 851 (S.C.C.) [hereinafter “*Nolet*”]; *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27, [2010] 2 S.C.R. 28 (S.C.C.) [hereinafter “*Ward*”]; *R. v. Cornell*, [2010] S.C.J. No. 31, 2010 SCC 31, [2010] 2 S.C.R. 142 (S.C.C.) [hereinafter “*Cornell*”]; *R. v. Sinclair*, [2010] S.C.J. No. 35, 2010 SCC 35, [2010] 2 S.C.R. 310 (S.C.C.) [hereinafter “*Sinclair*”]; *R. v. McCrimmon*, [2010] S.C.J. No. 36, 2010 SCC 36, [2010] 2 S.C.R. 402 (S.C.C.) [hereinafter “*McCrimmon*”]; *R. v. Willier*, [2010] S.C.J. No. 37, 2010 SCC 37, [2010] 2 S.C.R. 429 (S.C.C.) [hereinafter “*Willier*”]; *Globe and Mail v. Canada (Attorney General)*, [2010] S.C.J. No. 41, 2010 SCC 41, [2010] 2 S.C.R. 592 (S.C.C.) [hereinafter “*Globe and Mail*”]; and *R. v. Gomboc*, [2010] S.C.J. No. 55, 2010 SCC 55, [2010] 3 S.C.R. 211 (S.C.C.) [hereinafter “*Gomboc*”].

<sup>6</sup> *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, 2010 SCC 38, [2010] 2 S.C.R. 453 (S.C.C.) [hereinafter “*Lacombe*”]; *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) [hereinafter “*COPA*”]; *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, [2010] S.C.J. No. 45, 2010 SCC 45, [2010] 2 S.C.R. 696 (S.C.C.) [hereinafter “*NIL/TU, O*”]; *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, [2010] S.C.J. No. 46, 2010 SCC 46, [2010] 2 S.C.R. 737 (S.C.C.) [hereinafter “*Native Child*”]; and *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61, [2010] 3 S.C.R. 457 (S.C.C.) [hereinafter “*AHRA Reference*”].

<sup>7</sup> *Quebec (Attorney General) v. Moses*, [2010] S.C.J. No. 17, 2010 SCC 17, [2010] 1 S.C.R. 557 (S.C.C.) [hereinafter “*Moses*”]; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.) [hereinafter “*Carrier Sekani*”]; and *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, 2010 SCC 53, [2010] 3 S.C.R. 103 (S.C.C.) [hereinafter “*Little Salmon*”].

<sup>8</sup> *Statistics Bulletin*, *supra*, note 2.  
 The Chief Justice also authored one dissent, two concurrences, and one plurality opinion. For the purposes of these calculations, when two justices authored a particular opinion, each is given an authorship credit. *Per curiam* opinions, however, are excluded from the count.

With the exception of three cases decided by a panel of seven justices, all of the 2010 constitutional cases were decided by the full bench of the Court, as has been the clear preference of the McLachlin Court.<sup>9</sup>

## II. CHARTER CASES

The Court was not receptive to claims under the *Canadian Charter of Rights and Freedoms*<sup>10</sup> in 2010, with the claimant succeeding in just 18 per cent of cases (3 of 17).<sup>11</sup> The Court dismissed the claim in each of the remaining 14 cases,<sup>12</sup> though in three of those 14, it remitted certain statutory and common law questions to a lower tribunal for further adjudication.<sup>13</sup> Significantly, the success rate in 2010 was well below the McLachlin Court's average of 42 per cent (66 out of 156 cases since 2000).

The 17 cases decided in 2010 evidence a strong reluctance on the part of the Court to use the Charter in the first instance to address the claims before it. Instead, in a broad range of cases — from Charter remedies to access to information and journalist-source privilege to search and seizure — the Court instead turned first to statutory interpretation and common law rules, albeit infused by “Charter values”, to reach its decisions. This doctrine of “constitutional avoidance”<sup>14</sup> reflects an incremental and pragmatic approach, one which reflects a sensitivity on the part of the Court for its relationship with the legislative and executive branches.

### 1. Charter Remedies

The Court decided four remedies cases last year, all of which were unanimous. This quartet yields the most significant developments in section 24(1) jurisprudence since the Court's landmark decision in

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<sup>9</sup> The three exceptions — *Beaulieu*, *Morelli* and *Cornell* — were s. 8 cases that reached the Court as of right. Notably, however, two of the three resulted in a split panel, voting 4-3.

<sup>10</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>11</sup> See *Khadr II*; *Morelli*; and *Ward*, *supra*, note 4.

<sup>12</sup> See *JZS*; *Nasogaluak*; *Beaulieu*; *National Post*; *Torstar*; *Conway*; *CLA*; *Nolet*; *Cornell*; *Sinclair*; *McCrimmon*; *Willier*; *Globe and Mail*; and *Gomboc*, *id.*

<sup>13</sup> See *Conway*; *CLA*; and *Globe and Mail*, *id.*

<sup>14</sup> For an analogous U.S. approach, see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 at 347 (1936) (Brandeis J., concurring).

*Doucet-Boudreau*<sup>15</sup> nearly a decade ago. In *Khadr II*, the Court limited itself to a declaratory remedy in deference to the Crown prerogative. In *Nasogaluak*, the Court deferred to boundaries defined in a statutory scheme while leaving an exception for section 24(1) in only the rarest of cases. In *Conway*, the Court again deferred to the boundaries established by statute, this time in the administrative tribunal context. Finally, in *Ward*, the Court broke new ground in recognizing the availability of constitutional damages, but made clear that such damages would be unavailable where they risked chilling good governance. Taken together, these four cases suggest an emerging theme: Charter remedies are widely available in the abstract, but whether they will be “appropriate and just” in particular circumstances depends heavily on the will of legislatures. The watchword it seems is *deference*, with 2010 perhaps best characterized as the “Year of Restraint”.

(a) *Canada (Prime Minister) v. Khadr*

*Khadr II* was one of the most highly anticipated cases on the Court’s docket going in 2010. However, the Court’s short, 48-paragraph decision, rendered *per curiam*, appears to raise as many questions as it answers. The facts of the case are well known: Omar Khadr, a Canadian citizen, has been detained by the U.S. military at Guantánamo Bay, Cuba, since 2002, when he was a minor. In 2004, he was charged with war crimes but never taken to trial. Four years later, the Court held that Canada’s participation in the U.S. detention process constituted a violation of international human rights law and, consequently, section 7. Subsequently, Khadr made repeated requests that the Canadian government seek his repatriation but the Prime Minister said he would not do so, leading Khadr to seek judicial review. The Federal Court held that under the special circumstances of this case, Canada had a duty to protect Khadr under section 7 and ordered the government to request his repatriation.

In crafting its remedy — the more significant aspect of the decision<sup>16</sup> — the Court adopted a cautionary approach and articulated two chief

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<sup>15</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.) [hereinafter “*Doucet-Boudreau*”].

<sup>16</sup> As for the Charter breach, the Court concluded that “Canada’s active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr’s current detention ...”: *Khadr II*, *supra*, note 4, at para. 21.

concerns with the lower court's order. First, the order gave "too little weight" to the executive branch in its management of "complex and ever-changing circumstances, taking into account Canada's broader national interests".<sup>17</sup> The Court distinguished the facts here from its holding in *Burns*<sup>18</sup> because "Mr. Khadr is not under the control of the Canadian government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court."<sup>19</sup> From this list, the Court's comment regarding the impact on foreign relations is curious. In *Burns*, the Court dismissed the government's arguments that the proposed remedy "would undermine Canada's international obligations or good relations with neighbouring states" because there was "no suggestion in the evidence" that this would be the case.<sup>20</sup> In *Khadr II*, however, the Court did not articulate what about the facts made such an assessment impracticable. Indeed, and moving to the Court's second concern with the judgment below, the Court cautioned restraint with the order in light of the thin evidentiary record. Because the record provides a "necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request", the Court held that "it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's Charter rights."<sup>21</sup> In light of its finding that there had been a breach of section 7, however, it seems strange to effectively reward the state for proceeding with a thin record. Moreover, the Court's approach is internally inconsistent because, at the section 7 stage, the Court drew inferences adverse to the state when faced with a dearth of evidence.<sup>22</sup>

Ultimately, the Court concluded that "the proper remedy is declaratory relief,"<sup>23</sup> leaving it to the government to determine what actions should be taken to vindicate Khadr's Charter rights. Those questions, however, are now moot: 10 months after *Khadr II* was handed down,

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<sup>17</sup> *Id.*, at para. 39.

<sup>18</sup> *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.) [hereinafter "*Burns*"].

<sup>19</sup> *Khadr II*, *supra*, note 4, at para. 43.

<sup>20</sup> *Burns*, *supra*, note 18, at para. 136.

<sup>21</sup> *Khadr II*, *supra*, note 4, at para. 44.

<sup>22</sup> *Id.*, at para. 21.

<sup>23</sup> *Id.*, at para. 46.

Khadr struck a plea agreement with the United States and is expected to return to Canada later this year.<sup>24</sup>

(b) *R. v. Nasogaluak*

In *Nasogaluak*, the Court articulated a preference for “a general rule” that “it is neither necessary nor useful to invoke s. 24(1) of the *Charter* to effect an appropriate reduction of sentence to account for any harm flowing from unconstitutional acts of state agents consequent to the offence charged.”<sup>25</sup> That conclusion is significant in cases where a mandatory minimum sentence is involved, because it effectively fore-closes the possibility of a so-called “constitutional exemption”, which would allow a trial judge to impose a sentence lower than the minimum as a remedy for a Charter infringement suffered by the accused. The case involved an appeal by an accused whose sentence was reduced as a remedy for Charter breaches that he endured at the time of his arrest and detention. At trial, the judge concluded that the accused’s injuries — several broken ribs and a punctured lung at the hands of the police — amounted to a breach of his section 7 rights justifying a section 24(1) remedy of a conditional discharge.<sup>26</sup>

On appeal, however, the Supreme Court focused on the statutory sentencing provisions in the *Criminal Code*<sup>27</sup> over section 24(1).<sup>28</sup> Because those provisions afford courts “broad discretion ... to craft a fit sentence that reflects all the factual minutiae of the case”, LeBel J. concluded that a court could fashion a suitable remedy for a Charter breach in the form of a sentence reduction *without* recourse to section 24(1).<sup>29</sup> Though many Canadian courts have granted sentence reductions under section 24(1) as Charter remedies, LeBel J. suggested that these precedents “may not have been completely mindful that events which justify findings of

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<sup>24</sup> Paul Koring, “Deal sees Khadr plead guilty to murder; Onetime child soldier agrees to plea ‘in exchange for the Canadian government agreeing to repatriate him back to Canada’” *The Globe and Mail* (October 26, 2010) A22; *Khadr v. Canada (Prime Minister)*, [2011] F.C.J. No. 339, 2011 FCA 92, at para. 1 (F.C.A.) (“As a result of the prison sentence imposed on the respondent following the guilty plea ... the appeal is moot.”).

<sup>25</sup> *Nasogaluak*, *supra*, note 4, at para. 5.

<sup>26</sup> The trial judge — “somewhat surprisingly”, as LeBel J. put it for the Court — also found a s. 11(d) infringement. He declined to find any s. 12 infringement, however. The Court of Appeal and Supreme Court focused on the s. 7 breach. *Id.*, at paras. 15-18.

<sup>27</sup> R.S.C. 1985, c. C-46.

<sup>28</sup> Specifically, ss. 718-718.2.

<sup>29</sup> *Nasogaluak*, *supra*, note 4, at para. 47.

*Charter* breaches may also be circumstances which can legitimately form part of the analytical process leading to a fit sentence under the provisions of the *Criminal Code*.<sup>30</sup>

There is, of course, a key substantive difference between reliance on internal *Criminal Code* provisions as opposed to section 24(1) in order to remedy a Charter breach: the matter of the so-called “constitutional exemption”. The Code’s sentencing provisions do not provide a pathway to a sentence below the mandatory minimum, thus generating interest in a constitutional workaround. In its earlier holding in *Ferguson*,<sup>31</sup> however, the Court explained at great length its hesitation in allowing case-by-case exemptions to mandatory minimums under section 24(1). A unanimous Court concluded then that if a law mandating a minimum sentence were found to be unconstitutional on the facts of a particular case (because the sentence imposed would *itself* infringe the Charter), the law should be struck down under section 52 of the *Constitution Act, 1982*.<sup>32</sup> In other words, absent a facial challenge to the statute, a court’s *constitutional* discretion can be bounded by the limits of a *statutory* minimum. That said, *Ferguson* makes a crucial distinction: the Court did note that section 24(1) could be used “as a remedy, not for unconstitutional laws, *but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional*”.<sup>33</sup> That proposition has been confirmed in *Nasogaluak*. On the facts here, it was government acts, not the legal regime itself, that were impugned. Without pointing to *Ferguson*, the Court again left the door open to a “constitutional exemption”, but only in rare circumstances where there was a “particularly egregious form of misconduct”.<sup>34</sup> What misconduct is sufficient to meet this high threshold, however, remains unclear.

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<sup>30</sup> *Id.*, at para. 56.

<sup>31</sup> *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96, 2008 SCC 6 (S.C.C.).

<sup>32</sup> *Id.*, at para. 74.

<sup>33</sup> *Id.*, at para. 60 (emphasis added).

<sup>34</sup> *Nasogaluak*, *supra*, note 4, at para. 64 (“[I]n some exceptional cases, sentence reduction outside statutory limits, under s. 24(1) of the *Charter*, may be the sole effective remedy for some particularly egregious form of misconduct ... In that case, the validity of the law would not be at stake, the sole concern being the specific conduct of those state agents.”).

(c) *R. v. Conway*

*Conway* has greatly simplified the test for determining the jurisdiction of administrative tribunals to grant Charter remedies. But, as this case itself shows, the broad jurisdiction conferred on tribunals *in the abstract* can become quite narrow when applied *in practice*. The promise of *Conway* may thus be more ephemeral than first apparent. The appellant, Paul Conway, was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Diagnosed with a litany of conditions, he has been detained for over two decades in Ontario's mental health system. At his annual review hearing before the Ontario Review Board, Conway alleged breaches of sections 2(b), 2(d), 7, 8, 9, 12 and 15(1). The Board concluded that Conway was a threat to public safety and ordered that he remain in treatment pursuant to the statutory scheme. It also concluded that it had no jurisdiction to consider a section 24(1) application.

The Supreme Court dismissed Conway's appeal, but only after clarifying several lines of jurisprudence and rearticulating the test for when administrative tribunals have remedial jurisdiction under section 24(1). Justice Abella, writing for a unanimous Court, observed that *Conway* presented an opportunity to determine whether three "waves" of cases in this area could be "merged".<sup>35</sup> The jurisprudence of those cases suggested two conclusions: First, "administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them."<sup>36</sup> Second, "they must act consistently with the *Charter* and its values when exercising their statutory functions."<sup>37</sup>

In light of the above conclusions, Abella J. crafted a simplified, two-part inquiry:<sup>38</sup> first, having regard to its statutory mandate, does the tribunal have the jurisdiction to grant Charter remedies *generally*? The answer will depend on "whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law."<sup>39</sup> If it does, then it is *prima facie* a court of competent jurisdiction under section 24(1) "unless

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<sup>35</sup> *Conway, supra*, note 4, at para. 7.

<sup>36</sup> *Id.*, at para. 78.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, at para. 22.

<sup>39</sup> *Id.*, at para. 81.

it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction".<sup>40</sup> Second, assuming the first threshold is met, can the tribunal grant the *particular* remedy sought based on its statutory mandate? The answer hinges on "discerning legislative intent".<sup>41</sup> The critical question "will always" be "whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal".<sup>42</sup>

On the facts in *Conway*, the key was the second step. Pursuant to its statutory scheme, the Board was entitled to make one of only three dispositions: an absolute discharge, a conditional discharge or a detention order. If the Board found that a patient is a significant threat to public safety, as was the case in *Conway*, an absolute discharge is statutorily unavailable.<sup>43</sup> *Conway* argued that he was nevertheless entitled to an absolute discharge by virtue of the tribunal's powers under section 24(1). But Abella J. disagreed, reasoning that "Parliament did not imbue the Board with free remedial rein" once it found a given patient was a threat to public safety.<sup>44</sup> Restricting the Board's power was Parliament's prerogative and "barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent."<sup>45</sup> Such reasoning confirms the Court's growing confidence in the abilities of statutory remedies to meaningfully vindicate Charter rights — perhaps so much so that *Conway* did not recognize the "constitutional exemption" left open for rare cases found in *Nasogaluak* in the sentencing context.

A potential wrinkle with the approach in *Conway* is that the reasoning appears to merge statutory remedies with Charter remedies. The Board could not grant an absolute discharge as a *Charter* remedy because it could not grant an absolute discharge as a *statutory* remedy. Looked at another way, if *Conway* had succeeded based on the statutory scheme (because he met its criteria for an absolute discharge), that would obviate the need for a Charter remedy; on the other hand, if he failed under the statutory criteria, the Charter remedy was nonetheless unavailable. In either scenario, the Charter seems irrelevant. If this result is patterned in subsequent cases, *Conway* may well render section 24(1) redundant in

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, at para. 82.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, at para. 90.

<sup>44</sup> *Id.*, at para. 97.

<sup>45</sup> *Id.*

the administrative tribunal context. It may be, however, that the promise of *Conway* lies not in cases where the statutory scheme is clear, but where there are gaps, which can then be filled by remedies under section 24(1). Time will tell.

(d) *Vancouver (City) v. Ward*

The sole question on appeal in *Ward* concerned when money damages may be awarded as a section 24(1) remedy. The answer appears to be a carefully hedged “it depends”. The facts here concerned a mistaken arrest, a strip search, a 4.5-hour long detainment, and the police seizure of a car. The claimant had no claims in tort available, but the trial judge found infringements of sections 8 and 9, notwithstanding the absence of any finding of bad faith by the police, and assessed damages under section 24(1), including a \$5,000 award for arbitrary detainment, \$5,000 for the strip search, and \$100 for the car seizure.<sup>46</sup> Vancouver appealed the latter two awards only.

Referencing the seminal *Doucet-Boudreau* analysis of the function of Charter remedies and drawing heavily on the decisions of foreign courts,<sup>47</sup> the Chief Justice concluded that constitutional damages may be appropriate where they (1) serve to compensate the victim for psychological, physical and pecuniary losses, or harms to intangible interests;<sup>48</sup> (2) vindicate rights in the sense that they restore public confidence;<sup>49</sup> and (3) deter future unconstitutional conduct by the state.<sup>50</sup> “In most cases, all three objects will be present,” but a particular damage award need not fulfil all three functions.<sup>51</sup>

Two factors, however, may restrict the availability of damages: first, the availability of other damages, as there should be no duplication

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<sup>46</sup> Specifically, the trial judge found the strip search and the vehicle seizure violated the respondent’s right to be free from unreasonable search and seizure under s. 8. In addition, the trial judge found that the police violated the respondent’s s. 9 rights and committed the tort of wrongful imprisonment by detaining him longer than necessary.

<sup>47</sup> *Ward*, *supra*, note 4, at para. 74. The Chief Justice referenced judgments of the U.S. Supreme Court, English Court of Appeals, New Zealand Supreme Court and South African Constitutional Court, for example, to support her conclusions that public law damages can serve to compensate, vindicate a right and deter further infringements. See discussion at paras. 25-29.

<sup>48</sup> *Id.*, at para. 27.

<sup>49</sup> *Id.*, at para. 28.

<sup>50</sup> *Id.*, at para. 29.

<sup>51</sup> *Id.*, at para. 30.

between private and public law damages;<sup>52</sup> and second, concerns about good governance.<sup>53</sup> The second factor will likely emerge as the critical one in future cases. The Chief Justice reasoned that good governance, a foundational principle of the Charter, would itself be damaged if the state shirked from enforcing a valid statute for fear of Charter damages. She cited the earlier case of *Mackin* for the principle that damages should not be awarded for state action pursuant to valid statute unless “clearly wrong, in bad faith or an abuse of power”.<sup>54</sup> The state should be afforded “some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform”.<sup>55</sup> That concern may manifest itself in the future to certain section 24(1) “defences” which will become clearer “as the law in this area matures”.<sup>56</sup> Different situations may call for different “thresholds”, as in the private law context.<sup>57</sup> For now, however, the Chief Justice concluded that these are “complex matters which have not been explored on this appeal”; she thus left “the exact parameters of future defences to future cases”.<sup>58</sup>

On the facts of *Ward*, the Court concluded that the requisite threshold was a section 8 breach itself — and no more. The Chief Justice wrote that the respondent “had a constitutional right to be free from unreasonable search and seizure, which was violated in an egregious fashion”.<sup>59</sup> Though there was no finding of bad faith, “[m]inimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the [strip] search to be unnecessary and violative.”<sup>60</sup> Accordingly, that infringement called for compensation, but also engaged the objects of vindication and deterrence.<sup>61</sup> The Court quickly dispensed with any countervailing factors in a single paragraph.<sup>62</sup> With respect to the car’s seizure, however, the Court concluded that while it was “wrong, it was not of a serious nature”.<sup>63</sup> The Court affirmed the \$5,000 award for

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<sup>52</sup> *Id.*, at para. 35.

<sup>53</sup> *Id.*, at para. 39.

<sup>54</sup> *Id.*, at para. 39, citing *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. No. 13, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 78 (S.C.C.).

<sup>55</sup> *Ward*, *supra*, note 4, at para. 40.

<sup>56</sup> *Id.*, at para. 43.

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

<sup>58</sup> *Id.*

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

<sup>60</sup> *Id.*, at paras. 65, 72.

<sup>61</sup> *Id.*, at para. 66.

<sup>62</sup> *Id.*, at para. 68.

<sup>63</sup> *Id.*, at para. 77.

the search, but set aside the \$100 award for the car, substituting declaratory relief.<sup>64</sup>

The differential treatment between the damages for the strip search and car's seizure suggests that an analysis of the object of damages may take on aspects of a torts-like negligence determination. For example, with respect to the strip search, the Chief Justice noted that "it is not too much to expect that police would be familiar with the settled law" concerning when such searches are inappropriate.<sup>65</sup> This ostensible negligence pointed to a need to deter future careless conduct.<sup>66</sup> In contrast, the car's seizure is portrayed as a mistake that was quickly corrected. Accordingly, the rationale for deterrence was not "compelling".<sup>67</sup> Negligence, however, was not explicitly recognized as a factor worth considering in the *Ward* framework. Regardless, *Ward* is certain to spur additional litigation and such cases will be necessary to more clearly define the contours of the constitutional damages now available under section 24(1).

## 2. Access to Information

### (a) *Toronto Star Newspapers Ltd. v. Canada*

*Torstar* was the only case in 2010 where the Court engaged with the *Oakes*<sup>68</sup> test and, in doing so, confirmed its adherence to the new approach the Chief Justice articulated a year earlier in *Hutterian Brethren*.<sup>69</sup> In particular, *Torstar* makes abundantly clear that, after decades of being relegated to the jurisprudential corner, the fourth and final stage of *Oakes* can be the decisive point in the Court's section 1 analysis.

In *Torstar*, a number of media organizations launched a facial challenge to section 517 of the *Criminal Code* on the basis that it violates section 2(b). The provision provides for a mandatory publication ban at the request of the accused, covering the evidence and representations made at a bail hearing and any reasons given for the order. The Court accepted

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<sup>64</sup> *Id.*, at para. 79.

<sup>65</sup> *Id.*, at para. 65.

<sup>66</sup> *Id.*, at para. 72.

<sup>67</sup> *Id.*, at para. 77.

<sup>68</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

<sup>69</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.) [hereinafter "*Hutterian Brethren*"].

that there is “no question” that such an order limits expression.<sup>70</sup> The only live issue was whether the mandatory ban was justified under section 1. As part of its *Oakes* analysis, the Court concluded that the law constituted a minimal impairment of rights, confirming the more deferential approach to minimal impairment expressed in *Hutterian Brethren*, namely that “the minimum impairment test requires only that the government choose the least drastic means of achieving its objective.”<sup>71</sup> Under this approach, a measure restricting rights will only fail the minimal impairment test if there is an alternative measure that can achieve the government’s objective equally well, while being less rights restrictive. It is thus unsurprising that *Torstar* also became “a case where the decisive analysis falls to be done at the final stage of *Oakes*” — a result which will likely occur with increasing frequency.<sup>72</sup> In this regard, after listing the various salutary and deleterious effects of the measure, Deschamps J. concluded that “[a]lthough not a perfect outcome, the mandatory ban represents a reasonable compromise.”<sup>73</sup> Just as in *Hutterian Brethren*, the Court’s fourth-stage balancing in *Torstar* is notable for its remarkable brevity and considerable deference to Parliament.

In her lone dissent, Abella J. disagreed with the majority’s analysis only with respect to the fourth prong of *Oakes* on the basis that “the salutary effects of the ban under s. 517 are not proportional to the harmful effects flowing from the infringement of the open court principle.”<sup>74</sup> Her dissenting opinion in *Hutterian Brethren*, however, confirms this disagreement is not with the new approach to *Oakes*, but only with the outcome in this case (as it also was in the previous case). Indeed, Abella J. observed in *Hutterian Brethren* that “most of the heavy conceptual lifting and balancing ought to be done at the final step — proportionality” because “[p]roportionality [under the fourth stage of *Oakes*] is, after all, what s. 1 is about.”<sup>75</sup> It seems safe thus to conclude that the Court is of one mind on at least this: the fourth stage of *Oakes* has arrived.

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<sup>70</sup> *Torstar*, *supra*, note 4, at para. 2.

<sup>71</sup> *Hutterian Brethren*, *supra*, note 69, at para. 54 (emphasis in original).

<sup>72</sup> *Id.*, at para. 78. Indeed, Deschamps J. in *Torstar* expressly pointed to the decision in *Hutterian Brethren* and its defence of the fourth stage of *Oakes*. *Torstar*, *supra*, note 4, at para. 50.

<sup>73</sup> *Torstar*, *id.*, at para. 60.

<sup>74</sup> *Id.*, at para. 77.

<sup>75</sup> *Hutterian Brethren*, *supra*, note 69, at para. 149.

(b) *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*

In *CLA*, a unanimous Court for the first time recognized a limited right to access government information under section 2(b) “where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned”.<sup>76</sup> Though this right appears to be extremely narrow, its recognition nonetheless represents a noteworthy advance for section 2(b) jurisprudence.

This Charter challenge began with the staying of a murder trial owing to “many instances of abusive conduct by state officials”.<sup>77</sup> A subsequent provincial police investigation, however, exonerated local police of any misconduct. The Ontario Criminal Lawyers’ Association, concerned with the disparity between the trial judge’s and investigation’s findings, made a request under Ontario’s freedom of information statute for disclosure of the police investigation records. That law, however, exempts certain records from disclosure, subject to the relevant minister’s discretion, including law enforcement records (under section 14) and solicitor-client records (under section 19). Some of these exempt records — but *not* those under sections 14 and 19 — are subject to a further review to determine whether a compelling public interest in disclosure outweighs the basis for the initial exemption. Here, the minister exercised his discretion to decline disclosure — without explanation — claiming exemptions under sections 14 and 19. On review, the privacy commissioner agreed that the impugned records qualified for exemption under sections 14 and 19 and further held that the inapplicability of section 23’s public interest override to those sections did not infringe the CLA’s section 2(b) rights.

The Chief Justice and Abella J., writing for the Court, began with the premise that “[s]ection 2(b) guarantees freedom of expression, not access to information.”<sup>78</sup> That said, they recognized that “[a]ccess is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.”<sup>79</sup> In reaching this conclusion, the justices eschewed the positive versus negative rights debate that has crept into the section 2(b) jurisprudence as a result of the Court’s

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<sup>76</sup> *CLA*, *supra*, note 4, at para. 5.

<sup>77</sup> *Id.*, at para. 10 (emphasis removed).

<sup>78</sup> *Id.*, at para. 30.

<sup>79</sup> *Id.*

recent decisions in *Baier* and *Greater Vancouver*.<sup>80</sup> A finding that a claimant is asserting a positive expressive right can be fatal to his claim, as it was in *Baier*, because it has generally been understood that section 2(b) “prohibits gags, but does not compel the distribution of megaphones”.<sup>81</sup> In *CLA*, however, though the positive versus negative question had occupied the lower courts, the Chief Justice and Abella J. concluded that “nothing would be gained by furthering this debate.”<sup>82</sup> Unfortunately, they offered no further comment, and so it remains unclear whether the Court is backtracking from its “platform” framework in *Baier* or if *CLA* stands on its own.

Instead, the Court further adapted its long-standing framework from *Irwin Toy/City of Montréal*<sup>83</sup> for the access context. Again, however, the Chief Justice and Abella J.’s opinion is notable more for its conclusions than its elucidation of the jurisprudential path taken to arrive there:

To demonstrate that there is expressive content in accessing such documents, *the claimant must establish that the denial of access effectively precludes meaningful commentary*. If the claimant can show this, there is a *prima facie* case for the production of the documents in question. But even if this *prima facie* case is established, the claim may be defeated by factors that remove s. 2(b) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged. The only remaining question is whether the government action infringes that protection.<sup>84</sup>

The terms “meaningful public discussion”, “meaningful commentary”, and equivalents are used no less than 10 times in the Court’s opinion,<sup>85</sup> yet no clear definition for what “meaningful” actually means is provided.

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<sup>80</sup> *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, [2007] 2 S.C.R. 673 (S.C.C.) [hereinafter “*Baier*”]; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] S.C.J. No. 31, 2009 SCC 31, [2009] 2 S.C.R. 295 (S.C.C.) [hereinafter “*Greater Vancouver*”].

<sup>81</sup> *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C. J. No. 84, [1993] 2 S.C.R. 995, at 1035 (S.C.C.) [hereinafter “*Haig*”].

<sup>82</sup> *CLA*, *supra*, note 4, at para. 31.

<sup>83</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter “*Irwin Toy*”]; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.) [hereinafter “*City of Montreal*”].

<sup>84</sup> *CLA*, *supra*, note 4, at para. 33 (emphasis added).

<sup>85</sup> *Id.*, at paras. 5, 30-31, 33, 36-37, 58-59.

Furthermore, the first of the test's two prongs will be met only where access is "necessary" for such discussion, or if such discussion would be "substantially impeded", "effectively preclud[ed]" or "cannot take place" without it.<sup>86</sup> Though the diction here is clearer, there is arguably a material difference between something that is a *necessary condition* and something that is only a *substantial impediment*.

As for the second stage, the Court recognized that privileges are "appropriate derogations from the scope of the protection" afforded under section 2(b).<sup>87</sup> Accordingly, common law privileges, including solicitor-client privilege, "generally represent situations where the public interest in confidentiality outweighs the interests served by disclosure".<sup>88</sup> Drawing on their reasoning in *City of Montréal*, the Court observed that the "historic function of a particular institution" may also preclude disclosure; it cited cabinet deliberations or judicial memoranda as examples.<sup>89</sup>

The crux of the instant case, however, came down to a question of statutory interpretation. The Court concluded that adding the section 23 public interest override to the law enforcement exemption under section 14 or the solicitor-client exemption under section 19 "would add little to what is already provided for" in those sections.<sup>90</sup> Crucially, the language of both those sections confers discretion on the minister by stipulating that public disclosure "may" be refused. That word was highly significant: citing general administrative law principles, the Chief Justice and Abella J. concluded the discretion meant that "the [minister] must weigh the considerations for and against disclosure, including the public interest in disclosure."<sup>91</sup>

Returning to the constitutional question, the Chief Justice and Abella J. concluded that there would only be a section 2(b) infringement on the facts here if, absent a section 23 override, the existing statutory scheme impeded meaningful discussion of any police misconduct. They concluded this was not the case for three reasons. First, as "much is known

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<sup>86</sup> *Id.*, at paras. 33, 37-38, 58-59.

<sup>87</sup> *Id.*, at para. 39.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*, at para. 40.

<sup>90</sup> *Id.*, at para. 43. The Court did not say, but seems implicitly to have presumed, that had ss. 14 and 19 been subject to s. 23, there would be no constitutional question whatsoever. This situation is likely a result of the way the CLA pleaded its case on appeal.

<sup>91</sup> *Id.*, at para. 46.

about those events”, the CLA could not show necessity.<sup>92</sup> Second, even if it could show necessity, disclosure would likely impinge “on privileges or impair the proper functioning of relevant government institutions”.<sup>93</sup> Third and finally, the impact of section 23 on the consideration already built into sections 14 and 19 “is so minimal that even if s. 2(b) were engaged, it would not be breached”.<sup>94</sup>

The recognition of a limited constitutional right of access to information is a significant step in the Court’s section 2(b) jurisprudence, but *CLA* leaves many questions about the scope of that right. In addition to the problems already noted, the Court appears to conceive of “meaningful public discussion” at a high level of generality. Surely there can be little doubt that there can be no discussion on the *specific issues* raised in the reports sought by the CLA, since the public does not know what is in them. Nonetheless, the Court found that that meaningful public discussion is not precluded by keeping those materials out of the public domain. Furthermore, the “proper functioning of government” test in the access context remains largely undefined and has the potential to be quite broad. Additional cases will be necessary to elucidate the breadth of that allowance.

### 3. Journalist Source Privilege

#### (a) *R. v. National Post; Globe and Mail v. Canada (Attorney General)*

The flip side of the access debate is whether the Charter protects whistleblowers. In two separate cases last year, the Court was presented with the question of whether journalists enjoy a constitutional right to protect the identity of such sources. Though a unanimous Court answered in the negative in both cases, it nonetheless recognized potentially rigorous protection for journalists and their sources at common law, as rejuvenated by Charter values.

In *National Post*, the police sought materials — an envelope and the enclosed document — from a reporter that they said constituted evidence of a fraud. The reporter had received those documents while reporting on the “Shawinigate” scandal that engulfed former Prime Minister Jean

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<sup>92</sup> *Id.*, at para. 59.

<sup>93</sup> *Id.*, at para. 60.

<sup>94</sup> *Id.*, at para. 61.

Chrétien in the late 1990s. The documents, it was alleged, were forgeries, as the reporter discovered once he attempted to authenticate them. The police sought the documents in order to find the alleged fraudster. The reporter, who believed his source had not intended to deceive him but was himself deceived by some third person, refused to hand over the materials lest they identify his source.

Justice Binnie, writing for eight justices, accepted the importance of confidential sources,<sup>95</sup> but flatly rejected any contention that newsgathering itself was a Charter-protected right. Such a view, Binnie J. reasoned, was built on the incorrect premise that journalist-source privilege should be treated “as if it were an enumerated *Charter* right or freedom”.<sup>96</sup> Though he recognized that the right to gather news, while not mentioned in the text of section 2(b), is surely implicit in any right to freedom of the press, Binnie J. was at pains not to recognize any particular form of newsgathering as “entrenched in the Constitution”.<sup>97</sup> In his assessment, such a view would lend credence to the idea of constitutionalizing “[c]hequebook journalism,” “long-range microphones”, and “telephoto lenses”.<sup>98</sup>

The reluctance to draw distinctions between different kinds of newsgathering affected the Court’s decision in a second way. In last year’s *Grant v. Torstar*, the Court extended the British defence of “responsible journalism” to the broader concept of “responsible communication”, covering not only the traditional media, but bloggers and other online media outlets as well.<sup>99</sup> Crucially, in *Grant*, the Court was willing to be over-inclusive in its protective umbrella, even though it recognized “the essence” of the defence concerned traditional journalists.<sup>100</sup> In *National Post*, however, the very breadth of the class protected by *Grant* may well have undermined the prospect of any constitutional protection for traditional journalists. Pointing to *Grant*, Binnie J. remarked that “[t]o throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever ‘sources’ they deem worthy of a promise of confidentiality ... would

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<sup>95</sup> *National Post*, *supra*, note 4, at para. 28.

<sup>96</sup> *Id.*, at para. 38.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 96-97 (S.C.C.) [hereinafter “*Grant v. Torstar*”].

<sup>100</sup> *Id.*, at para. 96.

blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.”<sup>101</sup> Without questioning the choice to define the protected group broadly in *Grant*, one is nonetheless left to wonder whether the argument for a constitutionally protected privilege might have fared better in *National Post* had the Court limited *Grant* to traditional journalists. Based on concerns of over-inclusiveness, the Court ultimately rejected a common law class-privilege model in *National Post*.<sup>102</sup>

Instead, Binnie J. concluded a case-by-case approach, based on the well-known Wigmore criteria for establishing confidentiality at common law but “informed by the *Charter* guarantee of freedom of expression and the rights of the press and other media of communication”.<sup>103</sup> The Court focused principally on the last two of the four Wigmore criteria.<sup>104</sup> The third, which speaks to whether the relationship must be “sedulously fostered”, “introduces some flexibility” in a court’s evaluation of different sources and journalists.<sup>105</sup> This prong addresses the over-inclusiveness concern: The relationship between a blogger and his confidential source “might be weighed differently” than one between a professional journalist and her source.<sup>106</sup> The fourth prong, however, “does most of the work,” because it seeks to “achieve proportionality in striking a balance among the competing interests”.<sup>107</sup> In other words, a court must weigh the benefits of the disclosure, including “the nature and seriousness of the offence under investigation, and the probative value of the evidence sought to be obtained”, on the one hand, with “the public interest in respecting the journalist’s promise of confidentiality”, on the other.<sup>108</sup> Crucially, the onus remains on the party seeking to assert the privilege throughout.<sup>109</sup>

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<sup>101</sup> *National Post*, *supra*, note 4, at para. 40.

<sup>102</sup> *Id.*, at paras. 42-49.

<sup>103</sup> *Id.*, at para. 50 (internal quotation marks omitted).

<sup>104</sup> The four Wigmore factors are: (1) the relationship must originate in a confidence that the source’s identity will not be disclosed; (2) anonymity must be essential to the relationship in which the communication arises; (3) the relationship must be one that should be sedulously fostered in the public interest; and (4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth. *Id.*, at para. 53.

<sup>105</sup> *Id.*, at para. 57.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*, at paras. 58-59.

<sup>108</sup> *Id.*, at para. 61.

<sup>109</sup> *Id.*, at para. 60.

On the facts of *National Post*, given that the reporter in question was a professional journalist, the decisive analysis fell to the fourth stage of the Wigmore test. Here, Binnie J. stressed the “real possibility of obtaining DNA evidence” concerning “the very *actus reus* ... of the alleged crime”.<sup>110</sup> That combination was sufficient for the majority to order disclosure of the documents.<sup>111</sup> Justice Abella, writing in dissent, agreed with the majority’s analysis of the first three stages of the Wigmore test, but parted company at the crucial fourth stage. In her view, the evidence was of “only questionable assistance in connection with a crime of moderate seriousness”.<sup>112</sup>

The Court’s decision in *Globe and Mail*, handed down some seven months later, may underscore that the result in *National Post* hinged on the fact that the first case involved a crime and, more specifically, that the disclosure related to the *actus reus* of the crime.<sup>113</sup> In *Globe and Mail*, the Court was concerned with civil litigation flowing from the Quebec sponsorship scandal of the 1990s. The issue was whether a trial judge could order a reporter for *The Globe and Mail* newspaper to reveal the identity of a source who had been providing details of confidential settlement negotiations between the federal Attorney General and a company involved in the scandal. Holding that a Wigmore-like analysis was equally applicable in the context of the Quebec civil code, LeBel J. concluded for a unanimous Court that the journalist-source privilege claim here must be “rigorously tested against the Wigmore criteria”.<sup>114</sup> Though actual determination was remanded to the trial court, LeBel J. made clear that, given the “high societal interest in investigative journalism”, the reporter could “only be compelled to speak if his response was vital to the integrity of the administration of justice”.<sup>115</sup>

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<sup>110</sup> *Id.*, at paras. 72, 77.

<sup>111</sup> See *id.*, at paras. 71-77.

<sup>112</sup> *Id.*, at para. 100.

<sup>113</sup> Justice LeBel commented in *Globe and Mail*: “This case involves civil litigation, not the criminal investigative process. It involves testimonial compulsion, and not the production of documents or other physical evidence”: *Globe and Mail*, *supra*, note 4, at para. 25.

<sup>114</sup> *Id.*, at para. 68.

<sup>115</sup> *Id.*, at para. 69.

#### 4. The Right to Counsel

##### (a) *R. v. Sinclair*

In the *Sinclair* trilogy,<sup>116</sup> a sharply divided Court held the line on the scope of section 10(b), concluding that the Charter “does not mandate the presence of defence counsel throughout a custodial interrogation”.<sup>117</sup> Rather, a five-justice majority in *Sinclair* held that “the right to counsel is essentially a one-time matter with few recognized exceptions.”<sup>118</sup> The Court split essentially along the same lines as it had in *Singh*,<sup>119</sup> the last case to interpret section 10(b), with Cromwell J. replacing the now-retired Bastarache J. in the majority.<sup>120</sup> Each of the three cases generated three opinions, with each opinion offering a different test for determining when counsel must be present. Notably, however, each opinion either rejected or declined to decide whether Canada should adopt the American approach in *Miranda v. Arizona*,<sup>121</sup> under which the accused has a right to have counsel present throughout an interrogation.

In the trilogy’s lead case, the appellant, after being arrested for murder, was twice advised by police that he had a right to instruct counsel and he twice spoke to a lawyer. Each conversation lasted three minutes or less, but he told police he was satisfied with the calls. In response to increasingly tough questioning during a five-hour interrogation, the accused alternated between repeating his desire to speak with his lawyer and his intention to remain silent. In time, however, when confronted with evidence of his guilt, he confessed.

At the Court, the disagreement between the justices turned in part on the text of section 10(b), which provides that a person has the right to

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<sup>116</sup> See also *McCrimmon*, *supra*, note 4, and *Willier*, *supra*, note 4.

<sup>117</sup> *Sinclair*, *supra*, note 4, at para. 2.

<sup>118</sup> *Id.*, at para. 64.

<sup>119</sup> *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, [2007] 3 S.C.R. 405 (S.C.C.) [hereinafter “*Singh*”].

<sup>120</sup> The Chief Justice and Deschamps, Charron, Rothstein and Cromwell JJ. joined the majority opinion in *Sinclair* and the plurality opinions in *McCrimmon* and *Willier*. Justices LeBel, Fish and Abella dissented in *Sinclair* and *McCrimmon*, and concurred in judgment in *Willier*. Justice Binnie filed a separate dissenting opinion in *Sinclair* and concurred in judgment in *McCrimmon* and *Willier*.

<sup>121</sup> 384 U.S. 436 (1966) [hereinafter “*Miranda*”]. The majority notes that: “*Miranda* came about in response to abusive police tactics then prevalent in the U.S., and applies in the context of a host of other rules that are less favourable to the accused than their equivalents in Canada”: *Sinclair*, *supra*, note 4, at para. 39. See also para. 101 (Binnie J., dissenting) and para. 201 (LeBel and Fish JJ., dissenting).

“retain and instruct counsel without delay”. The Chief Justice and Charron J., writing for the majority, acknowledged that though the language “makes clear that the right arises on detention, there is nothing on its face to indicate when the right is exhausted”.<sup>122</sup> Turning to “a deeper purposive analysis”,<sup>123</sup> the majority concluded that section 10(b) exists to provide an opportunity to obtain legal advice as to his rights, “chief” among them in the context of a custodial interrogation being the right under section 7 to choose whether or not to cooperate.<sup>124</sup> Under the majority’s approach, further consultation with counsel is required when “changed circumstances suggest that reconsultation is necessary in order for the detainee to have the information relevant to choosing whether to cooperate with the police investigation or not.”<sup>125</sup> Such circumstances would include the use of non-routine procedures, such as a line-up or polygraphs,<sup>126</sup> a change in jeopardy when an investigation takes a new turn,<sup>127</sup> and belief that the detainee may not have understood his right to counsel.<sup>128</sup>

In dissent, LeBel and Fish JJ. offered severe criticism of the majority’s approach, saying that it “carries significant and unacceptable consequences for the administration of criminal justice and the constitutional rights of detainees in this country”.<sup>129</sup> They disputed the majority’s characterization of the plain meaning of section 10(b) which, they concluded (relying heavily on the French text), affords a detainee a “prospective right to the assistance of counsel”.<sup>130</sup> The purpose of such a right, to them, is clear: at a time when a detainee is “particularly vulnerable”, the right to counsel serves not only to remind the detainee of his or her rights, but also to “explain *why* and *how* that right should be, and can be, effectively exercised”.<sup>131</sup> Accordingly, LeBel and Fish JJ. concluded that a detainee is entitled to speak with counsel upon request, without the

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<sup>122</sup> *Sinclair, id.*, at para. 20.

<sup>123</sup> *Id.*, at para. 23.

<sup>124</sup> *Id.*, at para. 24; see also para. 32.

<sup>125</sup> *Id.*, at para. 48.

<sup>126</sup> *Id.*, at para. 50.

<sup>127</sup> *Id.*, at para. 51.

<sup>128</sup> *Id.*, at para. 52.

<sup>129</sup> *Id.*, at para. 180.

<sup>130</sup> *Id.*, at para. 153.

<sup>131</sup> *Id.*, at paras. 165, 167 (emphasis in original).

need to establish that the request is objectively valid or reasonable.<sup>132</sup> (Notably, though, the two justices were non-committal on *Miranda*.<sup>133</sup>)

In the third and final opinion, Binnie J., speaking only for himself in a forceful dissenting opinion, sought to find a middle ground between the two divided camps. It is clear where his focus lies: Though he acknowledged that many confessions obtained by police are true, “too many are not.”<sup>134</sup> In contrast to the majority’s focus on “changed” circumstances, Binnie J. instead devised a test to address “evolving” circumstances of an interrogation “that were not — and could not be — anticipated at the outset during the initial consultation with counsel”.<sup>135</sup> In his view, if the right to counsel is to be given its “full effect”, it must mean more than an incantation from counsel to “keep your mouth shut”.<sup>136</sup> A “one size fits all” instruction to keep quiet no matter what occurs in an interrogation “may turn out to be terrible advice” if, for example, the detainee has an alibi.<sup>137</sup> Accordingly, Binnie J. would permit re-consultation with counsel when a detainee’s request is reasonable. The request must find support in objective factors including, for example, the extent of prior contact with counsel, the length of the interview at the time of the request, and the extent of information (true or false) provided by police prior to the request.<sup>138</sup> On the facts in *Sinclair*, Binnie J. concluded the detainee’s request was reasonable in light of the police’s statements to the detainee that they had “absolutely overwhelming” evidence against him.<sup>139</sup> The majority, however, criticized Binnie J.’s approach on the twin bases that it “would go further and expand the category of cases” where counsel’s presence is required and that his proposed test is “so vague that it is impractical”.<sup>140</sup>

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<sup>132</sup> *Id.*, at para. 172.

<sup>133</sup> *Id.*, at para. 201 (“[W]e take care to make perfectly clear that we are not advocating the adoption of the American rules under *Miranda*. ... And while the appellant did urge us to find that counsel are entitled to be present during custodial interrogations, there is no need for us to do so ...”).

<sup>134</sup> *Id.*, at para. 78; see also para. 90.

<sup>135</sup> *Id.*, at para. 83.

<sup>136</sup> *Id.*, at paras. 86, 91.

<sup>137</sup> *Id.*, at para. 104.

<sup>138</sup> *Id.*, at para. 106.

<sup>139</sup> *Id.*, at para. 116.

<sup>140</sup> *Id.*, at paras. 56, 59.

## 5. Search and Seizure

Four of the five section 8 cases in 2010 concerned police tactics in the course of drug investigations. Notably, the Court upheld the constitutionality of the police conduct in each of those four cases, suggesting that it is not only the executive branch that is prepared to get tough in the war on drugs. None of the five section 8 cases makes new law, which is perhaps explained by the fact that each of the five cases reached the Court as of right.

### (a) *R. v. Gomboc*

Though only two of nine justices dissented from the Court's holding in *Gomboc*, the most significant of the five section 8 decisions handed down in 2010, the case has no majority opinion. The seven justices who agreed on the holding — that there was no section 8 infringement — were split between a plurality opinion, authored by Deschamps J. and joined by three other justices,<sup>141</sup> and a separate concurring opinion, authored by Abella J. and joined by two other justices.<sup>142</sup> This division is unfortunate because both the plurality and concurring opinions reflect interesting evolutions in the thinking of the justices on privacy rights under section 8, the future application of which appears uncertain.

The central issue in the case was whether the accused had a reasonable expectation of privacy in the information disclosed by a digital recording ammeter (“DRA”). The device, which was installed outside the accused's property, disclosed patterns of electricity use. The resulting data showed a pattern of cycling, which was consistent with the existence of a marijuana grow operation. Based on that data and other information, a search warrant was obtained and over 150 kilograms of bulk marijuana were found in the home.

All the justices took their cue from the two-part analysis in *Tessling*:<sup>143</sup> whether the accused had a subjective expectation of privacy and whether that expectation of privacy was objectively reasonable.<sup>144</sup> The split in *Gomboc* concerned the latter element, with its inherent

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<sup>141</sup> Justices Charron, Rothstein and Cromwell.

<sup>142</sup> Justices Binnie and LeBel.

<sup>143</sup> *R. v. Tessling*, [2004] S.C.J. No. 67, [2004] 3 S.C.R. 432, 2004 SCC 67 (S.C.C.) [hereinafter “*Tessling*”].

<sup>144</sup> *Gomboc*, *supra*, note 4, at paras. 18, 78, 107.

normative judgment. Two lines of inquiry have assisted in that determination in previous cases. First, in *Plant*, the Court concluded that section 8 protects “a biographical core of personal information” that “would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual”.<sup>145</sup> Second, in *Tessling*, the Court drew a distinction between three realms of privacy — personal, territorial and informational — and suggested a hierarchy between them.<sup>146</sup> Both inquiries would further divide the Court in *Gomboc*.

Justice Deschamps, for the plurality, stressed that the DRA data “reveals nothing but one particular piece of information: the consumption of electricity”.<sup>147</sup> That disclosure “does not yield anything meaningful in terms of biographical core data that attracts constitutional protection”.<sup>148</sup> She cited several examples of information that might go to that core — whether particular persons were watching TV or what their political affiliation was — and noted that none of them were present here.<sup>149</sup> Justice Abella disputed this characterization because the presence of a marijuana grow operation “is presumptively information about which individuals are entitled to expect privacy because it is information about an activity *inside the home*”.<sup>150</sup> The Chief Justice and Fish J., writing in dissent, agreed with Abella J. and added that “[e]vidence of criminal activity ... has previously been considered by this Court to be very personal biographical information.”<sup>151</sup> Though the view of Deschamps J. appears more faithful to the original conception of the biographical core — centred on the “intimate details of the lifestyle and personal choices of the individual” — the weight of precedent appears to be on the side of a

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<sup>145</sup> *R. v. Plant*, [1993] S.C.J. No. 97, [1993] 3 S.C.R. 281, at 293 (S.C.C.) (emphasis added).

<sup>146</sup> *Tessling*, *supra*, note 143, at paras. 20-24.

<sup>147</sup> *Gomboc*, *supra*, note 4, at para. 14.

<sup>148</sup> *Id.*, at para. 43.

<sup>149</sup> The information *not* disclosed included how many occupants live in the residence, whether any occupants are home at a particular time, whether anyone is watching television, whether anyone is taking a bath, sitting in a hot tub, or showering, the gender of the occupants, the political affiliation of the occupants, the sexual orientation of the occupants, and where electricity is being used in the house. *Id.*, at para. 7.

<sup>150</sup> *Id.*, at para. 80 (emphasis in original).

<sup>151</sup> *Id.*, at para. 130 (internal quotation marks omitted). Interestingly, as if to emphasize their point, the Chief Justice and Fish J. cited the dissenting opinion of Deschamps J. in *Kang-Brown*, one of the 2008 sniffer-dog cases, for that proposition. In *Kang-Brown*, Deschamps J. noted that evidence that an accused had come into contact with a controlled substance was “very personal” information. See *R. v. Kang-Brown*, [2008] S.C.J. No. 18, [2008] SCC 18, [2008] 1 S.C.R. 456, at para. 175 (S.C.C.) [hereinafter “*Kang-Brown*”].

more expansive conception.<sup>152</sup> Indeed, from the Court's recent jurisprudence, it is hard to discern what is *not* within the biographical core. Had her opinion commanded a majority, Deschamps J.'s opinion would have signalled a marked departure.

With respect to the realms of privacy, Deschamps J. recognized that both informational and territorial privacy were implicated on these facts.<sup>153</sup> Crucially, her opinion offers the Court's first attempt at reconciling the hierarchies of these two realms, which can often overlap. Though in agreement with *Tessling* and *Patrick*<sup>154</sup> that "the home is where our most intimate and personal activities often take place,"<sup>155</sup> Deschamps J. cautioned that "[t]he Constitution does not cloak the home in an impenetrable veil of privacy."<sup>156</sup> On the facts of *Gomboc*, she concluded that "the home itself was never *directly* the object of a search," and, as a result, "the informational privacy interest should be the focal point of the analysis."<sup>157</sup> This is an interesting attempt to clarify the principles laid down in *Tessling*, though the distinction Deschamps J. draws between direct and indirect searches in this context is unclear. Though the other opinions did not grapple with the proposition, it would seem safe to say that none of the authors accept it.<sup>158</sup>

Her disagreements with Deschamps J. in respect of the above notwithstanding, Abella J. concurred that there had been no Charter infringement. She reached that conclusion by looking at the regulation governing the privacy of utility customer information. The regulation allows a customer to request that his data remain confidential, in which case they could not be provided to police. Here, however, the accused had made no such request. For Abella J., the absence of such a request "determinatively diminished the objective reasonableness of the customer's

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<sup>152</sup> See, e.g., *Kang-Brown, id.*, *R. v. M. (A.)*, [2008] S.C.J. No. 19, 2008 SCC 19, [2008] 1 S.C.R. 569 (S.C.C.) [hereinafter "*M.(A.)*"]; and *R. v. Patrick*, [2009] S.C.J. No. 17, 2009 SCC 17, [2009] 1 S.C.R. 579 (S.C.C.).

<sup>153</sup> *Gomboc, supra*, note 4, at para. 22.

<sup>154</sup> *Supra*, note 152.

<sup>155</sup> *Gomboc, supra*, note 4, at para. 45.

<sup>156</sup> *Id.*, at para. 46.

<sup>157</sup> *Id.*, at paras. 48-49.

<sup>158</sup> See *id.*, at paras. 79-80 (Abella J., concurring) ("The existence of such activity, in my view, is presumptively information about which individuals are entitled to expect privacy because it is information about an activity *inside the home*": at para. 80) (emphasis in original); at para. 124 (McLachlin C.J.C. and Fish J., dissenting) ("The large-scale growing of plants *within one's home is a private activity*, and a surveillance technique capable of making strong predictions regarding its existence is an intrusion on the occupant's privacy ...") (emphasis added).

expectation of privacy in this case and, accordingly, the strength of his s. 8 claim”<sup>159</sup>.

Both the plurality and concurring opinions are also notable for not requiring any threshold grounds for the use of DRA technology. Though Deschamps J. recognized that the devices are usually used at “the culminating point of the investigation”, after other data has been gathered and perhaps even when reasonable and probable grounds for a warrant already exist, she did not actually require that such preconditions exist.<sup>160</sup> To require reasonable and probable grounds for the use of the DRA, of course, would mean that the devices “can only be used where there is no need for them”.<sup>161</sup> But, as the Court recognized in the 2008 sniffer-dog cases, an “all-or-nothing” approach to novel search methods runs the risk of “totally eliminat[ing] significant invasions of privacy from any [Charter] protection because they are not akin to traditional searches”.<sup>162</sup> For that reason, the Court adopted an intermediate standard of “reasonable suspicion” as a requirement before sniffer dogs could be constitutionally used. One is left to wonder why the standard could not have been considered here as a threshold protection, especially when the facts suggested it would have imposed no additional burden on the police.<sup>163</sup>

### III. FEDERALISM CASES

Each of the Court’s five federalism cases in 2010 resulted in multiple opinions, even where the Court was unanimous in its holding. The cases evidence two small camps of justices, each with their own firmly held jurisprudential view preventing them from signing on to an opinion of the other, along with a larger group of justices who alternate between the two camps. If one is keeping a federalism scorecard, 2010 was a draw:

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<sup>159</sup> *Id.*, at para. 58.

<sup>160</sup> *Id.*, at paras. 10-12.

<sup>161</sup> *M. (A.)*, *supra*, note 152, at para. 9.

<sup>162</sup> *Id.*, at paras. 53-54.

<sup>163</sup> The Chief Justice and Fish J. were the only justices to explicitly grapple with the police powers question. They noted that “[t]his is not a case like *Kang-Brown*” because “a police ‘stop-and-search,’ by virtue of its exigent nature, provides a more compelling reason for expanding common law police powers than a situation like the present where a warrant can be obtained in a timely fashion with appropriate grounds.” Accordingly, they declined to find that a DRA-search was authorized by law. *Gomboc*, *supra*, note 4, at paras. 145-149.

the federal position won in two cases, the provincial position in two cases, and neither side is likely pleased with the result in the last case.

## 1. Interjurisdictional Immunity

(a) *Quebec (Attorney General) v. Lacombe*; *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*

The decisions in *Lacombe* and *COPA*, each of which “pits the local interest in land use planning against the national interest in a unified system of aeronautical navigation”,<sup>164</sup> included two of the sharpest dissents at the Court last year. In both cases, Deschamps J., who enjoyed some support from just one other justice, reached a conclusion that was, in her own words, “diametrically opposed” to that of the Chief Justice and the rest of the Court.<sup>165</sup> The majority’s approach, she concluded, was “antithetical to co-operation between the levels of government”.<sup>166</sup> This theme — one side charging that the other lacks fidelity to the principles underlying Confederation — appears in each of the three sets of federalism cases decided in 2010.

Coming just three years after the Court signalled a strong preference in *Western Bank*<sup>167</sup> for scaling back the scope of interjurisdictional immunity on the basis that it went against the “dominant tide” of recent jurisprudence, *Lacombe* and *COPA* together form a kind of seawall. The two cases make clear that interjurisdictional immunity is alive and well, at least in the limited context of the federal aeronautics power. They also provide some guidance on the previously unanswered question of what amounts to an “impairment” for purposes of interjurisdictional immunity. Notably, Deschamps J., one of the Court’s more forceful voices on

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<sup>164</sup> *COPA*, *supra*, note 5, at para. 2.

<sup>165</sup> *Lacombe*, *supra*, note 5, at para. 182. In both *Lacombe* and *COPA*, the Chief Justice’s opinions for the majority were joined by all the justices save for LeBel and Deschamps JJ. Justice Deschamps dissented in both cases. Although LeBel J. concurred in judgment in *Lacombe* (on the basis that there was an operational conflict triggering federal paramountcy), he wrote separately to note his general agreement with the approach of Deschamps J. with respect to the pith and substance of the impugned municipal law and interjurisdictional immunity. In *COPA*, he concurred with Deschamps J.

<sup>166</sup> *Lacombe*, *id.*, at para. 116.

<sup>167</sup> *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.) [hereinafter “*Western Bank*”].

federalism, was not on the seven-judge panel in *Western Bank*.<sup>168</sup> The implications of that case are at the core of the disagreements in *Lacombe* and *COPA*.

The facts of both cases began with the establishment of an aerodrome — on a lake in *Lacombe* and on an erstwhile woodlot in *COPA*. In *Lacombe*, the owners of summer homes located on the lake succeeded in lobbying their municipal government to pass a zoning by-law outlawing the aerodrome. In *COPA*, two individuals cleared a woodlot on their property, in violation of a provincial law designating the area as an agricultural region, to construct an airstrip. At the Supreme Court, the Chief Justice, writing for a majority of seven justices, found the municipal by-law in *Lacombe* to be *ultra vires*. In *COPA*, though the provincial legislation was valid, it was inapplicable by virtue of interjurisdictional immunity.

The central dispute between the Chief Justice and Deschamps J. related to the proper application of interjurisdictional immunity. Writing in *COPA*, the Chief Justice began her analysis pointing to a long line of precedent, dating back over 50 years, that has “repeatedly and consistently held that the location of aerodromes lies within the core of the federal aeronautics power”.<sup>169</sup> Crucially, it did not matter that Parliament, on the facts in both these cases, had not actually chosen to exercise that power by enacting a positive requirement with respect to location. (The federal legislation in this case was broadly permissive and did not require prior federal authorization for the location of rural aerodromes.<sup>170</sup> As LeBel J. observed at the *Lacombe* hearing, the law essentially permitted anyone to construct an aerodrome “anywhere, anytime”.) Citing *Western Bank*, the Chief Justice concluded that the question was whether the provincial legislation “impairs” the federal power, as opposed to the old standards of “affects” (a lower threshold) or “sterilizes” (a higher threshold). To impair a federal power, the provincial incursion “not only affects the core federal power, but does so in a way that seriously or

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<sup>168</sup> Justice Rothstein, who joined the majority in *Lacombe* and *COPA*, was the other justice who did not participate in *Western Bank*. There were two opinions in *Western Bank*: one for the majority by Binnie and LeBel JJ. and a concurring opinion by Bastarache J., who wrote only for himself. Justice Cromwell, who replaced Bastarache J. upon his retirement, joined the majority in both *Lacombe* and *COPA*. See *Western Bank*, *id.*

<sup>169</sup> *COPA*, *supra*, note 5, at para. 37.

<sup>170</sup> *Lacombe*, *supra*, note 5, at para. 16; *COPA*, *id.*, at para. 12.

significantly trammels the federal power ... It need not paralyze it, but it must be serious”<sup>171</sup>.

On this basis, the Chief Justice concluded that the provincial legislation *did* impair the federal aeronautics power because it “prohibits the building of aerodromes in designated agricultural regions unless prior authorization has been obtained from the [provincial] Commission”.<sup>172</sup> This undermined the broadly permissive federal regime: “If Parliament wished to override [the provincial legislation] by way of federal paramountcy, it would be forced to establish a legislative conflict with each of the Commission’s decisions regarding aerodromes ...”<sup>173</sup> Such competing systems of regulation “would be a source of uncertainty and endless disputes” leading to “jurisdictional nightmare”.<sup>174</sup>

Though Deschamps J. did not dispute that the core of the federal aeronautics power includes the location of aerodromes,<sup>175</sup> she saw the Chief Justice’s reasoning as undermining the concept of “impairment” articulated in *Western Bank*. An impairment analysis, in her view, “must necessarily relate to the *concrete effects of the measure in question*”,<sup>176</sup> because a focus on impact on the federal head of power “leads to confusion between the issue of validity and that of applicability”.<sup>177</sup> (Under the doctrine of interjurisdictional immunity, an otherwise *valid* law is held to be *inapplicable* where it impairs a core power of the other level of government.) By focusing on impairment of the federal power instead of “analysing the real effects of the zoning by-law on *activities* of federal undertakings ... the Chief Justice effectively eliminates the impairment test”, leaving it “superfluous”.<sup>178</sup>

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<sup>171</sup> *COPA, id.*, at para. 45.

<sup>172</sup> *Id.*, at para. 47. On this point, the Chief Justice and Deschamps J.’s interpretation of the same fact is diametrically opposed. With respect to the area designated by provincial regulation as an agricultural zone, the Chief Justice concludes (at para. 48): “It effectively removes 63,000 km<sup>2</sup> ... from the territory that Parliament has designated for aeronautical uses. *This is not an insignificant amount of land*, and much of it is strategically located.” (Emphasis added) Justice Deschamps, meanwhile, concludes (at para. 89): “The record shows that the designated agricultural land represents *only* about 63,000 km<sup>2</sup>, *or about 4 percent of the province’s territory*.” (Emphasis added)

<sup>173</sup> *Id.*, at para. 53.

<sup>174</sup> *Id.* (internal quotation marks and citations omitted).

<sup>175</sup> *Lacombe, supra*, note 5, at para. 154.

<sup>176</sup> *Id.*, at para. 115 (emphasis added).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*, at para. 158 (emphasis in original). Though the Chief Justice does not directly respond to this critique, it seems reasonable to infer, based on other comments, that she would conclude that Deschamps J. is mingling elements of paramountcy and interjurisdictional immunity: “Unlike interjurisdictional immunity, which is concerned with the *scope* of the federal power,

The background to this whole discussion, of course, is that while the doctrine of interjurisdictional immunity is in theory reciprocal, in practice, as Binnie and LeBel JJ. observed in *Western Bank*, “the doctrine has produced somewhat asymmetrical results.”<sup>179</sup> This point was certainly not lost on Deschamps J., who noted that “the doctrine has been applied unequally, for the federal government’s benefit and therefore at the expense of the federate entities, the provinces ...”<sup>180</sup> *Western Bank* itself was less than helpful in defining what constitutes an impairment, thus foreshadowing the problem that arose in *Lacombe* and *COPA*. In that case, Binnie and LeBel JJ., speaking for the majority in that case, noted only that “[t]he difference between ‘affects’ and ‘impairs’ is that the former does not imply any *adverse consequence* whereas the latter does.”<sup>181</sup>

At bottom, the conflict between the two camps concerns how much room is left for interjurisdictional immunity in an era of cooperative federalism. As the Chief Justice noted:

The Province’s real objection appears to be that a law which presents a double aspect, and which is valid in its provincial aspect, should not have its application cut down merely because it impairs the core of a federal competence. Why, the Province asks, should a valid provincial law not apply, simply because Parliament has duplicative authority under the *Constitution Act, 1867*? If Parliament wants to prevent the impact, let it enact positive legislation creating an operative conflict and rely on the doctrine of federal paramountcy.<sup>182</sup>

This line of reasoning, however, “misapprehends the doctrine of interjurisdictional immunity” because it fails to appreciate that “it serves to protect the immunized core of federal power from *any* provincial impairment.”<sup>183</sup> Put differently, the argument is “a challenge to the very existence of the doctrine of interjurisdictional immunity.”<sup>184</sup>

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paramountcy deals with the way in which that power is *exercised*”: *COPA*, *supra*, note 5, at para. 62 (emphasis in original).

<sup>179</sup> *Western Bank*, *supra*, note 167, at para. 35 (internal quotation marks removed).

<sup>180</sup> *Lacombe*, *supra*, note 5, at para. 110.

<sup>181</sup> *Western Bank*, *supra*, note 167, at para. 48 (emphasis added).

<sup>182</sup> *COPA*, *supra*, note 5, at para. 56.

<sup>183</sup> *Id.*, at para. 57 (emphasis added).

<sup>184</sup> *Id.*, at para. 58.

It is clear that Deschamps J.'s understanding of "impairment" entails a higher threshold, which would thus provide greater room for provincial legislation via the double aspect doctrine, tempered by paramountcy. Interestingly, however, in *COPA*, both sides were in agreement that, had the analysis proceeded on the basis of a double aspect, there was no basis to invoke paramountcy: neither side found an operational conflict or a frustration of federal purpose.<sup>185</sup> Indeed, the Chief Justice noted that the federal legislative scheme does *not* disclose "any federal purpose with respect to the location of aerodromes".<sup>186</sup> That concession was clearly frustrating for Deschamps J., who noted that "[t]here is something fundamentally incoherent in the interpretation of the rules of our federalist system if a municipality is unable to establish reasonable limits to ensure that uses of its territory are compatible with one another where ... there is no inconsistency with federal legislation."<sup>187</sup>

Though *Western Bank* can still be understood as discouraging expansion of interjurisdictional immunity into *new* spheres, taking account of the majority view in *Lacombe* and *COPA*, it is clear that interjurisdictional immunity "has not been removed from the federalism analysis".<sup>188</sup> Indeed, in situations like this one, where there is a long line of precedent applying the doctrine in a particular context, a majority of justices on the McLachlin Court will not entertain revisiting its applicability in favour of a transition to the double aspect doctrine and federal paramountcy. "In this way", the Chief Justice noted, "[the Court] balances the need for intergovernmental flexibility with the need for predictable results in areas of core federal authority."<sup>189</sup>

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<sup>185</sup> For the reasons of Deschamps J., see *Lacombe*, *supra*, note 5, at paras. 120-129, 169-181; for the Chief Justice's, see *COPA*, *id.*, at paras. 64-74. Justice LeBel, however, found an operational conflict in *Lacombe* and accordingly invoked federal paramountcy: *Lacombe*, at para. 70.

<sup>186</sup> *COPA*, *id.*, at para. 74.

<sup>187</sup> *Lacombe*, *supra*, note 5, at para. 185.

<sup>188</sup> *COPA*, *supra*, note 5, at para. 58.

<sup>189</sup> *Id.*

## 2. Aboriginal Affairs and Labour Relations

(a) *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union; Communications, Energy and Paperworkers Union v. Native Child and Family Services of Toronto*

Both of these cases pick up where *Consolidated Fastfrate*<sup>190</sup> left off a year earlier, with the Court dividing along identical lines (even though all the justices concurred in judgment). The facts in both cases were quite simple: British Columbia and Ontario each established specialized, “culturally appropriate” and “culture-based” child welfare agencies for Aboriginal children.<sup>191</sup> In each case, the federal government collaborated in some form in getting the agency off the ground. Both cases began their path to the Supreme Court when unions sought certification to represent employees.

Justice Abella, writing for a majority of the Court in *NIL/TU,O* (pronounced “NEEL-twa”), observed that “[f]or the last 85 years, this Court has consistently endorsed and applied a distinct legal test for determining the jurisdiction of labour relations on federalism grounds.”<sup>192</sup> That test has been grounded in a presumption that “labour relations are presumptively a provincial matter, and that the federal government has jurisdiction over labour relations only by way of exception.”<sup>193</sup> The concurring opinion, authored by the Chief Justice and Fish J., did not disagree with any of this.<sup>194</sup> The two camps did, however, disagree on the precise articulation of that test. At the risk of oversimplifying, the dispute comes down to four paragraphs authored by Beetz J. some 30 years ago in *Four B*.<sup>195</sup> According to Abella J., *Four B* makes clear that the appropriate test in the labour relations context entails two distinct inquiries. First, a “functional test” must “examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking”.<sup>196</sup> If so, then the entity will be federally regulated. If the first step is inconclusive,

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<sup>190</sup> *Consolidated Fastfrate v. Western Canada Council of Teamsters*, [2009] S.C.J. No. 53, 2009 SCC 53, [2009] 3 S.C.R. 407 (S.C.C.).

<sup>191</sup> *NIL/TU,O*, *supra*, note 5, at para. 5; *Native Child*, *supra*, note 5, at para. 4.

<sup>192</sup> *NIL/TU,O*, *id.*, at para. 3.

<sup>193</sup> *Id.*, at para. 11.

<sup>194</sup> *Id.*, at para. 51.

<sup>195</sup> *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1979] S.C.J. No. 138, [1980] 1 S.C.R. 1031, 102 D.L.R. (3d) 385 (S.C.C.) [hereinafter “*Four B*”].

<sup>196</sup> *NIL/TU,O*, *supra*, note 5, at para. 18.

however, the Court must proceed to the second step: would provincial regulation of the entity's labour relations "impair the core of the federal head of power at issue"?<sup>197</sup> If so, then the entity will be federally regulated. The Chief Justice, however, sees a one-part "functional test" that integrates both questions asked by the majority: Does the undertaking at issue, viewed functionally in terms of its normal and habitual activities, fall within the core of a federal head of power?<sup>198</sup>

Fidelity to precedent aside, both camps disagreed about the merits of a two- versus one-part test. Justice Abella cautioned that collapsing the two steps into a single inquiry "transforms the traditional labour relations test into a different test: the one used for determining whether a statute is 'inapplicable' under the traditional interjurisdictional immunity doctrine".<sup>199</sup> The two-step inquiry, however, "preserves the integrity of the unique labour relations test".<sup>200</sup> One can perhaps infer that such a collapse, at least according to Abella J., would have the effect of locating an impairment of a federal power more often, especially under the test sanctioned in *Lacombe* and *COPA*. She stressed that "[t]he difference between these two approaches is significant," offering two reasons.<sup>201</sup> First, the core of a federal head of power "might not capture the scope or potential reach of federal legislative jurisdiction".<sup>202</sup> Second, "it is possible for an entity to be federally regulated in part and provincially regulated in part."<sup>203</sup> No further explanation was provided.

In contrast, the Chief Justice and Fish J., stressed that "the essence of the functional test ... is whether the function falls within the core of a federal power."<sup>204</sup> The two-stage test proposed by Abella J., however, would mean that labour jurisdiction would be determined in many cases before consideration of the relevant federal power is reached. Such an approach "hollows out the functional test" such that if the "normal activities *look provincial* on their face, it would not need to go

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*, at paras. 56-60.

<sup>199</sup> *Id.*, at para. 20.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*, at para. 22.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*, at para. 59.

further”.<sup>205</sup> Excluding explicit consideration of the federal power in the first stage of the test “would negate the federal power”.<sup>206</sup>

Though both opinions reached identical conclusions in these cases — that there was no federal jurisdiction — the real significance of the distinction between their respective approaches is likely more palpable in spheres outside the Aboriginal context. Here, the Chief Justice and Fish J. accepted that the scope of the federal power over Indians in section 91(24) is “admittedly narrow”.<sup>207</sup> As a result, it was difficult to see the core of that federal power impaired on these facts. However, in the context of a different federal power — aeronautics comes to mind — that may not be the case.

### 3. Criminal Law and Health

#### (a) *Reference re Assisted Human Reproduction Act*

After a victory for the federal Attorney General in *Lacombe* and *COPA* and a victory for provincial attorneys general in *NIL/TU,O* and *Native Child*, the Court split the baby with the *AHRA Reference*, the most significant of the five federalism cases decided in 2010. The decision, the text of which exceeded 35,000 words, is the epitome of the federalism fracture within the McLachlin Court: four justices, led by the Chief Justice, sided with the federal government position; four, led by LeBel and Deschamps JJ., sided with the provincial government, and one, Cromwell J., uncomfortably concurred in part with both camps.

The *Assisted Human Reproduction Act*,<sup>208</sup> the law in question, has a long and complicated history. In short, 10 years after a royal commission made its recommendations and following five failed attempts, Parliament passed the law in 2004. The Act contains a regulatory scheme — divided into “prohibited activities” and “controlled activities” — plus supporting provisions designed to administer and enforce the scheme. At the Supreme Court, the manner in which the case was presented focused the issue specifically on the federal criminal law power. Quebec, which initiated the case with a reference to its court of appeal, did not challenge the constitutionality of the prohibited activities, which it accepted as

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<sup>205</sup> *Id.* (emphasis in original).

<sup>206</sup> *Id.*, at para. 60.

<sup>207</sup> *Id.*, at para. 73.

<sup>208</sup> S.C. 2004, c. 20.

valid under the criminal law power, and instead focused solely on the controlled activities and the supporting regime. The federal government chose to defend the law exclusively under section 91(27). In other words, there was a clear contest of two powers: the federal criminal law power under section 91(27), on the one hand, and the provincial jurisdiction over civil rights and local matters under sections 92(13) and 92(16), on the other.

The two camps at the Supreme Court were divided on both the controlled activities and the supporting regime. The Chief Justice, joined by Binnie, Fish and Charron JJ., concluded that the controlled activities, in pith and substance, were valid under the criminal law power and that the supporting regime was valid under the ancillary powers doctrine. Justices LeBel and Deschamps, joined by Abella and Rothstein JJ., disagreed on both counts. The disagreement between the two groups is notable less for the substantive holding than the markedly different jurisprudential approaches to determining the law's validity. Once that difference is understood, the bases for the actual determinations of each group flow easily. Justice Cromwell, the most junior justice on the bench, disagreed with *both* camps on their approaches. After charting his own path, however, he ultimately agreed with parts of the substantive holding in each plurality opinion, thus achieving an uneasy middle ground.

The essential question in *AHRA Reference* was stated with characteristic clarity by the Chief Justice:

The issue is as follows: Is the *Assisted Human Reproduction Act* properly characterized as legislation to curtail practices that may contravene morality, create public health evils or put the security of individuals at risk, as the Attorney General of Canada contends? Or should it be characterized as legislation to promote positive medical practices associated with assisted reproduction, as the Attorney General of Quebec contends? In pith and substance, what is this legislation about? Controlling and curtailing the negative impacts associated with artificial human reproduction? Or establishing salutary rules to govern the practice of medicine and research in this emerging field?<sup>209</sup>

The Chief Justice concluded it would be inappropriate to consider the pith and substance of each impugned provision at the beginning of the analysis, as she conceded is usually the Court's practice. Instead, it would be more appropriate to consider the scheme as a whole because

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<sup>209</sup> *AHRA Reference*, *supra*, note 5, at para. 21.

Quebec was challenging “almost all” of the provisions in the Act. “Under these circumstances, it is impossible to meaningfully consider the provisions at issue without first considering the nature of the whole scheme,” she reasoned.<sup>210</sup> Justices LeBel and Deschamps took exception with this approach, because “the purposes and effects of a statute’s many provisions can be different,” and, accordingly, “it is important to consider the impugned provisions separately before considering their connection with the other provisions of the statute.”<sup>211</sup> Justices LeBel and Deschamps criticized the Chief Justice for departing from the approach adopted in *General Motors*,<sup>212</sup> which they said was “grounded in logic”.<sup>213</sup>

Having gone down the path of assessing the Act as a whole, the Chief Justice concluded, principally on the basis of its text alone, that its purpose was “prohibiting reprehensible conduct by imposing sanctions”.<sup>214</sup> The Act “is essentially a series of prohibitions, followed by a set of subsidiary provisions for their administration”.<sup>215</sup> Crucially, this finding impacted the rest of her analysis as she did not see a purposive distinction between the controlled activities and the prohibited activities to the extent they formed part of a coherent whole. Indeed, she reasoned, the controlled activities share the *same* purpose as the prohibited activities, namely to discourage reprehensible conduct: “[T]hey prohibit conduct, subject to exceptions for practices that Parliament does not consider to be harmful.”<sup>216</sup>

Justices LeBel and Deschamps, however, cast their gaze more broadly in assessing the overall scheme of the Act.<sup>217</sup> Relying on “the legislative history, from the nature of the activities and from how they are presented in the *AHR Act*”, they concluded the distinction between

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<sup>210</sup> *Id.*, at para. 17.

<sup>211</sup> *Id.*, at para. 194.

<sup>212</sup> *General Motors of Canada Ltd. v. City National Leasing*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.) [hereinafter “*General Motors*”].

<sup>213</sup> *AHRA Reference*, *supra*, note 5. In fairness to the Chief Justice, however, *General Motors* seems to leave room for her approach in circumstances akin to that in the instant case. See *General Motors, id.*, at paras. 41-43.

<sup>214</sup> *AHRA Reference, id.*, at para. 25.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*, at para. 26.

<sup>217</sup> The justices’ reliance on the report of the royal commission was criticized by the Chief Justice, who observed that the commission “was writing a policy analysis (not a constitutional law paper) ...”: *id.*, at para. 29. Justices LeBel and Deschamps responded, however, that the Chief Justice’s “approach is contrary to the usual approach to constitutional analysis”, which “gives considerable weight to the legislative facts”: at para. 177.

prohibited and controlled activities expressed a “dichotomy between dangerous activities and activities that benefit society”, respectively.<sup>218</sup> In the latter case, though “Parliament clearly took into account the concerns expressed about the ethical and moral aspects and the safety of assisted reproductive activities,” it concluded that the activities were “morally and socially acceptable”.<sup>219</sup> In other words, while the Chief Justice saw a coherent scheme whose purpose was to prohibit *reprehensible* conduct, LeBel and Deschamps JJ. saw two schemes, one intended to prohibit such conduct and another to facilitate and regulate other *beneficial* conduct. The pith and substance of the latter group was “the regulation of assisted human reproduction as a health service”.<sup>220</sup>

It is reasonably clear what the debate here is about. For LeBel and Deschamps JJ., “vague characterizations of the pith and substance of provisions” may well lead “not only to the dilution of and confusion with respect to the constitutional doctrines that have been developed over the years, but also to an erosion of the scope of provincial powers as a result of the federal paramountcy doctrine”.<sup>221</sup> Put simply, a broader perspective runs the risk of undermining provincial powers. The Chief Justice is alive to this criticism, which she paraphrased as the imposition of “national medical standards under the guise of criminal law”, but she dismisses it.<sup>222</sup> This critical view, the Chief Justice reasoned, “rests on an artificial dichotomy between reprehensible conduct and beneficial practices,” which leads — incorrectly — to a finding of two distinct purposes where there is only one.<sup>223</sup> Though she acknowledged that the Act will have beneficial effects — “one hopes all criminal laws will have beneficial effects” — and that it may impact provincial matters, “neither its dominant purpose nor its dominant effect is to set up a regime to regulate and promote the benefits of artificial reproduction in hospitals and laboratories.”<sup>224</sup> At bottom, “it is open to Parliament to create regulatory schemes under the criminal law power, provided they further the law’s criminal law purpose.”<sup>225</sup>

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<sup>218</sup> *Id.*, at paras. 176-177.

<sup>219</sup> *Id.*, at paras. 168-169.

<sup>220</sup> *Id.*, at para. 227.

<sup>221</sup> *Id.*, at para. 190.

<sup>222</sup> *Id.*, at para. 28.

<sup>223</sup> *Id.*, at para. 30.

<sup>224</sup> *Id.*, at para. 33.

<sup>225</sup> *Id.*, at para. 36.

The debate between the two camps is especially interesting for the weight each places on ensuring morality as a valid criminal law purpose. For the Chief Justice, her colleagues' view threatened "Parliament's power to enact general norms for the whole of Canada to meet the pressing moral concerns raised by the techniques of assisted reproduction".<sup>226</sup> She criticized LeBel and Deschamps JJ. for substituting "a judicial view of what is good and what is bad for the wisdom of Parliament".<sup>227</sup> On the other side, however, LeBel and Deschamps JJ., pointing to the *Margarine Reference*,<sup>228</sup> reasoned that the validity of a criminal law provision presupposes that "that the evil or threat [to be addressed] must be real".<sup>229</sup> Here, however, they found no such threat: "Assisted human reproduction was not then, nor is it now, an evil needing to be suppressed."<sup>230</sup> The bottom line for LeBel and Deschamps JJ. was that "care must be taken not to view every social, economic or scientific issue as a moral problem" because otherwise "the federal criminal law power would in reality have no limits."<sup>231</sup>

The two camps also disagreed in their assessment of the impact on provincial affairs. Justices LeBel and Deschamps pointed to "ample proof of the effect" that the federal regulatory scheme had on "the practice of medicine" in Quebec.<sup>232</sup> For them, "the fact that the impugned provisions have a significant effect on activities that generally fall within the exclusive jurisdiction of the provinces confirms that those provisions represent an overflow of the exercise of the federal criminal law power."<sup>233</sup> That "overflow", combined with lack of a sufficient nexus to suppressing evil, led LeBel and Deschamps JJ. to conclude there was no double aspect.<sup>234</sup> This reasoning, however, was a non-answer to the Chief Justice, because she would have found the provisions valid under the double aspect doctrine. "In holding that the double aspect doctrine does not apply to this field of double occupancy", the Chief Justice wrote,

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<sup>226</sup> *Id.*, at para. 48. The Chief Justice added that "[t]he objects of prohibiting public health evils and promoting security play supporting roles with respect to some provisions": *id.*, at para. 48.

<sup>227</sup> *Id.*, at para. 76.

<sup>228</sup> *Reference re Dairy Industry Act (Canada) S. 5(a)*, [1948] S.C.J. No. 42, [1949] S.C.R. 1 (S.C.C.), aff'd [1950] 4 D.L.R. 689 (P.C.) [hereinafter "*Margarine Reference*"].

<sup>229</sup> *AHRA Reference*, *supra*, note 5, at para. 236.

<sup>230</sup> *Id.*, at para. 251.

<sup>231</sup> *Id.*, at paras. 239-240.

<sup>232</sup> *Id.*, at para. 266.

<sup>233</sup> *Id.*, at para. 267.

<sup>234</sup> *Id.*, at para. 270.

“my colleagues assert a new approach of provincial exclusivity that is supported by neither precedent nor practice.”<sup>235</sup>

After the Chief Justice and LeBel and Deschamps JJ. had collectively taken 282 paragraphs to present their opinions, Cromwell J. appeared on the scene to cast the tie-breaking vote in an opinion that was just 13 paragraphs long. He disagreed with both camps as to the pith and substance of the impugned provisions, holding that they went “far beyond” even what LeBel and Deschamps JJ. had found and, in his view, included “regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction”.<sup>236</sup> On that basis, he agreed that most of the provisions “cannot be characterized as serving any criminal law purpose recognized by the Court’s jurisprudence”.<sup>237</sup> However, he singled out two provisions concerning consent and the age of consent, which he concluded “fall within the traditional boundaries of criminal law”, and a third, which merely “defines the scope” of an uncontested prohibition, as valid.<sup>238</sup> Crucially, Cromwell J. took no view on some of the most contested issues in the plurality opinions, including most notably the place of morality in assessing the validity of a criminal law.

After one of the longest gestation periods in recent memory — nearly 20 months — the unsatisfying result in the *AHRA Reference* is unsurprising. Nonetheless, it underscores the malleability and uncertainty inherent in the tests employed by the Court in its federalism jurisprudence, especially with respect to the section 91(27) federal criminal law power. The case appears to stand for little more than the proposition that one should check-in again in the future for the Court’s take on the limits of the criminal law power. Observers will have that opportunity in *Canada (Attorney General) v. PHS Community Services*.<sup>239</sup>

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<sup>235</sup> *Id.*, at para. 67.

<sup>236</sup> *Id.*, at para. 285.

<sup>237</sup> *Id.*, at para. 287.

<sup>238</sup> *Id.*, at paras. 289-290.

<sup>239</sup> [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.).

## IV. ABORIGINAL RIGHTS CASES

### 1. Treaty Interpretation

#### (a) *Quebec (Attorney General) v. Moses*

The Court's decision in *Moses* represents its first foray into the interpretation of a "modern" First Nations treaty. It proved to be a difficult case for the Court, taking nearly a year after the hearing to be handed down, with the justices split 5-4 along lines reminiscent of the year's federalism cases. The division was largely one of the parties' intentions versus the language of the treaty. Justices LeBel and Deschamps, writing for the minority and focusing on the intentions of the parties, charged that the majority "would now condone a decision by the federal government to unilaterally renege on its own solemn promises".<sup>240</sup> Justice Binnie, writing for the majority and focusing on the text itself, acknowledged this "very serious allegation", but added that he could "find no support whatsoever for this harsh condemnation in the body of the Treaty ...".<sup>241</sup>

At the core of the dispute in this case is the proper interpretation of the *James Bay and Northern Québec Agreement*. The Treaty, signed in 1975 by Canada, Quebec and Aboriginal peoples including the Cree Nation, was an "epic achievement".<sup>242</sup> Broadly speaking, the Treaty was "designed to fulfill obligations assumed by Quebec towards Aboriginal peoples at the time of the transfer of approximately 410,000 square miles of land and lakes from Canada's northern territories to Quebec in 1898 and 1912".<sup>243</sup> The question here was whether a mining project within the territory covered by the Treaty and thus subject to federal scrutiny under the *Fisheries Act*<sup>244</sup> was nevertheless exempted from such review by virtue of the Treaty. All parties agreed that, under the Treaty regime, responsibility for the project's core environmental impact assessment lay with the province. But they also agreed that the federal Fisheries Minister had to issue a permit for the project to proceed under the *Canadian Environmental Assessment Act*.<sup>245</sup> The disagreement thus concerned

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<sup>240</sup> *Moses, supra*, note 6, at para. 58.

<sup>241</sup> *Id.*, at para. 4.

<sup>242</sup> *Id.*, at para. 14.

<sup>243</sup> *Id.*

<sup>244</sup> R.S.C. 1985, c. F-14.

<sup>245</sup> S.C. 1992, c. 37 ("CEAA").

whether the federal minister was entitled to conduct an independent assessment of the project before issuing the permit (Canada's position) or if he had to forgo such an assessment and instead defer to the conclusions reached by the provincial administrator acting under the Treaty regime (Quebec's position). The Cree Nation adopted a middle-ground position, advocating a concurrent federal review within the Treaty regime in order to ensure adequate consultation with the Aboriginal community.

At the Court, both sides agreed that the Treaty was, in fact, a treaty for purposes of section 35 of the *Constitution Act, 1982*. Justice Binnie quickly concluded that there was "no doubt" that the Treaty was "clearly covered" under the provision.<sup>246</sup> The minority engaged in a lengthy analysis on this question — spanning some 25 paragraphs — but arrived at the same conclusion.<sup>247</sup> However, they took a more expansive view of the document as well. The James Bay Treaty, according to LeBel and Deschamps JJ., was also "an intergovernmental agreement between the federal government and the province of Quebec".<sup>248</sup> Such manifestations of modern cooperative federalism have "become increasingly commonplace in Canada".<sup>249</sup> Accordingly, they reasoned, "[t]he status of the Agreement as both a constitutional document that protects rights and a supra-legislative intergovernmental agreement must remain at the forefront of this Court's analysis."<sup>250</sup> The latter conclusion — that the Treaty spoke also to the nature of the federalist relationship — can explain much of the disagreement between the minority and majority.

As for the task of interpretation, Binnie J. began his analysis citing the observation in *Badger*<sup>251</sup> by Cory J. that Aboriginal "[t]reaties are analogous to contracts, albeit of a very solemn and special, public nature."<sup>252</sup> Justice Binnie concluded that the contract analogy is "even more apt in relation to a modern comprehensive treaty whose terms (unlike in 1899) are not constituted by an exchange of verbal promises reduced to writing in a language many of the Aboriginal signatories did not understand".<sup>253</sup> In contrast, "[t]he text of modern comprehensive

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<sup>246</sup> *Moses, supra*, note 6, at para. 15.

<sup>247</sup> *Id.*, at paras. 82-106.

<sup>248</sup> *Id.*, at para. 84.

<sup>249</sup> *Id.*, at para. 85.

<sup>250</sup> *Id.*, at para. 125.

<sup>251</sup> *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771 (S.C.C.) [hereinafter "*Badger*"].

<sup>252</sup> *Moses, supra*, note 6, at para. 7, citing *Badger, id.*, at para. 76 (S.C.C.).

<sup>253</sup> *Moses, id.*

treaties is meticulously negotiated by well-resourced parties.”<sup>254</sup> Justices LeBel and Deschamps, however, were of the view that since the Treaty was covered by section 35, there was no reason to depart from the Court’s traditional interpretive approach. The critical issue was whether the “context in which an agreement was negotiated and signed, not to the date of its signature”, warranted application of the principles used with historic treaties.<sup>255</sup>

Justice Binnie rejected Quebec’s contention that the Treaty was “exhaustive” when it comes to environmental matters in the area.<sup>256</sup> Rather, as he interpreted the language of its provisions, “all federal laws of general application respecting environmental protections apply insofar as they are not inconsistent with the Treaty.”<sup>257</sup> There was no inconsistency, so both procedures “internal” to the treaty and those “external” to it must be followed.<sup>258</sup> Nevertheless, Binnie J. noted that the federal government “must” apply the CEAA procedure in a way that “fully respects” the duty to consult on matters affecting the Cree Nation’s rights under the Treaty.<sup>259</sup>

For LeBel and Deschamps JJ., however, it was clear that the parties intended to streamline and consolidate the environmental assessment process for the James Bay area under the Treaty regime. Most significantly, they observed that, “[i]n light of the constitutional normative hierarchy, the *CEAA* cannot prevail to impose a parallel process in addition to the ones provided for in the Agreement.”<sup>260</sup> To allow an alternative interpretation “would mean that the federal government can unilaterally alter what was intended to be a comprehensive, multilateral scheme”.<sup>261</sup>

It is possible to exaggerate the difference between the majority’s focus on the text of the treaty and the minority’s preference for a more expansive interpretative approach. As the Court’s subsequent decision in *Little Salmon* shows, both sides look to the language of a modern Treaty — even getting into the minutiae — and both sides take into account contextual factors surrounding the special relationship between the Crown and Aboriginal peoples. Indeed, it is perhaps telling that Abella

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*, at para. 114.

<sup>256</sup> *Id.*, at para. 37.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*, at para. 8.

<sup>259</sup> *Id.*, at para. 45.

<sup>260</sup> *Id.*, at para. 141.

<sup>261</sup> *Id.*

and Charron JJ., who joined the minority opinion in *Moses*, joined Binnie J.'s opinion for the majority in *Little Salmon*. It may be then that the divisiveness of *Moses* was fuelled more by the special division-of-powers element that existed in these facts.

## 2. The Duty to Consult

*Rio Tinto* and *Little Salmon* are the fourth and fifth in a recent series of seminal cases to address the Crown's "duty to consult" with Aboriginal peoples.<sup>262</sup> *Rio Tinto* clarifies the Crown's duty to consult in cases where no treaty has been signed but where there are existing historical grievances; *Little Salmon*, building on the approach adopted in *Moses*, speaks to the Crown's obligations in the context of modern-day, legally sophisticated treaty.

### (a) *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*

*Rio Tinto* clarifies what triggers a duty to consult. The facts in this case began in the 1950s, when British Columbia authorized the building of a dam for the production of hydro power. The dam and reservoir altered the water flows to the Nechako River, which the Carrier Sekani First Nations have historically used for fishing and sustenance. Construction of the dam occurred without consulting with the First Nation. Recently, British Columbia sought approval of a contract for the sale of excess power from the dam. The question was whether the B.C. Utilities Commission was required to consider the issue of consultation with the First Nation in determining whether the sale is in the public interest.

The Chief Justice, writing for a unanimous Court, explained that the test from *Haida Nation*, the Court's seminal case on the duty to consult, can be broken down into three elements: first, the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; second, the contemplated Crown conduct; and third, the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. Only the third element was at issue in *Rio Tinto*. Here, "[t]he claimant

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<sup>262</sup> See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.).

*must show a causal relationship* between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.”<sup>263</sup>

The Chief Justice rejected a broader notion of the duty to consult, which was urged on her by the First Nation. “The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree,” she observed. “Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages.”<sup>264</sup> In other words, a past wrong *without more* — without an adverse impact — is not enough. The purpose of a duty to consult, she reasoned, is “to prevent damage to Aboriginal claims and rights while claim negotiations are underway.”<sup>265</sup> Without a potential immediate or future adverse impact, however, a past wrong lacks any *causal* connection to the proposed activity, even if it does have a *historical* connection.

(b) *Beckman v. Little Salmon/Carmacks First Nation*

*Little Salmon* was the second case in 2010, after *Moses*, to tackle the interpretation of modern treaties between the Crown and Aboriginal peoples. Here, the question was whether a modern treaty served as a “complete code” governing the relationship between the treaty signatories or whether the constitutional common law, including a duty to consult, affected the terms of the relationship. Over the forceful objection of Deschamps J., the Court concluded the latter, offering further clarity on its earlier decision in *Moses*.

The treaty at issue here was the *Little Salmon/Carmacks First Nation Final Agreement*, which was finalized in 1996 and ratified by members of the First Nation in 1997. It was a “monumental achievement.”<sup>266</sup> The facts concerned an application for judicial review of a decision by the Yukon territorial government to approve the grant of surrendered land to a Yukon resident. The plot bordered on the settlement lands of the Little Salmon/Carmacks Nation. Though no party claimed that Yukon had violated the Treaty, the First Nation contended that the territorial

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<sup>263</sup> *Rio Tinto Alcan*, *supra*, note 6, at para. 45 (emphasis added).

<sup>264</sup> *Id.*, at para. 54.

<sup>265</sup> *Id.*, at para. 48.

<sup>266</sup> *Little Salmon*, *supra*, note 6, at para. 2.

government proceeded without proper consultation. Yukon responded that no consultation was required. The treaty referred to consultation in over 60 different places but a land grant application was not one of them.

Justice Binnie, speaking again for a majority of the Court, reprised the notion from *Moses* that “[u]nlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties.”<sup>267</sup> To put it simply, “[t]he eight pages of generalities in Treaty No. 8 in 1899 is not the equivalent of the 435 pages of the [Little Salmon Treaty] almost a century later.”<sup>268</sup> Because those treaties were typically expressed “in lofty terms of high generality and were often ambiguous”, courts were “obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome”.<sup>269</sup> That imperative does not exist in the same way in the context of modern treaties which were “intended to create some precision around property and governance rights and obligations”.<sup>270</sup> This leads to the crux — and the tension — of *Little Salmon*: “Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, *subject to such constitutional limitations as the honour of the Crown*, the Court should strive to respect their handiwork.”<sup>271</sup>

According to Binnie J., the precise contours of the duty to consult can be shaped by the terms of a modern agreement. Though the Crown can never “contract out of its duty of honourable dealing with Aboriginal people”, upholding the honour of the Crown “may not *always require consultation*”.<sup>272</sup> Justice Binnie allowed that the parties may negotiate a different mechanism which, nevertheless, in the result, upholds the honour of the Crown. At the same time, however, he rejected the proposition that “unless consultation is specifically required by the Treaty it is excluded by negative inference.”<sup>273</sup> Such a view fails to recognize that “consultation works to avoid the indifference and lack of respect that can

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<sup>267</sup> *Id.*, at para. 9.

<sup>268</sup> *Id.*, at para. 52.

<sup>269</sup> *Id.*, at para. 12.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*, at para. 54 (emphasis added).

<sup>272</sup> *Id.*, at paras. 61, 71 (emphasis in original).

<sup>273</sup> *Id.*, at para. 55.

be destructive of the process of reconciliation that the [Treaty] is meant to address.<sup>274</sup>

Justice Deschamps, joined by LeBel J., fervently disagreed. First, she found that the provisions of the Treaty on their face *did* require consultation.<sup>275</sup> Second, and more fundamentally, she took strong objection at the interpretive approach adopted by Binnie J. At bottom, Deschamps J. reasoned that “[t]o add a further duty to consult to these provisions would be to defeat the very purpose of negotiating a treaty.”<sup>276</sup> According to Deschamps J., “[h]aving laboured so hard, in their common interest, to substitute a well-defined legal system for an uncertain normative system, both the Aboriginal party and the Crown party have an interest in seeing their efforts bear fruit.”<sup>277</sup> The majority’s approach, she said, undermined that effort. To allow one party “to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation.”<sup>278</sup> In contrast, to give “full effect” to the provisions of the Treaty “is to renounce a paternalistic approach to relations with Aboriginal peoples” and “to recognize that Aboriginal peoples have full legal capacity.”<sup>279</sup>

On the facts here, having found that a duty to consult existed, Binnie J. looked to the terms of the treaty itself to determine the scope of that duty on the basis that “it is a useful indication of what the parties themselves considered fair.”<sup>280</sup> He concluded that the negotiated definition was “reasonable statement” of the duty at the “lower end of the spectrum” established in *Haida Nation*.<sup>281</sup> He concluded that the record established the duty had been fulfilled.<sup>282</sup> Justice Deschamps reached a similar conclusion, but based on the duty as she understood it, also noting that “in some respects they were consulted to an even greater extent” than the Treaty required.<sup>283</sup>

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<sup>274</sup> *Id.* (internal quotation marks omitted).

<sup>275</sup> *Id.*, at para. 92.

<sup>276</sup> *Id.*, at para. 91.

<sup>277</sup> *Id.*, at para. 112.

<sup>278</sup> *Id.*, at para. 107.

<sup>279</sup> *Id.*, at para. 203.

<sup>280</sup> *Id.*, at para. 75.

<sup>281</sup> *Id.*

<sup>282</sup> See *id.*, at paras. 76-80.

<sup>283</sup> *Id.*, at para. 200.

*Little Salmon*, taken together with *Moses*, thus suggests that while modern treaties are different, they are not *so* different such that the core principles that have animated Aboriginal treaty interpretation are no longer relevant. Specificity and precision, it seems, will be rewarded with judicial deference, provided they do not undermine the honour of the Crown. But where a treaty is silent, echoes of the constitutional common law will be heard.

## V. VOTING PATTERNS

Only 56 per cent of constitutional cases in 2010 (14 of 25 cases) were unanimous in judgment, in contrast to the overall average for the year of 75 per cent.<sup>284</sup> Indeed, constitutional cases made up the majority of divided cases (11 of 17). Among the divided constitutional cases,<sup>285</sup> Cromwell J., the Court's most junior justice, boasts a remarkable record of not having dissented a single time in 2010.<sup>286</sup> He was followed by the Chief Justice and Rothstein J., who agreed with the Court's judgment in 90 per cent of the split constitutional cases. Justices Binnie and Charron made up the remainder of that contingent, joining the majority or concurring in judgment in 80 per cent of such cases. On the other end of the spectrum, LeBel and Abella JJ. found themselves in dissent in 56 per cent of all non-unanimous constitutional cases. Justice Deschamps dissented 44 per cent of the time in such cases and Fish J. dissented in 40 per cent of such cases.

Notably, dissenting judgments were present in each of the Charter,<sup>287</sup> federalism,<sup>288</sup> and Aboriginal<sup>289</sup> categories. Unlike past years, however,

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<sup>284</sup> Even among the 14 cases that were unanimous in judgment, however, the Court sometimes released multiple opinions, some of which diverged significantly from one another in their reasoning. See *Willier*, *supra*, note 4; *NIL/TUO*, *supra*, note 5; *Native Child*, *supra*, note 5, and *Little Salmon*, *supra*, note 6. For the avoidance of doubt, a split or non-unanimous constitutional case is one where at least one justice dissented from the Court's *ultimate holding*.

<sup>285</sup> The 11 split cases in 2010 were: *Morelli*, *supra*, note 4; *National Post*, *supra*, note 4; *Moses*, *supra*, note 6; *Torstar*, *supra*, note 4; *Cornell*, *supra*, note 4; *Sinclair*, *supra*, note 4; *McCrimmon*, *supra*, note 4; *Lacombe*, *supra*, note 5; *COPA*, *supra*, note 5; *Gomboc*, *supra*, note 4; and *AHRA Reference*, *supra*, note 5. *AHRA Reference*, however, is excluded from the following calculations because all the justices, save for Cromwell J., both dissented in part and concurred in part. Also, where a justice did not participate in a particular case, it is excluded from their individual calculation.

<sup>286</sup> Indeed, Cromwell J. did not dissent in a single case in 2010, constitutional or otherwise.

<sup>287</sup> Thirty-five per cent (6 of 17) Charter cases were split: *Morelli*; *National Post*; *Torstar*; *Cornell*; *Sinclair*; *McCrimmon*; and *Gomboc* (all *supra*, note 4).

the justices were more likely to be unanimous in Charter cases than in constitutional cases as a whole, with split decisions amounting to only 35 per cent of Charter cases. Among those split Charter cases, however, the dissent — with just a single exception — favoured the Charter claimant over the government.<sup>290</sup>

### 1. Trends in Charter Cases

Last year, all the justices continued a trend started in 2007: The Chief Justice and Binnie, LeBel, Fish and Abella JJ. have only registered dissenting votes in Charter cases in favour of the rights claimant, while Deschamps, Charron and Rothstein JJ. have only cast dissenting votes in favour of the government. Justice Cromwell has not cast any dissenting votes.

In the seven non-unanimous Charter cases decided in 2010,<sup>291</sup> Deschamps, Charron, Rothstein and Cromwell JJ. consistently registered votes supporting the government. In contrast, Abella J. consistently supported the Charter claimant (with the exception of her vote in *Gomboc*). Among the remaining justices, Binnie and LeBel JJ. registered an almost equal number of votes supporting each of the government and the claimant, while the Chief Justice tended to favour the government and Fish J. tended to favour the claimant.

### 2. Trends in Federalism Cases

A trio composed of the Chief Justice and Binnie and Fish JJ. evidenced a strong federalist leaning in all five federalism cases decided in 2010. Even in cases that were unanimous in judgment, the three justices crafted their own opinions. On the other end of the spectrum, Deschamps J. drafted or joined opinions that had a firm orientation in favour of provincial jurisdiction. Justice LeBel was a close second in that regard, voting with Deschamps J. in all cases except *Lacombe*. In the middle, Abella, Charron, Rothstein, Cromwell JJ. were the swing block, voting

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<sup>288</sup> Three of five federalism cases were split: *Lacombe*; *COPA*; and *AHRA Reference* (all *supra*, note 5).

<sup>289</sup> One of three Aboriginal cases was split: *Moses*.

<sup>290</sup> *Morelli*, *supra*, note 4, a s. 8 case, was the sole exception.

<sup>291</sup> *Morelli*; *National Post*; *Torstar*; *Cornell*; *Sinclair*; *McCrimmon*; and *Gomboc*, all *supra*, note 4.

with the majority in all the federalism cases except the *AHRA Reference* (where, of course, Cromwell J. was essentially a majority of one).

### 3. Trends in Aboriginal Rights Cases

With only three cases in 2010, there is not much to analyze here. In *Moses*, however, which had a clear federalism overlay, the usual split in the Court re-emerged, but for the fact that Abella and Charron JJ. were not in the majority. As with the federalism cases, however, the three Aboriginal rights cases confirm the firm differences in jurisprudential approach between the Chief Justice and Binnie J., on the one hand, and LeBel and Deschamps JJ. on the other.

## VI. CONCLUSION

With 25 cases handed down, many of them highly significant, 2010 was an important year on the constitutional front. Especially in the Charter arena, the Court sees itself as a policymaker and appears to be comfortable in that role. It has adopted a cautious, pragmatic approach to Charter analysis, eschewing categorical rules in favour of case-by-case balancing tests that afford it greater flexibility. Looking to the future, the surprise retirements of Binnie J., who could have stayed on the Court for another three years, and Charron J., who could have served for another 15 years, present the government with a significant opportunity to influence the direction of the Court. With these retirements, four justices, including Rothstein and Cromwell JJ., both of whom are among those most consistently in the majority, will have been appointed by the present government. Notably, Rothstein and Cromwell JJ. agreed with each other in 96 per cent of constitutional cases decided in 2010.<sup>292</sup> No two justices had a higher agreement ratio, though Charron J. came close, agreeing with each of Rothstein J. and Cromwell J. in 92 per cent of last year's constitutional cases. In contrast, the relatively more liberal Binnie J. joined with Rothstein and Cromwell JJ. only 63 per cent and 67 per cent of the time, respectively, in large part because he parted company with

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<sup>292</sup> Justices Rothstein and Cromwell parted ways only in the *AHRA Reference*, *supra*, note 5. For purposes of this and the following calculations, two justices are understood to have agreed with each other only if they joined the same opinion in a given case; cases where only one member of the pair participated in the decision are excluded from the calculation.

his colleagues on multiple Charter cases. This result suggests that, at least with respect to constitutional cases, the retirement of Binnie J. may be felt more acutely if the jurisprudential disposition of the government's two new appointees is comparable to that of its two sitting appointees. Looking further ahead, however, the approaching retirements of LeBel and Fish JJ., who are among the most liberal justices on the court and who must retire by 2014,<sup>293</sup> will present the government with another significant opportunity to shape the direction of the Court's jurisprudence in years to come.

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<sup>293</sup> Justice LeBel agreed with Rothstein and Cromwell JJ. in only 57 per cent and 54 per cent of constitutional cases, respectively. However, owing to his agreement with them on certain federalism cases, Fish J. had a higher agreement ratio with Rothstein and Cromwell JJ. — 63 per cent and 67 per cent, respectively — though he frequently parted ways with them in Charter cases.

