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Constitutional Cases 2011: An Overview

Patrick Monahan* and Chanakya Sethi**

I. INTRODUCTION

This special volume of the Supreme Court Law Review, which consists of papers presented at Osgoode Hall Law School's 15th Annual Constitutional Cases Conference held on May 4-5, 2012, examines the constitutional decisions of the Supreme Court of Canada released in the calendar year 2011.¹ It was an important year for the Court: Two cases, *PHS*² and the *Securities Reference*,³ are especially noteworthy, not just for their political significance, but their likely impact on constitutional jurisprudence in years to come. Several other decisions concerning freedom of association, equality rights and Aboriginal rights also reflected important developments in their respective areas, and in one case underscored deep divisions on the Court. In total, the Court handed down 71 judgments last year, a number broadly in line with its recent practice.⁴ After a sharp uptick in their number last year, however, the number of constitutional cases fell in 2011 to 27 per cent (19 of the 71 decisions).⁵ A large majority of the constitutional cases (16 of 19 cases) concerned *Canadian Charter of Rights and Freedoms* rights.⁶ There was

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

² *Infra*, note 6.

³ *Infra*, note 7.

⁴ The Court decided 69 cases in 2010, 70 cases in 2009 and 74 in 2008; its 10-year average is 77. Supreme Court of Canada, *Bulletin of Proceedings: Special Edition, Statistics 2001-2011*, online: <<http://www.scc-csc.gc.ca/stat/html/index-eng.asp>> [hereinafter "*Statistics Bulletin*"].

⁵ Since 2007, constitutional cases have ranged from a low of 16 per cent in 2007 (12 of 74 cases) to a high of 36 per cent in 2010 (25 of 69 cases).

⁶ *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, [2011] 1 S.C.R. 19 (S.C.C.) [hereinafter "*CBC No. 1*"]; *Canadian Broadcasting Corp. v. R.*, [2011] S.C.J.

a trio of cases with federalism questions,⁷ and a single Aboriginal rights case.⁸ Notably, 2011 was a year of unusual unanimity on the Court in the constitutional area: the justices agreed in all but four constitutional cases, or 78 per cent of the time, slightly above the 75 per cent unanimity rate overall in the appeal judgments issued in 2011.⁹

II. CHARTER CASES

The Court found for Charter claimants in 18 per cent of cases where there was a specific constitutional claim (2 of 11 cases).¹⁰ The Court dismissed the claim in each of the remaining nine cases.¹¹ Although the sample size is small, this success rate is below the McLachlin Court's average of 41 per cent for Charter claims over the past decade (68 out of 167 such cases, including the 2011 cases). Five of the cases discussed in this section are not included in the above figures as there was no specific

No. 3, [2011] 1 S.C.R. 65 (S.C.C.) [hereinafter "CBC No. 2"]; *R. v. Ahmad*, [2011] S.C.J. No. 6, [2011] 1 S.C.R. 110 (S.C.C.) [hereinafter "Ahmad"]; *Bou Malhab v. Diffusion Métromédia CMR Inc.*, [2011] S.C.J. No. 9, [2011] 1 S.C.R. 214 (S.C.C.) [hereinafter "Malhab"]; *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, [2011] 1 S.C.R. 396 (S.C.C.) [hereinafter "Withler"]; *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 (S.C.C.) [hereinafter "Fraser"]; *R. v. Loewen*, [2011] S.C.J. No. 100, [2011] 2 S.C.R. 167 (S.C.C.) [hereinafter "Loewen"]; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] S.C.J. No. 25, [2011] 2 S.C.R. 306 (S.C.C.) [hereinafter "Information Commissioner"]; *R. v. Campbell*, [2011] S.C.J. No. 32, [2011] 2 S.C.R. 549 (S.C.C.) [hereinafter "Campbell"]; *R. v. Nixon*, [2011] S.C.J. No. 34, [2011] 2 S.C.R. 566 (S.C.C.) [hereinafter "Nixon"]; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] S.C.J. No. 37, [2011] 2 S.C.R. 670 (S.C.C.) [hereinafter "Cunningham"]; *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter "PHS"]; *R. v. Côté*, [2011] S.C.J. No. 46, [2011] 3 S.C.R. 215 (S.C.C.) [hereinafter "Côté"]; *Crookes v. Newton*, [2011] S.C.J. No. 47, [2011] 3 S.C.R. 269 (S.C.C.) [hereinafter "Crookes"]; *R. v. Katigbak*, [2011] S.C.J. No. 48, [2011] 3 S.C.R. 326 (S.C.C.) [hereinafter "Katigbak"]; *R. v. Barros*, [2011] S.C.J. No. 51, [2011] 3 S.C.R. 368 (S.C.C.) [hereinafter "Barros"]. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁷ *PHS, id.*; *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, [2011] S.C.J. No. 60, [2011] 3 S.C.R. 635 (S.C.C.) [hereinafter "Quebec v. Canada"]; *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66, [2011] 3 S.C.R. 837 (S.C.C.) [hereinafter "Securities Reference"]. *PHS* is counted as both a Charter and a federalism case.

⁸ *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] S.C.J. No. 56, 2011 SCC 56, [2011] 3 S.C.R. 535 (S.C.C.) [hereinafter "Lax Kw'alaams"].

⁹ Though it is counted here as a divided case, the justices were unanimous in *Barros, supra*, note 6 on the constitutional issue (the extent of the accused's s. 7 right to full answer and defence as it related to informer privilege) but divided on a separate criminal law question.

¹⁰ See *PHS, supra*, note 6; *Côté, supra*, note 6.

¹¹ See *CBC No. 1*; *CBC No. 2*; *Ahmad*; *Withler*; *Fraser*; *Loewen*; *Campbell*; *Nixon*; and *Cunningham*, all *supra*, note 6.

Charter claim at issue, though Charter values infused the Court's thinking in each case.¹²

1. Freedom of Expression

The last year was a mixed one for section 2(b). Free speech advocates no doubt cheered the Court's continued march away from *Hill* in *Malhab* and *Crookes*, both of which adopted high bars for establishing defamation.¹³ Several other decisions, however, were less sanguine. The CBC cases marked the second and third time in recent years that the media suffered a setback in its attempt for greater access to the courts. In the two remaining cases, *Information Commissioner* and *Katigbak*, both of which concerned issues of statutory interpretation, the Court attempted to strike a balance between expressive rights and countervailing government interests. Of note, four of the six section 2(b) cases included multiple opinions. In other words, with the sole exception of the fractured decision in *Fraser*, those occasions in 2012 where the justices could not coalesce around a single opinion involved section 2(b) issues. As the following discussion illustrates, though certain justices approach freedom of expression in a doctrinally distinctive way, there are also differences between the justices when it comes to the application of long-settled principles.

(a) *Access to Information: Information Commissioner v. Minister of National Defence*

After recognizing a limited right to access government information under section 2(b) two years ago, the Court appears to have drawn a line at requests for information from political actors within government institutions. At its core, the question in *Information Commissioner* hinged on whether certain records, requested almost a decade ago and consisting of agendas, notes and e-mails relating to the activities of the Prime Minister, Minister of National Defence and Minister of Transport, were subject to disclosure under the *Access to Information Act*.¹⁴ The relevant statute made clear that the ministers' *departments* were subject to

¹² See *Malhab*, *Information Commissioner*, *Crookes*, *Katigbak* and *Barros*, all *supra*, note 6.

¹³ See *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.) [hereinafter "*Hill*"].

¹⁴ R.S.C. 1985, c. A-1.

disclosure requirements, but their individual *offices* were not expressly included in the regime. As Charron J. observed, “[t]he question becomes whether Parliament intended to implicitly include ministerial offices within the *Access to Information Act*.”¹⁵ As a matter of statutory interpretation, Charron J. agreed with the lower courts that the answer was, No.¹⁶

The question remained, however, whether ministerial documents were under the “control” of the relevant departments, in which case the Act required disclosure. Here, Charron J. rejected the broader test proposed by the Information Commissioner on the basis that it “would have the effect of extending the reach of the Act into the Minister’s office where ... Parliament has chosen not to go”.¹⁷ Instead, Charron J. favoured a narrower test, adopted by the courts below, while nonetheless insisting that “[t]he Minister’s office does not become a ‘black hole’ as contended.”¹⁸ First, the record must relate to a departmental matter.¹⁹ If it does not, that ends the inquiry. Second, “*all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request”.²⁰ These factors include the substantive content of the record sought, the circumstances in which it was created and the legal relationship between the department and minister’s office. On these facts, the records were found not to be under the control of the relevant departments.²¹

Though Charron J. did mention the Court’s holding in *Criminal Lawyers Assn.* in passing,²² the majority opinion did little to meaningfully engage with the implications of that case insofar as they applied in *Information Commissioner*. By contrast, LeBel J., who joined the holding of the Court but wrote separately, spent much of his concurring opinion emphasizing that “access to information legislation creates and safeguards certain values — transparency, accountability and governance — that are essential to making democracy workable”.²³ With respect to the control test, LeBel J. criticized the majority’s approach for creating “an implied presumption that the public does not have a right of access to

¹⁵ *Information Commissioner*, *supra*, note 6, at para. 26.

¹⁶ *Id.*, at para. 43.

¹⁷ *Id.*, at para. 53.

¹⁸ *Id.*, at para. 54.

¹⁹ *Id.*, at para. 55.

²⁰ *Id.*, at para. 56 (emphasis in original).

²¹ *Id.*, at para. 65.

²² *Id.*, at para. 15. *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 “*Criminal Lawyers’ Assn.*”].

²³ *Id.*, at para. 80.

records in a Minister's office".²⁴ Pointing to *Criminal Lawyers Assn.*, LeBel J. observed that the balance between government accountability and efficient governance "has been struck in access to information legislation by means of a presumption of a right of access — as opposed to a presumption that access should be refused — to all records, subject to exceptions that are specified in the legislation".²⁵ Because "political records" are not explicitly exempt from the Act, LeBel J. noted that *Criminal Lawyers Assn.* requires the Court to conclude that "the right of access can be presumed to apply to political records but that it is subject to any of the statutory exceptions that apply".²⁶ Notwithstanding this approach, LeBel J. accepts the same control test advocated by the majority. As he appears to concede, rather confusingly, "the presumption that the Act applies to Ministers' offices *does not expand the right of access at all*" because a claimant would still need to satisfy the control of the record.²⁷ One might reasonably question, then, the practical significance of the presumption discussion in these two opinions.

(b) *The Open Court Principle: CBC v. Canada; CBC v. R.*

The two companion CBC cases decided in 2011 mark the second and third time in the last two years that media organizations have lost in their battle to gain greater access to the courts system. Echoing her reasons for the majority in *Toronto Star*, Deschamps J. held for a unanimous Court in both cases that freedom of the press must yield "if it has a negative impact on the fair administration of justice".²⁸ Though neither decision dwelled on the point, it appears in both cases the Court was drawing a line between newsgathering at large, which must be robustly protected (at least notionally), and particular newsgathering *techniques*, which may well not deserve such protection.²⁹ That assertion was made recently in *National Post*, where Binnie J. observed that though "[c]hequebook journalism", "long-range microphones" "telephoto lenses" may all be important for journalists, "this is not to say that just because they are

²⁴ *Id.*, at para. 76.

²⁵ *Id.*, at para. 82.

²⁶ *Id.*, at para. 84.

²⁷ *Id.*, at para. 93 (emphasis added).

²⁸ *CBC No. 1, supra*, note 6, at para. 98. *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, 2010 SCC 21, [2010] 1 S.C.R. 721 (S.C.C.).

²⁹ See, e.g., *id.*, at para. 85.

important that news gathering techniques as such are entrenched in the Constitution”³⁰.

In *CBC No. 1*, the media challenged regulations restricting their ability to film, take photographs and conduct interviews in the public areas of courthouses and to broadcast the official audio recordings of court proceedings.³¹ In *CBC No. 2*, they sought to broadcast a video recording tendered in evidence at trial.³² Justice Deschamps had little difficulty acknowledging a *prima facie* section 2(b) infringement, but at the same time stressed the governmental interests on the other side. “The fair administration of justice is necessarily dependent on maintaining order and decorum in and near courtrooms and on protecting the privacy of litigants appearing before the courts, which are measures needed to ensure the serenity of hearings,” Deschamps J. wrote. “There is no question that this objective contributes to maintaining public confidence in the justice system.”³³ The Court seemed especially troubled by evidence that certain journalists in Quebec, where *CBC No. 1* originated, had “climbed onto furniture to take photographs or to film”, “filmed courtroom interiors through glass doors or doors left ajar” and accosted accused persons and their family and friends such that some “had to be escorted by special constables because they were unable to enter or exit courtrooms”.³⁴ In the face of such evidence, “controls on journalistic activities thus facilitate truth finding by not adding to the stress on witnesses who must participate in a process that, for most of them, is already distressing enough”.³⁵ Both cases thus send a clear message that though the Court is committed to the open court principle, the government and judges may restrict the depth of press access.

(c) *Artistic Expression: R. v. Katigbak*

Katigbak was the first constitutional test of the *Criminal Code*'s³⁶ new child pornography provision, a decade after the Court, in *R. v. Sharpe*,³⁷ struck down certain aspects of the existing child pornography

³⁰ *R. v. National Post*, [2010] S.C.J. No. 16, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 38 (S.C.C.).

³¹ *CBC No. 1*, *supra*, note 6, at para. 3.

³² *CBC No. 2*, *supra*, note 6, at para. 1.

³³ *CBC No. 1*, *supra*, note 6, at para. 69.

³⁴ *Id.*, at para. 72.

³⁵ *Id.*, at paras. 73, 89; see also *CBC No. 2*, *supra*, note 6, at para. 19.

³⁶ R.S.C. 1985, c. C-46.

³⁷ [2001] S.C.J. No. 3, 2001 SCC 2, [2001] 1 S.C.R. 45 [hereinafter “*Sharpe*”].

provisions as infringing section 2(b). The revamped defence to charges making, distributing or possessing child pornography created a defence if the accused's impugned act, first, had a legitimate purpose related to the administration of justice or to science, medicine, education or art; and, second, does not pose undue risk of harm to minors. In *Katigbak*, the accused claimed that the reason he was "collecting the materials was to create an artistic exhibition that would present the issue of child exploitation from the perspective of the child".³⁸ The Chief Justice and Charron J., writing for seven justices, concluded that the use of the word "legitimate" required an objective, not subjective, assessment of whether the accused's purpose was related to one of the protected activities.³⁹ They cautioned, however, that "this objective assessment does not involve the court in any assessment of the value of the particular scientific or artistic activity in question".⁴⁰ Invoking *Sharpe*, the Chief Justice and Charron J. noted that "courts are ill-equipped to inquire into whether or not a work is 'good' art or not".⁴¹ The Court split when it came to the second prong of the defence. Drawing on the standard of objective harm laid down in the obscenity context in *R. v. Labaye*,⁴² the majority favoured a case-by-case assessment of "whether the harm is objectively ascertainable and whether the level of the harm poses a *significant* risk to children".⁴³ They rejected a more speech-protective interpretation of the defence favoured by LeBel J. Though he otherwise agreed with the Court, LeBel J., writing for himself and Fish J., asserted that any assessment of "undue risk" must, at least in the case of possession offences, go beyond the "generic harms" associated with such activity to "specific and identifiable risk of harm in the circumstances of the particular case", such as a lack of security and ease of access to the material by others.⁴⁴ To do otherwise "would be to practically eliminate a defence that Parliament decided to leave open to the accused where the purpose of the possession is related to the administration of justice, science, medicine, education or art".⁴⁵

³⁸ *Katigbak*, *supra*, note 6, at para. 2.

³⁹ *Id.*, at para. 60.

⁴⁰ *Id.*, at para. 61.

⁴¹ *Id.*

⁴² [2005] S.C.J. No. 83, 2005 SCC 80, [2005] 3 S.C.R. 728 (S.C.C.).

⁴³ *Katigbak*, *supra*, note 6, at paras. 67, 70 (emphasis in original).

⁴⁴ *Id.*, at paras. 86, 90. This was the position favoured by the Canadian Civil Liberties Association, which intervened in *Katigbak*. One of the authors of this paper assisted with the preparation of the CCLA's argument.

⁴⁵ *Id.*, at para. 87.

(d) *Group Defamation: Bou Malhab v. Diffusion Métromédia*

Malhab, together with *Crookes*, offered the Court its third brush in recent years with the law of defamation. Unlike the recent cases of *WIC Radio* and *Grant*,⁴⁶ the Court in *Malhab* was not concerned with expanding defences to defamation, but with the definition of defamation and, in particular, whether racist comments made about a group can cause a compensable injury amounting to defamation under the Quebec civil code. Over a strong dissent from Abella J., a majority of the Court found that the comments at issue here did not constitute defamation, in part because they were “an extreme, irrational and sensationalist generalization”.⁴⁷ *Malhab* thus decisively continues the trend of a more speech-protective posture at the Court since the days of *Hill*.

The facts here begin with certain racist comments made by a radio host concerning Montreal taxi drivers whose mother tongue is Arabic or Creole:

Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that's French and English? ... I'm not very good at speaking “nigger” ... [T]axis have really become the Third World of public transportation in Montreal ... [M]y suspicion is that the exams, well, they can be bought. You can't have such incompetent people driving taxis, people who know so little about the city, and think that they took actual exams ... Taxi drivers in Montreal are really arrogant, especially the Arabs. They're often rude, you can't be sure at all that they're competent and their cars don't look well maintained.⁴⁸

The plaintiff, a taxi driver whose mother tongue is Arabic, applied to the Quebec Superior Court for authorization to institute a class action for defamation against the host and his employer. He was awarded damages at trial, but the Quebec Court of Appeal reversed.

The bulk of Deschamps J.'s opinion for the majority focuses on interpreting defamation under the Quebec civil code and is thus beyond the scope of this paper, but extensive comments on the section 2(b) interests at play are notable. Though she does invoke *Hill* in stating that it is “essential to do everything possible to safeguard a person's reputation,

⁴⁶ See *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41, 2008 SCC 40, [2008] 2 S.C.R. 420 (S.C.C.) [hereinafter “*WIC Radio*”]; *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.) [hereinafter “*Grant*”].

⁴⁷ *Malhab*, *supra*, note 6, at para. 92.

⁴⁸ *Id.*, at para. 3.

since a tarnished reputation can seldom regain its former lustre”,⁴⁹ the thrust of her opinion makes plain that the reconciliation of reputation and expressive rights does not involve the former trumping the latter. In particular, Deschamps J. observed, pointing to *WIC Radio* and *Grant*, that “[w]hat was an acceptable limit on freedom of expression in the 19th century may no longer be acceptable today.”⁵⁰ She also pointed to decisions by foreign high courts of a shift, noting that “all of these courts are increasingly concerned about protecting freedom of expression”.⁵¹ As a result, “[t]he law of defamation is changing” and “this case must be considered” in that context.⁵²

Ultimately, *Malhab* hinged on whether an “ordinary person” would have found the comments defamatory. Justice Deschamps agreed with the court below that “an ordinary person might have been annoyed by [the host’s] comments but could not have applied the insults, abuse and offensive accusations to each taxi driver personally”.⁵³ In particular, she concluded that “it is implausible that all members would have the specific failings imputed to them by [the host]”.⁵⁴ Indeed, there is “simply nothing rational” about the claim that all of Montreal’s taxi problems could be attributed those whose mother tongue is Arabic or Creole.⁵⁵ Moreover, the “distasteful and provocative language” came from a “known polemicist” who “had a satirical style and tried to sensationalize things”.⁵⁶ As a result, his comments, though “scornful and racist”, because of their context “have very little plausibility from the point of view of the ordinary person”.⁵⁷ Though wrongful, the comments failed to cause injury amounting to defamation.⁵⁸

In her short but forceful dissent, Abella J. placed greater emphasis on the harms she believed such vitriol may engender in society. “Canada’s strength as a multiracial, multicultural and multireligious country flows from its ongoing ability to develop core and transcendent values that help unify the differences,” she wrote. “Sometimes that means tolerating slings and arrows of misunderstanding that will be hurtful. And some-

⁴⁹ *Id.*, at para. 18, citing *Hill*, *supra*, note 13, at para. 108.

⁵⁰ *Id.*, at para. 19.

⁵¹ *Id.*, at para. 21.

⁵² *Id.*

⁵³ *Id.*, at para. 82.

⁵⁴ *Id.*, at para. 86.

⁵⁵ *Id.*, at para. 87.

⁵⁶ *Id.*, at para. 89.

⁵⁷ *Id.*, at paras. 82, 89.

⁵⁸ *Id.*, at para. 91.

times it means drawing a line because tolerating the ‘misunderstanding’ undermines the core of our core values.”⁵⁹ The majority’s approach, Abella J. held, “inappropriately elevates the attributed characteristics of an ordinary person to those of an ordinary third-year law student”, by imputing to them concern about “protecting and preserving the freedoms of thought, belief, opinion and expression as well as the right to safeguard one’s reputation”.⁶⁰ The comments here were “highly stigmatizing remarks” that “deliberately vilif[ied] vulnerable people”.⁶¹ As a result, they “diminish dignity and are an invitation to contempt”.⁶² Quoting from Dickson C.J.C.’s opinion in *Keegstra*, Abella J. noted that should such views “gain some credence ... the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society” is a possibility.⁶³ Accordingly, Abella J. would have awarded damages for defamation.⁶⁴

(e) *Online Defamation: Crookes v. Newton*

In *Crookes*, the Court tackled the question of whether a hyperlink itself constitutes publication of defamatory statements contained in the hyperlinked material, ultimately reaching a highly speech-protective result. Justice Abella, writing for the majority, offered a bright-line rule that “a hyperlink, by itself, should never be seen as ‘publication’ of the content to which it refers”.⁶⁵ Under the traditional common law publication rule, to prove the publication element of defamation a plaintiff need only establish that “the defendant has, *by any act*, conveyed defamatory

⁵⁹ *Id.*, at para. 97.

⁶⁰ *Id.*, at para. 105.

⁶¹ *Id.*, at para. 107.

⁶² *Id.*

⁶³ *Id.*, citing *R. v. Keegstra*, [1996] S.C.J. No. 21, [1996] 1 S.C.R. 458, at 748 (S.C.C.). Justice Abella’s concerns in this regard echo those voiced by Frankfurter J., speaking for a majority of the U.S. Supreme Court, some five decades ago. See *Beauharnais v. Illinois*, 343 U.S. 250, at 258-59 (1952):

[The state] did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.

Whether *Beauharnais* is still good law, however, is doubtful. See *Nuxoll v. Indian Prairie School District*, 523 F.3d 668, at 672 (7th Cir. 2008) (“Although *Beauharnais* ... has never been overruled, no one thinks that the First Amendment would today be interpreted to allow group defamation to be prohibited”).

⁶⁴ *Id.*, at para. 122.

⁶⁵ *Crookes*, *supra*, note 6, at para. 14.

meaning to a single third party who has received it”.⁶⁶ Barring a departure from the traditional approach, a hyperlink would therefore have been captured under the definition of publication. On the facts here, a local politician sued the defendant, the operator of a website advocating free speech on the Internet, on the basis that two of the hyperlinks on his website linked to defamatory material, and that by creating those hyperlinks, the defendant was publishing the defamatory information.

Drawing in part on developments in U.S. law⁶⁷ and on the Court’s own growing embrace of free expression values,⁶⁸ Abella J. concluded that the times required a rule of law that “not only accords with a more sophisticated appreciation of Charter values, but also with the dramatic transformation in the technology of communications”.⁶⁹ Crucially, her conclusion hinged on the view that “[h]yperlinks are, in essence, references.”⁷⁰ In light of this reality, “[s]trict application of the [traditional] publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.”⁷¹ The rule emerging from *Crookes* is that “[m]aking reference to the existence and/or location of content by hyperlink or otherwise, *without more*, is not publication of that content.”⁷² Only where the hyperlinker “actually repeats the defamatory content” should a court find publication by the hyperlinker.⁷³ On the facts here, as the links were presented without repeating any defamatory content, there was no defamation.⁷⁴

Though the Court was unanimous in its holding in *Crookes*, Abella J.’s bright-line rule was not sufficiently nuanced for three of the justices. Justice Deschamps, writing for herself, described Abella J.’s approach as a “blanket exclusion” that “exaggerates the difference between references and other acts of publication” while “treat[ing] all references, from footnotes to hyperlinks, alike”.⁷⁵ In doing so, “it disregards the fact that references vary greatly in how they make defamatory information available to third parties and, consequently, in the harm they can cause to

⁶⁶ *Id.*, at para. 16, citing *McNichol v. Grandy*, [1931] S.C.J. No. 49, [1931] S.C.R. 696, at 699 (S.C.C.) (emphasis in *Crookes*).

⁶⁷ *Id.*, at para. 28.

⁶⁸ *Id.*, at paras. 31-32.

⁶⁹ *Id.*, at para. 33.

⁷⁰ *Id.*, at para. 27.

⁷¹ *Id.*, at para. 36 (emphasis added).

⁷² *Id.*, at para. 42.

⁷³ *Id.*

⁷⁴ *Id.*, at para. 44.

⁷⁵ *Id.*, at para. 58.

people's reputations".⁷⁶ Instead, Deschamps J. counselled "a more nuanced approach" informed by an analysis of multiple factors assessing the "the totality of circumstances".⁷⁷ The Chief Justice and Fish J., writing jointly for themselves, favoured a middle ground: They adopted Abella J.'s opinion "in large part" but cautioned that "the combined text and hyperlink may amount to publication of defamatory material in the hyperlink in some circumstances".⁷⁸ In their view, "a hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to".⁷⁹

2. Freedom of Association

(a) *Collective Bargaining: Ontario v. Fraser*

Having opened Pandora's box four years ago in *Health Services*,⁸⁰ a bare majority of the Court attempted mightily in *Fraser* to contain the fallout while fighting off three competing views. At one end of the spectrum was Rothstein J., who would have overruled the case outright on the basis that it improvidently upset decades of the Court's labour rights jurisprudence. The bulk of the majority's reasons appear to have been drafted in response to his thorough assault on the earlier case. On the other end of the spectrum was Abella J., who sought to embrace the full promise of *Health Services*, in effect, constitutionalizing certain statutory protections that have usually been afforded to workers. The result in *Fraser* is that while *Health Services* still lives, its wings appear to have been significantly clipped. Nonetheless, the sharp division on the Court, combined with the change in its composition since *Fraser* was decided, leave the future of section 2(d) in the workplace context quite uncertain. What is known for sure, however, is that, with at least one case on the right to strike already working its way through the courts, *Fraser* will not be the last word on these issues.⁸¹

⁷⁶ *Id.*

⁷⁷ *Id.*, at paras. 59, 92ff.

⁷⁸ *Id.*, at paras. 46, 48.

⁷⁹ *Id.*, at para. 50.

⁸⁰ *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*Health Services*"].

⁸¹ See *Saskatchewan Federation of Labour v. Saskatchewan*, [2012] S.J. No. 49, 2012 SKQB 62 (Sask. Q.B.) (holding that there is a s. 2(d) right to strike based on the holding in *Fraser*).

The four opinions in *Fraser*,⁸² which at some 50,000 words was the longest decision handed down in 2011, cannot be understood without reference to the Supreme Court's controversial 2007 decision in *Health Services*, which transformed labour rights jurisprudence by overturning three seminal decisions in the area.⁸³ As Deschamps J. observed in her opinion in *Fraser*, that decision "fed expectations, but it also caused some bewilderment".⁸⁴ The facts in *Health Services* concerned a provincial statute that, without prior consultation or negotiation, voided certain collective agreements and precluded collective bargaining on a number of issues and conditions of employment. In striking down that law on the basis of section 2(d), the Court overturned several of its own precedents to find a right "to engage, in association, in collective bargaining on fundamental workplace issues".⁸⁵ Most significantly, the Court held that not only did this mean that workers have freedom "to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals", but also that section 2(d) "imposes *corresponding duties* on government employers to agree to meet and discuss with them".⁸⁶ As one scholar observed, reflecting the consensus on this point, the duty to bargain in *Health Services* is "taken hook, line, and sinker from [a particular North American statutory labour relations model] and the detailed jurisprudence regarding those statutory provisions".⁸⁷ As a result, and notwithstanding

⁸² The Chief Justice and LeBel J., joined by Binnie, Fish and Cromwell JJ., comprised the majority. Justice Rothstein, joined by Charron J., concurred in the result, but would have sought to overturn *Health Services*. Justice Deschamps, writing for herself, concurred in the result and accepted *Health Services*, albeit in a form more constrained than that contemplated by the majority. Justice Abella, writing for herself, dissented.

⁸³ The three decisions, frequently described as the "Labour trilogy", are *Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.); *Public Service Alliance of Canada v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.); and *R.W.D.S.U. v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.).

⁸⁴ *Fraser*, *supra*, note 6, at para. 297. The same point was not lost on others. As one lawyer observed to a roar of laughter during the hearing in *Fraser*, "there is no doubt that [*Health Services*] spawned a growth industry in the academic community and in the legal community". Justice LeBel responded wryly that the decision was a "gift to the legal community".

⁸⁵ *Health Services*, *supra*, note 80, at para. 19.

⁸⁶ *Id.*, at para. 89 (emphasis added).

⁸⁷ Brian Langille, "The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It" (2009) 54 McGill L.J. 177, at 209. See also Jamie Cameron, "The Labour Trilogy's Last Rites: B.C. Health and a Constitutional Right to Strike" (2009-10) 15 C.L.E.L.J. 297; Brian Etherington, "The B.C. Health Services and Support Decision — The Constitutionalization of a Right to Bargain Collectively in Canada: Where Did it Come From and Where Will it Lead?" (2009) Comp. Lab. L. & Pol'y J. 715; Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support Case in Canada and Beyond" (2008) 37 Industrial L.J. 25.

the majority's statement to the contrary,⁸⁸ the general understanding among legal observers was that the Court had begun constitutionalizing certain aspects of the legislative framework governing collective bargaining, all of which are peculiar to the North American "Wagner model",⁸⁹ into a kind of judge-made constitutional labour code.

The impact of *Health Services* was immediate and far-reaching. For example, in enacting a two-year wage freeze for public sector employees in 2010, the Ontario legislature exempted employees who were subject to collective bargaining agreements from the application of the legislation.⁹⁰ Given that 70 per cent of all employees in the broader public sector in Ontario are unionized, restricting a wage freeze to the approximately 250,000 non-unionized employees in the public sector meant that the legislation would have a limited impact in reducing cost pressures on government, at best. The fiscal situation of governments in the wake of the 2008-2009 economic crisis is very different from that prevailing when *Health Services* was decided in 2007, with the need to restrain the growth in public sector compensation emerging as an overriding imperative.⁹¹ It is hardly surprising, therefore, that the holding in *Health Services* would come under immediate and intense scrutiny, since a broad reading and application of the decision could severely constrain the ability of governments to respond effectively to these fiscal challenges.⁹²

Reading *Fraser* offers a study in the two truths of *Health Services*. At one other extreme, Abella J., writing only for herself, concluded that *Health Services* "creat[ed] a completely different jurisprudential universe".⁹³ Like Winkler C.J.O. at the court below, she accepted that *Health Services* required not only a "duty to consult and negotiate in good faith", but also, at least on the facts in *Fraser*, a statutory enforcement mechanism and majoritarian exclusivity, two other labour protections

⁸⁸ *Health Services*, *supra*, note 80, at para. 91 ("the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method").

⁸⁹ See *National Labor Relations Act*, 29 U.S.C. 151-169 (commonly known as the *Wagner Act*, after its principal sponsor in the U.S. Senate).

⁹⁰ *Public Sector Compensation Restraint to Protect Public Services Act, 2010*, S.O. 2010, c.1, Sch. 24, s. 4.

⁹¹ See Commission on the Reform of Ontario's Public Services (D. Drummond, Chair), *Public Services for Ontarians: A Path to Sustainability and Excellence*, February 2012.

⁹² It should be noted, nonetheless, that Ontario, in its arguments before the Court in *Fraser*, did not ask the Court to overturn *Health Services*. Indeed, that Rothstein J. was willing to overrule *Health Services* in the absence of arguments by the parties drew criticism from his colleagues. See *Fraser*, *supra*, note 6, at para. 59, *per* McLachlin C.J.C. and LeBel J., and para. 321, *per* Abella J.

⁹³ *Id.*, at para. 325.

taken right out of the Wagner model.⁹⁴ Similarly, Rothstein J., writing for himself and Charron J., agreed that the conclusion that *Health Services* “constitutionalized prominent features of the Wagner model under s. 2(d) of the *Charter* ... is inescapable”.⁹⁵ However, he found this shift in the Court’s jurisprudence to be deeply misguided on multiple bases and concluded that *Health Services* should be overruled.⁹⁶ In particular, Rothstein J. charged that *Health Services* altered the fundamental conception of section 2(d) by “improperly assign[ing] collective dimensions to an individual right” and “positive obligations to the essentially negative freedom of association”.⁹⁷ The fact that two justices of the Supreme Court of Canada openly advocated overruling a near-unanimous decision of the Court that was less than five years old, and in the absence of argument from counsel to this effect, can only be described as remarkable.⁹⁸

The other members of the Court in *Fraser*, while refusing to accept that *Health Services* should be overruled, nevertheless attempted to narrow or minimize its practical impact. Justice Deschamps, who had been the lone dissenter in *Health Services*, argued that the decision merely represented “a step forward in the recognition of collective activities” and claimed that the decision “does not extend to imposing a duty on employers to bargain in good faith”.⁹⁹ As for the Chief Justice and LeBel J. (the authors of the majority opinion in *Health Services* who managed to secure three other votes and thus a bare majority in *Fraser*), they asserted that *Health Services* never endorsed “a full-blown Wagner system of collective bargaining”.¹⁰⁰ Rather, the decision established only “that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith” — a proposition, they added, that is “hardly radical”.¹⁰¹ The Chief

⁹⁴ *Id.*, at paras. 326, 335.

⁹⁵ *Id.*, at paras. 226-227.

⁹⁶ *Id.*, at para. 275. It should be noted that though Rothstein J. only called for formally overruling *Health Services*, the majority nonetheless concluded that his reasons “impl[y] rejection of *Dunmore* as well, since the two cases rest on the same fundamental logic”. *Id.*, at para. 56.

⁹⁷ *Id.*, at para. 177.

⁹⁸ We note parenthetically that *Health Services* was decided by a panel of seven justices, as there was, at the time of the hearing a vacancy on the Court, which was ultimately filled by Rothstein J. Justice Charron, who was the only justice then on the bench who did not participate in *Health Services*, joined his opinion in *Fraser*. Justice Cromwell, the only other justice to join the Court since *Health Services* was decided, joined the majority opinion.

⁹⁹ *Id.*, at paras. 300, 299.

¹⁰⁰ *Id.*, at paras. 44-45.

¹⁰¹ *Id.*, at paras. 51, 43. The terminology here may be telling in that the words “collective bargaining”, together with their attendant specialized meaning, are no longer used. Indeed, the term

Justice and LeBel J. also emphasized that *Health Services* “unequivocally stated that section 2(d) does not guarantee a particular model of collective bargaining or a particular outcome”.¹⁰²

Their markedly different approaches notwithstanding, with the exception of Abella J., the justices were agreed on the result in *Fraser*. The facts giving rise to the case arose from the Ontario government’s response to the Court’s earlier holding in *Dunmore*, where the Court struck down as unconstitutional a law that excluded agricultural workers from the province’s labour rights regime.¹⁰³ In response, the government enacted a new law, the *Agricultural Employees Protection Act, 2002* (“AEPA”), which did not extend collective bargaining rights to employees and required only that employers consider representations from employee associations “in good faith”.¹⁰⁴ That regime was upheld at trial as being consistent with *Dunmore*, but was struck down at the Ontario Court of Appeal. Notably, that decision was reached in the aftermath of

“collective bargaining” is used only 65 times by the Chief Justice and LeBel J. in *Fraser*, in marked contrast to the 239 times that they used the term in *Health Services*. For those more technically minded and looking to compare apples to apples, the words “collective bargaining” appeared with a frequency of 1.16 per cent in *Health Services* but only 0.49 per cent in *Fraser*. In other words, accounting for length, *Fraser* used the term less than half as much as *Health Services* did.

¹⁰² *Id.*, at para. 45.

¹⁰³ The wisdom of the Court’s choice in *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.) [hereinafter “*Dunmore*”] was openly questioned in *Fraser*. Justice Deschamps, in her concurring opinion, suggested that the issue in *Dunmore* “[a]t its heart was the economic inequality” and that the Court’s response of a “somewhat convoluted framework ... appears to have been an artifice designed to sidestep the limits placed on the recognition of analogous grounds for the purposes of s. 15” (at paras. 315, 318). Owing to its narrow focus on enumerated and analogous grounds within s. 15, the Court in *Dunmore* chose instead to construct an elaborate positive rights architecture for adjudicating claims of under-inclusion in statutory regimes that affect fundamental freedoms under s. 2. Only L’Heureux-Dubé J., writing for herself in *Dunmore*, argued that the occupational status of agricultural workers, in this context, was a “suspect marker of discrimination” and thus an analogous ground under s. 15(1). In *Fraser*, Deschamps J. suggested that “it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under s. 15, as L’Heureux-Dubé J. proposed in *Dunmore*” (at para. 319) rather than reshape the jurisprudence under s. 2. She added, of course, that such a view “would entail a sea change in the interpretation of s. 15” (*id.*). While not going so far as to embrace such a view, the majority in *Fraser* did not rule out the possibility that occupational status could amount to an analogous ground for purposes of s. 15. Instead, the Chief Justice and LeBel J. acknowledged that AEPA provides a “special” scheme for agricultural workers, but that “on the record before us, it has not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage” (at para. 116). Moreover, they left the door open to a future s. 15 challenge.

¹⁰⁴ The “good faith” requirement was not expressly referenced in the legislation itself but was regarded by the majority of the Court as being implied. *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16.

Health Services, and Winkler C.J.O. specifically faulted AEPA for not including other aspects of the Wagner model.¹⁰⁵

The Chief Justice and LeBel J. found that the Court of Appeal's decision "overstate[d] the ambit" of *Health Services* by holding that particular components of the Wagner model were constitutionally required. But they agreed that AEPA had to conform to the standard laid down in *Health Services*, as clarified in *Fraser*: employees are constitutionally entitled to make collective representations and to have their collective representations considered in good faith.¹⁰⁶ Notwithstanding that AEPA was drafted and passed five years *before* the *Health Services* standard was even articulated, in a triumph of imaginative statutory interpretation, they found the law passed constitutional muster. The relevant statutory language is as follows:

5(1) The employer shall give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.

...

(5) The employees' association may make the representations orally or in writing.

(6) The employer shall listen to the representations if made orally, or read them if made in writing.

(7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.

The Chief Justice and LeBel J. found that the requirements in section 5(6) that an employer "listen" or "read" representations, as may be the case, and in section 5(7) that an employer "acknowledge" any written representations "do not expressly refer to a requirement that the employer consider employee representations in good faith".¹⁰⁷ But, they added, "[n]or do they rule it out."¹⁰⁸ Because the language is ambiguous and the Legislature is presumed to enact Charter-compliant legislation,

¹⁰⁵ *Fraser v. Ontario (Attorney General)*, [2008] O.J. No. 4543, 2008 ONCA 760, 92 O.R. (3d) 481, at para. 80 (Ont. C.A.).

¹⁰⁶ *Fraser*, *supra*, note 6, at para. 51.

¹⁰⁷ *Id.*, at para. 101.

¹⁰⁸ *Id.*

the ambiguity had to be resolved in favour of a requirement that the employer consider the representations in good faith.¹⁰⁹ “[C]orrectly interpreted”, AEPA thus “protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer”.¹¹⁰

Noting the extensive criticism that had been levelled at the decision in *Health Services*, the Chief Justice and LeBel J. argued that it was “premature” to conclude that the holding in the case “is unworkable in practice”. This seems a remarkably tepid defence of the decision, and in fact invites future litigants to proffer evidence of the unworkability of the decision in the hopes that it might be overruled. It can be expected that governments will continue to search for ways to limit the growth of compensation costs in the public sector,¹¹¹ thus testing the limits and the scope of *Health Services* in the future.

3. Fundamental Justice

(a) *Security of the Person: Canada v. PHS Community Services Society*

In retrospect, it may have been evident that the federal government would lose its case in *PHS*, arguably the Court’s most significant section 7

¹⁰⁹ *Id.*, at paras. 102-104. It is ironic, in light of the Chief Justice and LeBel J.’s conclusion here, that the trial judge remarked of the same language: “Perhaps unfortunately there is no specific requirement that the employer respond to the substance of the representations; however, it should be noted that this would then involve the parties *in a form of collective bargaining*.” See *Fraser v. Ontario (Attorney General)*, [2006] O.J. No. 45, 79 O.R. (3d) 219, at para. 19 (Ont. S.C.J.) (emphasis added).

¹¹⁰ *Fraser*, *supra*, note 6, at para. 107.

¹¹¹ See the Honourable Dwight Duncan, *Strong Action for Ontario* (Toronto: Queen’s Printer, March 2012) (Ontario Budget 2012). The budget notes (in Chapter I, “Transforming Public Services”):

The government fully expects employers and bargaining agents to reach responsible settlements that are respectful of fiscal realities and also maintain vital public services. Where agreements cannot be reached that are consistent with the government’s plan to eliminate the deficit and protect priority public services, or in the face of significant disruption, *the government is prepared to propose necessary administrative and legislative measures.* (emphasis added)

Acting on that commitment, an emboldened Ontario legislature in September 2012 took steps to freeze the wages of public school teachers. A month later, a teacher’s union took the province to court over the newly enacted law on the basis that it “strips teachers ... of the right to bargain collectively”. Kate Hammer, “Teachers take Ontario government to court over bargaining rights” *The Globe and Mail* (October 11, 2012), online: <<http://www.theglobeandmail.com/news/politics/teachers-take-ontario-government-to-court-over-bargaining-rights/article4601152/>>. See also *Putting Students First Act, 2012*, S.O. 2012, c. 11.

decision in the last five years, from the tenor of questions during oral argument. The justices repeatedly pushed the government's lawyers to explain what benefit would be obtained by shutting down Insite, the nation's first and only safe drug injection facility, but they never got an answer. "Have you got, in this case, anything that tends to demonstrate that this program doesn't work?" LeBel J. asked near the end of one exchange. After a pause, the federal government lawyer replied, "I think that's a fair observation, Justice LeBel," and moved on to his next submission. Less than five months later, the Chief Justice, writing for a unanimous Court, concluded that Insite was an "experiment" that has "proven successful" because it "saved lives and improved health".¹¹² In the Court's view, whatever benefit the state might obtain by maintaining an absolute prohibition on the possession of illegal drugs on Insite's premises was outweighed by the resulting increased risk of death and disease to drug users that would flow from the decision to close the site.¹¹³

The decision in *PHS* is significant for being at once both sweeping and narrow. On the one hand, the Court appears to have blessed a robust role, grounded in section 7, for judicial scrutiny of government policy not seen since *Chaoulli*.¹¹⁴ On the other hand, by stressing how crucial the particular facts of this case were, the Court suggests reluctance on the part of at least some members to wield this power very frequently. Though *PHS* is already having an impact in the courts, as we discuss below, its fuller ramifications will not be apparent for some time.

Insite is located in the Downtown East Side of Vancouver ("DTES"), a neighbourhood that the Chief Justice described as "crippled by disability and addiction", where the "living conditions ... would shock many Canadians".¹¹⁵ In an unusually detailed summary of the facts, she also pointed out that the DTES population includes some 4,600 drug users, almost half of the city's total, and that passers-by in the neighbourhood would observe "addicts tie rubber bands around their arms to find veins in which to inject heroin and cocaine, or smoke crack from glass pipes".¹¹⁶ It was in this context that, in 2003, after years of "research, planning, and intergovernmental cooperation", local, provincial and

¹¹² *PHS*, *supra*, note 6, at para. 19.

¹¹³ *Id.*, at para. 136.

¹¹⁴ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35, [2005] 1 S.C.R. 791, at paras. 131-132 (S.C.C.) [hereinafter "*Chaoulli*"].

¹¹⁵ *Id.*, at para. 8.

¹¹⁶ *Id.*, at paras. 4-6.

federal authorities established a facility where addicts “could inject drugs under medical supervision without fear of arrest and prosecution”.¹¹⁷ Insite, the Chief Justice stressed, is a “strictly regulated health facility” run by “personnel [who] are guided by strict policies and procedures”.¹¹⁸

The legal framework applicable to Insite implicates both provincial and federal concerns. The provincial interest arises from the provinces’ exclusive power over health services under section 92(7) of the *Constitution Act, 1867*.¹¹⁹ The federal interest arises from Canada’s power over the criminal law under section 91(27). At issue in *PHS* was the scope of the *Controlled Drugs and Substances Act* (“CDSA”),¹²⁰ sections 4 and 5 of which proscribed the possession and trafficking of certain substances, including heroin and cocaine, both of which were being injected by drug users at Insite, under the supervision of medical staff. Crucially, however, section 56 of the CDSA provides relief to the criminal sanctions in sections 4 and 5 if “in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest”. Absent a ministerial exemption, however, drug users and Insite staff were liable to prosecution. In 2003, a three-year exemption was granted and was subsequently extended twice, through June 30, 2008. It was not extended or renewed thereafter. Though left unsaid by the Chief Justice, there was, of course, an important change in federal government between 2003 and 2008, with control of government shifting in 2006 from the Liberals, who had blessed the Insite experiment, to the Conservatives, who had publicly questioned it.

The plaintiffs brought two sets of challenges against Canada. First, they argued that sections 4 and 5 of the CDSA are constitutionally inapplicable to Insite, because as a health facility it is under exclusive provincial control.¹²¹ Second, they asserted that those provisions’ application to Insite violated their constitutional rights under section 7 of the Charter and to that extent are invalid. In the alternative, they sought a declaration that any decision of the federal health minister to refuse to grant or extend the exemption constituted a violation of the individual plaintiffs’ section 7 rights. The plaintiffs succeeded at trial on the second argument, winning a declaration of unconstitutionality, but failed on their

¹¹⁷ *Id.*, at paras. 12, 1.

¹¹⁸ *Id.*, at para. 18.

¹¹⁹ (U.K.), 30 & 31 Vict., c. 3.

¹²⁰ S.C. 1996, c. 19.

¹²¹ For more on this aspect of the case, see the discussion below, under Federalism.

federalism argument. The B.C. Court of Appeal split, with a majority finding for the plaintiffs on both the federalism and Charter claims.

The Chief Justice's opinion for the Court repeatedly underscored how central the trial judge's findings of facts were to the ultimate holding in *PHS*. Indeed, she acknowledged that "[h]is factual findings are key to this appeal."¹²² They included, most significantly, that addiction is an illness; that the use of unsanitary equipment, techniques and procedures for injection of heroin and cocaine, not the injections themselves, cause infections such as HIV and Hepatitis C; and that the risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals.¹²³ The Chief Justice also noted that the trial judge found that since Insite's opening in 2003, the DTES had witnessed "a reduction in the number of people injecting in public", "no evidence of increases in drug-related loitering, drug dealing or petty crime in the area around Insite", and "no changes in rates of crime recorded".¹²⁴ The conclusion was plain: "Insite has saved lives and improved health. And it did those things without increasing the incidence of drug use and crime in the surrounding area."¹²⁵

On the strength of the trial judge's findings of fact, the Chief Justice determined there had been a deprivation under section 7. The prohibition on possession of scheduled substances in section 4 of the CDSA certainly captured the activity of the clients of Insite and potentially captured that of the staff.¹²⁶ Either directly or indirectly, therefore, the clients' section 7 right was triggered: "Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out," the Chief Justice held, adding that "[w]here the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer."¹²⁷

Significantly, however, the Chief Justice did not conclude that the law itself was responsible for any deprivation. Pointing to the ministerial exemption in section 56, she observed that "Parliament has recognized that there are good reasons to allow the use of illegal substances in certain circumstances."¹²⁸ The constitutionality of section 4 could not be

¹²² *PHS*, *supra*, note 6, at para. 27.

¹²³ *Id.*

¹²⁴ *Id.*, at para. 28.

¹²⁵ *Id.*, at para. 19.

¹²⁶ *Id.*, at paras. 90-94.

¹²⁷ *Id.*, at para. 93.

¹²⁸ *Id.*, at para. 20.

determined “without considering the provisions in the Act designed to relieve against unconstitutional or unjust applications of that prohibition”.¹²⁹ The focus of the Chief Justice’s analysis thus shifted to the manner in which the minister’s discretion was exercised, since section 56 “acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects”.¹³⁰ Simply put, the question of whether there is a violation under section 7 hinged on the minister’s actions and, in particular, his decision to deny *Insite* an exemption from section 4.

The Chief Justice assessed the minister’s actions against three principles of fundamental justice: arbitrariness, overbreadth and gross disproportionality. By our reckoning, *PHS* is the first instance where the Court has entertained in a single case an analysis of all three of these principles, which were first articulated in *Rodriguez*, *Heywood* and *Malmo-Levine*, respectively.¹³¹ That the Court has coalesced around these three principles is notable, in part, because they mirror the analysis conducted under the *Oakes* test: arbitrariness equates with rational connection, overbreadth with minimal impairment and gross disproportionality with the proportionality of salutary and deleterious effects. In weighing a section 7 deprivation using these three principles, which essentially mirror the analysis under section 1, the Court also appears to have accepted the necessity of engaging in a balancing of societal and individual interests under section 7 itself, as opposed to doing so exclusively under section 1.¹³²

¹²⁹ *Id.*, at para. 109.

¹³⁰ *Id.*, at para. 113.

¹³¹ See *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.) [hereinafter “*Rodriguez*”]; *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) [hereinafter “*Heywood*”]; *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, 2003 SCC 74, [2003] 3 S.C.R. 571 (S.C.C.) [hereinafter “*Malmo-Levine*”].

¹³² *Cf. Malmo-Levine, id.*, at para. 96 (“We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure ‘strikes the right balance’ between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice”). For another example of balancing under s. 7, see *C. (A.) v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, 2009 SCC 30, [2009] 2 S.C.R. 181, at para. 108 (S.C.C.) [hereinafter “*C. (A.)*”] (“The balance is thus achieved between autonomy and protection, and the provisions are, accordingly, not arbitrary”), at paras. 141-143, McLachlin C.J.C., concurring (“The objective of the statutory scheme is to balance society’s interest in ensuring that children receive necessary medical care on the one hand, with the protection of minors’ autonomy interest to the extent this can be done, on the other. ... The legislative decision to vest treatment authority regarding under-16 minors in the courts is a legitimate response”), at para. 194, Binnie J., dissenting (referring to “the balance that must be struck between the value of autonomy and the need to protect the vulnerable”).

On the facts in *PHS*, the Chief Justice found the minister's decision to be arbitrary and grossly disproportionate. She noted that the minister had been quoted as saying that "the scientific evidence with respect to [Insite's] effectiveness was mixed, but that the 'public policy is clear', and that 'the site itself represents a failure of public policy'".¹³³ Such a view, the Chief Justice concluded, could not be rationally supported in light of the trial judge's findings, which "suggest not only that exempting Insite from the application of the possession prohibition does not undermine the objectives of public health and safety, but furthers them".¹³⁴ Indeed, "Insite saves lives. Its benefits have been proven. There has been no discernable negative impact on the public safety and health objectives of Canada during its eight years of operation."¹³⁵ On that basis, the application of the CDSA to Insite was also "grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics".¹³⁶ Having found the denial of the exemption to be arbitrary and grossly disproportionate, the Chief Justice saw no need in assessing the overbreadth claim.¹³⁷ Unsurprisingly, in light of the earlier discussion of the duplication of section 7 fundamental justice principles and the *Oakes* test, the Chief Justice did not undertake a section 1 analysis because "no s. 1 justification could succeed".¹³⁸ Accordingly, the Court ordered the minister to grant Insite an exemption: "On the facts as found here, there can be only one response: to grant the exemption."¹³⁹ Noting "the special circumstances of this case", the Chief Justice concluded that "an order in the nature of mandamus is warranted" and ordered the minister to grant an exemption to Insite "forthwith".¹⁴⁰

Given the defining role that the concept of arbitrariness, in particular, is playing in the section 7 jurisprudence, it is unfortunate that the Court did not undertake to clarify existing ambiguity about the principle's meaning. The Chief Justice noted that the split in *Chaoulli* remains: In that case, three justices, including the Chief Justice, asked whether a

¹³³ *PHS*, *supra*, note 6, at para. 122.

¹³⁴ *Id.*, at para. 131.

¹³⁵ *Id.*, at para. 133.

¹³⁶ *Id.*

¹³⁷ *Id.*, at para. 134. This is not surprising given how controversial the overbreadth principle has proven in the s. 7 context. The Court appears to have left for another day the task of refining its use.

¹³⁸ *Id.*, at para. 137. *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

¹³⁹ *PHS*, *id.*, at para. 150.

¹⁴⁰ *Id.*

particular deprivation under section 7 was “*necessary*” to further the state’s objective.¹⁴¹ Three other justices, drawing on an earlier approach in *Rodriguez*, instead asked whether a deprivation “bears no relation to, or is *inconsistent* with, the state interest that lies behind the legislation”.¹⁴² *PHS*, regrettably, leaves this debate unresolved on the basis that the deprivation on its facts “qualifies as arbitrary under both definitions”.¹⁴³ As Binnie and LeBel JJ. observed in *Chaoulli*:

To substitute the term “unnecessary” for “inconsistent” is to substantively alter the meaning of the term “arbitrary”. “Inconsistent” means that the law logically contradicts its objectives, whereas “unnecessary” simply means that the objective could be met by other means. It is quite apparent that the latter is a much broader term that involves a policy choice. If a court were to declare unconstitutional every law impacting “security of the person” that the court considers unnecessary, there would be much greater scope for intervention under section 7 than has previously been considered by this Court to be acceptable.¹⁴⁴

At least one lower court has judged it prudent to maintain the “inconsistent” threshold: In *Bedford*, a case concerning a challenge to certain of the *Criminal Code*’s prostitution provisions, the Ontario Court of Appeal chose to adopt the more “conservative test for arbitrariness from *Rodriguez* that requires proof of inconsistency, and not merely a lack of necessity” on the basis that “[u]ntil a clear majority of the Supreme Court holds otherwise, we consider ourselves bound by the majority in *Rodriguez* on this point.”¹⁴⁵

No discussion of *PHS* can conclude without some prognostication about its future impact. For her part, the Chief Justice cautioned that *PHS* is not “a licence for injection drug users to possess drugs wherever and whenever they wish”, nor is it “an invitation for anyone who so chooses to open a facility for drug use under the banner of a ‘safe injection facility’”.¹⁴⁶ The message is clear: The result in *PHS* hinges on the

¹⁴¹ *Chaoulli*, *supra*, note 114, *per* McLachlin C.J.C. and Major J. (emphasis added).

¹⁴² *Id.*, at para. 232, *per* Binnie and LeBel JJ. (emphasis added).

¹⁴³ *PHS*, *supra*, note 6, at para. 132.

¹⁴⁴ *Chaoulli*, *supra*, note 114, at para. 234.

¹⁴⁵ *Canada (Attorney General) v. Bedford*, [2012] O.J. No. 1296, 2012 ONCA 186, at para. 147 (Ont. C.A.) [hereinafter “*Bedford*”].

¹⁴⁶ *PHS*, *supra*, note 6, at para. 140. Even so, calls are already growing for additional safe injection sites around the country. See, e.g., Anna Mehler Paperny, “Ottawa, Toronto resist call for supervised injection sites” *The Globe and Mail* (April 11, 2012), online: <<http://www.theglobeandmail.com/news/national/politics/ottawa-toronto-resist-call-for-supervised-injection-sites/article4099713/>>.

particular facts as found by the trial judge.¹⁴⁷ Should other such cases arise where “the evidence indicates that a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption”.¹⁴⁸

There also remains the question about the future of section 7, not only in light of what most observers expect will be an appeal of *Bedford* to the Supreme Court, but also cases working their way through the courts in British Columbia concerning physician-assisted suicide and the *Criminal Code* prohibition on polygamy.¹⁴⁹ As the Ontario Court of Appeal noted in *Bedford*, the jurisprudence in this area has been “less than clear”.¹⁵⁰ Indeed, *PHS* leaves many unanswered questions about how courts should properly enforce the most enigmatic of the Charter’s protections. What is clear, however, is that *PHS* confirms, and in some ways advances, the Court’s foray into the realm of policymaking. As recognized in *Bedford*, which was the first significant treatment of *PHS* by an appellate court, the constitutional assessments embraced in *PHS* “inevitably draw the court into an assessment of the merits of policy choices made by Parliament as reflected in legislation”.¹⁵¹

(b) *Secret Evidence: R. v. Ahmad*

Ahmad, a case that was a decade in the making, was the first test of the national security amendments to the *Canada Evidence Act*¹⁵² enacted in the aftermath of the September 11, 2001 attacks on the World Trade Center. After they were struck down as an unjustifiable infringement of section 7 at the trial level, the Supreme Court upheld the constitutionality of the entire scheme in an opinion by the Court that emphasized the need for a “practical approach” to interpretation of the amendments, which create a scheme whereby relevant evidence may be withheld from the defence in a criminal proceeding by virtue of national security concerns.¹⁵³

¹⁴⁷ *PHS*, *id.*

¹⁴⁸ *Id.*, at para. 152.

¹⁴⁹ See *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 2012 BCSC 886 (B.C.S.C.) (right to physician-assisted suicide); *Reference re Section 293 of the Criminal Code of Canada (B.C.)*, [2011] B.C.J. No. 2211, 2011 BCSC 1588 (B.C.S.C.) (polygamy).

¹⁵⁰ *Bedford*, *supra*, note 145, at para. 153.

¹⁵¹ *Id.*, at para. 91.

¹⁵² R.S.C. 1985, c. C-5.

¹⁵³ *Ahmad*, *supra*, note 6, at para. 27.

At issue was section 38 of the Act, which provides for a complicated disclosure and notice requirement when a party seeks to disclose sensitive national security information in a legal proceeding. The most novel aspect of the scheme is that a Federal Court judge may order, after weighing several factors, that certain information not be disclosed — even in a criminal proceeding in Superior Court. The challenge in *Ahmad* arose from the case of the so-called “Toronto 18”, who were arrested in June 2006 on the suspicion that they were plotting terrorist attacks.¹⁵⁴ Though over 150,000 records were provided as part of the Crown’s disclosure to the defence, significant redactions were made on the basis of objections raised under section 38. The trial judge held that this non-disclosure violated both section 96 of the *Constitution Act, 1867*, because the Federal Court’s disclosure determinations represented an invasion of the core jurisdiction of superior courts, and section 7 of the Charter, because it infringed the accused’s right to full answer and defence.

The Supreme Court reversed, emphasizing that “Parliament is presumed to have intended to enact legislation in conformity with the *Charter*”.¹⁵⁵ Ultimately, the Court held that

[w]hile the statutory scheme of s. 38, particularly its division of responsibilities between the Federal Court and the criminal courts of the provinces, raises numerous practical and legal difficulties, we are satisfied that s. 38, properly understood and applied, is constitutionally valid.¹⁵⁶

First, the Court dispensed with the section 96 objection. Properly characterized, the concern “is that the criminal courts retain the ability to ensure that every person who comes before them as the subject of a criminal prosecution receives a fundamentally fair trial”.¹⁵⁷ The Act, however, explicitly recognizes that “sometimes the only way to avoid an ‘[un]fair’ trial is to have no trial at all”, and the Act expressly affirms the power of superior courts, in appropriate circumstances, to order a stay of proceedings and to otherwise safeguard the accused’s fair trial rights with other remedies.¹⁵⁸ Second, as for the section 7 challenge, the Court held

¹⁵⁴ The judgment notes that “[t]he suspects were alleged to have conducted terrorist training camps in Ontario, to have amassed weapons, and to have made plans to storm Parliament, where they intended to behead politicians and detonate truck bombs in several locations.” *Id.*, at para. 8.

¹⁵⁵ *Id.*, at para. 28, citing *R. v. Hamilton*, [2005] S.C.J. No. 48, 2005 SCC 47, [2005] 2 S.C.R. 432, at para. 75 (S.C.C.); *Sharpe*, *supra*, note 37, at para. 33.

¹⁵⁶ *Ahmad*, *supra*, note 6, at para. 3.

¹⁵⁷ *Id.*, at para. 65.

¹⁵⁸ *Id.*

that the trial judge “was not deprived of the ability to adjudicate the *Charter* issues that flowed from the non-disclosure order”.¹⁵⁹ Indeed, the Court took the view that Parliament expressly contemplated the “more drastic remedy” of a stay of proceedings and “chose to live with that possibility”.¹⁶⁰ Though the bifurcated scheme does have the potential to give rise to other challenges — such as delays, which will need to be addressed on a case-by-case basis — the scheme as interpreted in *Ahmad* “passes constitutional muster” because “[t]rial unfairness will not be tolerated.”¹⁶¹

What *Ahmad* illustrates is a cautious and pragmatic approach to the interpretation of legislation intended to deal with sensitive national security issues. The Court is clearly reluctant to issue sweeping declarations that could well have unintended consequences, favouring, instead, a case-by-case approach in which trial judges are empowered to ensure trial fairness given the circumstances before them. This practical approach seems appropriate and welcome, given the difficult competing considerations in this area.

(c) *Repudiation of Plea Bargains: R. v. Nixon*

In *Nixon*, a unanimous Court held that the Crown’s decision to repudiate a plea agreement falls squarely within the scope of protected prosecutorial discretion and is subject to judicial scrutiny only for abuse of process.¹⁶² In so holding, the Court firmly rejected the view that a plea bargain is a contract that must be enforced by a Court, while nonetheless cautioning that prosecutors should only resile from their agreements in “very rare” cases.¹⁶³ Justice Charron stressed that prosecutorial discretion does not mean that “plea agreements can be overturned on a whim”.¹⁶⁴ It would appear, however, that the Court understands the binding effect of plea agreements to be protected, generally, not by direct judicial enforcement (absent some abuse of process), but from the practical consideration that defence counsel will only enter into such bargains if they are virtually certain to be honoured by the Crown.¹⁶⁵

¹⁵⁹ *Id.*, at para. 68.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*, at para. 80.

¹⁶² Circumstances amounting to abuse of process justifying judicial intervention would include prosecutorial misconduct, improper motive or bad faith. See *Nixon*, *supra*, note 6, at paras. 68-69.

¹⁶³ *Id.*, at para. 48.

¹⁶⁴ *Id.*, at para. 69.

¹⁶⁵ *Id.*, at para. 47. See also discussion at para. 48.

On the facts in *Nixon*, the accused drove her motor home through an intersection without stopping and struck another vehicle, killing a husband and wife and injuring their young son. Tests showed she was intoxicated. Initially, she was charged with dangerous driving causing death, dangerous driving causing bodily harm and impaired driving, but Crown counsel, worried about the admissibility of certain evidence, agreed to a plea of careless driving and a \$1,800 fine. Due to the sensitive nature of the case, an Assistant Deputy Minister (“ADM”) in the Ministry of the Attorney General was advised of the plea. After obtaining legal opinions about the merits of the prosecution and the ability to repudiate plea agreements, the ADM concluded that Crown counsel’s assessment of the strength of the case was flawed. The ADM further concluded that the plea agreement was contrary to the interests of justice and that it could be repudiated without prejudice to the accused. The decision to repudiate the plea prompted the accused’s Charter challenge.

Justice Charron, pointing to *Krieger*,¹⁶⁶ the Court’s last decision on prosecutorial discretion, held that the discretion to accept a guilty plea to a lesser charge fell squarely within the ambit of prosecutorial discretion.¹⁶⁷ The nuance in *Nixon* arose from the possible distinction between a decision to *accept* a guilty plea and a decision to subsequently *withdraw* that plea once accepted. Justice Charron concluded that prosecutorial discretion here “was not spent with the decision to initiate the proceedings, nor did it terminate with the plea agreement”.¹⁶⁸ The logic here appears to be that, so long as proceedings continue, the Crown may be required to make further decisions about whether the prosecution should be continued and, if so, in respect of what charges. Accordingly, the Crown’s ultimate decision to resile from the plea agreement and to continue the prosecution is subject to the principles set out in *Krieger*: “it is *only* subject to judicial review for abuse of process”.¹⁶⁹ In such a review, though the ultimate burden remains on the accused to establish an abuse of process, “the Crown must explain why and how it made the decision not to honour the plea agreement”.¹⁷⁰ Pointing to earlier jurisprudence, Charron J. noted that an accused’s section 7 rights might be affected by (1) prosecutorial conduct affecting the fairness of the trial;

¹⁶⁶ *Krieger v. Law Society of Alberta*, [2002] S.C.J. No. 45, 2002 SCC 65, [2002] 3 S.C.R. 372 (S.C.C.) [hereinafter “*Krieger*”].

¹⁶⁷ *Id.*, at para. 21.

¹⁶⁸ *Id.*, at para. 30.

¹⁶⁹ *Id.*, at para. 31 (emphasis in original).

¹⁷⁰ *Id.*, at para. 63.

and (2) prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.¹⁷¹

On the facts in *Nixon*, Charron J. pointed to the trial judge's findings that the ADM's decision appeared to have been made in good faith and that there was "nothing improper in the considerations that informed the ADM's decision to resile from the agreement".¹⁷² Furthermore, she found that act of repudiation "was indeed a rare and exceptional occurrence",¹⁷³ with only two prior occurrences in the province since the 1980s. Finally, the accused suffered no prejudice, in that she was returned to the position she had been in at the conclusion of the preliminary hearing before the plea agreement was entered into.¹⁷⁴ Therefore Charron J. found, correctly in our view, that no Charter breach had occurred.

(d) *Informer Privilege: R. v. Barros*

Barros holds that an accused's section 7 right to full answer and defence generally permits him to make efforts to discern the identity of a confidential police informant. Here, the Crown alleged that an investigator hired by defence counsel used threats to determine the identity of a police informer for use as a bargaining lever to force the Crown to withdraw the charges rather than risk disclosure of the informer's identity. The investigator, after approaching police with information about the identity of the informer, was charged with obstruction of justice and extortion, but was acquitted by the trial judge on the basis of section 7. The Alberta Court of Appeal overturned, finding that informer's privilege prohibits the accused or anyone on his behalf from making efforts even wholly independent of the prosecution to discover the identity of the informant. Justice Binnie, writing for a Court unanimous on the Charter question, reversed, holding the transformation of "a rule of non-disclosure binding on the police, the prosecutorial authorities and the courts into a general prohibition of investigation into police informers binding on the whole world ... goes too far".¹⁷⁵

Recognizing that "[i]nformers come in all shapes and sizes", Binnie J. observed that "[t]he defence is entitled to do what it can to poke holes in the prosecution's case, provided that the methods used are otherwise

¹⁷¹ *Id.*, at para. 36.

¹⁷² *Id.*, at para. 66.

¹⁷³ *Id.*, at para. 69.

¹⁷⁴ *Id.*, at para. 70.

¹⁷⁵ *Barros*, *supra*, note 6, at para. 1.

lawful.”¹⁷⁶ The so-called “innocence at stake” exception — the only exception to the otherwise blanket privilege — “pertains to disclosure *by the state* of the informer’s identity, not to information obtained by the defence through its own resources”.¹⁷⁷ To criminalize efforts by the defence “to ascertain the identity of the source independently of the Crown would in many cases render illusory the right to challenge his or her ‘informer’ status”.¹⁷⁸ That said, the right to full answer and defence has limits: “[T]he methods and purpose of the defence investigation, and the use to which any information obtained is put” may cross the line into obstruction of justice, depending on a case-by-case evaluation of the totality of circumstances.¹⁷⁹ Crucially, Binnie J. noted that efforts to elicit information from prosecutors and police officers, who *are* bound by the duty to protect the identity of informers, “will not be tolerated”.¹⁸⁰ As to the facts in *Barros*, the Court divided, with Fish and Cromwell JJ. each dissenting separately, and the majority remanding the case back for a new trial on two of three counts.¹⁸¹

4. Search and Seizure

Last year was a quiet one for the Court on the section 8 front. In both *Loewen* and *Campbell*, two cases that reached the Court as of right, the justices unanimously dismissed the accused’s appeal, finding in each case that there had been reasonable grounds for the impugned searches. The third case, *Côté*, made no new law, but is notable if only because of the force with which a majority of the Court affirmed the lower courts’ holding to exclude evidence under section 24(2) of the Charter where there has been a violation of the accused’s constitutional rights.

(a) *Systemic Rights Violations: R. v. Côté*

The Court in *Côté* was faced with what it called the “serious and systematic disregard for Charter rights by the police”.¹⁸² The trial judge in the case had concluded that the police “had violated virtually every

¹⁷⁶ *Id.*, at para. 38.

¹⁷⁷ *Id.* (emphasis in original).

¹⁷⁸ *Id.*, at para. 39.

¹⁷⁹ *Id.*, at para. 41.

¹⁸⁰ *Id.*, at para. 43.

¹⁸¹ *Id.*, at para. 83.

¹⁸² *Côté*, *supra*, note 6, at para. 1.

Charter right accorded to a suspect in a criminal investigation” and that the violations “were not the result of isolated errors of judgment on the part of the police investigators, but rather were part of a larger pattern of disregard of the appellant’s Charter rights”.¹⁸³ In the face of such conduct, the trial judge concluded that to admit the evidence in the face of what Cromwell J., writing for the majority, described as “extraordinarily troubling police misconduct”, even when the decision would lead to an acquittal on a murder charge, would bring the administration of justice into disrepute.¹⁸⁴ The Quebec Court of Appeal allowed the Crown’s appeal in part, admitting some of the evidence and ordering a new trial. The Supreme Court reversed over the lone dissent of Deschamps J., who typically takes a harder line on exclusion under section 24(2). Though she acknowledged the “the police misconduct, considered as a whole, is serious and the courts must dissociate themselves from it”, in *Côté* it was “possible to do so in respect of the constitutional violations in this case without excluding *all* the evidence”.¹⁸⁵

Much of Cromwell J.’s opinion focused on reiterating that trial judges, provided they have considered the proper factors and have not made any unreasonable finding, are owed “considerable deference” on review.¹⁸⁶ He did not mince words in criticizing the Court of Appeal in *Côté*, which “exceeded its role by its re-characterization of the evidence” in the absence of “any clear and determinative error” by the trial judge.¹⁸⁷ He also faulted the Court of Appeal for focusing excessively on the discoverability of certain derivative evidence when there was evidence that the trial judge had considered this factor and nonetheless decided to exclude the evidence.¹⁸⁸ *Côté* thus echoes a point made recently in *R. v. Beaulieu*^{188A}: where a trial judge considers the relevant factors, his or her ruling on section 24(2) will be upheld on appeal.

5. Equality

After several uneventful years on the section 15 front, the Court took two separate opportunities to clarify its last significant pronouncement in

¹⁸³ *Id.*, at para. 2.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*, at para. 118 (emphasis in original).

¹⁸⁶ *Id.*, at para. 44.

¹⁸⁷ *Id.*, at para. 51.

¹⁸⁸ *Id.*, at paras. 58-59, 86-87.

^{188A} [2010] S.C.J. No. 7, [2010] 1 S.C.R. 248 (S.C.C.).

the seminal 2008 decision in *R. v. Kapp*.¹⁸⁹ In *Withler*, the Court tweaked its approach to section 15(1), ousting what had been understood as a requirement to craft so-called “mirror” comparator groups. In *Cunningham*, the Court revisited section 15(2), confirming that if the government can establish an ameliorative program under that subsection of section 15, it will be immunized from further judicial scrutiny under section 15(1). These two cases evidence a further bifurcation of the Court’s approach to section 15, with section 15(1) largely acting as an anti-discrimination provision and section 15(2) serving to promote (and protect) the government’s ameliorative programs. For some, this result will be disappointing. Notwithstanding its repeated assurances of a commitment to substantive equality, in saying that the purpose of section 15(1) is to “[protect] every person’s equal right to be *free* from discrimination” — that is, in conceiving of it as a negative *freedom* as opposed to a positive *right* — the Court may be seen as limiting the potential of what equality-seeking groups can accomplish through the courts.¹⁹⁰ Others will welcome *Withler*’s attempt to clarify the unduly complicated jurisprudence in this area.

(a) “Mirror” Comparator Groups: *Withler v. Canada*

In *Withler*, the Court returns again to a familiar and recurring issue, namely, the appropriate framework for the analysis of equality claims under section 15 of the Charter. The Court’s equality jurisprudence has had a troubled and chequered past, dating from the landmark 1989 *Andrews* decision in which the Court emphasized the importance of a focus on “substantive” as opposed to “formal” equality.¹⁹¹ The difficulty is that over more than two decades and despite numerous attempts, including a number of false starts, the Court has had extraordinary difficulty in translating that key concept into a practical framework that is readily intelligible to lower courts and litigants.

In *Withler*, the Chief Justice and Abella J., writing for a unanimous Court, reiterate the oft-repeated admonition that substantive equality “rejects the mere presence or absence of difference as an answer to

¹⁸⁹ [2008] S.C.J. No. 42, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter “*Kapp*”].

¹⁹⁰ *Withler*, *supra*, note 6, at para. 31 (emphasis added). For more on the rights versus freedoms distinction, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale, 1946).

¹⁹¹ See *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

differential treatment” and “insists on going behind the facade of similarities and differences”.¹⁹² Its focus must be “on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group”.¹⁹³ The problem with these kinds of general statements is that they focus on considerations that should be avoided in the equality analysis, without presenting a positive and direct elaboration of the actual essence of the analysis. This had led lower courts, in a continuing search for the proper analytic approach, to seize upon *obiter* statements or specific considerations relied upon in particular Supreme Court decisions, and to structure the entire analysis around such statements or considerations. The latest example of this difficulty, in the wake of the Court’s recent restatement of the equality “test” in *Kapp*, is an undue reliance on “comparator groups” as the basis for the analysis. In *Withler*, the Court makes plain that, though “equality is a comparative concept”, the heavy reliance on comparator groups “may substitute a formal ‘treat likes alike’ analysis for the substantive equality analysis that has from the beginning been the focus of s. 15(1) jurisprudence”.¹⁹⁴

In *Withler*, a class of widows challenged a federal pension scheme that reduced certain of their benefits because of the age of their husbands at the time of their deaths. The relevant statutes included a “supplementary death benefit”, akin to life insurance, with payment to be made to a plan member’s designated beneficiary at the time of the member’s death. For younger plan members, the Court held that the purpose of the benefit was to insure against unexpected death at a time when the deceased member’s beneficiary would be unprotected by a full pension. For older members, however, the purpose of the benefit was to assist surviving spouses with the costs of the plan member’s last illness and death. This benefit was not intended to be a long-term income stream for the spouses of older plan members, recognizing that older members would have had an opportunity to accrue larger pensions, which their spouses would still receive after their deaths. The courts below were divided about the appropriate comparator groups, partly because the claimant classes were composed of many different surviving spouses in diverse situations and because the plan’s scheme was quite complex. This debate provided a ripe foundation for revisiting the question of comparator groups.

¹⁹² *Withler*, *supra*, note 6, at para. 39.

¹⁹³ *Id.*

¹⁹⁴ *Id.*, at paras. 40, 55.

The Court pointed to four problems with the use of comparator groups, all of which had been identified in recent academic criticism. First, the choice of comparator group may predetermine the outcome of a claim. “As a result, factors going to discrimination — whether the distinction creates a disadvantage or perpetuates prejudice or stereotyping — may be eliminated or marginalized.”¹⁹⁵ Second, the use of comparators “becomes a search for sameness, rather than a search for disadvantage, again occluding the real issue — whether the law disadvantages the claimant or perpetuates a stigmatized view of the claimant”.¹⁹⁶ Third, comparator groups can be insensitive to interwoven grounds of discrimination because they focus on a comparison between two identical groups save for a *single* ground of distinction.¹⁹⁷ Somewhat ironically, the Court failed to note that *Withler* was such a case: even though the claimants based their claim on discrimination based on *age*, as one intervener observed, the “impugned provisions, while worded in a gender-neutral way, disproportionately affect elderly single *women*, a group that is vulnerable and more marginalized than many other groups in society”.¹⁹⁸ Fourth and finally, the use of comparator groups places an unfair burden on claimants. In this regard, “finding a mirror group may be impossible, as the essence of an individual’s or group’s equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison”.¹⁹⁹ But even once found, “[r]ational people may differ on what characteristics are relevant,” potentially leaving a claimant without an adequate evidentiary foundation should a court refashion the proposed comparator group proposed by the claimant.²⁰⁰ The Chief Justice and Abella J. had alluded to these concerns in a footnote in their judgment in *Kapp*,²⁰¹ but the point was never expanded upon. In *Withler*, however, the justices note that, “[s]ignificantly, a mirror comparator group approach was not assigned a role in the analysis [in *Kapp*].”²⁰² Nevertheless, it seems the significance of that omission is only apparent now.

¹⁹⁵ *Id.*, at para. 56.

¹⁹⁶ *Id.*, at para. 57.

¹⁹⁷ *Id.*, at para. 58.

¹⁹⁸ LEAF factum in *Withler*, at para. 22 (emphasis added).

¹⁹⁹ *Withler*, *supra*, note 6, at para. 59.

²⁰⁰ *Withler*, *supra*, note 6, at para. 59.

²⁰¹ See *Kapp*, *supra*, note 189, at para. 22, n. 2 (citing many of the same academic criticisms cited in *Withler*).

²⁰² *Withler*, *supra*, note 6, at para. 52.

Withler retains the core of the *Kapp* test while explicitly ruling out the necessity of a comparator group. The two-pronged test remains the same: First, does the law create a distinction based on an enumerated or analogous ground? Second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping? Though “[c]omparison plays a role throughout the analysis,” the Chief Justice and Abella J. concluded that it is “unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination”.²⁰³ The claimant need only “[establish] a distinction based on one or more enumerated or analogous grounds”.²⁰⁴ Crucially, in an example of another omission from *Kapp*, the justices expressly endorsed the idea that the distinction need not be made on the face of the impugned laws. Rather, a section 15(1) claim may arise on the adverse effects of an otherwise facially neutral law where such effects “can be identified by factors relating to enumerated or analogous grounds”.²⁰⁵ However, in such cases of indirect discrimination, “the claimant will have more work”.²⁰⁶ Though the reader is not told how that burden is to be satisfied, the Chief Justice and Abella J. did observe that “[h]istorical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others.”²⁰⁷

On the facts of *Withler*, the Chief Justice and Abella J. concluded that it was “obvious” that a distinction based on age was made because surviving spouses of plan members who die before they reach the prescribed ages are not subject to a reduced death benefit.²⁰⁸ That was sufficient to establish a distinction at the first stage of the *Kapp* test — no comparator group was necessary. At the second stage, however, the Court declined to find discrimination, holding that “such schemes of necessity must make distinctions on general criteria, including age” and that “[t]he question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme.”²⁰⁹ Here, the “degree of correspondence between the differential treatment and the claimant group’s reality confirms the absence of any

²⁰³ *Id.*, at paras. 61, 63.

²⁰⁴ *Id.*, at para. 63.

²⁰⁵ *Id.*, at para. 64.

²⁰⁶ *Id.*

²⁰⁷ *Id.*, at para. 64.

²⁰⁸ *Id.*, at para. 69.

²⁰⁹ *Id.*, at paras. 73, 71.

negative or invidious stereotyping on the basis of age”.²¹⁰ The justices noted that “[p]erfect correspondence is not required,” suggesting the Court is willing to grant lawmakers a degree of deference at the section 15(1) stage even where a distinction has been established, without requiring justification under section 1.²¹¹

Though the Chief Justice and Abella J. stressed that the Court had never sanctioned “a rigid conception of how [equality] should be approached”, we hazard that most observers would agree that the jurisprudence had indeed become rigid and formulaic as courts struggled for a framework within which to grasp complex and admittedly vague concepts such as stereotyping.²¹² *Withler* does appear to be a positive step to the extent that it draws courts away from such approaches in favour of a frank admission that case-by-case analyses, sensitive to the full context of the claim, offer the best path to fulfilling section 15’s promise of equality. What *Withler* also suggests is that a key organizing concept is the degree of “fit” or “correspondence” between the policy objective of a law, and the category, classification or distinction utilized in the law in order to achieve that objective.²¹³ Yet while this concept of fit is clearly central to the analysis in the case (and section 15 more generally), the Court remains reluctant to elaborate on this point, other than to confirm the need to avoid stereotyping or the perpetuation of disadvantage. On the facts here, the Chief Justice and Abella J. noted only that “[t]he degree of correspondence between the differential treatment and the claimant group’s reality confirms the absence of any negative or invidious stereotyping on the basis of age” and that “[t]he benefit scheme uses age-based rules that, overall, are effective in meeting the actual needs of the claimants.”²¹⁴ Despite these challenges, *Withler* does indicate that the Court is inching forward towards a simpler and more straightforward framework for section 15 claims.

²¹⁰ *Id.*, at para. 77.

²¹¹ *Id.*, at para. 71.

²¹² *Id.*, at para. 45.

²¹³ See *id.*, at paras. 21, 73, 77. Though to do so blurs the line between the concepts of breach and justification, some assessment of fit is necessary lest each distinction be transformed into discrimination. It is also unsurprising given that the Court, in its modern era, has essentially never upheld under s. 1 a finding of discrimination under s. 15.

²¹⁴ *Id.*, at para. 77.

(b) *Ameliorative Programs: Alberta v. Cunningham*

Cunningham confirms and elaborates on the interpretation of section 15(2) offered in *Kapp* four years ago. Here, a group of claimants with both Indian and Métis heritage challenged an Alberta statute that did not permit status Indians to also become formal members of a Métis settlement, asserting that this restriction amounted to discrimination under section 15(1). The claimants, resident members of the Métis settlement, had opted to register as status Indians in order to obtain medical benefits under the *Indian Act*.²¹⁵ Consequently, provincial officials revoked their formal membership in their Métis settlement, pursuant to the relevant statute. The claimants then sued. The Court held, however, that the statute amounted to an ameliorative law under section 15(2), the purpose of which is “to enhance Métis identity, culture, and self-governance by creating a land base for Métis”.²¹⁶ The exclusion of status Indians from membership in the Métis settlement “serves and advances this object and hence is protected by s. 15(2)”.²¹⁷

The Chief Justice, writing for a unanimous Court, explained that while “s. 15(1) is aimed at *preventing* discrimination on grounds such as race, age and sex”, “s. 15(2) is aimed at permitting governments to *improve* the situation of members of disadvantaged groups that have suffered discrimination in the past, in order to enhance substantive equality”.²¹⁸ Anticipating the challenge in *Cunningham*, she also observed that “[i]t is unavoidable that ameliorative programs, in seeking to help one group, necessarily exclude others.”²¹⁹ But the Chief Justice went further, stating:

If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. *The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.*²²⁰

Significantly, the reference to “identical treatment” refers to demands for identical ameliorative treatment between *already disadvantaged groups*. In other words, in adopting such a highly deferential attitude

²¹⁵ R.S.C. 1985, c. I-5.

²¹⁶ *Cunningham*, *supra*, note 6, at para. 3.

²¹⁷ *Id.*

²¹⁸ *Id.*, at paras. 39-40 (emphasis in original).

²¹⁹ *Id.*, at para. 40.

²²⁰ *Id.*, at para. 41 (emphasis added).

toward section 15(2), the Court appears to be saying that when the government chooses to ameliorate the situation of *one* disadvantaged group, the Court will not step in to demand equal treatment for *other* disadvantaged groups. Under *Cunningham*, section 15(1) appears to have no role when section 15(2) is successfully invoked. Indeed, the Chief Justice expressly referred to distinctions being “*saved* by s. 15(2)”.²²¹

Cunningham also elaborates on *Kapp*’s “tentative guide that s. 15(2) precludes from s. 15(1) review distinctions made on enumerated or analogous grounds that *serve and are necessary* to the ameliorative purpose”.²²² Here, the Chief Justice concluded that “‘necessary’ should not be understood as requiring proof that the exclusion is essential to realizing the object of the ameliorative program”.²²³ Rather, what is required is that the impugned distinction “in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality”.²²⁴ The Court’s language is telling: “[A]ll the government need show is that it was rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to its ameliorative purpose.”²²⁵

The Chief Justice acknowledged the obvious question that remains: “[U]p to what point does s. 15(2) protect against a claim of discrimination?”²²⁶ For now, we are told that the state cannot choose “irrational means to pursue its ameliorative goal”.²²⁷ This criterion “may be refined and developed as different cases emerge”,²²⁸ but for now it would appear safe to say that it is a highly deferential one that affords governments a wide ambit to craft ameliorative programs that may benefit some disadvantaged groups while excluding others. Though *Cunningham* is not necessarily such a case, it is not hard to imagine them: a university admissions policy that advantages Aboriginal applicants over applicants from other under-represented minority groups, or a disability support program that provides funding for those with certain disabilities but not others. Under *Cunningham*, provided the programs have *some* rational basis, they would appear to be fully immune from further judicial scrutiny under section 15(1).

²²¹ *Id.*, at para. 44 (emphasis added).

²²² *Kapp*, *supra*, note 189, at para. 52.

²²³ *Cunningham*, *supra*, note 6, at para. 45.

²²⁴ *Id.*

²²⁵ *Id.*, at para. 74 (internal quotation marks and edits omitted).

²²⁶ *Id.*, at para. 46.

²²⁷ *Id.*

²²⁸ *Id.*

On the facts of *Cunningham*, the Court held that the “special type of ameliorative program” at issue was not irrational and thus was saved by section 15(2).²²⁹ Its goal was to establish “a Métis land base to preserve and enhance Métis identity, culture and self-governance, as distinct from surrounding Indian cultures and from other cultures in the province”.²³⁰ The correlation between the goals of the program and the disadvantage suffered by the Métis group was “manifest”: “The history of the Métis is one of struggle for recognition of their unique identity as the mixed race descendants of Europeans and Indians. Caught between two larger identities and cultures, the Métis have struggled for more than two centuries for recognition of their own unique identity, culture and governance.”²³¹ With this background, the exclusion of persons with dual Métis and Indian identities was justifiable because it “serves and advances the object of the program”.²³² To accord formal membership in the Métis settlement to such persons “*may* undercut the goals of preserving and enhancing the distinctive Métis culture, identity and self-governance into the future” and “the distinctive Métis identity, with its historic emphasis on being distinct from Indian identity, *would* be compromised”.²³³ We note the curious use of “*may*” and “*would*” — in the same paragraph no less — with respect to the likelihood that the program’s objectives would be undermined.

III. FEDERALISM CASES

1. Trade and Commerce

(a) *Reference re Securities Act*

If there were a prize for the most baffling decision of the decade, the Court’s unanimous decision to find Canada’s draft national securities act unconstitutional would be a fine candidate. In gutting the proposed law, the Court handed the federal government a major defeat in a reform effort that spanned more than five decades. Though the Court suggested that the door remains open to a national regulator achieved “harmoni-

²²⁹ *Id.*, at para. 54.

²³⁰ *Id.*, at para. 62.

²³¹ *Id.*, at para. 70.

²³² *Id.*, at para. 73.

²³³ *Id.*, at para. 78 (emphasis added).

ously, in the spirit of cooperative federalism”, the all-but-total victory achieved by the provinces gives the scheme’s provincial opponents no incentive to participate.²³⁴ As a practical matter, the question moving forward is whether the federal government will be able to craft an alternative proposal that works within the restrictive constitutional framework set out by the Court. As a legal matter, the question is to what extent the Court’s emaciated conception of trade and commerce power under section 91(2) of the *Constitution Act, 1867* will frustrate future legislative reform efforts.²³⁵

As is the norm with references, the opinion was signed “by the Court”. At its core, the Court’s reasons appear to boil down to the simple proposition that, because the provinces have historically regulated securities markets, the federal government cannot upset the status quo. More specifically, first, the Court decisively rejected Canada’s contention that the “the securities market has been so transformed as to make the day-to-day regulation of all aspects of trading in securities a matter of national concern”.²³⁶ Second, though the Court accepted that aspects of the securities market have evolved to be national in scope, these aspects — chiefly the management of systemic risk and national data collection — do not “justify a complete takeover of provincial regulation”, because to do so “would disrupt rather than maintain” the balance of Canada’s federal system.²³⁷ The Court repeatedly pointed out that its analysis was restricted to the general branch of the trade and commerce power, which may lead one to wonder whether the Court was inviting justification on another ground and whether Canada was well served by restricting its justification to that power.²³⁸

In its analysis, the Court applied the “the settled test” from *General Motors*. Broadly speaking, its focus, as the Court observed, is on ensuring that federal legislation is “*genuinely national in scope and qualitatively distinct* from those falling under provincial heads of power relating

²³⁴ *Securities Reference*, *supra*, note 7, at para. 9.

²³⁵ See, e.g., Michael Geist, “Are Canada’s digital laws unconstitutional?” *The Toronto Star* (January 9, 2012), online: <<http://www.thestar.com/business/article/1112019--geist-are-canada-s-digital-laws-unconstitutional>>.

²³⁶ *Securities Reference*, *supra*, note 7, at para. 117.

²³⁷ *Id.*, at paras. 6, 117, 7.

²³⁸ See, e.g., *id.*, at para. 68 (“As noted earlier, Canada grounds its submission in support of the Act’s constitutionality entirely on this power”), and at para. 129 (“We further note that we have not been asked for our opinion on the extent of Parliament’s legislative authority over securities regulation under other heads of federal power or indeed the interprovincial or international trade branch of s. 91(2)”).

to local matters and property and civil rights.”²³⁹ Of the five *General Motors* factors,²⁴⁰ the first two were “[c]learly ... met” and the proposed law’s constitutionality hinged on the last three.²⁴¹ Quoting from Dickson C.J.C.’s opinion in *General Motors*, the Court observed that “the final three share a common theme — namely that the scheme of regulation [must be] national in scope and that *local regulation would be inadequate*”.²⁴²

The Court on multiple occasions pointed out that its analysis of what is “inadequate” did not necessitate an assessment of policy considerations,²⁴³ but such a view misrepresents both the analysis in *General Motors* itself and what the Court in fact did in the *Securities Reference*. In *General Motors*, where the Court considered the constitutionality of the federal competition regime, Dickson C.J.C. pointed to “the diverse economic, geographical, and political factors which make it essential that competition be regulated on the federal level” and cited with approval scholarly articles arguing *on policy reasons* why national regulation was more effective.²⁴⁴ Indeed, Dickson C.J.C. concluded “from this discussion that competition *cannot be effectively regulated* unless it is regulated nationally.”²⁴⁵ In underscoring Parliament’s rationale for passing the challenged statute, Dickson C.J.C. cautioned that “a certain degree of judicial restraint in proposing strict tests which will result in striking

²³⁹ *Id.*, at para. 70 (emphasis added).

²⁴⁰ The five factors are as follows: (1) whether the impugned law is part of a general regulatory scheme; (2) whether the scheme is under the oversight of a regulatory agency; (3) whether the legislation is concerned with trade as a whole rather than with a particular industry; (4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and (5) whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country. See *General Motors of Canada v. City National Leasing*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641, at 661-62 (S.C.C.) [hereinafter “*General Motors*”]; *Securities Reference*, *id.*, at para. 80.

²⁴¹ *Securities Reference*, *id.*, at paras. 110, 6.

²⁴² *Id.*, at para. 81, citing *General Motors*, *supra*, note 240, at 678 (internal quotation marks omitted, emphasis added).

²⁴³ See *id.*, at para. 10 (“it is important to stress that this advisory opinion does not address the question of what constitutes the optimal model for regulating the securities market”); and para. 90 (“We would add that, in applying the *General Motors* test, one should not confuse what is optimum as a matter of policy and what is constitutionally permissible”).

²⁴⁴ See, e.g., the discussion in *General Motors*, *supra*, note 240, at para. 59, citing Hogg & Grover, “The Constitutionality of the Competition Bill” (1976) 1 Can. Bus. L.J. 197, at 199-200:

The introduction of an effective competition policy can be seen as one method to ensure that these differing regional advantages will accrue to the nation as a whole in terms of lower prices, better quality and variety and increased opportunities for Canadians. Any attempt to achieve an optimal distribution of economic activity must transcend provincial boundaries, for, in many respects, Canada is one huge marketplace.

²⁴⁵ *General Motors*, *id.*, at para. 60.

down such legislation is appropriate”.²⁴⁶ Mysteriously, however, the Court glosses over this aspect of *General Motors*.²⁴⁷ Moreover, as the discussion that follows will illustrate, the Court *did* make judgments about the policy goals of the proposed federal securities regime when undertaking its analysis.

The third factor under *General Motors* is “whether the proposed Act is directed at trade as a whole rather than at a particular industry”.²⁴⁸ The Court accepted Canada’s argument that the regulation of the securities market as a conceptual matter “goes beyond a particular ‘industry’ and engages ‘trade as a whole’ within the general trade and commerce power as contemplated by the *General Motors* test”.²⁴⁹ Accordingly, legislation restricted to preserving the “stability and integrity of Canada’s financial markets might well relate to trade as a whole”.²⁵⁰ The Court found, however, that the Act as drafted “reaches beyond such matters and descends into the detailed regulation of *all* aspects of trading in securities, a matter that has long been viewed as provincial”.²⁵¹ For such reach to be justified, “Canada must present the Court with a factual matrix that supports its assertion of a constitutionally significant transformation such that regulating every aspect of securities trading is no longer an *industry-specific* matter, but now relates, in its entirety, to *trade as a whole*.”²⁵²

Ultimately, the Court concluded that Canada failed to demonstrate “the asserted transformation” and that “the day-to-day regulation of securities ... remains essentially a matter of property and civil rights within the provinces and therefore subject to provincial power”.²⁵³ The basis for this conclusion is perplexing. The Court justified this conclusion on the single fact that “the structure and terms of the proposed Act largely replicate the existing provincial schemes belies the suggestion that the securities market has been wholly transformed over the years”.²⁵⁴ But for this reasoning to have merit, one would have to assume that the provincial regimes regulated particular *industries* exclusively and not *trade as a whole*. On the contrary, however, one might observe that the provincial regimes *do* regulate local trade as a whole and that the federal

²⁴⁶ *Id.*, at para. 45.

²⁴⁷ See *Securities Reference*, *supra*, note 7, at paras. 86-89.

²⁴⁸ *Id.*, at para. 112.

²⁴⁹ *Id.*, at para. 114.

²⁵⁰ *Id.*

²⁵¹ *Id.* (emphasis in original).

²⁵² *Id.*, at para. 115 (emphasis added).

²⁵³ *Id.*, at para. 116.

²⁵⁴ *Id.*

regime merely proposed to do the same on a nationwide basis. Whether one regime replicates another is thus neither here nor there with respect to whether it is an “industry” being regulated or “trade as a whole”. The Court’s analysis with respect to this factor thus appears misconceived, confusing matters properly considered under the fifth *General Motors* criterion. The third factor could have been resolved on much simpler grounds: The proposed Act, as Dalphond J.A. observed at the Quebec Court of Appeal, “is not limited to regulating the securities industry or ... enterprises whose primary business is trading in securities; rather, it extends as well to ... no less than an entire sector of the Canadian economy”²⁵⁵.

The fourth *General Motors* criterion is concerned with “the constitutional capacity of the provinces and territories to enact a similar scheme acting in concert”²⁵⁶. Here, the Court agreed that the provinces “lack the constitutional capacity” to address two aspects of the federal regime — the control of systemic risk and national data collection — that “anticipat[e] and identif[y] risks that may transcend the boundaries of a specific province”²⁵⁷. But because the proposed law contained “detailed regulation of all aspects of securities” that could be addressed provincially, the Court concluded that “the proposed federal Act overreaches the legislative interest of the federal government”²⁵⁸.

The Court’s reasoning with respect to the fourth criterion contains a crucial but unspoken policy judgment that favours the arguments advanced by provincial opponents of the federal scheme. The Court accepted that there was some value to be obtained from controlling nationwide systemic risk and collecting national data on a national basis, and held that there is nothing the provinces could do, alone or acting in concert, to address these issues in a permanent fashion.²⁵⁹ In doing so, however, the Court engaged in a subtle normative judgment that defined systemic risk and nationwide data collection as concerns that *are necessarily federal*.²⁶⁰ For example, the Court found that “[t]he expert evi-

²⁵⁵ *Québec (Procureur général) c. Canada (Procureur générale)*, [2011] Q.J. no 2940, 2011 QCCA 591, at para. 497 (Que. C.A.) [hereinafter “*Securities Reference* (QCCA)”].

²⁵⁶ *Securities Reference*, *supra*, note 7, at para. 118.

²⁵⁷ *Id.*, at paras. 104-105, 121.

²⁵⁸ *Id.*, at para. 122.

²⁵⁹ *Id.*, at paras. 118-120.

²⁶⁰ *Id.*, at para. 103 (“Systemic risks have been defined as risks that occasion a ‘domino effect’ whereby the risk of default by one market participant will impact the ability of others to fulfill their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system”) (internal quotation marks omitted).

dence adduced by Canada provides support for the view that systemic risk is an emerging reality, *ill-suited to local legislation*.²⁶¹ As the Court noted, “[t]he point is not that the provinces are constitutionally or practically unable to adopt legislation aimed at systemic risk *within* the provinces.”²⁶² Rather, it is that they lack the constitutional capacity to regulate extra-territorially with respect to systemic risk and national data collection and, thus, that the desired effect of such regulation cannot be achieved. Even if they collaborated with one another, because the provinces always retain the ability to resile from an interprovincial scheme and withdraw an initial delegation to a single national regulator, the Court found that the fourth *General Motors* factor weighed in favour of Canada with respect to systemic risk and data collection.²⁶³

The problem with the Court’s approach here is that the same logic could be applied for nationally harmonized disclosure requirements, insider trading rules or, indeed, anything else in the proposed federal scheme. In each case, the provinces lack the capacity to regulate such matters extra-territorially with a guarantee that no province will resile, thereby undercutting the ability to achieve the desired national effect. Even if they act collaboratively, for the reasons the Court pointed out and accepted with respect to systemic risk and data collection, such action would still not satisfy the fourth criterion. The difference, therefore, between systemic risk and data collection, on the one hand, and everything else in the proposed Act, on the other, is that the Court — albeit without saying so — found the latter group *not* to be “ill-suited to local legislation”. In other words, in sharp contrast to that of the federal government, which obviously sees tremendous value in national harmonization, the Court sees little or nothing to be gained. That disagreement reflects a policy judgment, not a legal one. Indeed, for precisely the same reason that the Court accepted with respect to systemic risk and data collection — that there is *some value* to be gained by a nationwide response to these concerns — one could conclude that the other matters addressed by the proposed federal regime cannot be adequately addressed by the provinces.

The fifth and final *General Motors* inquiry asks “whether the absence of a province from the scheme would prevent its effective operation”.²⁶⁴ Here, again, the Court engaged in an unspoken policy judgment.

²⁶¹ *Id.*, at para. 104 (emphasis added).

²⁶² *Id.*, at para. 120 (emphasis in original).

²⁶³ *Id.*, at para. 119.

²⁶⁴ *Id.*, at para. 123.

With respect to the “*genuine* national goals ... including national data collection and prevention of and response to systemic risks, the answer must be yes”.²⁶⁵ But because the bulk of the proposed Act is “concerned with the day-to-day regulation of securities, the proposed Act would not founder if a particular province declined to participate in the federal scheme”.²⁶⁶ One is left to wonder, again, what makes guarding against systemic risk and data collection, but not other aspects of the federal scheme, “*genuine*” national goals. Even more confounding, however, was the Court’s criticism of the federal scheme’s opt-in feature.²⁶⁷ Despite the Court’s many invocations of the manifold benefits of cooperative federalism, it appears here to be suggesting that Canada would have fared better if it had not compromised on its ultimate objective by compelling participation by all provinces immediately instead of seeking gradually to win full membership in the national scheme.

Ultimately, weighing all five of the *General Motors* factors, the Court concluded that the scheme “chiefly regulates contracts and property matters within each of the provinces and territories, overlain by some measures directed at the control of the Canadian securities market as a whole that may transcend intra-provincial regulation of property and civil rights”.²⁶⁸ It thus answered the reference question — whether the proposed act was constitutional — in the negative.²⁶⁹ Instead of the current proposal, it counselled “a cooperative approach that permits a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available”.²⁷⁰

We offer two thoughts in closing. First, and as mentioned above, the Court’s review of the constitutionality of the proposed Act necessarily involved policy judgments, notwithstanding its insistence to the contrary. As the earlier discussion of *General Motors* showed, the Court has forthrightly engaged in such assessments in the past. The remaining question then is *how* it should do so. Writing for the majority in *Canadian Western Bank*, Binnie and LeBel JJ. cautioned that courts must recognize that “the task of maintaining the balance of powers in practice falls primarily *to governments*, and constitutional doctrine must facilitate,

²⁶⁵ *Id.* (emphasis added).

²⁶⁶ *Id.*

²⁶⁷ *Id.*, at para. 133.

²⁶⁸ *Id.*, at para. 125.

²⁶⁹ *Id.*, at paras. 8, 125.

²⁷⁰ *Id.*, at para. 130.

not undermine what this Court has called ‘co-operative federalism’²⁷¹. Distilled, the principle appears to be one of deference and restraint, allowing the political process to work itself out while remaining above the fray. For that reason, as Laskin C.J.C. observed in the *Anti-Inflation Reference*, the federal government need only “go so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked”.²⁷² The decision in the *Securities Reference*, however, represents a troubling and, in our view, problematic break with this tradition of deference and restraint.

Second, the Court’s fear here appears to have been *if this, then what next?* The opinion, for example, stated that “the validity of the Act ultimately comes down to the *breadth* of the general branch of the federal trade and commerce power” and voiced concerns that “[a]n overly expansive interpretation of the federal trade and commerce ... would have the potential to *duplicate and perhaps displace*, through the paramountcy doctrine, the clear provincial powers over local matters and property and civil rights which embrace trade and commerce in the province.”²⁷³ These fears have been voiced repeatedly by courts over many decades as the basis for the need to truncate the scope of federal authority over the regulation of trade and commerce. But we suggest that these fears are vastly overblown, because, as recently noted in a similar case by a sister high court, “[w]hen contemplated in its extreme, almost any power looks dangerous.”²⁷⁴ In the Canadian context, there are at least two reasons not to overreact to the spectre of unrestrained federal power. First, as Dickson C.J.C. counselled in *General Motors*, “careful case by case analysis remains appropriate”;²⁷⁵ in other words, the fact that the outcome in a particular case might favour federal regulation does not inevitably or necessarily compel similar results in future cases. Second, the courts have consistently been careful in policing the scope of the paramountcy doctrine, precisely in order to avoid the possibility that it not be used to displace the scope of overlapping provincial legislation.²⁷⁶

²⁷¹ *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 24 [hereinafter “*Canadian Western Bank*”] (emphasis added).

²⁷² *Reference re Anti-Inflation Act (Can.)*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at para. 67 (S.C.C.).

²⁷³ *Securities Reference*, *supra*, note 7, at paras. 69, 72 (emphasis added).

²⁷⁴ *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, at 2625 (2012), *per* Ginsburg J.

²⁷⁵ *General Motors*, *supra*, note 240, at 663.

²⁷⁶ Although the Court did apply the paramountcy doctrine this year in *Quebec v. Canada*, *supra*, note 7, discussed below, this does not alter the general approach to paramountcy that has consistently been applied by the Court over a number of years.

With those points in mind, in our view, the “gradual but radical transformation of the concrete reality of the capital market, a market that has become Canada-wide, integrated and vital to thousands of diverse enterprises, and is essentially characterized by interprovincial and international transactions” should not have been a bridge too far, especially when this day had been anticipated for so long.²⁷⁷

2. Interjurisdictional Immunity

(a) *Canada v. PHS Community Services Society*

After breathing some life into interjurisdictional immunity in 2010,²⁷⁸ the Court last year once again distanced itself from the concept in *PHS*. Though the Court ultimately rejected the federalism argument in *PHS*, the case highlights how courts may intervene in a policy disagreement between different levels of government, resulting in a breakdown of cooperative federalism, where there is a clear Charter rights-based nexus (see section II.3(a) above for the discussion regarding the section 7 Charter claim and fuller overview of the facts). The case pitted the federal criminal law power under section 91(27) of the *Constitution Act, 1867* against provincial jurisdiction over health under section 92(7). The claimants’ principal claim was that interjurisdictional immunity should apply to shield provincial decisions about medical treatments from

²⁷⁷ *Securities Reference (QCCA)*, *supra*, note 255, at para. 538, Dalphond J.A., dissenting. See also *Multiple Access Ltd. v. McCutcheon*, [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161, at 225 (S.C.C.), Estey J., dissenting (“As the magnitude and number of multi-provincial security transactions increase the strain on the present unbalanced regulatory system will mount. It remains to be seen whether this will precipitate a change in the national appreciation of constitutional requirements and federal legislative policy”); at 173-74, Dickson C.J.C. (“Parliament has not yet enacted any comprehensive scheme of securities legislation. ... I should not wish by anything said in this case to affect prejudicially the constitutional right of Parliament to enact a general scheme of securities legislation pursuant to its power to make laws in relation to interprovincial and export trade and commerce”); *Global Securities Corp v. British Columbia (Securities Commission)*, [2000] S.C.J. No. 5, [2000] 1 S.C.R. 494, at para. 46 (S.C.C.) (“I would note, however, that this Court has already upheld aspects of federal securities regulation ... in *Multiple Access* ... under the ‘double aspect’ theory. The Court’s decision in the present appeal should not be taken in any way to question the holding of that case”).

²⁷⁸ See *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*”]. See also Patrick Monahan & Chanakya Sethi, “Constitutional Cases 2010: An Overview” in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 3, at 30-34 [hereinafter “*Monahan & Sethi*”].

interference by the federal government.²⁷⁹ The controversial doctrine, as the Court observed recently, “has produced somewhat ‘asymmetrical’ results ... in favour of federal immunity at the expense of provincial legislation”.²⁸⁰ That asymmetry was not lost on the majority at the B.C. Court of Appeal, which agreed with the claimants and asserted that “[i]f interjurisdictional immunity is not available to a provincial undertaking on the facts of this case, then it may well be said the doctrine is not reciprocal and can never be applied to protect exclusive provincial powers.”²⁸¹ The Supreme Court, in its unanimous decision, disagreed.

The breadth of the province’s asserted immunity doomed the claimant’s argument. They asserted that “decisions about what treatment may be offered in provincial health facilities lie at the core of the provincial jurisdiction in the area of health care, and are therefore protected from federal intrusions by the doctrine of interjurisdictional immunity”.²⁸² The Chief Justice observed, however, that interjurisdictional immunity has applied to “circumscribed areas” of activity, such as aviation, ports and federal communications works, but “never ... to a broad and amorphous area of jurisdiction”.²⁸³ More specifically, the Chief Justice identified three separate reasons the claimants’ argument could not succeed. First, though not itself determinative, “the proposed core of the provincial power over health has never been recognized in the jurisprudence”.²⁸⁴ Second, and crucially, the claimants “failed to identify a delineated ‘core’ of an exclusively provincial power” as is required by the jurisprudence.²⁸⁵ On these facts, it was particularly problematic that the provincial health power “extends to thousands of activities and to a host of different venues”, consequently rendering quite “daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread”.²⁸⁶ Third and finally, “application of interjurisdictional immunity to a protected core of the provincial health power has the potential to create legal vacuums”.²⁸⁷ For example, Parliament would not be able to legislate on “controversial medical

²⁷⁹ *PHS*, *supra*, note 6, at para. 48.

²⁸⁰ *Canadian Western Bank*, *supra*, note 271, at para. 35.

²⁸¹ *PHS Community Services Society v. Canada (Attorney General)*, [2010] B.C.J. No. 57, 2010 BCCA 15, at para. 176 (B.C.C.A.).

²⁸² *PHS*, *supra*, note 6, at para. 57.

²⁸³ *Id.*, at para. 60.

²⁸⁴ *Id.*, at para. 67.

²⁸⁵ *Id.*, at para. 68.

²⁸⁶ *Id.*

²⁸⁷ *Id.*, at para. 69.

procedures, such as human cloning or euthanasia”²⁸⁸ Such a legislative vacuum is “inimical to the very concept of the division of powers”²⁸⁹

The decision in *PHS* is consistent with the Court’s recent assessments of interjurisdictional immunity. The case reiterates the core message from *Canadian Western Bank*, the most significant interjurisdictional immunity case under the McLachlin Court, where Binnie and LeBel JJ. cautioned against expanding interjurisdictional immunity into new spheres. Here, the Chief Justice recalled that “the modern trend is to strike a balance between the federal and provincial governments, through the application of pith and substance analysis and a restrained application of federal paramountcy”²⁹⁰ At the same time, *PHS* does not undermine the message in *Lacombe* and *COPA*,²⁹¹ two other recent decisions, which made clear that the doctrine has staying power where there is a long line of precedent applying it in a recognized context.

3. Paramountcy

(a) *Quebec v. Canada*

The case involves a relatively straightforward application of existing paramountcy rules. The facts concern an individual who, following an industrial accident, received certain income replacement benefits from both federal and provincial agencies. He was not entitled to some of the federal benefits. The provincial agency complied with a requirement, pursuant to federal law, from the federal agency to recover those federal benefits to which he was not entitled by garnishing certain of his provincial benefits. The individual challenged those garnishments, however, on the basis of a provincial law that provides that income replacement benefits are unseizable. Applying the federal paramountcy rule most recently articulated in *COPA*, Deschamps J. for a unanimous Court found a conflict of purposes between the relevant federal and provincial schemes and thus held the provincial scheme inoperative.²⁹²

The decision is more notable for its brief discussion of the Crown immunity rule. Canada had invoked the rule, which holds that the Crown

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*, at para. 65.

²⁹¹ *Lacombe*, *supra*, note 278; *COPA*, *supra*, note 278.

²⁹² *Quebec v. Canada*, *supra*, note 7, at paras. 36-37.

is not bound by any enactment unless the enactment so provides,²⁹³ arguing that the provincial statute is inapplicable to the federal Crown. Because paramountcy concerns the operability of a statute while the Crown immunity rule concerns its applicability, and because the Court has generally favoured assessing applicability before operability, Canada sought to dispose of the case using Crown immunity.²⁹⁴ Justice Deschamps acknowledged that the Court has generally adopted validity-applicability-operability analytical hierarchy as a matter of “judicial policy”.²⁹⁵ But she concluded that paramountcy should be considered before Crown immunity for three reasons: (1) the immunity has been eroded over time; (2) the exceptions to the rule are so numerous that the law in this area exceedingly complex; and (3) the rule has tended to benefit the federal Crown asymmetrically.²⁹⁶ These concerns echo those voiced by others.²⁹⁷ Ultimately, Deschamps J. concluded:

Although the courts cannot change the Crown immunity rule given that it is set out in [statute], this does not mean that they are required to apply it systematically. Where a case can be decided without recourse to Crown immunity, the court should generally give preference to the other grounds raised by the parties.²⁹⁸

Accordingly, on these facts, she proceeded with a paramountcy analysis.

IV. ABORIGINAL RIGHTS CASES

1. Identifying Aboriginal Rights

(a) *Lax Kw'alaams Indian Band v. Canada (Attorney General)*

Lax Kw'alaams is the latest in a string of decisions issued by the Court over the last two decades concerning the identification of Aboriginal rights under section 35(1) of the *Constitution Act, 1982*. In his last

²⁹³ See generally *Interpretation Act*, R.S.C. 1985, c. I-21, s. 17 (“No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner, except as mentioned or referred to in the enactment”).

²⁹⁴ *Quebec v. Canada*, *supra*, note 7, at para. 11.

²⁹⁵ *Id.*

²⁹⁶ *Id.*, at paras. 12-14.

²⁹⁷ See, e.g., Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000), at 326-30.

²⁹⁸ *Quebec v. Canada*, *supra* note 7, at para. 16.

constitutional decision for the Court, Binnie J. took the opportunity to clarify and further tweak that jurisprudence. First, Binnie J. put to bed the notion that the Court had embraced a more liberal approach to the requisite connection between a claimed right and an Aboriginal community's traditions for the right to be recognized for constitutional purposes. Some observers had thought the Court's reference in *Sappier* to a community's pre-contact "way of life" signalled a departure from the Court's somewhat convoluted "distinctive culture" test as set out in *Van der Peet*.²⁹⁹ However, Binnie J. clarified that no such departure was intended and, citing *Van der Peet*, that the threshold remains one where an Aboriginal claimant "must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture".³⁰⁰

Second, Binnie J. offered the most extensive treatment on the limits of an Aboriginal right's evolution. The claimants in *Lax Kw'alaams* asserted an Aboriginal right to the commercial harvesting and sale of *all* species of fish within their traditional waters. Though the trial judge found that the harvesting and consumption of fish was an integral part of the community's distinctive culture, there was no finding that the community engaged in anything beyond "some form of loosely termed trade" with the exception of limited trade in *one* fish variety, the euchalton.³⁰¹ The challenge for the claimants thus was not whether the *means* of exercising an Aboriginal right could evolve but whether the *subject matter* of the right itself could. The answer from a unanimous Court was a firm, No. "A 'gathering right' to berries based on pre-contact times would not, for example, 'evolve' into a right to 'gather' natural gas within the traditional territory", Binnie J. observed. "While courts have recognized that Aboriginal rights must be allowed to evolve within limits, such limits are both quantitative and qualitative."³⁰² In this case, an industrial fishery would represent "an outcome *qualitatively* different from the pre-contact activity on which it would ostensibly be based, and out of all proportion to its original importance to the pre-contact [Aboriginal] economy".³⁰³ Furthermore, because of the small amount of

²⁹⁹ See *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507 (S.C.C.) [hereinafter "*Van der Peet*"]; *R. v. Sappier*, [2006] S.C.J. No. 54, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) [hereinafter "*Sappier*"].

³⁰⁰ *Lax Kw'alaams*, *supra*, note 8, at para. 54, citing *Van der Peet*, *id.*, at para. 55 (emphasis removed).

³⁰¹ *Lax Kw'alaams*, *id.*, at para. 16.

³⁰² *Id.*, at para. 51.

³⁰³ *Id.*, at para. 56 (emphasis added).

trading activity relative to overall harvesting, “to extrapolate a modern commercial fishery from the pre-contact trade in eulachon grease would lack proportionality in *quantitative* terms relative to the overall pre-contact fishing activity as well”.³⁰⁴ For that reason, Binnie J. concluded that the “Lax Kw’alaams’ attempt to build a full-blown twenty-first century commercial fishery on the narrow support of an ancestral trade in eulachon” must fail.³⁰⁵

Third, and perhaps most notably, Binnie J. added a new element to the test for identifying an Aboriginal right. The preliminary stages remain the same. First, a claimant must prove a pre-contact practice, tradition or custom that was integral to the distinctive pre-contact Aboriginal society. Second, the claimant must show that the claimed modern right (assuming it differs from the pre-contact practice) is demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice. Under the approach advanced in *Lax Kw’alaams*, however, if the claimed modern right is a right to trade *commercially*, the court when “delineating” such a right must have regard for conservation goals, the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups.³⁰⁶ Binnie J. cited *Gladstone* for this proposition, acknowledging, however, that the discussion of such factors in that case was in the context of *Sparrow* justification.³⁰⁷ Chief Justice Lamer, writing for the majority in *Gladstone*, explained that such a balancing of interests was necessary where the Aboriginal right in question contained no “internal limitation”.³⁰⁸ In *Sparrow*, for example, where a right to fish for food, social and ceremonial purposes was recognized, the right was “internally limited” because “at a certain point the band will have sufficient fish to meet these needs”.³⁰⁹ Accordingly, *Sparrow*, as interpreted in *Gladstone*, stood for the proposition that Aboriginal rights holders should be afforded priority over others and that “when that right has been satisfied ... other users can be allowed to participate in the fishery”.³¹⁰ If the right were a commercial one, however, *Gladstone* recognized that the notion

³⁰⁴ *Id.*, at para. 58 (emphasis in original).

³⁰⁵ *Id.*, at para. 8.

³⁰⁶ *Id.*, at para. 46.

³⁰⁷ *Id.* See *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) [hereinafter “*Sparrow*”].

³⁰⁸ *R. v. Gladstone*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723, at para. 57 (S.C.C.) [hereinafter “*Gladstone*”].

³⁰⁹ *Id.*

³¹⁰ *Id.*, at para. 58.

of *priority* would become one of *exclusivity*, and “such a result was not the intention of *Sparrow*”.³¹¹ It was in that context that Lamer C.J.C. suggested that other interests should be balanced — as part of a *Sparrow* infringement and justification analysis — against the rights of the Aboriginal claimants. *Lax Kw’alaams*, however, appears to hold that *Gladstone* balancing should occur when “delineating” the scope of the right itself.³¹² If only as a matter of analytical structure, this is a significant shift and, for that reason, it is puzzling that Binnie J. chose not to further explain the Court’s rationale in effecting it.

The impact of *Lax Kw’alaams* will likely soon be felt in lower courts. On March 29, the Court denied leave to appeal in *Canada v. Ahousaht Indian Band and Nation* but remanded the case back to the B.C. Court of Appeal for reconsideration in light of the holding in *Lax Kw’alaams*.³¹³ Two things are notable about *Ahousaht* in the context of *Lax Kw’alaams*. First, the Court of Appeal narrowed the scope of the Aboriginal fishing right recognized by the trial judge with respect to one species of fish on the basis that as it was “high tech fishery of very recent origin, there can be no viable suggestion that the ancestors of the respondents could have participated in the commercial harvesting and trading of this particular marine resource at some time before contact with explorers and traders late in the 18th century”.³¹⁴ This finding appears vulnerable in light of *Lax Kw’alaams*. Justice Binnie remarked that “a court ought not to ‘freeze’ today’s permissible catch to species present in 1793 in the northwest coastal waters of British Columbia” were it established, for example, that “a defining feature of the distinctive [Aboriginal] culture was to catch whatever fish they could and trade whatever fish they caught”.³¹⁵

Second, though the trial judge in the case found a quasi-commercial Aboriginal right to “fish and to sell fish”, she expressly declined to circumscribe the ambit of the right when delineating it.³¹⁶ Justice Garson (as she then was) said: “Beyond stating that the right does not extend to a

³¹¹ *Id.*, at para. 60.

³¹² *Lax Kw’alaams*, *supra*, note 8, at para. 46.

³¹³ See *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, [2011] B.C.J. No. 913, 2011 BCCA 237 (B.C.C.A.) [hereinafter “*Ahousaht* (BCCA)”].

³¹⁴ *Id.*, at para. 69.

³¹⁵ *Lax Kw’alaams*, *supra*, note 8, at para. 57.

³¹⁶ The right was described as “not an unlimited right to fish on an industrial scale, but it does encompass a right to sell fish in the commercial marketplace”: *Ahousaht Indian Band v. Canada (Attorney General)*, [2009] B.C.J. No. 2155, 2009 BCSC 1494, at para. 489 (B.C.S.C.) [hereinafter “*Ahousaht* (BCSC)”].

modern industrial fishery or to unrestricted rights of commercial sale, I decline to do so. *Limitations on the scope of the right are most appropriately addressed at the infringement and justification stages of the analysis, as part of the reconciliation process.*³¹⁷ The Court of Appeal did not take issue with this approach.³¹⁸ However, in light of the holding from *Lax Kw'alaams* that some form of balancing should occur when *delineating* a right, the right in question in *Ahousaht* may on remand need to be both broadened (because it is no longer frozen in time) *and* narrowed (because of countervailing concerns with respect to commercial rights).

V. THE JUSTICES

1. Opinion Authorship

As usual, the Chief Justice remained the most prolific author of constitutional judgments, crafting a total of seven opinions (including six majority opinions),³¹⁹ but was joined last year by Deschamps J., who also wrote seven opinions (four majorities, one dissent, and two concurrences). The remaining majority opinions were roughly evenly spread among the other justices, though neither Fish J. nor Rothstein J. authored a single majority opinion in 2011. In a year with so much unanimity among the justices, only four justices had occasion to craft dissenting opinions in 2011: each of Deschamps, Fish and Cromwell JJ. penned a single dissent, while Abella J. wrote two.

2. Voting Patterns

As mentioned previously, 2011 was a year of remarkable unanimity on the Court. The justices agreed in all but four cases, or 78 per cent of the time, in marked contrast with 2010, when they agreed in only 56 per cent of constitutional cases (14 of 25 cases).³²⁰ Justice Binnie, in his last year at the Court, was the only justice to be in the majority in every single constitutional case (see Table 1, below). He was followed by the Chief Justice and Charron, Rothstein and Cromwell JJ. — the same

³¹⁷ *Id.*, at para. 487 (emphasis added).

³¹⁸ *Ahousaht* (BCCA), *supra*, note 313, at para. 19.

³¹⁹ For the purposes of these calculations, when two justices authored a particular opinion, each is given an authorship credit. Opinions by the Court, however, are excluded from the count.

³²⁰ Monahan & Sethi, *supra*, note 278, at 50.

group of five justices as last year, albeit with the order slightly rearranged. The figures for split decisions (that is, decisions with multiple opinions, even where the Court was unanimous in its holding) are especially interesting (see Table 2, below).³²¹ Among these decisions, Fish J. joined the majority opinion only half the time (3 of 6 cases). He was followed by Deschamps J., who joined the Court's majority opinion in 67 per cent of the split decisions (4 of 6 cases).

Table 1: Opinion Participation (All Constitutional Cases)

	McLachlin	Binnie	LeBel	Deschamps	Fish	Abella	Charron	Rothstein	Cromwell
Majority %	94%	100%	89%	83%	82%	89%	95%	95%	94%
Dissent %	0%	0%	0%	6%	6%	11%	0%	0%	6%
Concur %	6%	0%	11%	11%	12%	0%	5%	5%	0%

Table 2: Opinion Participation (Cases with Multiple Opinions)

	McLachlin	Binnie	LeBel	Deschamps	Fish	Abella	Charron	Rothstein	Cromwell
Majority %	86%	100%	71%	57%	50%	71%	86%	86%	83%
Dissent %	0%	0%	0%	14%	17%	29%	0%	0%	17%
Concur %	14%	0%	29%	29%	33%	0%	14%	14%	0%

³²¹ The seven split decisions in 2011 were: *Malhab* (one dissent); *Fraser* (one concurrence, one dissent); *Information Commissioner* (one concurrence); *Côté* (one dissent); *Crookes* (two concurrences); *Katigbak* (one concurrence); and *Barros* (two partial dissents).

As between the justices, only Charron and Rothstein JJ., owing partly to the fact that Charron J. joined Rothstein J.'s concurring opinion in *Fraser*, had the distinction of agreeing with each other in 100 per cent of constitutional cases. Following them, the McLachlin-Binnie, Binnie-Charron and Binnie-Rothstein pairs joined the same opinion in more than 86 per cent of cases with multiple opinions (see Table 4, below).³²² On the other end of the spectrum, the Deschamps-Fish and Deschamps-LeBel pairs joined the same opinion in only 17 per cent and 29 per cent of such cases, respectively. More broadly, as the data in Table 4 illustrates, the three Quebec justices have the lowest agreement ratios with their peers.

Table 3: Pairwise Agreement (All Constitutional Cases, %)

	McLachlin	Binnie	LeBel	Deschamps	Fish	Abella	Charron	Rothstein	Cromwell
McLachlin	N/A	94%	83%	82%	88%	83%	89%	89%	87%
Binnie	94%	N/A	89%	82%	81%	89%	94%	94%	93%
LeBel	83%	89%	N/A	72%	82%	79%	84%	84%	81%
Deschamps	82%	82%	72%	N/A	69%	78%	83%	83%	75%
Fish	88%	81%	82%	69%	N/A	76%	76%	76%	81%
Abella	83%	89%	79%	78%	76%	N/A	89%	89%	88%
Charron	89%	94%	84%	83%	76%	89%	N/A	100%	88%
Rothstein	89%	94%	84%	83%	76%	89%	100%	N/A	88%
Cromwell	87%	93%	81%	75%	81%	88%	88%	88%	N/A

³²² For these statistics, the data from cases with multiple opinions (Table 4) is preferred over that from all cases (Table 3) because the latter data tends to exaggerate the agreement between the justices owing to the high number of unanimous opinions. In contrast, the former data illustrates agreement between pairs where the Court itself failed to agree, which we judge to be a more useful indicator.

Table 4: Pairwise Agreement (Cases with Multiple Opinions, %)

	McLachlin	Binnie	LeBel	Deschamps	Fish	Abella	Charron	Rothstein	Cromwell
McLachlin	N/A	86%	57%	57%	67%	57%	71%	71%	67%
Binnie	86%	N/A	71%	57%	50%	71%	86%	86%	83%
LeBel	57%	71%	N/A	29%	50%	43%	57%	57%	50%
Deschamps	57%	57%	29%	N/A	17%	43%	57%	57%	33%
Fish	67%	50%	50%	17%	N/A	33%	33%	33%	50%
Abella	57%	71%	43%	43%	33%	N/A	71%	71%	67%
Charron	71%	86%	57%	57%	33%	71%	N/A	100%	67%
Rothstein	71%	86%	57%	57%	33%	71%	100%	N/A	67%
Cromwell	67%	83%	50%	33%	50%	67%	67%	67%	N/A

3. Leave and Hearings Statistics

Considering all cases, the time the Court took to decide leave applications and schedule hearings increased somewhat in 2011. Most notably, in the case of leave applications, the Court took on average 4.1 months — roughly three weeks longer than last year — to decide petitions.³²³ The average time taken to render a decision, however, fell to 6.2 months, over a full month less than last year's record high of 7.7 months, but still above the Court's 10-year average of 5.8 months.³²⁴ At eight cases, the Court also doubled the number of judgments it rendered from the bench compared with last year.³²⁵

With the exception of four cases decided by a panel of seven justices, all members of the Court participated in the 2011 constitutional cases, as

³²³ *Statistics Bulletin*, *supra*, note 4.

³²⁴ *Id.*

³²⁵ *Id.* Even at eight oral judgments, however, the Court is far off from the numbers seen in the early years of the McLachlin Court, when as many as 20 judgments were handed down from the bench.

has been the strong preference of the McLachlin Court. Two of the exceptions — *Campbell* and *Loewen* — were section 8 cases that reached the Court as of right and were decided unanimously. It is unclear why the Court sat in a panel of seven in both *Lax Kw'alaams* and *Malhab*, the two remaining cases.

VI. CONCLUSION

The past year was an important one for the Court in constitutional matters, particularly in relation to freedom of association and labour relations in the wake of *Health Services*, the continued robust application of section 7 rights signalled earlier in *Chaoulli* and reiterated in *PHS*, as well as the continuing and as yet inconclusive search for a straightforward framework to guide analysis of equality rights claims. The *Securities Reference* was clearly the major surprise of the year, with the Court relying upon a novel provincial “occupying the field” analysis, resulting in a significant constitutional as well as policy defeat for the federal government.

For the second year in a row, Prime Minister Stephen Harper will have a chance to change the face of the Court given the retirement of Justice Deschamps. With his appointment of Justice Wagner, Mr. Harper has named five Supreme Court justices, making 2012 the first year of a “Harper Court”.³²⁶ Looking to the future, within the next two years Fish and LeBel JJ. will reach mandatory retirement age, providing the Prime Minister with the opportunity to appoint his sixth and seventh members of the Court.³²⁷ Of the five appointments Mr. Harper has made to date, four may serve on the Court for a decade or more,³²⁸ the exception being Rothstein J., who must retire by December 2015, just after the next federal election, which will be held in October of that year. The point is that by the time of the next election, Mr. Harper will have had an opportunity to appoint a clear majority of justices who will shape the

³²⁶ Mr. Harper previously appointed Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

³²⁷ Justice Fish must retire by November 2013 and LeBel J. by November 2014. Both justices are among the most liberal members of the Court and, as the data indicate, have tended to dissent from the Court’s core block of five justices relatively frequently. See also Kirk Makin, “End of an era looms on Supreme Court” *The Globe and Mail* (April 18, 2012), online: <<http://www.theglobeandmail.com/news/politics/end-of-an-era-looms-on-supreme-court/article4210348/?page=all>>.

³²⁸ Justices Moldaver, Cromwell, Karakatsanis and Wagner will not reach mandatory retirement age until 2022, 2027, 2030 and 2032, respectively.

jurisprudence of the Court for years to come.³²⁹ Perhaps even more importantly, Mr. Harper has now appointed approximately half of the federally appointed judges in Canada and this proportion will continue to rise between now and the next election in 2015.

There have been suggestions that there is a confrontation looming between the federal government and the judiciary over matters such as expanded police powers, prostitution, assisted suicide and refugee rights.³³⁰ It can also be expected that governments at all levels will be required to take measures aimed at reducing the significant budget deficits that arose following the economic crisis of 2008-2009, which could provoke various forms of legal disputes and challenges.

There will no doubt be areas of legal conflict between courts and governments, including the occasional invalidation of laws, over the next number of years. At the same time, it is doubtful that the judiciary could be characterized as approaching these issues in monolithic terms. Moreover, the Supreme Court of Canada under Chief Justice McLachlin's leadership has generally adopted a careful, case-by-case approach to the development of constitutional jurisprudence. It would seem likely that this trend will continue into the future.

³²⁹ It should be noted, however, that the Prime Minister has selected his Supreme Court appointees from the ranks of appellate judges who were themselves appointed by previous governments, and who have generally been praised for their competence and fairness.

³³⁰ See Kirk Makin, "Why this year could prove to be the Charter's most controversial" *The Globe and Mail* (April 15, 2012), online: <<http://www.theglobeandmail.com/news/politics/why-this-year-could-prove-to-be-the-charters-most-controversial/article4100511/>>; Andrew Stobo Sniderman, "Harper v. The Judges: The biggest issues facing the country are being tackled not by Parliament, but in court", *Macleans* (August 21, 2012), online: <<http://www2.macleans.ca/2012/08/21/harper-v-the-judges/#>>.

