

## Constitutional Cases 2015: An Overview

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# Constitutional Cases 2015: An Overview

Lorne Sossin\*

This contribution reviews the Constitutional Cases issued by the Supreme Court in 2015. The analysis is divided into three parts. In the first part, as in previous years, I begin with an analysis of the year as a whole, identifying noteworthy statistics or trends. In the second part, I explore some specific Constitutional decisions of the Court – especially those revealing important divergences on the Court around the scope and reach of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> and the premise of Federalism – in greater detail. I conclude, in the third part, with a discussion of the evolving composition of the Court, and the significance of the departure of Justice Rothstein, together with the arrival of Justices Côté and Brown.

## I. 2015: A YEAR IN REVIEW

2015 was a remarkable year by any standard. In total, the Supreme Court of Canada (“SCC”) decided 68 cases during this calendar year. Of these, I characterize 28 cases as Constitutional decisions, including 22 identified by the SCC as such in their headnotes and keyword system, and a further six that deal with constitutional principles, constitutional provisions or constitutional values.<sup>2</sup>

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\* Dean and Professor, Osgoode Hall Law School, York University. I am deeply indebted to three Osgoode Hall Law School students, Tristan Davis, Irina Samborski and Raymond Seelen, for their superb research and collaboration on the statistical review of 2015 for the Constitutional Cases Conference, held at Osgoode on April 8, 2016. I also benefited from the lively discussions on that day with many of those in attendance. Ben Berger and Sonia Lawrence provided invaluable assistance as conveners of the Conference and I am grateful for their editorial assistance.

<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>2</sup> The cases identified are: *R. v. Appulonappa*, [2015] S.C.J. No. 59, 2015 SCC 59 (S.C.C.), affg [2014] B.C.J. No. 762 (B.C.C.A.); *Caron v. Alberta*, [2015] S.C.J. No. 56, 2015 SCC 56 (S.C.C.), affg [2014] A.J. No. 174 (Alta. C.A.); *R. v. Moriarity*, [2015] S.C.J. No. 55, 2015 SCC 55 (S.C.C.); *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, [2015] S.C.J. No. 52,

This figure takes on significance in light of the steady decline in the number of overall judgments from the Court (79 in 2014 to 68 in 2015), and the steady increase in the number of constitutional judgments (19 in 2014 to 28 in 2015), with the proportion of judgments devoted to constitutional issues correspondingly rising (now approximately 40 per cent).

While it would be wrong to suggest the Supreme Court of Canada is becoming more akin to a Constitutional Court, it is fair to say the centrality of Constitutional cases within the Supreme Court firmament is becoming more apparent. In particular, it is worth highlighting that, between 2013 and 2015, the number of *Charter of Rights and Freedoms* cases increased by 58 per cent.

Notwithstanding the maturing of Canada's Constitutional jurisprudence, Constitutional Applicants continue to enjoy significant success before the Supreme Court. Applicants were successful in 13 of the 28 cases, or 46 per cent of the time (including partial successes, such

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2015 SCC 52 (S.C.C.); *Alberta (Attorney General) v. Moloney*, [2015] S.C.J. No. 51, 2015 SCC 51 (S.C.C.), affg [2014] A.J. No. 155 (Alta. C.A.); *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] S.C.J. No. 53, 2015 SCC 53 (S.C.C.), varg [2014] S.J. No. 164 (Sask. C.A.); *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, [2015] S.C.J. No. 46, 2015 SCC 46 (S.C.C.); *B010 v. Canada (Citizenship and Immigration)*, [2015] S.C.J. No. 58, 2015 SCC 58 (S.C.C.), revg [2013] F.C.J. No. 322 (F.C.A.); *Guindon v. Canada*, [2015] S.C.J. No. 41, 2015 SCC 41 (S.C.C.), affg [2013] F.C.J. No. 673 (F.C.A.); *R. v. Simpson*, [2015] S.C.J. No. 40, 2015 SCC 40, [2015] 2 S.C.R. 827 (S.C.C.), revg [2014] Q.J. No. 5425 (Que. C.A.); *R. v. Smith*, [2015] S.C.J. No. 34, 2015 SCC 34, [2015] 2 S.C.R. 602 (S.C.C.), varg [2014] B.C.J. No. 2097 (B.C.C.A.); *Canada (Attorney General) v. Barnaby*, [2015] S.C.J. No. 102, 2015 SCC 31, [2015] 2 S.C.R. 563 (S.C.C.), revg [2013] Q.J. No. 8752 (Que. C.A.); *Caplin v. Canada (Justice)*, [2015] S.C.J. No. 32, 2015 SCC 32, [2015] 2 S.C.R. 570 (S.C.C.); *Kahkewistahaw First Nation v. Taypotat*, [2015] S.C.J. No. 30, 2015 SCC 30, [2015] 2 S.C.R. 548 (S.C.C.); *R. v. Kokopenace*, [2015] S.C.J. No. 28, 2015 SCC 28, [2015] 2 S.C.R. 398 (S.C.C.); *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] S.C.J. No. 25, 2015 SCC 25, [2015] 2 S.C.R. 282 (S.C.C.); *Henry v. British Columbia (Attorney General)*, [2015] S.C.J. No. 24, 2015 SCC 24, [2015] 2 S.C.R. 214 (S.C.C.); *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] S.C.J. No. 21, 2015 SCC 21, [2015] 2 S.C.R. 139 (S.C.C.), revg [2014] B.C.J. No. 155 (B.C.C.A.); *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 22, 2015 SCC 22, [2015] 2 S.C.R. 179 (S.C.C.); *R. v. Nur*, [2015] S.C.J. No. 15, 2015 SCC 15, [2015] 1 S.C.R. 773 (S.C.C.), affg [2013] O.J. No. 5120 (Ont. C.A.); *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, 2015 SCC 14, [2015] 1 S.C.R. 693 (S.C.C.), affg [2013] J.Q. no 6676 (Que. C.A.); *R. v. Sanghera*, [2015] S.C.J. No. 13, 2015 SCC 13, [2015] 1 S.C.R. 691 (S.C.C.); *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.), revg [2012] J.Q. no 15094 (Que. C.A.) [hereinafter "*Loyola*"]; *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, 2015 SCC 7, [2015] 1 S.C.R. 401 (S.C.C.), varg [2013] B.C.J. No. 632 (B.C.C.A.); *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.), revg [2013] B.C.J. No. 2227 (B.C.C.A.); *Meredith v. Canada (Attorney General)*, [2015] S.C.J. No. 2, 2015 SCC 2, [2015] 1 S.C.R. 125 (S.C.C.), affg [2013] F.C.J. No. 465 (F.C.A.) [hereinafter "*Meredith*"]; and *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] S.C.J. No. 1, 2015 SCC 1, [2015] 1 S.C.R. 3 (S.C.C.), revg [2012] O.J. No. 2420 (Ont. C.A.) [hereinafter "*Mounted Police*"].

as *Saskatchewan Federation of Labour* (where one of two impugned sections was struck down) and *Law Societies of Canada* (where three of five impugned sections were read down).

If there is a trend apparent in the successful cases, it may be reluctance of the Court to strike down legislation. In the 13 successful Constitutional claims, the Supreme Court:

- (1) read down provisions in 6 cases;
- (2) struck down sections only in 4 cases (with 3 suspended declarations of invalidity);
- (3) issued declaratory relief in 2 cases and
- (4) granted 1 motion.

While a one-year snapshot cannot provide a full portrait of a judge on the Supreme Court, it can suggest key roles particular judges play within the Court's jurisprudence.

Significantly, Chief Justice McLachlin authored the most majority decisions (6) – it is, after all, the McLachlin Court – while Justices Abella and Cromwell authored 5 majority judgments each. Chief Justice McLachlin also has the distinction of authoring the most concurring judgments (4) and the fewest dissenting judgments (0)! By contrast, Justice Wagner authored the most dissenting judgments (3) followed by retiring Justice Rothstein (2). In light of the influence of some of the Court's most seasoned voices, it remains difficult to decipher where some of the more recently appointed members of the Court will leave their mark on the Canadian Constitution.

Against this backdrop, I explore some of the most notable cases of 2015. Beyond the implications to which each gives rise (and many other important decisions that I do not specifically review), are there any clear or emerging themes to the Constitutional jurisprudence of the year? In my view, 2015 revealed some key fissures on the Court around the reach of the Charter (in labour relations where Charter rights are asserted, in administrative justice where Charter values are at play and in cases where Charter damages are claimed) and the premise of Federalism (whether legislative jurisdiction is seen through the lens of a single level of government or through the partnerships between levels of government increasingly required to achieve policy ends). Below, I examine some of the key cases revealing these fissures, and their implications, in more detail.

## II. 2015: THE YEAR, IN CASES

As noted above, the Supreme Court decided 28 cases featuring the Constitution. The most significant activity involved developments under sections 2, 7 and 24(1) of the Constitution and the distribution of legislative powers under Canadian federalism.

The 2015 Constitutional cases were notable not just for some important judgments with wide-ranging implications, but also for a resurgence in the number of interveners taking part in those cases. For example, in *Saskatchewan Federation of Labour* (discussed below, which recognized the right to strike under section 2(d) right to association), the Court granted intervener status to 35 groups. The consideration of whether a deadline for invalidity in *Carter* should be extended featured 26 Interveners, while *Loyola* (applying Charter values in the context of religious freedom) and *Henry* (establishing new test for Charter damages) had 17 and 14 Interveners participating, respectively.

Below, I discuss the labour and section 2(d) trilogy: *Saskatchewan Federation of Labour v. Saskatchewan*, *Mounted Police Association of Ontario v. Canada (Attorney General)* and *Meredith v. Canada (Attorney General)*,<sup>3</sup> *Quebec (Attorney General) v. Canada (Attorney General)* the culminating judgment in a series of cases exploring co-operative federalism; a continuation of the Court's exploration of Charter values in *Loyola*; and the Charter damages case, *Henry*. These cases, in my view, are likely to have the most significant impact in charting Canada's Constitutional jurisprudence.

Any selection of cases for scrutiny among such a rich pool of over two dozen decisions is necessarily subjective and easily critiqued for what is left out. Many will say that one of the most significant decisions in 2015 was *R. v. Nur*,<sup>4</sup> for example, which suggests that only evidence based justifications for mandatory minimum sentences will pass constitutional muster under the "cruel and unusual treatment" test of section 12 of the Charter. Others will point to the significance of the exploration of the role of lawyers and solicitor-client relationships under section 7 of the Charter in *Canada (Attorney General) v. Federation of Law Societies of Canada*,<sup>5</sup> as one of the year's most noteworthy decisions. I welcome the debates surrounding why a particular judgment is seen as more significant than

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<sup>3</sup> *Supra*, note 2.

<sup>4</sup> *Supra*, note 2.

<sup>5</sup> *Supra*, note 2.

others, and I would not want to suggest any Supreme Court decisions do not merit more scrutiny. Selecting the particular cluster of cases for further commentary below had less to do with the impact of a decision in the moment and more to do with the implications of a decision for the future. In each of the cases below, I provide an analysis of why I believe the implications of these cases justify special attention.

**1. Procedural Justice and Section 2(d) Freedom of Association:  
*Saskatchewan Federation of Labour v. Saskatchewan, Mounted  
Police Association of Ontario v. Canada (Attorney General)  
& Meredith v. Canada (Attorney General)***

The Supreme Court is in the midst of a fundamental, far-reaching and ground-shifting revision of the intersection between Constitutional law and Labour law in Canada. In the trilogy of *Saskatchewan Federation of Labour, Mounted Police Association of Ontario v. Canada (Attorney General)*, and *Meredith v. Canada (Attorney General)*, the Supreme Court continued to develop the scope, coverage and implications of section 2(d) of the Charter. While a trilogy of cases in the early days of Charter jurisprudence in 1987 suggested the freedom of association would not guarantee rights to collective bargaining,<sup>6</sup> or the right to strike, the Court reinvigorated these debates in 2010 with its landmark *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*,<sup>7</sup> recognizing a right to collective bargaining. At the time, *Health Services* seemed to fit within a template of cases delineating more robust procedural protections under the Charter.<sup>8</sup> In 2015, however, the Supreme Court made clear at least in the context of labour, the Charter section 2(d) boundary between procedural and substantive justice remains very much a work in progress.

In *Saskatchewan Federation of Labour v. Saskatchewan*,<sup>9</sup> the Saskatchewan Federation of Labour challenged the constitutional validity of *The Public Service Essential Services Act 2008* and *The Trade Union Amendment Act 2008* arguing that the legislation infringed the freedom of

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<sup>6</sup> *Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.), affg [1984] A.J. No. 616 (Alta. C.A.); *PSAC v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.), affg [1984] F.C.J. No. 183 (F.C.A.); and *RWDSU v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.), revg [1985] S.J. No. 476 (Sask. C.A.).

<sup>7</sup> [2007] S.C.J. No. 27, 2007 SCC 27 (S.C.C.), varg [2004] B.C.J. No. 1354 (B.C.C.A.) [hereinafter “*Saskatchewan Federation of Labour*”].

<sup>8</sup> See, for example, “The Promise of Procedural Justice” in A. Dodek and D. Wright (eds.), *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin, 2011), at 55-76.

<sup>9</sup> [2015] S.C.J. No. 4, 2015 SCC 4 (S.C.C.), varg [2013] S.J. No. 235 (Sask. C.A.).

association of employees protected by section 2(d) of the Charter, and could not be saved under section 1. In the context of more and more services being designated as “essential” by Canadian governments, the stakes were extremely high, with some wondering whether the Supreme Court would find a free-standing right to strike under the section 2(d) right to freedom of association (or even a derivative right as part of what the already recognized right to collective bargaining might entail).

The Court split in its findings on the two pieces of legislation, striking down *The Public Service Essential Services Act 2008* (with the declaration of invalidity suspended for 12 months) while upholding *The Trade Union Amendment Act 2008*.<sup>10</sup> *The Public Service Essential Services Act* was found to infringe section 2(d) of the Charter because it “substantially interfered” with the freedom of public sector employees to take meaningful strike action.

The right to strike was recognized by the majority as protected activity under freedom of association, not simply derivative of the right to collective bargaining under section 2(d). The impugned Act directed that in the absence of an agreement with the Union, the Crown and other public employers could unilaterally determine employees to be “essential” and preclude legal strike. In light of this broad authority, the Act was found by the majority not to satisfy the minimal impairment test under section 1. The Court found no such infringement with respect to *The Trade Union Amendment Act 2008*, however, which dealt with the requirements for union certification and the process for decertification. The Court held that the provisions of this legislation did not have the effect of preventing employees from bargaining collectively through a trade union of their own choosing under section 2(d), nor did the Act interfere with the expression of freedom by employees under section 2(b).

*Saskatchewan Federation of Labour* represents the first case in which the Supreme Court definitively recognized a right to strike under the Charter. Justice Abella, writing for the majority, stated,

...The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.<sup>11</sup>

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<sup>10</sup> *The Public Service Essential Services Act*, c. P-42.2 of the Statutes of Saskatchewan, 2008 (effective May 14, 2008) as amended (repealed) by the Statutes of Saskatchewan, 2014, c. S-32.21; the *Trade Union Amendment Act, 2008*, S.S. 2008, c. 26 and c. 2.

<sup>11</sup> *Id.*, at para. 3.

Beyond the many essential services statutes which may now need to be revisited with the Court's framework in *Saskatchewan Federation of Labour* in mind, the Court signalled it would not shy away from a more muscular role in restraining the state from legislative unilateralism in the labour context. The dissenting Justices (Rothstein and Wagner JJ.) take issue with the majority's foray into what they see as an inherently political trade-off in how Governments organize labour relations, and do so by quoting two members of that majority (Chief Justice McLachlin and LeBel J.) in an earlier case:

McLachlin C.J. and LeBel J., writing for a unanimous Court in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, cautioned that

[j]udging the appropriate balance between employers and unions is a delicate and essentially political matter. Where the balance is struck may vary with the labour climates from region to region. This is the sort of question better dealt with by legislatures than courts. Labour relations is a complex and changing field, and courts should be reluctant to put forward simplistic dictums. [para. 85]

Thirteen years later, the majority in this case ignores this sage warning in reaching its conclusion. Our colleagues have taken it upon themselves to determine "the appropriate balance between employers and unions", despite the fact that this balance is not any less delicate or political today than it was in 2002. In our respectful view, the majority is wrong to intrude into the policy development role of elected legislators by constitutionalizing the right to strike.<sup>12</sup>

This more activist and expansive role for the Court was tested in *Mounted Police Association of Ontario v. Canada (Attorney General)*,<sup>13</sup> where the Court considered legislation circumscribing how the RCMP could engage in collective bargaining, and in the companion case of *Meredith v. Canada (Attorney General)*, in which the Court examined whether a reduction in pay for RCMP officers violated the Charter. The differing outcomes in these cases provide a clearer picture of the freedom of association under section 2(d) and the boundaries of state action in constraining unions.

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<sup>12</sup> *Id.*, at para. 105.

<sup>13</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, *supra*, note 2, online: <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14577/index.do>>.



At issue in *Mounted Police* was the RCMP labour relations regime, which did not involve a trade union but rather a Staff Relations Representative Program [SRRP]. The SRRP permitted RCMP members to engage in resolving labour issues (though not salary) and, through a National Executive Committee staffed by member representatives from various RCMP divisions and regions, to be consulted on human resources policies. Under this scheme, however, the final say was with management. This scheme had been upheld under section 2(d) of the Charter in *Delisle v. Canada (Deputy Attorney General)*.<sup>14</sup>

The challenge in *Mounted Police* involved two private associations of RCMP members who sought to represent RCMP members in Ontario and British Columbia. They argued that the imposition of the SRRP as a labour relations regime infringed members' freedom of association. The majority interpreted section 2(d) as guaranteeing a "meaningful process" of collective bargaining which includes a degree of choice and independence. It found the impugned labour relations regime for RCMP members denied them that choice. While reiterating that section 2(d) guarantees a process, not a result, the majority held that the government cannot enact laws that substantially interfere with the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. In other words, a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals, as in the *Mounted Police* context.

In a jointly authored majority judgment, the Chief Justice and Justice LeBel (in one of his final judgments, as he formally retired in November of 2014) noted that section 2(d) does not require a single ideal model for collective bargaining, but does require balance and equilibrium between employers and employees:

The search is not for an "ideal" model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue. Choice and independence do not require adversarial labour relations; nothing in the Charter prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of employees' interests, where these diverge from those of their employer, in the name of a "non-adversarial" process. Whatever

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<sup>14</sup> [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989 (S.C.C.), affg [1997] J.Q. no 189 (Que. C.A.).

the model, the Charter does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2 (d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.<sup>15</sup>

Applying this standard, the majority found that the SRRP scheme imposed on RCMP members results in their being represented by an organization they did not choose or control. Further, as part of the management structure of the RCMP, the SRRP structure lacked independence. The majority concluded that the SRRP process did not achieve the necessary balance between employees and employer.

The violation of section 2(d) was found not to be justified under section 1 as the majority concluded there the objective of maintaining an independent and objective police force is not rationally connected to the exclusion of RCMP members from a statutorily protected collective bargaining process. The majority further observed (in *obiter*) that the RCMP is the only police force in Canada without a collective agreement to regulate the working conditions of its officers, a status that the Court found would have justified the conclusion that the measure was not minimally impairing – had it been necessary to undertake that analysis.

Once again, Justice Rothstein issued a sharply worded dissent (this time alone), asserting that concerns such as maintaining “the balance between employees and employer” and attaining “equilibrium” in labour relations are the concerns of governments and legislatures, not the judiciary.<sup>16</sup>

Finally, in *Meredith v. Canada (Attorney General)*,<sup>17</sup> the Supreme Court considered a challenge by RCMP members of the SRRP over a unilateral roll back of wages pursuant to the *Expenditure Restraint Act*.<sup>18</sup> With a notable dissent by Justice Abella (who, as noted, authored the majority reasons in the *Saskatchewan Federation* judgment), the majority concluded the wage restraint imposed through the Act was not unconstitutional.

The majority concluded that while the labour relations process may attract scrutiny under section 2(d), the focus of that scrutiny will be whether

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<sup>15</sup> *Id.*, at para. 97.

<sup>16</sup> *Id.*, at para. 162.

<sup>17</sup> *Supra*, note 2.

<sup>18</sup> S.C. 2009, c. 2, s. 393, which imposed a limit of 1.5 per cent on wage increases in the public sector for the 2008 to 2010 fiscal years.

a statute or process interferes with the RCMP members' freedom of association. The limits imposed by the impugned Act were shared by all public servants, and did not preclude consultation on other compensation-related issues in the future (and, indeed, an exception for RCMP members included in the Act allowed RCMP members to obtain significant benefits as a result of subsequent proposals) – as a result, the Court found the impact of the Act on the associational activity of RCMP members was minor.

Taken together, the trilogy of *Saskatchewan Federation*, *Mounted Police* and *Meredith*, constitute a significant advance in the Supreme Court's engagement in the labour field, and refinement of section 2(d) of the Charter. Looking just at the majority judgments in these three cases, it is possible to chart the boundaries of state interference in the associational process, which will attract constitutional intervention. Where state action can be shown to materially impair the associational process, including in its substantive manifestations, such as the right to strike, the Court will step in. While this procedural governance of labour relations is becoming more robust, the Court remains reticent to dictate outcomes, or appear to tilt the delicate balance to which labour relations strive. The more the Court intervenes in labour relations cases, however, the more dependent all parties may become on litigation to maintain this balance.

## 2. The Premise of Federalism: *Quebec (Attorney General) v. Canada* (the “Gun Registry”)

In the sharply divided 5-4 *Gun Registry* decision,<sup>19</sup> the majority of the Supreme Court upheld the Federal Government's right to destroy data collected through the discontinued long gun registry.<sup>20</sup> The majority concluded that the Federal government's legislative authority over criminal law matters gave it the authority to dispose of the data if it wished. Notably, the four Justices in dissent included all three of the Justices appointed from Quebec (the province that brought the challenge against the Federal Government's decision).

While the decision explores (once again) the existential purposes of Canadian federalism, it also engages politics, as the long gun registry has been a flashpoint since the Liberals (under Prime Minister Jean Chretien) created the registry in 1995. Gun licensing data were collected by an officer

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<sup>19</sup> *Quebec (Attorney General) v. Canada (Attorney General)*, *supra*, note 2.

<sup>20</sup> See Judy Hemming, “Battle of the Doctrines, Division of Powers Trumps Cooperative Federalism: *Quebec (AG) v Canada*” (April 3, 2016), online: <<http://www.thecourt.ca/2015/04/in-a-battle-of-the-doctrines-division-of-powers-trumps-cooperative-federalism-quebec-ag-v-canada/>>.

in each province. After winning his first majority in 2011, Prime Minister Stephen Harper's Conservative government introduced the *Ending the Long-Gun Registry Act*.<sup>21</sup> This Act repealed the requirement for the registration of non-restricted weapons, known as long guns. That legislation also authorized the destruction of already collected data.

The Supreme Court had already situated the Federal Government's authority to create a gun registry in its legislative jurisdiction over Criminal Law.<sup>22</sup> For the majority, Justices Cromwell and Karakatsanis assert the primacy of the "constitutional boundaries that underlie the division of powers" so that, where clearly stated as in areas such as Criminal Law, the notion of cooperative or flexible federalism cannot modify or constrain this jurisdiction.<sup>23</sup> They state,

Neither this Court's jurisprudence nor the text of the *Constitution Act, 1867* supports using that principle [the principle of cooperative federalism] to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government adopted legislation having some impact on the policy objectives of another. Paradoxically, such an approach could discourage the practice of cooperative federalism for fear that cooperative measures could risk diminishing a government's legislative authority to act alone.<sup>24</sup>

The dissenting minority held that the destruction of the data was unconstitutional, citing the doctrine of cooperative federalism. Written jointly by Justices LeBel, Wagner and Gascon, the dissenting judgment would have allowed the appeal (in part). Invoking "a modern view of federalism", the dissent adopts a more flexible account of federalism, especially in settings where the policy or law in question required both federal and provincial government action to be effective (as in the case).<sup>25</sup>

The dissent focused on the section of the Act which precluded data transfer to the provinces, which they concluded "has significant effects on Quebec's legislative powers and is not necessary to the achievement

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<sup>21</sup> S.C. 2012, c. 6.

<sup>22</sup> See *Quebec (Attorney General) v. Canada (Attorney General)*, *supra*, note 2.

<sup>23</sup> *Id.*, at paras. 62-68.

<sup>24</sup> *Id.*, at para. 20.

<sup>25</sup> *Id.*, at para. 147.

of the ELRA's purpose."<sup>26</sup> For this reason, the dissent would have found the provision unconstitutional.

At first glance, it does not seem controversial to assert that the constitutional jurisdiction to enact legislation in a given field must include the jurisdiction to repeal that legislation, or otherwise modify it. As Ian Peach has observed, however, the issue that is less straightforward is whether the constitutional jurisdiction of one level of government can be constrained by a positive duty to cooperate with the other.<sup>27</sup> While the Federal Government was free to establish (or not) a gun registry, once one is established, and integrated with provincial law enforcement (and there was no question in this case that Quebec actively relied on the very data which the Act sought to have destroyed), should the Federal Government's ability to destroy that data be constrained by provincial reliance on it?

The dissent's vision of cooperative federalism in this regard is compelling. They construe the scheme from the outset as a partnership between federal and provincial governments (and, indeed, the federal scheme relied on provincial action to register guns in a particular province). For Quebec, the reality of this partnership must inform the question of whether the Government that established the basis for that partnership can unilaterally repeal it. In their view, destroying the registry data relating to Quebec undermines Quebec's exercise of its constitutional jurisdiction over law enforcement and civil rights in the province and is not necessary for the goals of the Act (discontinuing the federal registry).

The implications of this judgment are far-reaching, in light of how many crucial initiatives in the offing require federal-provincial partnerships (from medically assisted dying to legalizing and regulating marijuana). The lack of consensus on the Supreme Court as to the overarching vision of Canadian federalism is not encouraging.

### 3. Valuing the Charter: *Loyola v. Quebec (Attorney General)*

Among the areas with potential to affect the scope and relevance of Constitutional law in Canada, the emerging doctrine of Charter values may top the list. On the one hand, it appears not to be part of Constitutional

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<sup>26</sup> *Id.*, at para. 51.

<sup>27</sup> Ian Peach, "The Supreme Court of Canada Long-Gun Registry Decision: The Constitutional Question Behind an Intergovernmental Relations Failure" (2015) 24 *Constitutional Forum* 1 at 2, online: <[https://ualawccsprod.srv.ualberta.ca/images/PDFs/01\\_Peach.pdf](https://ualawccsprod.srv.ualberta.ca/images/PDFs/01_Peach.pdf)>.

law at all, as it involves cases where no Charter claim *per se* is engaged, and influences only the Administrative Law analysis where exercises of administrative discretion are challenged. On the other hand, it introduces Constitutional principles into a far broader array of settings (well beyond the notions of Government action in the section 32 or *Dolphin Delivery* sense of the term). The introduction of Charter values as a distinct methodology applicable outside Charter claims in the context of judicial review over administrative discretion arrived with *Doré v. Barreau du Québec*.<sup>28</sup> *Loyola* offered the first opportunity for the Supreme Court to revisit, explore and apply the *Doré* framework. For this reason, it is especially telling that the majority and concurring decisions agree on the result but are ships passing in the night in terms of whether Charter values or a Charter claim *per se* apply.<sup>29</sup>

*Loyola* involved a decision by Quebec's Minister of Education, Recreation and Sport denying Loyola High School an exemption from a provincially-mandated curriculum which included a required course on world culture and religion. Loyola is a private Catholic secondary school for boys, established by Jesuits in the 1840s. The required course in Ethics and Religious Culture ("ERC") was initiated for the 2008-2009 school year, and compels teachers to be objective and impartial in their instruction – so that, for example, instructors at a Catholic school would have to teach Catholicism as a world religion amongst others in a neutral way. The provincial scheme making this course a requirement allowed private schools to seek an exemption if they provided an equivalent alternative. Loyola applied for an exemption based on the view that this curriculum was incompatible with its Catholic mission and convictions. It proposed an alternative program that discussed major world religions and ethical positions but with Catholic values at its core.

The Minister denied Loyola's request for the exemption. She determined that its alternative program was faith-based, and thus at odds with the ERC Program's secular goals. Loyola brought an application for judicial review.

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<sup>28</sup> [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.), affg [2010] J.Q. no 88 (Que. C.A.) [hereinafter "*Doré*"].

<sup>29</sup> See for discussion Kirk Andrews, "The Majority: Water in Loyola's Wine" (March 23, 2015), The Court, online: <<http://www.thecourt.ca/2015/03/loyola-v-quebec-part-i-the-majority-water-in-loyolas-wine/>>; and "Loyola v Quebec, Part II: Freedom of Religion for Religious Organizations" (April 2, 2015), The Court, online: <<http://www.thecourt.ca/2015/04/loyola-v-quebec-part-ii-freedom-of-religion-for-religious-organizations/>>.

The majority saw this exercise of ministerial discretion as clearly within the sphere of Charter values, as explained by Justice Abella:

This Court's decision in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, sets out the applicable framework for assessing whether the Minister has exercised her statutory discretion in accordance with the relevant *Canadian Charter of Rights and Freedoms* protections. *Doré* succeeded a line of conflicting jurisprudence which veered between cases like *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, that applied s. 1 (and a traditional Oakes analysis) to discretionary administrative decisions, and those, like *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, which applied an administrative law approach. The result in *Doré* was to eschew a literal s. 1 approach in favour of a robust proportionality analysis consistent with administrative law principles.<sup>30</sup>

One of the main areas of confusion arising out of the *Doré* framework involves the scope of Charter values – are these delineated by the language of Charter rights or do they extend to values such as privacy and human dignity which are implied by Charter rights but not included expressly in any Charter provisions.<sup>31</sup> Justice Abella attempts to clarify this question in the following passage: “Charter values — those values that underpin each right and give it meaning — help determine the extent of any given infringement in the particular context and, correlatively, when limitations on the right are proportionate in light of the applicable statutory objectives... ”<sup>32</sup> Suffice it to say this encapsulation raises as many issues as it resolves. While this is not necessarily unhelpful at an early stage of working through the precise delineation of Charter values, at some point a crisper account of Charter values will be needed.

Under the *Doré* framework, those who exercise discretion must consider the presence and implications of Charter values and balance these against the objectives of the statute or policy. Justice Abella stresses the contextual aspect of the *Doré* framework. She notes that it responds to the diverse settings within which discretionary decision-makers operate and highlights deference to the expertise of the decision-makers (even,

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<sup>30</sup> *Id.*, at para. 3.

<sup>31</sup> See also L. Sossin and M. Friedman, “Charter Values and Administrative Justice” (2014) 67 S.C.L.R. (2d) 391.

<sup>32</sup> *Id.*, at para. 36.

controversially, when it comes to understanding Charter principles in particular policy contexts).

A reviewing Court considers whether the decision-maker's balancing of these factors was reasonable. In the context of *Loyola*, in other words, the question for the Court was whether the Minister balanced religious freedom for Loyola against the secular goals of the curriculum. The majority concluded that the curriculum allowed for significant variation in instruction, as long as the competencies were tied to the program's goals: that is, the recognition of others and the pursuit of the common good. By requiring that all aspects of Loyola's alternative program be taught from a neutral perspective, including its instruction on Catholicism, the state was telling it how to teach the religion that "animates" Loyola's identity. The majority found that this undermined the ability of institutions offering religious education to convey faith based principles to the children whose parents chose to expose them to these principles. In short, the Minister's decision limited freedom of religion more than necessary given the statutory objectives.

While finding for Loyola, Justice Abella expressed reservations about its alternative program. Loyola sought to teach other ethical and religious frameworks from the "lens" of Catholic ethics and morality. It was determined that this would transform the ethics component from a study of different ethical approaches to a study of Catholicism. She elaborated:

In any event, it is the Minister's decision as a whole that must reflect a proportionate and therefore reasonable balancing of the *Charter* protections and statutory objectives in issue. It does not, in my respectful view, because it rests on the assumption that a confessional program cannot achieve the objectives of the ERC Program. This assumption led the Minister to a decision that does not, overall, strike a proportionate balance between the *Charter* protections and statutory objectives at stake in this case. It is, with respect, unreasonable as a result.<sup>33</sup>

For this reason, the remedy selected by the majority was not to grant the exemption sought by Loyola but to remit the matter back to the Minister for reconsideration.

The concurring reasons, jointly authored by Chief Justice McLachlin and Moldaver J., approach the challenge as a Charter claim around the violation

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<sup>33</sup> *Id.*, at para. 79.



of freedom of religion. They do not take issue with the application of the *Doré* framework but rather ignore it altogether. Applying the well-accepted section 2(a) freedom of religion framework, the concurring minority finds a clear violation of the freedom of religion of those who choose to attend Loyola and the “collective development of belief” and conclude this violation cannot be justified under section 1, and further, that the only possible remedy would be to grant the exemption Loyola sought. This approach to such a new and important area of constitutional thought is genuinely puzzling. Where, in the past, members of the Court have disagreed with each other on whether to apply a constitutional or administrative law methodology to the review of discretionary decisions (e.g., *Multani* or *Trinity Western*), this has been the subject of the judgments themselves. For the concurring Justices to determine that the *Doré* framework was not necessary or applicable without even a passing reference as to why is telling.

As *Loyola* demonstrates, much remains to be determined in the context of Charter values. Must a reviewing court apply Charter values and an administrative law analysis every time an exercise of administrative discretion is challenged that engages those values, or do applicants have the choice whether to challenge those decisions either (or both) on Administrative Law/Charter Values grounds as well as through a Charter claim itself? *Loyola* raises this issue starkly as the Trial Court reached a decision on a Charter claim by *Loyola* (prior to *Doré*), then the Quebec Court of Appeal reversed and applied a Charter values analysis (post *Doré*). The majority applies an Administrative Law/Charter values analysis and sees no reason for a Charter analysis while the concurring minority does the precise opposite.

Given the similarity of outcome, there is a temptation to see the methodological divergence as academic. It is not. Charter values represent a potentially substantial expansion of the reach of the Charter – extending to all discretionary decision-makers subject to Administrative law review for reasonableness – a category including all agencies, boards, tribunals, self-regulating professions, universities, hospitals and pretty much the entire broader public sector. Further, because the *Doré* framework envisions deference to administrative decision-makers in ways a Charter claim would not, Charter values also holds the promise that our understanding the Charter and its relevance could be enhanced by the expertise of discretionary decision-makers across diverse policy contexts.

#### 4. Righting Wrongs: *Henry v. British Columbia (Attorney General)*

Like Charter values, the emergence of Charter damages has generated promise and tension. On the one hand, for those whose rights have been infringed, the Charter's section 24(1) jurisdiction to provide any remedy that is "just and appropriate in the circumstances" held out the promise that damages would play a key role in deterring unconstitutional conduct and promoting a culture of freedom and equality. On the other hand, the prospect of turning constitutional dialogues into debates about compensation raised clear tensions – for instance, should the wealthy individual whose valuable heirlooms are destroyed by an unreasonable search be entitled to greater compensation than the homeless individual whose shelter is destroyed by an unreasonable search. If private law principles of compensation are imported into the field of Charter damages, then quite literally, some people's rights will be more valuable than others. These issues figured in one of the most significant Charter damages case decided by the Supreme Court – especially as the loss involved wasn't an item with a replacement value but rather close to three decades of a person's life.

The Court's 2010 decision in *Ward* (dealing with a far less grave type of harm)<sup>34</sup> set out a framework for evaluating the competing considerations inherent in a determination of the appropriateness of Charter damages. The *Ward* test for an award of damages under section 24(1) of the Charter consists of four steps: (1) establishing a Charter breach; (2) establishing that damages would serve at least one of the functions of compensation, vindication or deterrence; (3) If (1) and (2) are established, the onus shifts to the state to show that there are "countervailing considerations" (such as alternative remedies or "good governance concerns") that would make Charter damages inappropriate or unjust; and (4) establishing the appropriate quantum of damages.

The question of Charter damages and application of this framework in the context of wrongful conviction, arose in *Henry v. British Columbia (Attorney General)*.<sup>35</sup> Ivan Henry spent almost 27 years in prison and was declared a "dangerous offender" for a series of violent sexual

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<sup>34</sup> *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27 (S.C.C.), varg [2009] B.C.J. No. 91 (B.C.C.A.).

<sup>35</sup> [2015] S.C.J. No 24, 2015 SCC 24 (S.C.C.), revg [2014] B.C.J. No. 71 (B.C.C.A.). See for analysis Katya Bogdanov, "Henry v British Columbia: Defending Rights, or the State?" (July 2015), The Court, online: <<http://www.thecourt.ca/2015/07/henry-v-british-columbia-defending-rights-or-the-state/>>.

assaults in the early 1980s. In 2010, the British Columbia Court of Appeal quashed Mr. Henry's convictions and entered acquittals on all charges, due to serious errors in the conduct of the trial (among other flagrant violations, the Crown had failed to provide Mr. Henry with 30 inconsistent victim statements and medical evidence).<sup>36</sup> Mr. Henry, once released, sued the City of Vancouver, the Attorney General of British Columbia and the Attorney General of Canada, seeking damages for his wrongful convictions and imprisonment. The Supreme Court judgment concerns only the award of damages against the Attorney General for British Columbia under section 24(1) of the Charter for failures to meet disclosure obligations under the Charter.

In *Henry*, the Court considered a potentially vast new terrain of Charter damages – prosecutorial conduct that, without malice, was found to infringe the Charter rights of an individual. The majority, in a judgment authored by Justice Moldaver, held that a Charter claimant must provide intent in order to justify Charter damages for prosecutorial conduct – in other words, Mr. Henry would have to show that the prosecutors intentionally withheld information which they knew, or ought to have known, to be of material help to the defence.

The majority asserts its approach is responsive to cases like Mr. Henry's, since intention “may be inferred”.<sup>37</sup> Justice Moldaver summarizes the standard as follows:

As discussed, a cause of action for Charter damages will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence.<sup>38</sup>

That said, the majority appears to accept the submissions of the Attorneys General that fear of civil liability should not be allowed to “distract” or unduly influence prosecutorial decision-making as might be the case if the bar for Charter damages were set too low. This argument is as unsavory as it is unpersuasive. It is unsavory as it suggests prosecutors are a vulnerable group who need protection in the development of Charter damages rather than focusing on the remedy needed by those subject to state action whose Charter rights have been breached. And it is

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<sup>36</sup> *R. v. Henry*, [2010] B.C.J. No. 2072, 2010 BCCA 462 (B.C.C.A.).

<sup>37</sup> *Id.*, at para. 86.

<sup>38</sup> *Id.*, at para. 82.

unpersuasive because the notion of a “chill” or distraction due to concerns over liability arises from a private law perspective, where officials may become more cautious where their own, personal liability may be engaged. Private law perspectives simply are unsuited to the task of identifying and enforcing public and constitutional duties. Rather than worry about whether police officers, prosecutors, national security officials or others who wield the enormous array of state law enforcement resources (and legitimacy to deprive people of their liberty) will be distracted by legal and constitutional accountability for their actions, Government could focus more usefully on recruiting, training and supporting prosecutors and law enforcement officers well versed in their legal and constitutional obligations. The majority speaks of Charter damages as a private law dynamic, as if there were no distinction between civil claims for malicious prosecution and Charter claims. Consider, for example, the following passage from Justice Moldaver’s reasons:

It may seem harsh to deny *Charter* damages for cases of wrongful non-disclosure which, while less serious, still result in a violation of an accused’s *Charter* rights. However, it is a reality that wrongful non-disclosures will cover a spectrum of blameworthiness, ranging from the good faith error, quickly rectified, to the rare cases of egregious failures to disclose exculpatory evidence. Given the policy concerns associated with exposing prosecutors to civil liability, it is necessary that the liability threshold be set near the high end of the blameworthiness spectrum. In reaching this conclusion, I do not purport to create silos of *Charter* violations, classifying some as worthy of concern and others as inconsequential. Courts should endeavour, as much as possible, to rectify *Charter* breaches with appropriate and just remedies. Nevertheless, when it comes to awarding *Charter* damages, courts must be careful not to extend their availability too far.<sup>39</sup>

The key issue of broader implication here, in my view, is whether a private law standard (malice) would be imported into the Charter damages analysis, or whether Charter damages should remain fundamentally a matter of public law and accord to public law principles. For private law, blameworthiness is a key aspect of the legal standard. The relevance that blameworthiness could have in remedying a Charter breach, however, is far less clear. For public law principles, the issue is not liability on the part of individual prosecutors for particular conduct but rather the unjustified harm imposed on those subject to state authority flowing from breaches of their rights under the Charter.

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<sup>39</sup> *Id.*, at para. 91.

For the concurring Justices – Chief Justice McLachlin and Justice Karakatsanis – demonstrating intention represents too high a bar, and they would require only proof that a Charter remedy was “appropriate and just” to advance the purposes of compensation, vindication or deterrence. They further (and, in my view, correctly) found arguments around prosecutorial “distraction” not applicable to settings where the issue was prosecutorial obligation to comply with fundamental Charter rights.<sup>40</sup>

In light of *Henry*, and the requirement that a failure to disclose on the part of the state be intentional to trigger compensation, even with the possibility that this can be inferred from the circumstances, it is unlikely that Charter damages will play an expanded role in the accountability of state actors. As Katya Bogdanov observes, “I do not see an appreciable difference between this test and the tests requiring malice.” I share this assessment – once the focus is on the intent or blameworthiness of the prosecutor, the ability of Charter damages to meaningfully fulfil the potential of Charter remedies under section 24(1) is precluded. While there may be cases where the degree of intentionality could make a difference, these will be few and of questionable general application. In the end, notwithstanding the principled stand taken by the concurring minority, *Henry* calls into question the Court’s resolve under the Charter to ensure against rights without remedies.

While this brief consideration of some of the cases from 2015 with wide-ranging and long-lasting implications highlights the continuing impact of the Supreme Court on the evolution of the Canadian Constitution, the Court itself is evolving in important ways as well.

### III. 2015: A CHANGING OF THE GUARD

The year 2015 marked the end of the decade of the Harper Government – and as if to provide a bookend to that era, Justice Marshall Rothstein, the first of Harper’s seven SCC appointments, retired in August, 2015, just weeks before the Liberals under Prime Minister Trudeau swept to power with a majority Government and an activist platform to reform Supreme Court appointments.<sup>41</sup>

Marshall Rothstein participated in 126 Constitutional decisions, and as the chart below illustrates, he rarely dissented in Constitutional cases.

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<sup>40</sup> *Id.*, at paras. 128-29.

<sup>41</sup> The Liberal platform included a commitment to “restore dignity and respect to the relationship between government and the Supreme Court... to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians.” Online: <<https://www.liberal.ca/realchange/supreme-court-appointments/>>.

Year	MAJORITY		DISSENT		CONCURRING		Total
	(Co)/Wrote	Joined	(Co)/Wrote	Joined	(Co)/Wrote	Joined	
2006	1	1	0	0	0	0	2
2007	2	9	0	1	1	0	13
2008	1	9	1	2	0	0	13
2009	3	7	0	0	0	1	11
2010	0	22	0	1	0	1	24
2011	0	13	0	0	1	0	14
2012	0	8	0	1	0	0	9
2013	1	10	0	0	0	0	11
2014	5	7	1	0	0	1	14
2015	1	10	2	1	1	1	16
<b>TOTAL</b>	14	96	4	6	3	4	127

While Justice Rothstein may be better remembered for his leadership in Administrative and Regulatory Law (particularly in areas of federal jurisdiction, building on his many years in a Transportation Law practice, and as a Justice of the Federal Court and Federal Court of Appeal), his contributions to Canadian Constitutional Law certainly have been consequential.

Justice Rothstein wrote or co-authored notable majority judgments in Charter cases – such as *Canada (Attorney General) v. Hislop*,<sup>42</sup> extending the reach of the rights of same sex spouses in the context of pension rights, but he will be best remembered more recently for his spirited opposition to extending the Charter’s reach, including in the context of labour relations as reflected in his dissents in *Mounted Police*,<sup>43</sup> and *Saskatchewan Federation*,<sup>44</sup> discussed above.

Justice Rothstein also took up the cause of judicial restraint in his expansive concurring judgment in *Fraser*,<sup>45</sup> a judgment which set the stage for the section 2(d) trilogy discussed above. In *Fraser*, a majority

<sup>42</sup> [2007] S.C.J. No. 10, 2007 SCC 10 (S.C.C.), affg [2004] O.J. No. 4815 (Ont. C.A.).

<sup>43</sup> Dissenting alone, at paras. 159-270.

<sup>44</sup> Dissenting with Justice Wagner, at paras. 204-76.

<sup>45</sup> *Fraser v. Ontario (Attorney General)*, [2011] S.C.J. No. 20, 2011 SCC 20 (S.C.C.), revg [2008] O.J. No. 4543 (Ont. C.A.). See also the analysis of Justice Rothstein’s concurring reasons in Paul Cavalluzzo, “The Fog of Judicial Deference” (2012) 16 C.L.E.L.J. 369.

of the Court found the *Agricultural Employees' Protection Act, 2002* ("AEPA"), which provided minimal labour rights to agricultural workers, to be constitutional (with Abella J. alone dissenting). The majority applied the earlier decision of the Court in *Health Services*, establishing a right to collective bargaining under section 2(d) of the Charter, but emphasized its flexibility and the fact that it did not prescribe any particular model of collective bargaining over others.

Justice Rothstein (with Justice Charron concurring) also upheld the legislation, but went further in his concurring judgment in *Fraser* to set out a far more radical position, one that would have reversed the Court's judgment in *Health Services*. His reasoning, in short, was that the policy balance inherent in labour relations was fundamentally political and unsuited to the role of the Court. He summarized his position in the following terms:

In my view, s. 2(d) protects the liberty of individuals to associate and engage in associational activities. Therefore, s. 2(d) protects the freedom of workers to form self-directed employee associations in an attempt to improve wages and working conditions. What s. 2(d) does not do, however, is impose duties on others, such as the duty to bargain in good faith on employers.<sup>46</sup>

Generally, Justice Rothstein's voice emerged as a clarion call for judicial deference to Parliament. A salient example of this approach occurred in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*,<sup>47</sup> a 2014 case in which the majority of the Court held unconstitutional the imposition of court fees. Justice Rothstein vigorously dissented, particularly taking issue with the majority's reliance on implied or unwritten constitutional principle to support striking down legislated fees – he argued forcefully that such judicially crafted principles, not clearly flowing from the text of a constitutional provision, should not be used as a basis to strike down a legislative provision. He wrote:

In engaging, on professed constitutional grounds, the question of the affordability of government services to Canadians, the majority enters territory that is quintessentially that of the legislature. The majority looks at the question solely from the point of view of the party to litigation required to undertake to pay the hearing fee. It does not consider, and has no basis or evidence upon which to consider, the

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<sup>46</sup> *Id.*, at para. 125.

<sup>47</sup> [2014] S.C.J. No. 59, 2014 SCC 59 (S.C.C.).

questions of the financing of court services or the impact of reduced revenues from reducing, abolishing, or expanding the exemption from paying hearing fees. Courts must respect the role and policy choices of democratically elected legislators. In the absence of a violation of a clear constitutional provision, the judiciary should defer to the policy choices of the government and legislature. How will the government deal with reduced revenues from hearing fees? Should it reduce the provision of court services? Should it reduce the provision of other government services? Should it raise taxes? Should it incur debt? These are all questions that are relevant but that the Court is not equipped to answer. I respectfully dissent.<sup>48</sup>

The 2015 year in the life of the Supreme Court will not be remembered only for who departed, but also for who arrived. During 2015, two new Justices joined the Supreme Court: Suzanne Côté (who was appointed in December of 2014 and sworn in on January 9, 2015) and Russell Brown (who was appointed in August of 2015 and sworn in on October 6, 2015).

The Supreme Court at the end of 2015 includes only two Justices not appointed by Prime Minister Stephen Harper's Government – Justices Abella (Martin) and McLachlin (Mulroney). It remains too early to assess the impact of the most recent appointments – Justice Côté's first Constitutional decisions included 2 dissents and 2 concurring decisions, but at the time of writing she has yet to pen a majority decision on a Constitutional issue. Justice Brown did not participate in a 2015 Constitutional decision so remains to be heard from. In a sense, then, the real impact of the "Harper Court" may not be seen until after Prime Minister Harper's departure. While the unexpected resignation of Justice Cromwell in 2016 will provide an early indication of the activist progressive Justices many believe Prime Minister Trudeau will appoint, he may not have many opportunities in this mandate to leave his Government's mark on the Court. The next scheduled vacancy would occur with Chief Justice McLachlin's mandatory retirement in 2018. Nevertheless, given the Trudeau Government's commitment to diversity and inclusion, it is worth asking whether this will be the last annual update where the author needs to highlight that Canada's Supreme Court has never had a member with an Indigenous background, or who was

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<sup>48</sup> *Id.*, at para. 82. For discussion of Justice Rothstein's theory of judicial deference to Parliament, see L. Sossin, "The Humility of Administrative Law" (2016) 74 S.C.L.R. (2d) 189-209, and more generally I. Entchev and L. Kelly (eds), *Judicious Restraint: The Life and Law of Justice Marshall E. Rothstein* (Toronto: LexisNexis, 2016).



brought up in a faith other than Christianity and Judaism, or who is part of a racialized community?

For now, the Court remains in transition, as a shift occurs from the influence of the Harper Government's early appointments (Rothstein, Cromwell, Moldaver and Karakatsanis) to his later ones (Wagner, Gascon, Côté and Brown). As 2015 demonstrated, however, against this backdrop, Chief Justice McLachlin and Justice Abella remain the dominant forces on the Court, together authoring 11 Constitutional majority judgments, and writing or co-authoring almost all of those highlighted above as most significant.

In summary, the year 2015 in the life of the Canadian Constitution and the Supreme Court was revealing of consensus in some familiar areas but more notably surfaced fundamental divergences in the reach of the Charter and the premise of Canadian Federalism, and demonstrated just how much the Canadian constitutional project remains a work in progress.