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Constitutional Cases 2016: An Overview

Benjamin L. Berger, Sonia Lawrence, and Spiros Vavougiros*

We are delighted to offer this introduction to the yearly volume of articles flowing from Osgoode Hall Law School's annual Constitutional Cases Conference. The articles in this volume offer insightful and illuminating analysis of the constitutional jurisprudence from the Supreme Court of Canada's 2016 term. In this introduction, we set the frame for these articles with an overview of the "constitutional year" at the Supreme Court, identifying some key patterns, themes, and issues that gave 2016 its distinctive mark. This overview is organized into three parts. As is the custom for these introductions, in Part I, we begin by offering a view of the constitutional jurisprudence of the Court in 2016 "on the numbers". In Part II we reflect on two larger issues that shaped the Court's work in 2016: retirements and debates about appointments, and the pressing question of reconciliation and the Constitution. Finally, Part III examines the decisions themselves, directing the reader to articles in this volume which provide in-depth analysis and offering our observations about how these cases participate in broader themes and patterns that have been in our sightlines at the Constitutional Cases conference over the past many years.

I. PART I: 2016: THE YEAR IN REVIEW, ON THE NUMBERS

From the perspective of the numbers alone, it was a quiet year at the Court, particularly in constitutional law. In total, the Court decided 56 cases in the 2016 calendar year. Of the 56 cases decided, only 12 are identified as Constitutional decisions (2 Federalism cases and 10 Charter

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cases),¹ and 4 cases identified deal with constitutional principles or values.² In addition, the Court granted a motion extending the suspended declaration of invalidity in *Carter v. Canada (Attorney General)*.³

This year's figures continue a steady decline in the overall number of judgments released by the Court in recent years (79 total cases in 2014, 68 in 2015, and 56 in 2016). Much more notable is what looks like a dramatic drop in the number of constitutional judgments released (19 in 2014 and 28 in 2015 to 12 in 2016). The proportion of the Court's judgments devoted to constitutional issues in 2015 was approximately 40 per cent. In 2016, this figure halved to approximately 21 per cent. It is difficult to account for this precipitous decline in the number and proportion of constitutional cases. Is it simply a product of the vicissitudes of how issues arrive at the Court? Might it be attributable to the fact that the Court was short staffed after Justice Cromwell retired on September 1, 2016? Or are there deeper conclusions to be drawn? This is certainly an issue worth tracking in the coming years.

Looking deeper into the 12 constitutional cases that were issued by the Court in 2016, it seems that applicants enjoyed considerable success in advancing their claims. Specifically, in 10 of the 12 constitutional cases, applicants were successful (a success rate of approximately 83 per cent). This includes partial successes, as in *Conférence des juges* (in which 3 of

¹ The Constitutional cases identified are: *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, [2016] S.C.J. No. 39, [2016] 2 S.C.R. 116, 2016 SCC 39 (S.C.C.) [hereinafter "*Conférence des juges*"]; *R. v. Williamson*, [2016] S.C.J. No. 28, [2016] 1 S.C.R. 741, 2016 SCC 28 (S.C.C.) [hereinafter "*Williamson*"]; *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] S.C.J. No. 12, [2016] 1 S.C.R. 99, 2016 SCC 12 (S.C.C.) [hereinafter "*Daniels*"]; *Rogers Communications Inc. v. Châteauguay (City)*, [2016] S.C.J. No. 23, [2016] 1 S.C.R. 467, 2016 SCC 23 (S.C.C.) [hereinafter "*Rogers Communications*"]; *R. v. Saeed*, [2016] S.C.J. No. 24, [2016] 1 S.C.R. 518, 2016 SCC 24 (S.C.C.) [hereinafter "*Saeed*"]; *R. v. Jordan*, [2016] S.C.J. No. 27, [2016] 1 S.C.R. 63, 2016 SCC 27 (S.C.C.) [hereinafter "*Jordan*"]; *R. v. Cawthorne*, [2016] S.C.J. No. 32, [2016] 1 S.C.R. 983, 2016 SCC 32 (S.C.C.) [hereinafter "*Cawthorne*"]; *R. v. Lloyd*, [2016] S.C.J. No. 13, [2016] 1 S.C.R. 130, 2016 SCC 13 (S.C.C.) [hereinafter "*Lloyd*"]; *R. v. Vassell*, [2016] S.C.J. No. 26, [2016] 1 S.C.R. 625, 2016 SCC 26 (S.C.C.) [hereinafter "*Vassell*"]; *Canada (Attorney General) v. Chambre des notaires du Québec*, [2016] S.C.J. No. 20, [2016] 1 S.C.R. 336, 2016 SCC 20 (S.C.C.) [hereinafter "*Chambres des notaires*"]; *R. v. K.R.J.*, [2016] S.C.J. No. 31, [2016] 1 S.C.R. 906, 2016 SCC 31 (S.C.C.) [hereinafter "*K.R.J.*"]; *R. v. Safarzadeh-Markhali*, [2016] S.C.J. No. 14, [2016] 1 S.C.R. 180, 2016 SCC 14 (S.C.C.) [hereinafter "*Safarzadeh-Markhali*"].

² *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, [2016] S.C.J. No. 8, [2016] 1 S.C.R. 29, 2016 SCC 8 (S.C.C.); *Endean v. British Columbia*, [2016] S.C.J. No. 42, [2016] 2 S.C.R. 162, 2016 SCC 42 (S.C.C.); *Morasse v. Nadeau-Dubois*, [2016] S.C.J. No. 44, [2016] 2 S.C.R. 232, 2016 SCC 44 (S.C.C.); *Windsor (City) v. Canadian Transit Co.*, [2016] S.C.J. No. 54, [2016] 2 S.C.R. 617, 2016 SCC 54 (S.C.C.).

³ *Carter v. Canada (Attorney General)*, [2016] S.C.J. No. 4, [2016] 1 S.C.R. 13, 2016 SCC 4 (S.C.C.) [hereinafter "*Carter II*"].

the 5 impugned provisions were struck down) and *K.R.J.* (in which 1 of the 2 impugned provisions was read down). Decisions of lower courts did not fare particularly well: of these 10 successful cases, seven were appeals of lower court decisions. In the 10 cases in which the Court found a constitutional violation, the Court employed a variety of remedies, reading down provisions in 2 cases,⁴ striking down provisions in 3 cases,⁵ and issuing declaratory relief in 5 cases.⁶

What can we discern from the year's cases about the roles of the individual judges of the Court in shaping the Court's constitutional jurisprudence? Notably, Karakatsanis and Moldaver JJ. authored the most constitutional decisions (4 each); in terms of total judgments written, Brown and Karakatsanis JJ. take the lead with, respectively, 7 and 6 decisions. Justice Karakatsanis' strong voice in the Court's jurisprudence in recent years is particularly interesting in light of early commentary that, as a newly appointed jurist, she was "struggle[ing] to make an impact".⁷ On the other side of the ledger, Abella and Brown JJ. each authored two dissenting opinions in constitutional cases. If we move beyond the constitutional cases, however, many will be interested to see that one of the Court's newest members, Côté J., authored the largest number of dissents, at 10. The first woman appointed to the Court directly from private practice, Côté J.'s tone and industry suggest that she may come to command an influence like her two "straight-from-practice" predecessors, Sopinka and Binnie JJ.

The Court released 5 unanimous constitutional decisions: 3 of which were authored by the Court's most senior justices (2 by Chief Justice McLachlin, who has been on the Court since 1989 and 1 by Abella J., appointed to the SCC in 2004), 1 joint decision by Karakatsanis, Wagner, and Côté JJ., and 1 joint decision authored by Wagner and Gascon JJ.

Interesting though they are — and although they offer some watching briefs for the constitutional work of the Court in the coming years — the numbers can capture neither the significance of the cases decided, nor the character of the year as defined by the key issues that the Court faced as an institution. It is to the latter issues that we now turn.

⁴ The cases where the impugned provisions were read down include: *K.R.J.*, *supra*, note 1 and *Chambres des notaires*, *supra*, note 1.

⁵ The Court struck down impugned provisions in *Safarzadeh-Markhali*, *supra*, note 1; *Lloyd*, *supra*, note 1; *Conference des juges*, *supra*, note 1;

⁶ Declaratory relief was provided in the following cases: *Jordan*, *supra*, note 1; *Williamson*, *supra*, note 1; *Vassel*, *supra*, note 1; *Rogers Communications*, *supra*, note 1; *Daniels*, *supra*, note 1.

⁷ "A Supreme Court Justice struggles to make an impact", Editorial, *The Globe and Mail* (April 3, 2013), online: *Globe and Mail* <<https://www.theglobeandmail.com/opinion/editorials/a-supreme-court-justice-struggles-to-make-an-impact/article10748372/>>.

II. PART II: THE PAST AND FUTURE OF THE INSTITUTION

1. The Judges of the Court: A Retirement and an Appointment

This year illustrated the pace of replacement and renewal on the Supreme Court. When we opened the year, only two judges had been appointed by someone other than Prime Minister Harper: Chief Justice McLachlin (appointed to the Court by PM Mulroney and named Chief Justice by PM Chrétien); Justice Abella (appointed by PM Martin). By the end of 2016, Justice Malcolm Rowe, the first appointment of the Trudeau (*file*s) era was sitting, and Chief Justice McLachlin had announced her retirement, heralding the coming appointment of a second.

Justice Cromwell retired on September 2, 2016, having been involved in 103 constitutional decisions and 427 overall decisions. Over the course of his tenure at the Court, Cromwell J. wrote many key constitutional decisions, leaving a strong mark on the jurisprudence of the Court, particularly in the Court's legal rights jurisprudence. For example, in the context of section 8 of the *Canadian Charter of Rights and Freedoms*,⁸ his noteworthy constitutional cases include: *R. v. Cornell*⁹ (reasonableness of authorized search executed without announcement and forced/hard entry to preserve evidence); *R. v. Vu*¹⁰ (search and seizure of computers without specific prior judicial authorization); *R. v. Spencer*¹¹ (reasonable expectation of privacy and engagement of informational privacy in the context of subscriber information associated with an IP address received from an Internet Service Provider); *R. v. Fearon*¹² (search of cellphones incident to arrest); and *Canada (Attorney General) v. Federation of Law Societies of Canada*¹³ (authorization of sweeping searches in law offices pursuant to anti-money laundering and terrorist financing provisions found to violate sections 7 and 8 of the Charter and undermine solicitor-client privilege).¹⁴

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁹ *R. v. Cornell*, [2010] S.C.J. No. 31, [2010] 2 S.C.R. 142, 2010 SCC 31 (S.C.C.).

¹⁰ *R. v. Vu*, [2013] S.C.J. No. 6, [2013] 3 S.C.R. 657, 2013 SCC 6 (S.C.C.).

¹¹ *R. v. Spencer*, [2014] S.C.J. No. 43, [2014] 2 S.C.R. 212, 2014 SCC 43 (S.C.C.).

¹² *R. v. Fearon*, [2014] S.C.J. No. 77, [2014] 3 S.C.R. 621, 2014 SCC 77 (S.C.C.).

¹³ *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, [2015] 1 S.C.R. 401, 2015 SCC 7 (S.C.C.).

¹⁴ Other notable constitutional decisions authored by Cromwell J. include: *Reference Re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, [2010] 3 S.C.R. 45, 2010 SCC 61 (S.C.C.) (Cromwell J.'s judgment determined the issues before the Court, which was split as to the validity of the impugned provisions relating to assisted human reproduction on Division of Powers grounds); *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, [2015] 1 S.C.R.

Justice Cromwell's announcement of his retirement came as something of a surprise (given his age, he could have stayed a further decade) and it inaugurated vigorous public discourse about his replacement. It would be the first use of a new set of appointments procedures which, *inter alia*, created an independent panel to advise on appointments, required that candidates be functionally bilingual, but did not include in its mandate anything about the convention of regional representation in appointments.¹⁵ This disturbed the Atlantic Provinces Trial Lawyer's Association so much that they filed an application on September 19, 2016 with the Nova Scotia Supreme Court. Citing *Reference re Supreme Court Act, ss. 5 and 6 (Nadon Reference)*,¹⁶ they sought a declaration that departing from the tradition of regional representation would be unconstitutional unless treated as a constitutional amendment.¹⁷

The announcement, in late October 2016, of the nomination of Malcolm Rowe J. calmed those particular anxieties.¹⁸ Despite the fact that he graduated from Osgoode Hall Law School in Toronto, his Newfoundland credentials are well established. With the exception of a few years in Ottawa, Rowe J. spent his legal career in Newfoundland and Labrador, where he was appointed to the Trial Division in 1999

693, 2015 SCC 14 (S.C.C.) (whether the principle of cooperative federalism can constrain Parliament's legislative power over the destruction of long-gun registry data); *Caron v. Alberta*, [2015] S.C.J. No. 54, [2015] 3 S.C.R. 511, 2015 SCC 56 (S.C.C.) (language rights in the context of Alberta's *Alberta Languages Act*, which posits that provincial laws and regulations be enacted, printed, and published in English only); *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] S.C.J. No. 62, [2013] 3 S.C.R. 733, 2013 SCC 62 (S.C.C.) (freedom of expression in the context of the *Personal Information Protection Act* and union video-taping and photographing individuals crossing picket lines for use in labour dispute); *R. v. Kokopenace*, [2015] S.C.J. No. 28, [2015] 2 S.C.R. 398, 2015 SCC 28 (S.C.C.) (writing in dissent with McLachlin C.J.C., he asserted that the representativeness of a jury roll is tethered to the right to a jury trial and the right to be tried by an independent and impartial tribunal, as enshrined in s. 11 of the Charter); and *R. v. Jordan*, [2016] S.C.J. No. 27, [2016] 1 S.C.R. 631, 2016 SCC 27 (S.C.C.) (writing for the Dissent, he criticized the Majority's new framework for dealing with the right to be tried within a reasonable time, cautioning that a numerical ceilings approach will be inadequate in accounting for fact and case-specific complexities).

¹⁵ The Advisory Board was established, and the Terms of Reference approved by the Governor in Council ("GIC") on July 29, 2016 (Order in Council PC 2016-0693).

¹⁶ [2014] S.C.J. No. 21, 2014 SCC 21 (S.C.C.) [hereinafter "*Nadon Reference*"].

¹⁷ *Atlantic Provinces Trial Lawyers Association v. The Right Honourable Prime Minister of Canada and the Governor General of Canada* (19 September 2016), Halifax, NSSC SH-455561 (notice of application).

¹⁸ "Prime Minister announces nomination of Mr. Justice Malcolm Rowe to the Supreme Court of Canada" (17 October 2016), online: *Prime Minist Can* <<http://pm.gc.ca/eng/news/2016/10/17/prime-minister-announces-nomination-mr-justice-malcolm-rowe-supreme-court-canada>>.

and the Court of Appeal in 2001.¹⁹ But other court watchers, primed by section 8(f) of the Board's Terms of Reference ("...in establishing a list of qualified candidates, [the Advisory Board should] seek to support the Government of Canada's intent to achieve a gender-balanced Supreme Court of Canada that also reflects the diversity of members of Canadian society, including Indigenous peoples, persons with disabilities and members of linguistic, ethnic and other minority communities including those whose members' gender identity or sexual orientation differs from that of the majority..."), and the statements of the Trudeau government on reconciliation and diversity, were less impressed.²⁰

The gentle "grilling" Rowe J. received from the Members of the House of Commons justice committee and Senate legal affairs committee (along with Bloc Québécois and Green MPs, with law students from across Canada in attendance) is interesting viewing for initiates. One watches a delicate dance as the questioners and the nominee try to meet the serious constraints of the process while still asking questions, and offering answers, with some semblance of substance.²¹ Ultimately, the Q&A process seems to reveal more about our public and political concerns about judges than it did about Rowe J. or his views on critical legal questions.

The appointments process is, as this article goes to press, gearing up again for the selection of Chief Justice McLachlin's replacement, with applications due on September 15, 2017.²² The process of appointments

¹⁹ Supreme Court of Canada, "Supreme Court of Canada - Biography - Malcolm Rowe", (1 January 2001), online: Supreme Court of Canada <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=malcolm-rowe>>.

²⁰ Jennifer Taylor, "Preserving regional representation on the SCC; but what about diversity?", (20 October 2016), online: *CBA Natl* <<http://www.nationalmagazine.ca/Blog/October-2016/Preserving-regional-representation-on-the-SCC;-but.aspx>>; Michael Tutton, "Advocates for minority Supreme Court judge disappointed by Trudeau's pick", *Tor Star* (18 October 2016), online: <<https://www.thestar.com/news/canada/2016/10/18/advocates-for-minority-supreme-court-judge-disappointed-by-trudeaus-pick.html>>; Nina Corfu, "Another white man on Supreme Court means people of colour 'shut out'", *CBC News* (18 October 2016), online: <<http://www.cbc.ca/news/canada/nova-scotia/supreme-court-appointment-aboriginal-indigenous-african-canadian-diversity-1.3809776>>.

²¹ John Paul Tasker, "Supreme Court nominee Malcolm Rowe grilled on French, diversity and Aboriginal rights", *CBC News* (25 October 2016) online: *CBC News* <<http://www.cbc.ca/news/politics/malcolm-rowe-committee-questions-1.3820318>>; Canada, "Public Record: Parliamentary panel questions Malcolm Rowe", online: *CPAC* <<http://www.cpac.ca/en/programs/public-record/episodes/49446035>> [hereinafter "Tasker"].

²² Office of the Commissioner for Federal Judicial Affairs Canada, "Supreme Court of Canada Appointment Process - 2017" (26 November 2015), online: <<https://perma.cc/XN38-ETK7>>.

itself has been the subject of a Committee Report (which tended to support the process followed for Rowe J. in all aspects).²³ Observers have a bit more clarity this time around on the regional representation matter: the Advisory Board is specifically seeking candidates from “Western Canada (British Columbia, Alberta, Saskatchewan, and Manitoba) and Northern Canada (Northwest Territories, Nunavut, Yukon)”.²⁴ Still very unclear is whether the commitment to functional bilingualism will, as some have predicted, serve to preclude the realization of other expressions of diversity, and in particular the appointment of an Indigenous justice, and whether there is any real significance to the use and public release of questionnaires filled out in the application process by the successful candidate.²⁵

2. Reconciliation and The Constitution

It has been some years since Chief Justice McLachlin suggested that the threshold work for the Charter was completed in the first generation of the Court’s decision-making,²⁶ leading us to a constitutional moment focused on the “imperative of achieving reconciliation between Canada’s First Nations and the Crown”.²⁷ These issues attained a new level of prominence this year, perhaps ironically, through the efforts of the Department of Canadian Heritage to celebrate the 150th anniversary of Confederation by branding it Canada150. The government described Canada150 as an opportunity to join together and celebrate the country’s

²³ Standing Committee on Justice and Human Rights, 9th Report: THE NEW PROCESS FOR JUDICIAL APPOINTMENTS TO THE SUPREME COURT OF CANADA (Anthony Housefather Chair) 22 Feb. 2017 (42nd Parl. 1st Sess). See also Government Response to the 9th Report of the Standing Committee on Justice and Human Rights, 13 June 2017, online: <<https://perma.cc/CC8E-ZTFV>>.

²⁴ *Supra*, note 22 (note that the question of what precisely makes a candidate “from” a particular region seems to be somewhat flexible).

²⁵ Ian MacLeod, “Supreme Court appointment makes history while keeping traditional regional balance”, *National Post* (18 October 2016) online: <<http://nationalpost.com/news/politics/supreme-court-appointment-makes-history-while-keeping-traditional-regional-balance/wcm/6bbd51ef-24e4-428b-8bb9-863bb91dde8a>>; Canada, *supra*, note 23.

²⁶ Kirk Makin, “Ten years as top judge and she’s still losing sleep”, *The Globe and Mail* (7 January 2010), online: <<https://www.theglobeandmail.com/news/national/ten-years-as-top-judge-and-shes-still-losing-sleep/article1366103/>>.

²⁷ The Right Honourable Beverley McLachlin, “Defining Moments: The Canadian Constitution”, Remarks delivered on 5 February 2013 at the Canadian Club of Ottawa, online: Supreme Court of Canada <<https://perma.cc/TK2F-JGZP>>.

rich linguistic, cultural, and regional diversity, history, and heritage.²⁸ But this state-sponsored celebration and the events that were planned under this umbrella had the interesting, if no doubt unintended effect, of focusing attention on the genesis of the Canadian state, and the dispossession and erasure of Indigenous sovereignty that it required. Critics seized the opportunity to reframe what *British North America Act, 1867* accomplished — not as a matter for celebration but as (another, failed) attempt at erasing Indigenous sovereignties.

Canada150 and the critical discourse it prompted closely followed and built on discussions following the 2015 release of the Final Report of the Truth and Reconciliation Commission. Senator Murray Sinclair, who chaired that Commission, this year reminded Canadians that 1867 marked the beginning of an abusive relationship that culminated in the precarious economic and social positioning of Indigenous peoples in Canada today.²⁹ Even the Minister of Justice Jody Wilson-Raybould, the first Indigenous person to hold that position, commented “It is hard to celebrate 150 years of colonialism.”³⁰ Indigenous voices in social media echoed and supported the critique, pressing for more attention to how Canada150 might be seen and understood in Indigenous communities. Indigenous artist Isaac Murdoch, from Serpent River First Nation started the #Resistance150 hashtag to challenge the erasure of Indigenous history.³¹ Indigenous organizers including Freddy Stonypoint and Candace Day Neveau, planned to erect a teepee on the lawn of Parliament as a “ceremonial reoccupation” during the Canada Day celebrations.³² Their efforts produced confrontation with

²⁸ Government of Canada, *Canada 150*, online: Government of Canada <<https://perma.cc/5B86-382V>>.

²⁹ Chinta Puxley, “Many Indigenous people see little reason to celebrate Canada’s 150th birthday” *Metro* (13 June 2017) online: <<http://www.metronews.ca/news/canada/2017/06/13/indigenous-people-see-little-reason-to-celebrate-canada-150.html>> [hereinafter “Puxley”].

³⁰ The Honourable Jody Wilson-Raybould, “Separate Journeys, Similar Path: Truth and Reconciliation in Canada and South Africa”, Remarks delivered on 30 March 2017 at University of Cape Town Law School, South Africa, online: Government of Canada <<https://perma.cc/6FHM-MKHB>>.

³¹ Puxley, *supra*, note 29.

³² Jorge Barrera, “Nine arrested after RCMP blocks teepee raising on Parliament Hill” *APTN News* (29 June 2017) online: <<http://aptnews.ca/2017/06/29/nine-arrested-after-rcmp-blocks-teepee-raising-on-parliament-hill/>>; Alex Ballingall, “Teepee erected on Parliament Hill highlights pain of Canada 150, activists say”, *Toronto Star* (29 June 2017), online: <<https://www.thestar.com/news/canada/2017/06/29/canada-150-protesters-erect-teepee-on-parliament-hill.html>>; The Canadian Press, “Sault group behind teepee on Parliament Hill”, *Sault Star* (29 June 2017) online: <<http://www.saultstar.com/2017/06/29/sault-group-behind-teepee-on-parliament-hill/>>; “Negotiated compromise produces ‘historic’ teepee raising on central Parliament Hill lawn”, *APTN News* (2017), online: <<http://aptnews.ca/>>

the RCMP, arrests, and then a negotiated solution and ultimately, a visit to the teepee from the Prime Minister.³³

It is hard to predict what the impact of these national explorations of historical and contemporary injustices will be in the long term, and the various ways that they will generate constitutional litigation and doctrine, but with several significant cases involving Indigenous rights claims on the horizon, the prominence of these questions across legal, political, and public arenas feels unprecedented. *Daniels v. Canada (Indian Affairs and Northern Development)* was one of the most significant cases of the year, addressing complicated issues surrounding reconciliation not in the context of section 35, but, rather, out of the jurisdictional questions created by section 91(24) — which grants jurisdiction to the federal government over Indians and lands reserved for Indians.³⁴ Writing for the Court, Abella J. begins the judgment with a tone that echoes the assertions of the Chief Justice surrounding our current constitutional moment:

As the curtain opens wider and wider on the history of Canada’s relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought. Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages remains robust. This case represents another chapter in the pursuit of reconciliation and redress in that relationship.³⁵

At issue in *Daniels* was whether Métis and non-status Indians are “Indians” within the meaning of section 91(24). In granting a declaration in the affirmative, the Court highlighted the practical utility that flows from such a declaration: previously, both federal and provincial governments denied responsibility for Métis and non-status Indians, leaving individuals in these groups in a “jurisdictional wasteland”³⁶ that deprived them of funding and access to programs, services, and other intangible benefits that both provincial and federal governments recognized as necessities.³⁷

2017/06/30/negotiated-compromise-produces-historic-teepee-raising-on-central-parliament-hill-lawn/>; “‘A state of crisis’: Indigenous group calls for change as Canada Day nears”, *CBC News* (2017), online: <<http://www.cbc.ca/news/canada/ottawa/parliament-hill-indigenous-ceremony-june-29-1.4180411>>.

³³ John Paul Tasker, “Justin Trudeau visits ‘reoccupation’ teepee on Parliament Hill”, *CBC News* (2017) online: <<http://www.cbc.ca/news/politics/trudeau-visits-reoccupation-teepee-1.4185758>>.

³⁴ *Daniels*, *supra*, note 1.

³⁵ *Id.*, at para. 1.

³⁶ *Id.*, at para. 14.

³⁷ *Id.*

The evidentiary foundation relied on by the Court included many findings made by Phelan J. at the trial level, which established that various historical, philosophical, and linguistic contexts support the conclusion that “Indians” under section 91(24) is a broad term that was intended to encompass all Indigenous peoples in Canada.³⁸ Although the decision resolves the jurisdictional tug-of-war surrounding Métis and non-status Indigenous peoples, the decision treated reconciliation in the context of federalism as narrow and aimed primarily at redress. Two articles in this collection consider the *Daniels* decision and its implications for reconciliation. Thomas Isaac and Arend Hoekstra focus not on the declaration the Court offered, but on the language it used in the decision. They highlight that this is the first decision where the Court uses the term “Indigenous” in a material way: whereas in previous cases the term is used as an adjective, in *Daniels* it is employed as a proper noun. The authors highlight the uncertainty of the scope and purpose of using Indigenous as a category of identity, while Ron Stevenson traces the way the decision on section 91(24) relies on argumentation from both the “framers’ intent” or “originalist” tradition, and from the progressive or “living tree” tradition, raising concerns about the way this embeds 19th century colonial and racist ideologies into contemporary constitutional interpretations. What seems clear from *Daniels* is that reconciliation in the context of section 91(24) will be limited to the redress of historic wrongs, and does not give rise to a duty to legislate.³⁹ The precise nature of the obligations imposed by section 91(24) moving forward remains obscured; however, the Court’s use of “policy redress”⁴⁰ as opposed to legal redress may suggest that the Court envisages Indigenous peoples and the federal government entering into dialogue, where a spectrum of needs and interests will be heard without the imposition of strict legal obligations on the government. Such a vision, of course, raises questions as to how institutional dynamics between the Court and the Legislature may be strained as we move further into the “constitutional moment” of reconciliation.

Beyond *Daniels*, the judgments which will likely be released by the Court in 2017 reinforce the prominence and significance of questions about “reconciliation”. *Ktunaxa* will require that the Court consider an Indigenous claim for constitutional justice beyond sections 91(24) and 35.

³⁸ *Id.*, at para. 6.

³⁹ *Daniels*, *supra*, note 1, at para. 15.

⁴⁰ *Id.*

The case involves the assertion of a religious freedom over the Qat'muk (Jumbo Valley) in British Columbia, the home of the venerated Grizzly Bear Spirit and has been argued mainly as a section 2(b) claim for religious freedoms.⁴¹ The implications for reconciliation go beyond redress. As John Borrows notes, constitutional limitations placed on spiritual rights are particularly injurious in the (neo)colonial context:

It is one thing to place constitutional limits on material culture's development, because doing so virtually drives that culture to physical poverty. However, when constitutional limits are placed on spirituality's development, the law stoops even lower. It denies Indigenous people protection of the inner means to cope with the physical impoverishment that often developed as a result of European contact. Indigenous peoples' religious freedoms should not hinge on historic non-Aboriginal contact, especially when non-Aboriginal Europeans were so harsh in their treatment of Indigenous religion after contact.⁴²

2017 has already seen a pair of cases on the duty to consult, including *Clyde River*,⁴³ in which a unanimous Court provided the following caution:

True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstrance following an adversarial process.⁴⁴

As we progress into the “era” of reconciliation, reflection on the concept's historical and constitutional trajectory may help us explore whether the concept is capable of facilitating the healing of Indigenous-Settler relations. In the transcript of their roundtable conversation, reproduced in this volume, Amar Bhatia, Beverley Jacobs, Jonathan Rudin, Douglas Sanderson, and Mark Walters consider these and other issues related to the idea of reconciliation. Bringing diverse expertise and experience, the group explored the promise and peril, history and trajectory of the notion of reconciliation and what it might require of us.

⁴¹ Supreme Court of Canada, “Webcast of the Hearing on 2016-12-01” (December 1, 2016), online: <<http://www.scc-csc.ca/case-dossier/info/webcasts-webdiffusions-eng.aspx>>.

⁴² John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 252 [hereinafter “Borrows”].

⁴³ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] S.C.J. No. 40, 2017 SCC 40 (S.C.C.).

⁴⁴ *Id.*, at para. 24 (emphasis in original).

Does reconciliation obscure more than it reveals? Does it harken back to very early relationships between settlers and Indigenous peoples, such as those agreed upon in the Covenant Chain and Two-Row wampum, agreements which sought to solidify healthy relationships? Can the jurisprudence to this point support a robust version of reconciliation, or have the interpretations of section 35 so relied on essentializations that they are bound to produce cramped versions of Indigenous rights and title, rather than the self-governance or sovereignty that the section could otherwise encompass? Will reconciliation require that settler institutions fundamentally consider the depth of the sovereignty asserted by the colonial state? What is the end game of reconciliation? Is the settler state prepared to begin the process of recognizing sovereignties and providing redress, or will this reconciliation era prove to be a form of what legal historian Reva Siegel has termed “preservation through transformation”: a legal idea which seems to fundamentally revise the form and content of doctrine, but ultimately comes to accommodate and further the same underlying ideas as the law that came before?⁴⁵

III. PART III: A THEMATIC REVIEW OF THE 2016 JURISPRUDENCE

Marking its 20th anniversary this year, Osgoode’s Annual Constitutional Cases Conference offers attendees an invaluable review of the Supreme Court’s constitutional jurisprudence, but each year is also a moment in an ongoing conversation about the themes and patterns that characterize the Court’s constitutional work. The articles included in this volume offer deep dives into many of the cases discussed below. But our purpose in what follows is to place these cases in the stream of certain trends, patterns, concerns, and debates that have emerged over the last 20 years.

1. Co-Operative Federalism in Division of Powers Decisions

Rogers Communications v. Châteauguay (City) (“*Rogers Communications*”) provides fodder for analyses of how division of powers jurisprudence creates and shapes the meaning and possibility of cooperative federalism. *Rogers Communications Inc.* (“*Rogers*”) tried to construct a

⁴⁵ Reva Siegel, “Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action” (1997) 49 *Stan L. Rev.* 1111.

new radiocommunication antenna system in the City of Châteauguay, pursuant to a spectrum licence, which requires that the company ensures adequate network coverage in the geographic areas covered by the licence. In response, the City passed a resolution authorizing the establishment of a reserve, prohibiting the construction of the antenna system for a period of two years (it was subsequently renewed for an additional two years), claiming it was concerned about the health and well-being of the residents surrounding the installation site.

The Court was unanimous in concluding that the doctrine of interjurisdictional immunity operated to render the impugned notice of reserve inapplicable; however, two conflicting decisions were generated regarding the pith and substance and thus *vires* of the resolution authorizing the impugned notice. Writing for the Majority, Wagner and Côté JJ. maintained that the pith and substance of the impugned notice was the siting of a radio communication antenna system, which amounts to the exercise of federal jurisdiction.⁴⁶ Conversely, Gascon J., writing for himself, asserted that the matter of the resolution is the protection of health and well-being of the City's inhabitants.⁴⁷

The Majority's analysis of pith and substance is sparse. While it is true that the doctrine is more akin to an art than science, we might have expected a more explicit engagement with the impugned law's purpose and effects. For example, in considering the law's purpose, Wagner and Côté JJ. consider a timeline of events,⁴⁸ including when the notice of reserve was served, and are led to but one conclusion: that the purpose of the notice was to prevent Rogers from installing the antenna system at the property in question. The Majority's inquiry into the legal and practical effects of the impugned law are even more cursory: in one paragraph comprising three sentences, the Majority simply concludes that the municipal law had the effect of prohibiting the construction of the antenna system.

In contrast, Gascon J., in considering the purpose of the impugned law, detailed the resolution's preamble and the circumstances surrounding the notice of reserve,⁴⁹ including evidence heard by the trial judge of residents' health concerns. Justice Gascon also noted that the legal effect of the notice was to enable the City to exercise its power of expropriation, which falls within its jurisdiction, and of course, the

⁴⁶ *Rogers Communications*, *supra*, note 1, at para. 5.

⁴⁷ *Id.*, at para. 79.

⁴⁸ *Id.*, at para. 43.

⁴⁹ *Id.*, at paras. 92-102.

practical effect was to prohibit Rogers from constructing its antenna system.⁵⁰ Justice Gascon concluded that, at a minimum, the impugned notice engaged the doctrine of double aspect.⁵¹ However, the Majority rejected this, citing *Multiple Access v. McCutcheon*⁵² for the proposition that the doctrine only applies “when the contrast between the relative importance of the two features is not so sharp”.⁵³ Having concluded that the pith and substance of the impugned municipal law was the location of the radio communication antenna, Wagner and Côté JJ. could not find an equivalence between the federal and the claimed provincial aspect (health). To do so would suggest that the province had jurisdiction over the siting of such infrastructure, contrary to the precedent established by the Privy Council in *Re Regulation and Control of Radio Communications in Canada*, granting exclusive jurisdiction to the federal government.⁵⁴

While the majority in *Rogers Communications* decided the case through pith and substance alone, they proceeded to apply the doctrine of interjurisdictional immunity to “clarify” the law. This is curious, as the analysis itself adds little, if any, new insight and may muddy the waters in terms of how these doctrines are to be applied. The Court repeats that interjurisdictional immunity is reserved for situations that have been sufficiently covered by precedent.⁵⁵ A 1905 decision then serves as the precedent in this case, *Toronto Corporation v. Bell Telephone Co. of Canada*, where the Privy Council held that the siting of radio communication antenna systems lies at the core of the federal power, ensuring as it does the orderly development and efficient operation of radio communications in Canada. The interjurisdictional immunity argument proceeds in a very similar fashion to *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*,⁵⁶ with the majority concluding that the notice of a reserve seriously and significantly impaired the core of the federal power, rendering Parliament unable to achieve the purpose for which it was granted the power over radio communications.⁵⁷ What, then, is the *ratio* of this case? One possibility is that these cases over the siting of (often unwanted)

⁵⁰ *Id.*, at paras. 103-106.

⁵¹ *Id.*, at para. 116.

⁵² *Multiple Access v. McCutcheon*, [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161 (S.C.C.).

⁵³ *Id.*, at 182.

⁵⁴ *Rogers Communications*, *supra*, note 1, at paras. 50-51.

⁵⁵ *Rogers Communications*, *supra*, note 1, at para. 61 citing *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at paras. 77-78 (S.C.C.). See also *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536 at para. 58 (S.C.C.).

⁵⁶ *Id.*

⁵⁷ *Rogers Communications*, *supra*, note 1, at para. 121.

infrastructure such as radio communications antennae and aerodromes have a particular logic to them which simply cannot allow for provincial overlap, since this would consistently prove ruinous to the federal power.

The general trend for some time has been more recognition of overlapping jurisdiction, and judicial decisions that favour cooperative federalism.⁵⁸ Justice Gascon's dissent continues this tradition, drawing on the principles of presumptive constitutionality, subsidiarity, and cooperative federalism to describe a flexible approach "tailored to the modern conception of federalism, which allows for some overlapping and favours a spirit of cooperation".⁵⁹ Justice Gascon cites Professor Hogg for the proposition that "in choosing between competing, plausible characterizations of a law, the court should normally choose one that would support the validity of the law".⁶⁰ The Majority, however, disagreed:

[the principle of cooperative federalism] can neither override nor modify the division of powers itself. It cannot be seen as imposing limits on the valid exercise of legislative authority [citations omitted.] Nor can it support a finding that an otherwise unconstitutional law is valid.⁶¹

The outcome, a case in which jurisdiction is ousted, seems to cut against the trend. But it may simply illustrate a more subtle trend. In 2011, Professor Bruce Ryder noted the centrality of the principle of equal autonomy—which accords equal weight and consideration to the claims of the legislatures in their exercise of autonomy over distinct policy objectives within their jurisdiction—to the Supreme Court's federalism jurisprudence.⁶² He highlighted the Court's commitment to a flexible vision of federalism that favours a generous interpretation of both federal and provincial heads of power; indeed, prior to 2010, the last case where a provincial or municipal law was found to be *ultra vires* through the doctrine of pith and substance was the *Morgentaler*⁶³ decision in 1993. Yet, from 2010 onward, Ryder noted an increasing number of fissures within the Court as to the *vires* of impugned provisions. As we near the end

⁵⁸ See, for example, Wade K. Wright, "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada" (2010) 51 S.C.L.R. (2d) 625. See also Warren Newman, "The Promise and Limits of Cooperative Federalism as a Constitutional Principle" (2016) 76 S.C.L.R. (2d) 67.

⁵⁹ *Id.*, at para. 93.

⁶⁰ *Id.*; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Toronto: Thomson Carswell, 2007), at 15-23.

⁶¹ *Rogers Communications*, *supra*, note 1, at para. 39.

⁶² Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 S.C.L.R. (2d) 565.

⁶³ *R. v. Morgentaler*, [1993] S.C.J. No. 95, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537 (S.C.C.).

of the McLachlin era, it will be interesting to consider the extent to which the Court's jurisprudence reflects a return to the centralist-decentralized debates engaged in by Chief Justice Laskin and Beetz J. It is possible to read *Rogers Communications* as another step along that path.

2. Constitutional Protection of Lawyer/Client Relationships and section 8 of the Charter

*Canada (Attorney General) v. Chambre des notaires du Québec et Barreau de Québec*⁶⁴ illustrates an interaction between solicitor-client privilege and section 8 of the Charter, producing constitutional limits on the disclosures that the Canada Revenue Agency ("CRA") can require in the course of its investigations.

At issue in *Chambre des Notaires* were sections 231.2 and 231.7 of the *Income Tax Act* ("ITA"), which,⁶⁵ allowed requirements to be issued directly to notaries in Quebec to provide documents relating to their clients for tax collection or auditing purposes, and allowed the Minister to apply to a court for execution of a requirement sent out pursuant to section 231.2. The position of the CRA was that the information sought under the requirement fell within the "accounting records" exception set out in the definition of solicitor-client privilege (under section 232(1) of the *ITA*).

Writing for a unanimous court, Wagner and Gascon JJ. concluded that sections 231.2(1), 231.7, and 232(1) violated section 8 of the Charter and were thus of no force or effect in relation to Quebec notaries and lawyers for all documents protected by professional secrecy. The Court characterized professional secrecy as both a legal principle of supreme importance and principle of fundamental justice.⁶⁶

The Court easily found a violation of the right against unreasonable search and seizure. On the one hand, notaries' clients' reasonable expectations of privacy were implicated because the requirements targeted information or documents that would normally be protected by confidentiality.⁶⁷ The Court was clear that the civil and administrative context of the documents captured by the *ITA*'s requirement scheme did not diminish the taxpayer's expectation of privacy. On the other hand, in balancing clients' individual privacy with the state's interest in carrying out the search or seizure to collect amounts

⁶⁴ *Chambre des notaires, supra*, note 1.

⁶⁵ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (hereinafter "*ITA*").

⁶⁶ *Chambres des notaires, supra*, note 1, at para. 37.

⁶⁷ *Id.*, at para. 35.

owing to CRA, the Court concluded that the search pursuant to the requirement scheme was unreasonable. Specifically, where the privacy interest implicates the professional secrecy of legal advisors, the usual balancing exercise under section 8 will rarely, if ever, cut against the individual's privacy interest. The Court maintained that a stringent standard is necessary in order to protect professional secrecy. This standard means that legislative provisions that interfere with professional secrecy in a manner that is more than absolutely necessary will be found unreasonable.⁶⁸

Several defects in the requirement scheme caused it to fall below this stringent standard.⁶⁹ First, the client of a notary faced with a requirement was not given notice.⁷⁰ Second, an inappropriate burden was placed on the notary or lawyer.⁷¹ Third, compelling disclosure was not absolutely necessary. For example, it is clear that the impugned search was not a measure of last resort: the information sought by the Minister could have been made available through alternative sources, like financial institutions, which do not have the same onerous confidentiality requirements as notaries in Quebec.⁷² Finally, the scheme included no measures to help mitigate the impairment of professional secrecy. To assist Parliament in drafting a scheme that sufficiently mitigates concerns surrounding professional secrecy, *Wagner and Gascon JJ.* point to a directive issued by Revenu Québec, stating that the Revenu will attempt to obtain the documents from alternative sources first, and undertake not to prosecute a notary who invokes professional secrecy in good faith.⁷³

The exclusion of notaries' and lawyers' accounting records from the definition of solicitor-client privilege was also deemed to violate section 8 of the Charter. The Court was clear that the legislature is not free to abrogate professional secrecy by statutory authorizations allowing for the seizure of information that would otherwise be exempt from the duty to disclose, unless it was absolutely necessary to achieving the scheme's objective. Since the Court was not convinced that giving the State access to such protected information was absolutely necessary to realizing the objective of tax collection, the broad and imprecise definition of solicitor-client privilege did not pass constitutional muster.⁷⁴

⁶⁸ *Id.*, at paras. 37-38.

⁶⁹ *Id.*, at para. 44.

⁷⁰ *Id.*, at paras. 45-52.

⁷¹ *Id.*, at paras. 53-57.

⁷² *Id.*, at para. 59.

⁷³ *Id.*, at para. 67.

⁷⁴ *Id.*, at para. 71.

In this volume, Amy Salyzyn considers the decision in *Chambres des notaires*. She highlights analytical tensions that emerge in light of the Court's reliance on the Charter, typically used to protect individuals, to safeguard the lawyer-client relationship from governmental intrusions. Salyzyn notes that in both *Chambres des notaires* and *Canada (Attorney General) v. Federation of Law Societies of Canada*⁷⁵ — the Court curiously characterizes solicitor-client privilege as a fundamental principle that cannot be interfered with unless the stringent threshold of “absolute necessity” is passed, while simultaneously working with the rule under section 8 of the Charter, which protects against “unreasonable” searches and seizure.

The result is a constitutional incongruity whereby an extremely high threshold is tethered to the concept of reasonableness. Salyzyn queries the extent to which this results in the establishment of solicitor-client privilege as a constitutional right that supersedes other rights. If so, this could place the Court in a “constitutional straightjacket” in future cases. Given the high threshold of absolute necessity, Salyzyn also wonders if even the mitigation that Wagner and Gascon commended in their reasons would survive constitutional scrutiny in any subsequent Charter challenge.

3. Mandatory Minima: End of a Story?

Lloyd is the third case since the Charter's enactment in which the Court has struck down a mandatory minimum, the previous two decisions being *R. v. Smith*⁷⁶ and *R. v. Nur*.⁷⁷ In *Lloyd*, the accused was charged with possession of methamphetamine and heroin. Because Mr. Lloyd had previously been convicted of several drug-related offences, he was subject to section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* [hereinafter “CDSA”],⁷⁸ which required the sentencing judge to impose a mandatory sentence of one year. The scope of the impugned provision was summarized by Chief Justice McLachlin in the following way:

To be subject to the mandatory minimum sentence of one year of imprisonment, an offender must be convicted of trafficking, or of possession for the purpose of trafficking, of either any quantity of a

⁷⁵ *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, 2015 SCC 7 (S.C.C.) (considered issues similar to *Chambre des notaires* in the context of anti-money laundering and terrorist financing legislation).

⁷⁶ *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045, 40 D.L.R. (4th) 435 (S.C.C.).

⁷⁷ *R. v. Nur*, [2015] S.C.J. No. 15, [2015] 1 S.C.R. 773, 2015 SCC 15 (S.C.C.).

⁷⁸ *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (hereinafter “CDSA”).

Schedule I substance, such as cocaine, heroin or methamphetamine, or three kilograms or more of a Schedule II substance, namely cannabis: s. 5(3)(a) and (a.1) of the *CDSA*. The offender must also have been convicted within the previous 10 years of a “designated substance offence”, which is defined at s. 2(1) of the *CDSA* as any offence under Part I of the *CDSA* other than simple possession.⁷⁹

Despite the apparent narrowness of the provision, the Majority in *Lloyd* found that the mandatory minimum amounted to cruel and unusual punishment, contrary to section 12 of the Charter. Specifically, Chief Justice McLachlin maintained that although the impugned provision was not grossly disproportionate to the circumstances of the accused in this case, it was nonetheless so because the impugned provision applied in many situations to offenders with significantly varying degrees of moral blameworthiness, and further, because the definition of trafficking and the scope of the designated substance offences were too broad.⁸⁰

The test for determining if a mandatory minimum sentencing provision violates section 12 of the Charter was most recently articulated by the Court in *Nur*. First, the Court must determine what a proportionate sentence for an offence would be, having regard to the objectives and principles of sentencing in the *Criminal Code*.⁸¹ Second, the Court must then consider whether the mandatory minimum imposed by Parliament would require the sentencing judge to impose a sentence that is grossly disproportionate to the offence and its circumstances.⁸²

In considering the second step of the analysis, the Chief Justice crafted two reasonable hypotheticals to demonstrate how the impugned mandatory minimum provision would be grossly disproportionate in foreseeable cases. The first hypothetical involves a drug addict who is charged for sharing a small amount of a Schedule I drug with a spouse or friend. The second hypothetical involves a drug addict who is charged with trafficking a Schedule I drug for a second time to support his own addiction and who, in between conviction and sentencing, attends rehabilitation and overcomes his addiction.⁸³ In both scenarios, the Chief Justice concluded that a mandatory sentence of one year would shock the conscience of Canadians.⁸⁴

⁷⁹ *Lloyd*, *supra*, note 1, at para. 5.

⁸⁰ *Id.*, at paras. 28-32.

⁸¹ *Nur*, *supra*, note 77, at para. 46.

⁸² *Id.*

⁸³ *Id.*, at paras. 32-33.

⁸⁴ *Id.*, at para. 33.

Writing in dissent, Wagner, Gascon, and Brown JJ., asserted that the impugned provision was sufficiently tailored and narrow so as not to offend section 12 of the Charter,⁸⁵ and emphasized the degree of deference that Parliament is entitled to in crafting mandatory minima.⁸⁶ The dissenting justices also rejected the hypotheticals crafted by the Chief Justice, arguing that the minimum would not apply in those scenarios, and even if it did apply, the scenarios are akin to the circumstances of Mr. Lloyd, for whom the Majority agreed that a one-year sentence was not cruel and unusual.⁸⁷

Notable in *Lloyd* is the Court's reflection of the specificity and narrowness that will be required of Parliament if it is to create constitutionally compliant mandatory minima. It seems that the era of proliferating mandatory minima through which we have recently lived might well be at an end, an end marked by *Lloyd*. Yet *Lloyd* also offers fodder for debate in the form of the Court's commentary on the role that statutory exemptions allowing for judicial discretion could play in preserving the constitutionality of mandatory sentences. The Chief Justice suggests as follows:

Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment. Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity in other countries [citation omitted]... It allows the legislature to impose severe sentences for offences deemed abhorrent, while avoiding unconstitutionally disproportionate sentences in exceptional cases. The residual judicial discretion is usually confined to exceptional cases and may require the judge to give reasons justifying departing from the mandatory minimum sentence prescribed by the law. It is for the legislature to determine the parameters of the residual judicial discretion.⁸⁸

Although permitting discretion in the context of mandatory minimum sentences might well address some of the excesses and flaws intrinsic to mandatory minima, this approach also raises concerns surrounding the certainty and predictability expected from the criminal law, which may also produce troubling implications for the rule of law,⁸⁹ an issue that the Court seemed concerned with in *Ferguson*.⁹⁰

⁸⁵ *Id.*, at para. 79.

⁸⁶ *Id.*, at para. 95.

⁸⁷ *Id.*, at para. 96.

⁸⁸ *Id.*, at para. 36.

⁸⁹ Benjamin L. Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law, and *R v Ferguson*" (2009) 47 S.C.L.R. (2d) 101.

⁹⁰ *Id.*

The piece by Asad G. Kiyani in this volume addresses the uneasiness raised by some that *Lloyd's* reading in of highly individualistic circumstances into the reasonable hypothetical test under section 12 of the Charter may open the floodgates such that it will be near impossible for Parliament to craft a mandatory minimum scheme that survives constitutional scrutiny. Kiyani argues that such concerns are overstated: judicial practice suggests that both before and after *Lloyd*, the courts have preserved mandatory sentences much more frequently than they have struck them down. Further, he notes that notwithstanding judicial pronouncements on the importance of section 718.2(e) of the *Criminal Code* and the *Gladue* principles, which call on the courts to consider the circumstances of racialized offenders in determining a just sanction, the jurisprudence on section 12 has been silent as to how these factors ought to be relevant in the context of a gross disproportionality analysis. For Kiyani, this deficiency in conjunction with the Court's non-recognition of proportionality as a principle of fundamental justice under section 7 of the Charter further subverts any possibility that sections 12 and 15 might be integrated in order to address concerns of substantive equality in sentencing and the criminal justice system more broadly. Kiyani not only challenges readers to consider how race and Aboriginal status have been glossed over in the Court's construction of reasonable hypotheticals under section 12 (as in *Lloyd*, for example), but further, to consider how such constructions actually centre around white and male privilege (as in *Nur*, for example).

4. Widening Police Powers

On the strength of its decisions on sentencing⁹¹ and on the limits of substantive criminalization,⁹² over the past many years the Court has benefitted from a developing narrative about its progressive, skeptical take on the expansion of crime and punishment through the criminal law. In many instances, it has been positioned as the counterweight to a government with a “tough on crime” agenda. And yet over those same years there has been a quiet countercurrent in the Court's constitutional

⁹¹ As in *Nur*, *supra*, note 77; *Lloyd*, *supra*, note 1.

⁹² See, e.g., *R. v. Bedford*, [2013] S.C.J. No. 72, [2013] 3 S.C.R. 1101, 2013 SCC 72 (S.C.C.); *R. v. Carter*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, 2015 SCC 5 (S.C.C.).

work in the criminal law, marked by a significant and steady expansion of police powers.⁹³ *R. v. Saeed*⁹⁴ further illustrates this trend.⁹⁵

At issue in the case was whether the common law power of search incident to arrest authorizes penile swabs to secure the DNA of complainants from suspects in the course of sexual assault investigations. The case produces three sets of reasons that highlight deep fissures as to the appropriate authorities that ought to be applied in determining the reasonableness of the impugned search in the context of section 8 of the Charter. On the one hand, the samples that are acquired from a penile swab are akin to the seizure of bodily samples, for which the *Stillman*⁹⁶ framework could apply; on the other, penile swabs can be seen as significantly interfering with the bodily integrity and dignity of a suspect, which would seem to implicate the considerations identified around strip searches in *Golden*.⁹⁷

Writing for the Majority, Moldaver J. concluded that although penile swabs amount to a significant intrusion on the privacy interests of suspects, such swabs will be reasonable where, as in this case, police have “reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested, and the swab is conducted in a reasonable manner”.⁹⁸ Drawing on *Golden* as a framework, Moldaver J. identified 10 factors that Courts may draw on to discern the reasonableness of penile swabs.⁹⁹

For Moldaver J., *Stillman* did not apply to create a requirement for police to obtain consent or a warrant to seize bodily samples or impressions. This is because, in contrast to the bodily samples or impressions protected under *Stillman*, a penile swab is not designed to seize the bodily samples of the accused; rather, it is the complainant’s DNA that is sought.¹⁰⁰ Accordingly, a penile swab does not implicate the same privacy interests of an accused person, since no personal information of the

⁹³ See, e.g., *R. v. Singh*, [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405, 2007 SCC 48 (S.C.C.); *R. v. Clayton and Farmer*, [2007] S.C.J. No. 37, [2007] 2 S.C.R. 725, 2007 SCC 37 (S.C.C.).

⁹⁴ *Saeed, supra*, note 1.

⁹⁵ Other cases where the common law right to search has been broadened in favour of a “crime control” paradigm include: *R. v. Fearon* (cell-phone searches incident to arrest) and *R. v. A.M. and Kang-Brown* (use of sniffer-dogs for the detection of drugs); *R. v. Golden* (strip searches incident to arrest).

⁹⁶ *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

⁹⁷ *R. v. Golden*, [2001] S.C.J. No. 83, [2001] 3 S.C.R. 679, 2001 SCC 83 (S.C.C.).

⁹⁸ *Saeed, supra*, note 1, at paras. 6-7.

⁹⁹ *Id.*, at para. 78.

¹⁰⁰ *Id.*, at para. 45.

suspect is revealed.¹⁰¹ Furthermore, in contrast to the taking of dental impressions or the removal of hair from a suspect's body, Moldaver J. posits that a penile swab is less invasive in that it does not involve penetration or the placement of objects or substances inside the suspect.¹⁰² Finally, evidence of the complainant's DNA that is sought via the swab degrades over time and can be destroyed by the accused, implicating concerns about the preservation of reliable evidence.¹⁰³

Justices Karakatsanis and Abella disagreed. Specifically, Karakatsanis J. maintained that although *Stillman* did not expressly address the issue of genital swabs, the principles underlying that decision suggest that an inappropriate balance would be struck between privacy interests and the state's interest in investigating crimes if the common law authorized warrantless genital swabs.¹⁰⁴ Notwithstanding the unreasonableness of the search, Karakatsanis J. held that the evidence was properly admitted. Justice Abella was the sole judge to find that the penile swab violated section 8 of the Charter and was not properly admissible under section 24(2) of the Charter. The impassioned tone of her dissent is captured at paragraph 167, where she asserts:

[T]he deliberate failure to consider a warrant in the absence of exigent circumstances is, at its best, careless; ignoring the legal possibility that under Canadian law the police were not even entitled to take a penile swab, is fatal.

The article by Christine Mainville in this volume argues that Moldaver J.'s reasoning overstates the importance of the informational privacy impacted by the swab (the complainant's DNA) and fails to sufficiently account for the personal privacy interest that is inherently engaged when genitalia are searched. For Mainville, the assumption that a penile swab is not as invasive as the samples and impressions described in *Stillman* is unfounded.

5. *Jordan* and the Right to be Tried Within a Reasonable Time

Perhaps the most controversial decision released in 2016 — and certainly the one with the most immediately sweeping impact on the administration of justice in Canada — was *Jordan*,¹⁰⁵ in which a deeply

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*, at para. 59.

¹⁰⁴ *Id.*, at para. 99.

¹⁰⁵ *Jordan*, *supra*, note 1.

split¹⁰⁶ Court revamped the framework for addressing the right to be tried within a reasonable time. At the heart of the new scheme is the establishment of presumptive ceilings, which, if surpassed, will lead to a presumption that accused's rights under section 11(b) have been violated. The presumptive ceilings for trials proceeding in Provincial Court and Superior Court are, respectively, 18 and 30 months.¹⁰⁷ Delays caused by the defence are subtracted from the total delay.¹⁰⁸ For the Crown to rebut the presumption of unreasonableness that would otherwise give rise to a stay of proceedings, it must establish the presence of exceptional circumstances.¹⁰⁹

Writing in dissent, Cromwell J. charged the Majority's approach as unnecessary and unlikely to inject simplicity into the law, highlighting that inquiries into the reasonableness of time is a delicate, fact-sensitive and case-specific exercise that cannot adequately be accounted for through use of blunt tools like presumptive ceilings.¹¹⁰ He further maintained that the setting of ceilings is a polycentric enterprise that is better left to the legislature, and that the ceilings selected by the Majority do not accord with the past 10 years of section 11(b) jurisprudence.¹¹¹ Finally, Cromwell J. expressed the concern that the "ceilings will put thousands of cases at risk of being judicially stayed".¹¹²

Two pieces in this volume grapple with the decision in *Jordan* and offer insight into how the Court's deployment of presumptive ceilings is perhaps unsurprising and indeed responsive to various problems generated by previous section 11(b) jurisprudence. Steve Coughlan provides a historically and sociologically rich analysis on the distinction between individual and institutional delay and competing notions of prejudice, and how these factors influenced not only the development of the law surrounding unreasonable delay, but moreover, the attitudes of actors within the criminal justice system.

Coughlan further argues that the establishment of presumptive ceilings was necessary to address the tendency of trial judges to use the

¹⁰⁶ The Majority reasons were written by Karakatsanis, Moldaver, and Brown JJ. (Abella and Côté JJ. concurring); Justice Cromwell wrote for McLachlin C.J.C. and Wagner and Gascon JJ. concurring only in the result.

¹⁰⁷ *Id.*, at para. 46.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, at para. 147.

¹¹¹ *Id.*

¹¹² *Id.*

judicial discretion under the previous *Morin*¹¹³ regime to explain away delay. He argues, the main problem harkens back to a concern first expressed by Lamer J., as he then was, in *Rahey*.¹¹⁴ Specifically, Lamer J. posited that security of the person prejudice should be sufficient to establish a violation of the right enshrined by section 11(b) of the Charter, and further, that liberty and fair trial prejudices should be irrelevant to the analysis.¹¹⁵ This view was ultimately not accepted by the Court in subsequent cases like *Askov*.¹¹⁶ For Coughlan, the concern expressed by Lamer J. foreshadowed problems that quickly materialized in the section 11(b) jurisprudence: because evidence of liberty and fair trial prejudice cases made some cases appear stronger than others, cases advanced solely on the basis of security of the person prejudice appeared weak, with the effect that institutional delay was overlooked.

Palma Paciocco also offers thoughtful insight into possible practical consequences that may flow from *Jordan*, which would be contrary to the interests of the public and accused persons. Specifically, she cautions that excising *actual* prejudice suffered from the analysis may have the effect of incentivizing the Crown to pressure accused persons to enter into guilty pleas at increased rates, which would produce negative implications for fair trial rights. Moreover, she posits that the absence of actual prejudice renders uncertain how section 11(b) will accommodate young offenders who, on account of having different perceptions of time and a reduced ability to appreciate the connection between actions and consequences, experience delay prejudice differently than adult accused.

6. Proportionality as a Principle of Fundamental Justice

Over the last 20 years, proportionality reasoning has found its way deep into the constitutional jurisprudence addressing the criminal justice system and legal rights,¹¹⁷ just as it has become the mainstay of Charter jurisprudence at large. One might say that momentum in this direction reached an apex with LeBel J.'s suggestion in *Ipeelee* that "proportionality in sentencing could aptly be described as a principle of fundamental

¹¹³ *R. v. Morin*, [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771 (S.C.C.).

¹¹⁴ *R. v. Rahey*, [1987] S.C.J. No. 23, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481 (S.C.C.).

¹¹⁵ *Id.*, at para. 35.

¹¹⁶ *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355 (S.C.C.).

¹¹⁷ Benjamin L. Berger, "Constitutional Principles" in Markus D. Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (New York: Oxford University Press), at 422.

justice under s. 7 of the *Charter*”.¹¹⁸ Would this mean that criminal laws (all of which intrinsically implicate the liberty interest under section 7) could be challenged for “mere” disproportionality?

Viewed in this frame, along with *Lloyd*, the Court’s decision in *R. v. Safarzadeh-Markhali*¹¹⁹ no doubt left criminal law lawyers and scholars with mixed feelings.

On the one hand, the Court’s use of section 7 of the Charter in *Safarzadeh-Markhali* illustrates the vigour of the principle of overbreadth in Charter litigation¹²⁰ and clarified the proper methodology to employ when expounding the purpose of an impugned provision or statute in the context of section 7.¹²¹ The Court found that section 719(3.1) of the *Criminal Code*, which made enhanced credit unavailable to offenders who were denied bail primarily because of prior convictions, violated section 7 in that it was overbroad in relation to its purpose: the impugned provision had the effect of catching a broad range of offenders in ways that do not contribute to the enhancement of public safety and security.¹²²

On the other hand, both here and in *Lloyd* the Court rejected the Respondent’s and Ontario Court of Appeal’s assertion that the principle of proportionality was a freestanding principle of fundamental justice within the meaning of section 7.¹²³ Writing for a unanimous Court, Chief Justice McLachlin in *Safarzadeh-Markhali* maintained that the principle of proportionality in sentencing enshrined in section 718.1 of the *Criminal Code* and *Ipeelee*, though fundamental, is not a principle of fundamental justice and does not have constitutional status. She reiterated that the “constitutional dimension” of proportionality in sentencing is the prohibition of grossly disproportionate sentences under section 12 of the Charter.¹²⁴ Similarly, in *Lloyd*, the Chief Justice asserted that the principles of fundamental justice in section 7 must be defined in a way that promotes both coherence within the Charter and conformity to the appropriate institutional roles of Parliament and the Judiciary.¹²⁵ Specifically, she notes¹²⁶ that the recognition of proportionality as a free-standing principle of

¹¹⁸ *R. v. Ipeelee*, [2012] S.C.J. No. 13, [2012] 1 S.C.R. 433, 2012 SCC 13, at para. 37 (S.C.C.).

¹¹⁹ *Safarzadeh-Markhali*, *supra*, note 1.

¹²⁰ *Id.*, at paras. 50-55.

¹²¹ *Id.*, at paras. 24-49.

¹²² *Id.*, at para. 52.

¹²³ *Id.*, at paras. 67-73.

¹²⁴ *Safarzadeh-Markhali*, *supra*, note 1, at 70.

¹²⁵ *Lloyd*, *supra*, note 1, at para. 40.

¹²⁶ *Id.*, at para. 42.

fundamental justice would be inconsistent with the Court's decision in *Malmo-Levine*, in which the Court stated that sections 7 and 12 of the Charter cannot impose different standards with respect to the proportionality of punishment:

Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.¹²⁷

Furthermore, the Chief Justice in *Lloyd* cautioned that the recognition of proportionality as a principle of fundamental justice would destabilize institutional dynamics by allowing judges to subvert the norms of punishment generated by Parliament — a matter which is properly within the realm of policy choices to which Parliament is owed deference.¹²⁸

Interestingly, in both *Safarzadeh-Markhali* and *Lloyd*, the Court did not even attempt to apply the framework for analyzing whether a principle of fundamental justice could be established.¹²⁹

The article in this volume by Andrew Menchynski and Jill R. Presser considers the *Markhali* decision and argues that the Court's focus on the principles of gross disproportionality, overbreadth, and arbitrariness in recent section 7 jurisprudence produces a troubling set of implications for the role that section 7 of the Charter may have in advancing substantive rights in the future. Specifically, the authors argue that the Court's emphasis on instrumental rationality ensures only that the objective and means of an impugned provision are aligned, and that this may frustrate the philosophical foundation of section 7 as a vehicle through which minority groups can secure substantive protection under the Charter. For Menchynski and Presser this is concerning, because in

¹²⁷ *R. v. Malmo-Levine*, [2003] S.C.J. No. 74, [2003] 3 S.C.R. 571, 2003 SCC 74 at para. 160 (S.C.C.).

¹²⁸ *Lloyd*, *supra*, note 1, at paras. 43-45.

¹²⁹ *Per Canadian Foundation for Children, Youth, and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, 2004 SCC 4 (S.C.C.), the test for what amounts to a new principle of fundamental justice within the meaning of s. 7 is: (1) the proposed principle must be a legal principle; (2) there must be consensus that the proposed principle is essential to our shared notions of justice; and (3) the proposed principle must be capable of being identified with precision and applied in a manner that yields predictable results.

their view, the utility of arbitrariness and overbreadth will diminish since Parliament exercises influence over the sources through which legislative purpose is determined. Moreover, analyses on instrumental rationality do not entrench in *stare decisis* in a substantive way, even though such principles may be used to strike down substantively wrong laws. Finally, the authors express a concern that a commitment to instrumental rationality only precludes the Charter from functioning as a living tree that recognizes the progressive social values of the day.

7. *K.R.J.* and the Interplay Between the Rule of Law and the Liberal and Purposive Approach to interpreting section 11 Charter rights

K.R.J. is a case that shows an interplay between the Court's concern for the rule of law and its commitment to a liberal and purposive approach to delineating the scope of rights guaranteed under the Charter. Specifically, the case addressed the question of whether section 161(1) of the *Criminal Code*—which restricts the liberty interests of convicted sexual offenders who pose an ongoing risk to children through means such as prohibitions against using computer systems to communicate with minors and using the Internet generally—constitutes “punishment” within the meaning of section 11(i) of the Charter. This, in turn, determines the constitutionality of their retroactive application to *K.R.J.*

In finding that the impugned prohibition orders constitute punishment, the Court recalibrated the test under section 11 to clarify when measures aimed at public protection will amount to punishment, having regard to the impact the measure has on the offender's liberty and security interests. Specifically, in *K.R.J.* a third consideration was added to the test under section 11. Under the new approach a measure will be punishment where:

- (1) It is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either
- (2) it is imposed in furtherance of the purpose and principles of sentencing, or
- (3) it has a significant impact on an offender's liberty or security interests.¹³⁰

¹³⁰ *Id.*, at para. 41.

The piece by Stacey D. Young in this volume posits that the decision in *K.R.J.* will invite future litigation on ancillary orders, which the author notes have proliferated in recent years. Specifically, Young posits the decision in *K.R.J.* may change the categorization of forfeiture orders for offence-related property such that they are now punishment within the meaning of section 11. For example, the use of property in the commission of an offence may have the effect of tainting the property, such that it is properly the subject of a forfeiture order under Part XII.2 of the *Criminal Code*. Because such an order may remove the offender's ability to deal with their property, it is possible that their liberty or security interests may be significantly impacted, which, under the third prong of the test articulated in *K.R.J.*, could result in the order amounting to punishment.

For Young, the Court's decision in *K.R.J.* signifies a less deferential approach to Parliament and suggests that it will no longer be sufficient to generate measures or sanctions aimed primarily at public protection to evade characterization as punishment and thereby shield the measure from scrutiny under section 11 of the Charter. Notwithstanding that the purpose of a measure may indeed be public protection, the impact that the impugned measure has on an offender must now be considered: if the measure rises to the level of punishment, its retroactive application will be contrary to section 11 of the Charter.

IV. CONCLUSION

The contributions to this volume offer a rich and lively entry point into not only understanding key dimensions of the Court's constitutional jurisprudence in 2016, but larger themes with which the Court, judges, lawyers, and scholars are actively wrestling. As we have suggested, foremost among those larger themes are questions about the political and institutional role of the Court within the constitutional "architecture" of the country, and in particular, the way in which the Supreme Court of Canada will play its part in the defining question of our contemporary constitutional moment: is there a route through reconciliation to a just relationship between Indigenous peoples and the Canadian state?

As we look ahead, and with this challenge — on which she has shone a spotlight — in mind, it is impossible to ignore the pending retirement of the Chief Justice of Canada, Beverley McLachlin, who has led the Court since January 7, 2000. We look forward to contributing to the reflection on the full shape and import of her legacy in these pages next year.

