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Triage and Dissensus at the Supreme Court of Canada: A Review of the Court's 2020 Constitutional Decisions

Bruce Ryder*

I. INTRODUCTION

The onset of the COVID-19 pandemic in March 2020 produced dramatic shifts in the way we live and work. The pandemic compelled individuals and institutions to radically revise practices and priorities. This was as true at the Supreme Court of Canada as it was everywhere else. The Court heard six appeals in January 2020, and two in February 2020. The Court held its last in-person hearing of the winter session, the appeal in *Ontario (Attorney General) v. G.*, on February 20, when COVID-19 was an international public health emergency but not yet a pandemic. The archived webcast brings back some nostalgia for a courtroom packed with counsel and judges, unmasked and undistanced.¹

All that changed beginning on March 11 when the World Health Organization declared COVID-19 a global pandemic. The Court had to reschedule many cases, hearing no appeals in March, April or May as it figured out how to adapt to the evolving health crisis. In June the Court heard three appeals virtually on Zoom. In September, the judges returned to a reconfigured courtroom to hear submissions in person, starting with the appeals of the references concerning the validity of the *Greenhouse Gas Pollution Pricing Act*² on September 22. Throughout the fall session, the judges heard appeals in the courtroom, with counsel making submissions either in-person or remotely.

Despite the Court's commitment to hearing appeals during a time of turmoil, and the agility it demonstrated in adapting to new challenges, it was inevitable that the disruption caused by the pandemic would significantly impact the number of hearings and rulings. The Court heard 41 appeals in 2020, a dramatic decline from the norm.³ Similarly, the Court decided 45 cases in 2020, also dramatically below

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¹ *Ontario (Attorney General) v. G.*, [2020] S.C.J. No. 38, 2020 SCC 38 (S.C.C.), webcast online: <https://scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38585>.

² *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186.

³ Over the past decade, the Court has heard between 57 and 85 appeals annually. For example, the Court heard 69 appeals in 2019. See Supreme Court of Canada, *2020 Year in Review* (2021), at 30, online: <https://scc-csc.ca/review-revue/2020/index-eng.aspx>.

the Court's usual output.⁴

Of the Court's 45 rulings issued in 2020, 13 were constitutional decisions (down from 19 in 2019). Of these 13 cases, two involved the federal division of legislative powers,⁵ two concerned judicial independence,⁶ one related to the rights of Indigenous peoples,⁷ and eight involved the *Canadian Charter of Rights and Freedoms*⁸ (five relating to legal rights,⁹ two concerning section 15 equality rights,¹⁰ and one involving section 23 minority language education rights).¹¹

In addition, the Court issued three rulings in 2020 that, while they did not involve constitutional issues strictly speaking, were constitutional-adjacent: they involved the role of human rights norms in other areas of Canadian law. In *Nevsun Resources Ltd. v. Araya*,¹² Abella J. wrote a bold, ground-breaking opinion for a majority of the Court finding that a common law civil action could proceed against a Canadian company based on breach of customary international human rights law. In *1704604 Ontario Ltd. v. Pointes Protection Assn.*¹³ and *Bent v. Platnick*,¹⁴ the Court had its first opportunity to interpret legislation aimed at protecting freedom of expression

⁴ Over the past decade, the Court has decided between 57 and 83 cases annually. In 2019, the Court issued 72 decisions. See Supreme Court of Canada, *2020 Year in Review* (2021), at 32, online: <https://scc-csc.ca/review-revue/2020/index-eng.aspx>.

⁵ *Reference re Environmental Management Act (British Columbia)*, [2020] S.C.J. No. 1, 2020 SCC 1 (S.C.C.); *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.).

⁶ *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, [2020] S.C.J. No. 20, 2020 SCC 20 (S.C.C.); *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, [2020] S.C.J. No. 21, 2020 SCC 21 (S.C.C.).

⁷ *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020] S.C.J. No. 4, 2020 SCC 4 (S.C.C.).

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

⁹ *R. v. K. (K.G.)*, [2020] S.C.J. No. 7, 2020 SCC 7 (S.C.C.); *R. v. Thanabalasingham*, [2020] S.C.J. No. 18, 2020 SCC 18 (S.C.C.); *R. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (oral decision issued from the bench on October 7, 2020); *R. v. Reilly*, [2020] S.C.J. No. 27, 2020 SCC 27 (S.C.C.); *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.).

¹⁰ *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.); *Ontario (Attorney General) v. G.*, [2020] S.C.J. No. 38, 2020 SCC 38 (S.C.C.).

¹¹ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020] S.C.J. No. 13, 2020 SCC 13 (S.C.C.).

¹² *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5 (S.C.C.).

¹³ *1704604 Ontario Ltd. v. Pointes Protection Assn.*, [2020] S.C.J. No. 22, 2020 SCC 22 (S.C.C.) [hereinafter "*Pointes Protection*"].

¹⁴ *Bent v. Platnick*, [2020] S.C.J. No. 23, 2020 SCC 23 (S.C.C.).

on matters of public interest from being suppressed by strategic lawsuits against public participation (“anti-SLAPP legislation”).

While the number of constitutional rulings may not have been high in 2020, the Court nevertheless took advantage of the limited opportunities it had to make significant contributions to the clarification and development of constitutional law. In this review of the Court’s 2020 constitutional rulings, I will not focus on individual rulings; I will leave that task to the other papers in this volume. Rather, I will highlight two important features of the Court’s work that emerge from a study of the 2020 constitutional decisions as a whole.

The first feature is the deepening of the Court’s approach to triage in its 2020 rulings. The Court is compelled — even in the best of times — to make difficult choices about how to prioritize its limited time and resources. The leave to appeal process functions as a form of triage — along with appeals as of right, it determines which cases are admitted for the Court’s consideration. The pandemic exacerbated the need for triage, disrupting routines, requiring new forms of adaptation, and leading to the postponement of a number of appeals.

When the Court is engaged in deciding the appeals it has heard, it is engaged in triage as well. The judges have to decide how much of their time and resources to devote to deliberations and to the writing of opinions in particular cases. In other words, the Court engages in triage both in determining admissions to its docket and in how it treats admitted cases. The decisions of the Court in 2020 display a striking approach to the prioritization of its limited jurisprudential resources.

The second feature of the Court’s 2020 rulings I will highlight is the remarkable degree of dissensus that exists among the judges on constitutional issues. The Court spoke unanimously in reasons and result in just one major constitutional ruling in 2020 (an oral ruling delivered by the Chief Justice from the bench immediately after the hearing in *Reference re Environmental Management Act (British Columbia)*)¹⁵

¹⁵ *Reference re Environmental Management Act (British Columbia)*, [2020] S.C.J. No. 1, 2020 SCC 1 (S.C.C.). The Court was also unanimous in two rulings dealing with the right to be tried within a reasonable time protected by s. 11(b) of the Charter: see the brief unanimous opinion issued by “the Court” in *R. v. Thanabalasingham*, [2020] S.C.J. No. 18, 2020 SCC 18 (S.C.C.), agreeing with the Quebec Court of Appeal that the accused’s right to be tried within a reasonable time had been violated; and *R. v. K. (K.G.)*, [2020] S.C.J. No. 7, 2020 SCC 7 (S.C.C.), a unanimous ruling (Moldaver J. writing for eight members of the Court and Abella J. writing a separate concurrence) finding that the accused’s right to be tried within a reasonable time had not been violated. See also the unanimous opinions written by Karakatsanis J. in two companion cases dealing with access to Cabinet documents in litigation involving the constitutionally-mandated process for setting judicial salaries: *British Columbia (Attorney General) v. Provincial Court Judges’ Association of British Columbia*, [2020] S.C.J. No. 20, 2020 SCC 20 (S.C.C.); *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, [2020] S.C.J. No. 21, 2020 SCC 21 (S.C.C.).

and in one important constitutionally-adjacent ruling (in *Pointes Protection*,¹⁶ a rare unanimous opinion authored by Côté J.). All of its other major constitutional rulings featured one or more dissenting opinions, and a number were decided by narrow 5-4 margins.¹⁷ The dissensus is apparent not just in the number of decisions featuring a closely divided Court. The dissensus is also apparent in the length and vehemence of the judges' disagreements.

The discussion below will explore these two features of the Court's 2020 constitutional decisions. Part II discusses the approach the Court took to triage, that is, how it went about prioritizing its limited jurisprudential resources. Part III discusses the nature and degree of dissensus evident in the Court's decisions. There are positive and negative aspects of the Court's approach to triage, just as there are positive and negative aspects of the robust disagreements that characterize the Court's recent constitutional jurisprudence. I try to draw attention to those positive and negative aspects in the discussion that follows. I conclude with some thoughts about how triage and dissensus may evolve at the Court in the years ahead.

II. TRIAGE

The Court exercises substantial control over how best to direct the limited time and resources it has to hearing and deciding appeals, to issuing reasons that resolve the issues in dispute, and to clarifying and developing the law.

The Court controls most of its docket by deciding whether to grant leave to appeal pursuant to section 40(1) of the *Supreme Court Act*.¹⁸ The Court cannot possibly

¹⁶ *1704604 Ontario Ltd. v. Pointes Protection Assn.*, [2020] S.C.J. No. 22, 2020 SCC 22 (S.C.C.).

¹⁷ *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020] S.C.J. No. 4, 2020 SCC 4 (S.C.C.) (5-4); *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020] S.C.J. No. 13, 2020 SCC 13 (S.C.C.) (7-2); *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.) (5-4); *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (7-2); oral decision issued from the bench on October 7, 2020); *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.) (6-3); *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.) (unanimous in result; 5-3 split on role of international and comparative law in Charter interpretation); *Ontario (Attorney General) v. G.*, [2020] S.C.J. No. 38, 2020 SCC 38 (S.C.C.) (7-2). See also the Court's constitutionally adjacent rulings in *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5 (S.C.C.) (5-4) and *Bent v. Platnick*, [2020] S.C.J. No. 23, 2020 SCC 23 (S.C.C.) (5-4).

¹⁸ Section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 provides as follows:

an appeal lies to the Supreme Court. . . where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance . . . one that ought to be decided by the Supreme Court . . . and leave to appeal from that judgment is accordingly granted by the Supreme Court.

operate as a court of correction; it simply lacks the time and resources to correct all errors committed by courts of appeal. Rather, it grants leave according to the public importance of the issues raised by a case. The Court typically receives about 500 applications for leave every year (471 in 2020); since 2014, it has not granted leave to more than 50 cases annually. The number of cases granted leave declined to 42 in 2018 and 36 in 2019.¹⁹ The leave to appeal process thus functions as an increasingly harsh form of jurisprudential triage — over the course of the past decade, an application for leave to appeal has had a 10 per cent chance at best of being granted leave. The Court prioritizes its resources by granting leave in accordance with its assessment of the urgency of the need for clarification and development of the law in the areas at issue in a case.

A significant number of appeals arrive at the Court as of right (26 in 2018, 25 in 2019 and 25 in 2020).²⁰ Most of these appeals as of right are in criminal cases. Pursuant to section 691 of the *Criminal Code*, an accused person convicted by a Court of Appeal has an appeal as of right to the Supreme Court if there was a dissent at the Court of Appeal or if the Court of Appeal substituted a verdict of guilty for an acquittal at trial.²¹ Another source of appeals as of right comes from references initiated by provincial governments to their courts of appeal: section 36 of the *Supreme Court Act* provides that an appeal as of right lies to the Supreme Court from opinions of provincial courts of appeal on provincial references.²²

Deciding whether to grant leave to appeal is the first and familiar way in which the Court engages in triage. The Court approached this task in 2020 much as it has in previous years. Once cases are admitted to the Court’s docket, and appeals are heard, the Court engages in the second kind of triage mentioned above: the judges have to decide how much of their time and resources to devote to deliberations and to the writing of opinions in particular cases. It is with respect to this second form of triage that the Court’s work in 2020 is notable. The decisions of the Court in 2020 display a striking approach to the prioritization of its limited jurisprudential resources.

Oral rulings, delivered from the bench at the end of a hearing, usually accompanied by summary reasons, continue to constitute an alarmingly high number of the Court’s rulings.²³ The Court decided 15 cases — including one appeal

¹⁹ Supreme Court of Canada, *2020 Year in Review* (2021), at 29, online: <https://scc-csc.ca/review-revue/2020/index-eng.aspx>.

²⁰ Supreme Court of Canada, *2020 Year in Review* (2021), at 29, online: <https://scc-csc.ca/review-revue/2020/index-eng.aspx>.

²¹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 691(1), (2).

²² *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 36.

²³ The number of oral summary reasons delivered by the Court started increasing in 2014. Jamie Cameron noted that in 2018, the Court rendered oral reasons in 18 cases representing close to 30 per cent of the Court’s docket: Jamie Cameron, “A Chief and Court in Transition:

from a provincial reference raising important issues regarding the constitutional division of legislative powers,²⁴ and two criminal appeals raising Charter issues²⁵ — summarily in the form of brief oral reasons delivered from the bench.²⁶ These 15 summary rulings constituted a third of the Court’s rulings issued in 2020. In these cases, the Court chose to devote no time to deliberation on the result beyond the date of the hearing.

Not surprisingly, with only one exception, the appeals disposed of summarily from the bench were appeals as of right.²⁷ Summary rulings enable the Court to devote significant resources to deep and prolonged engagement with the issues raised in a select number of appeals, including a number of high-profile constitutional cases.

Nevertheless, the Court engages in a questionable form of triage by conserving its deliberative and judgment-writing resources for the cases it has chosen to hear by granting leave. The Court has waxed eloquent about the importance of trial judges giving reasons in criminal cases. For example, in *R. v. Sheppard*, Binnie J. wrote that “[t]he delivery of reasoned decisions is inherent in the judge’s role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public

The Wagner Court and the Constitution”, (2020) 94 Sup. Ct. L. Rev. (2d) 3. The Court’s penchant for delivering oral summary reasons has attracted the ire of some members of the bar: see Frank Addario & James Foy, “The Supreme Court of Canada’s ‘new transparency’ is anything but” *The Globe and Mail* (December 16, 2018); Sean Fine, “Fast rulings from Supreme Court creating uncertainty about precedents it is setting, legal community says” *The Globe and Mail* (February 1, 2021).

²⁴ *Reference re Environmental Management Act (British Columbia)*, [2020] S.C.J. No. 1, 2020 SCC 1 (S.C.C.).

²⁵ *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (decision delivered orally from the bench on October 7, 2020; written reasons followed later); *R. v. Reilly*, [2020] S.C.J. No. 27, 2020 SCC 27 (S.C.C.).

²⁶ The 12 non-constitutional summary rulings delivered orally from the bench were: *R. v. Doonanco*, [2020] S.C.J. No. 2, 2020 SCC 2 (S.C.C.); *R. v. Li*, [2020] S.C.J. No. 12, 2020 SCC 12 (S.C.C.); *R. v. Esseghaier*, [2020] S.C.J. No. 102, 2021 SCC 9 (S.C.C.) (decision delivered orally from the bench on October 7, 2020; written reasons followed later); *R. v. Riley*, [2020] S.C.J. No. 31, 2020 SCC 31 (S.C.C.); *R. v. Langan*, [2020] S.C.J. No. 33, 2020 SCC 33 (S.C.C.); *R. v. Kishayinew*, [2020] S.C.J. No. 34, 2020 SCC 34 (S.C.C.); *R. v. Slatter*, [2020] S.C.J. No. 36, 2020 SCC 36 (S.C.C.); *R. v. Delmas*, [2020] S.C.J. No. 39, 2020 SCC 39 (S.C.C.); *R. v. Mehari*, [2020] S.C.J. No. 40, 2020 SCC 40 (S.C.C.); *Co-operators General Insurance Co. v. Sollio Groupe Coopératif*, [2020] S.C.J. No. 41, 2020 SCC 41 (S.C.C.); *R. v. M. (W.)*, [2020] S.C.J. No. 42, 2020 SCC 42 (S.C.C.); *R. v. Cortes Rivera*, [2020] S.C.J. No. 44, 2020 SCC 44 (S.C.C.).

²⁷ The only case decided summarily that had been granted leave was *Co-operators General Insurance Co. v. Sollio Groupe Coopératif*, [2020] S.C.J. No. 41, 2020 SCC 41 (S.C.C.).

at large.”²⁸ In the administrative law context, the Court has also stressed the importance of reasons.²⁹ The reasons the Court has given for encouraging or requiring decision-makers to give reasons in these contexts are equally or more compelling for the top court itself. Public confidence in the Court’s reasoning process requires reasons. Without reasons, how are the parties to know that they have been heard, and their submissions taken seriously? Moreover, fulfilling the Court’s responsibility to clarify and develop the law requires deliberation and the giving of reasons.

When the Court routinely issues oral reasons from the bench, it is also showing little regard for the intent underlying section 691 of the *Criminal Code* and section 36 of the *Supreme Court Act*. Parliament has decided to grant an appeal as of right in criminal cases that have attracted important forms of judicial disagreement in order to provide an additional safeguard against wrongful convictions. Similarly, Parliament has decided to give an appeal as of right from the opinions of courts of appeal on provincial references. When the Court dismisses an appeal as of right from the bench, providing only cursory oral reasons, it is treating these appeals more like applications for leave to appeal than *bona fide* appeals. A strong case can be made that the Court should issue summary rulings only in those rare situations where it has nothing to add to an opinion below.

The most egregious summary oral decision delivered by the Court in 2020 was in the first case it heard, on January 16, 2020, on an appeal from the British Columbia Court of Appeal’s opinion in the *Reference re Environmental Management Act (British Columbia)*.³⁰ The British Columbia government, responding to increasing public concerns about the possibility of oil spills from interprovincial pipelines, proposed amendments to provincial environmental legislation that would put in place a new regime of “hazardous substance permits” that would enable the imposition of conditions on the transport and storage of heavy oil in the province. The B.C. government referred three questions to the Court of Appeal: whether the proposed amendments, if enacted, would be a valid exercise of the provincial legislature’s powers pursuant to section 92 of the *Constitution Act, 1867*,³¹ and, if so, whether the proposed legislation would be applicable to interprovincial undertakings, and, if so, whether the proposed legislation would be rendered inoperative by a conflict with federal law. These questions related to three constitutional doctrines: the pith and substance doctrine (used to determine validity),

²⁸ *R. v. Sheppard*, [2002] S.C.J. No. 30, at para. 55, 2002 SCC 26 (S.C.C.).

²⁹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

³⁰ *Reference re Environmental Management Act (British Columbia)*, [2019] B.C.J. No. 925, 2019 BCCA 181 (B.C.C.A.), affd [2020] S.C.J. No. 1, 2020 SCC 1 (S.C.C.).

³¹ *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3 [reprinted in R.C.S. 1985, App. II, No. 5].

the interjurisdictional immunity doctrine (used to determine applicability) and the paramountcy doctrine (used to determine operability). In a unanimous opinion written by Newbury J., the British Columbia Court of Appeal concluded that the proposed amendments were beyond the jurisdiction of the provincial legislature, and were thus *ultra vires*. As a result, she found it unnecessary to address the second and third questions.

On appeal to the Supreme Court, Joe Arvay, in what sadly turned out to be his last appearance before the Court, presented British Columbia's submissions. He struggled valiantly to convince the judges that the constitution ought to leave some room for provincial legislatures to protect against local environmental impacts, even when caused by heavy oil moving through federally-authorized inter-provincial pipelines. In addition to the respondent Attorney General of Canada, the Court heard from four provincial attorney-generals, as well as 16 other interveners. In total, 49 counsel participated in the appeal. Some of the interveners made interesting and novel submissions; for example, Josh Hunter and Otto Ranalli, on behalf of the Attorney General of Ontario, argued that it was time for the Court to jettison the doctrine of interjurisdictional immunity altogether.³²

Despite the importance of the constitutional issues raised by the reference, and the quality of submissions devoted to the appeal, at the conclusion of the hearing, the Chief Justice delivered the following one-sentence ruling orally from the bench: "We are all of the view to dismiss the appeal for the unanimous reasons of the Court of Appeal for British Columbia."³³ This was not an auspicious beginning to the Court's 2020 constitutional cases.

From the point of view of the Court's responsibility to clarify and develop the law, the brief oral ruling in the *Reference re Environmental Management Act (British Columbia)* was a huge disappointment. In its past jurisprudence, the Court had not had the opportunity to address the scope of federal and provincial jurisdiction in relation to inter-provincial pipelines. Lower courts and tribunals have been left to extrapolate from constitutional principles the Court has developed in cases involving other kinds of interprovincial undertakings falling within exclusive federal jurisdiction pursuant to section 92(10)(a) of the *Constitution Act, 1867*. The oral ruling in this reference was thus a significant, missed opportunity. In the Court's defence, one might argue that Newbury J.'s opinion for the unanimous Court of Appeal was so thorough and convincing, it simply was not possible for the Court to improve upon it. But this is not convincing. Justice Newbury did not conduct a thorough pith and substance analysis of the proposed legislative amendments. Nor did she grapple with the awkwardness of assessing pith and substance before

³² Factum of the Attorney General of Ontario, Court File No. 38682, at paras. 23-46, online: https://scc-csc.ca/WebDocuments-DocumentsWeb/38682/FM020_Intervener_Attorney-General-of-Ontario.pdf.

³³ *Reference re Environmental Management Act (British Columbia)*, [2020] S.C.J. No. 1, at para. 1, 2020 SCC 1 (S.C.C.).

amendments have even been introduced in the legislature. While her opinion was unequivocal in declaring the proposed amendments *ultra vires*, she did not offer any thoughts on whether provinces or municipalities have any capacity to regulate any activities associated with interprovincial pipelines. We are left wondering how an opinion so strongly discouraging of the exercise of provincial environmental jurisdiction fits with the Supreme Court’s frequently touted commitments to modern or co-operative federalism (an approach that favours overlap and interplay between federal and provincial powers). We are also left wondering how the British Columbia Court of Appeal’s opinion fits with the Court’s view that environmental protection is one of the supreme challenges of our time that needs to be addressed by legislation from all levels of government.

The Court’s summary dismissal of the appeal in the *Reference re Environmental Management Act (British Columbia)* was the low point of the year, revealing a Court willing to engage in radical jurisprudential triage in questionable ways. At the other end of the triage spectrum, the Court seized the opportunity in a handful of 2020 constitutional cases to boldly clarify and develop the law.

The principal majority opinion of Karakatsanis J. in *Reference re the Genetic Non-Discrimination Act* affirmed Parliament’s ability to use its criminal law power to sanction conduct that amounts to discrimination or an invasion of autonomy and privacy.³⁴

In *Fraser v. Canada (Attorney General)*,³⁵ the majority of the Court, in a powerful opinion written by Abella J., restated and clarified the test for determining a breach of Charter equality rights. Her opinion is particularly helpful in setting what claimants need to establish, and what they do not need to establish, to make out a case of adverse effects discrimination, an issue that has bedeviled Charter equality rights jurisprudence for decades.³⁶

In *Ontario (Attorney General) v. G.*,³⁷ all members of the Court, in three thoughtful opinions (a majority opinion written by Karakatsanis J., a separate concurring opinion by Rowe J., and a dissent co-authored by Côté and Brown JJ.),

³⁴ *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.). I served as co-counsel, along with Joseph Arvay, Michael Sobkin and William Colish, for the appellant the Canadian Coalition for Genetic Fairness.

³⁵ *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.).

³⁶ See the excellent symposium of papers on *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.) published in the Constitutional Forum: Jonnette Watson Hamilton, “Cautious Optimism: *Fraser v. Canada (Attorney General)*” (2021) 30:2 Const. Forum Const. 1; Fay Faraday, “The Elephant in the Room and Straw Men on Fire” (2021) 30:2 Const. Forum Const. 15; Jennifer Koshan, “Intersections and Roads Untravelling: Sex and Family Status in *Fraser v. Canada*” (2021) 30:2 Const. Forum Const. 15; Joshua Sealy-Harrington, “The Alchemy of Equality Rights” (2021) 30:2 Const. Forum Const. 53.

³⁷ *Ontario (Attorney General) v. G.*, [2020] S.C.J. No. 38, 2020 SCC 38 (S.C.C.).

engaged in an overdue and wide-ranging reconsideration of its approach to remedies when legislation is found to violate Charter rights or freedoms. The Court's remedial practices in Charter cases had long since moved beyond the approach it had set out in *Schachter v. Canada*³⁸ in 1992. Justice Karakatsanis' majority opinion reformulated the *Schachter* approach and provided important guidance on when courts should issue suspended declarations of invalidity (rarely) and constitutional exemptions (only on those rare occasions on which suspended declarations are issued, in which case they should normally accompany the suspension).

The Court's ambitious approach to select constitutional issues continued in its first major constitutional decision of 2021 upholding the federal *Greenhouse Gas Pollution Pricing Act*.³⁹ Chief Justice Wagner's majority opinion undertook a major review and revision of the national concern branch of Parliament's "peace, order and good government" power, the first such revision in a generation.⁴⁰

These landmark rulings are distinguished by the length, breadth and depth of the judges' engagement with the legal issues and with the scholarly literature. They are also distinguished by the Court's willingness to clarify and develop the law in light of fundamental principles. While all members of the Court seem to share these commitments to deep engagement and principled development of the law, the methodological common ground seems to stop there. The Court is deeply divided in its approach to constitutional issues. The divisions on the Wagner Court have been apparent for several years, but in 2020 they came to the fore like never before.

III. DISSENSUS

The proportion of unanimous decisions issued by the Court has declined significantly on the Wagner Court, a trend noted in previous years' reviews of the Court's constitutional cases.⁴¹ For the third year running, in 2020 less than half of the Court's rulings were unanimous (22 of 45).⁴² Leaving out oral decisions delivered from the bench (11 of 15 unanimous), the Court's reasons were unanimous in only 11 of its 30 reserved opinions (37 per cent).

While the numbers tell part of the story, they do not tell us how divided the Court is on big constitutional issues. The Court's most important 2020 constitutional

³⁸ *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

³⁹ *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 (S.C.C.).

⁴⁰ The previous leading statement on the parameters of the national concern branch was Le Dain J.'s majority opinion in *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401 (S.C.C.).

⁴¹ Sonia Lawrence, "Introduction – 2019 Constitutional Cases at the Supreme Court: Up Close and in Person" (2021) 100 Sup. Ct. L. Rev. (2d) 3; Jamie Cameron, "A Chief and Court in Transition: The Wagner Court and the Constitution" (2020) 94 Sup. Ct. L. Rev. (2d) 3.

⁴² Supreme Court of Canada, *2020 Year in Review* (2021), at 33, online: <https://scc-csc.ca/review-revue/2020/index-eng.aspx>.

rulings exhibited sharp divisions: this was the case in *Reference re the Genetic Non-Discrimination Act* on the federal criminal law power (5-4); *Fraser v. Canada (Attorney General)* on Charter equality rights (6-3); *Quebec (Attorney General) v. 9147-0732 Québec inc.* on the role of international and comparative law in constitutional interpretation (5-3); and *Ontario (Attorney General) v. G.* on the approach to be taken to the issuance of suspended declarations of invalidity and personal constitutional exemptions (7-2); and *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* on whether the Quebec Superior Court could take jurisdiction over the adjudication of the entirety of a claim to Aboriginal title that involved territory in Quebec and Newfoundland and Labrador (5-4).⁴³ Deep divisions on the Court on major constitutional questions were not unique to 2020; they started to emerge prior to 2020,⁴⁴ and continued in 2021.⁴⁵

As any observer of the current Court knows, Côté, Brown and Rowe JJ. are the leading dissenters (in frequency and vigour) on the Court, including in constitutional decisions. Vanessa MacDonnell observed in 2019 that Côté J. is the Court's most frequent dissenter.⁴⁶ Justice Côté remained the Court's most frequent dissenter in

⁴³ *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020] S.C.J. No. 4, 2020 SCC 4 (S.C.C.) (5-4); *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020] S.C.J. No. 13, 2020 SCC 13 (S.C.C.) (7-2); *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.) (5-4); *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (7-2; oral decision issued from the bench on October 7, 2020); *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.) (6-3); *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.) (unanimous in result; 5-3 split on role of international and comparative law in Charter interpretation); *Ontario (Attorney General) v. G.*, [2020] S.C.J. No. 38, 2020 SCC 38 (S.C.C.) (7-2). See also the Court's constitutionally adjacent rulings in *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5 (S.C.C.) (5-4) and *Bent v. Platnick*, [2020] S.C.J. No. 23, 2020 SCC 23 (S.C.C.) (5-4).

⁴⁴ See, e.g., *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17 (S.C.C.) (6-3); *Centrale des syndicats du Québec v. Quebec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18 (S.C.C.) (8-1, three separate opinions); *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.) and *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, 2018 SCC 33 (S.C.C.) (7-2, four separate opinions); *R. v. Boudreault*, [2018] S.C.J. No. 58, 2018 SCC 58 (S.C.C.) (7-2); *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.) (5-2, three separate opinions).

⁴⁵ *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 (S.C.C.) (6-3); *R. v. Desautel*, [2021] S.C.J. No. 17, 2021 SCC 17 (S.C.C.) (7-2); *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34 (S.C.C.) (5-4).

⁴⁶ Vanessa A. MacDonnell, "Justice Suzanne Côté's Reputation as a Dissenter on the Supreme Court of Canada" (2019) 88 Sup. Ct. L. Rev. (2d) 47.

2020, authoring 13 dissents in total, constituting a remarkable 30 per cent of the Court's 45 rulings. Justice Brown was the most frequent dissenter in the Court's 2020 constitutional rulings: Brown and Rowe JJ. co-authored dissents in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, *Nevsun Resources Ltd. v. Araya*, *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*⁴⁷ and *Fraser v. Canada (Attorney General)* (they also co-authored the majority opinion in *9147-0732 Québec*); Côté and Brown JJ. co-authored a dissent in *Ontario (Attorney General) v. G.* Justice Abella, once a frequent dissenter, was along with Martin, the judge most frequently in the majority in 2020.

Justices Abella, Karakatsanis and Martin frequently vote together. They were the leaders of a dominant liberal wing on the Court in 2020, more often than not forming a majority with the support of at least two of Chief Justice Wagner, and Moldaver and Kasirer JJ. When Moldaver J. and the Chief Justice join the conservative trio of Brown, Côté and Rowe JJ., rulings can swing against the liberal group, as they did in 2020 in *Bent v. Platnick*⁴⁸ and *9147-0732 Québec*⁴⁹ (on the role of international and comparative law in Charter interpretation), and, as they did in 2021 in *Toronto (City) v. Ontario (Attorney General)*.⁵⁰

Justice Abella was the crucial fifth vote in favour of the validity of the legislation at issue in *Reference re Genetic Non-Discrimination Act*. The last time the Court had considered the scope of Parliament's criminal law power, in *Reference re Assisted Human Reproduction Act*,⁵¹ Abella J. had joined the opinion co-authored by LeBel and Deschamps JJ., an opinion that has much in common with Kasirer J.'s dissent in *Reference re Genetic Non-Discrimination Act*. By signing on to a more expansive view of the criminal law power in 2020 than she had a decade earlier, Abella J. cast a crucial vote on the fate of *Reference re Genetic Non-Discrimination Act*. Justice Abella also authored the majority opinions in the 5-4 ruling in *Nevsun Resources Ltd. v. Araya* and in the 6-3 ruling in *Fraser v. Canada (Attorney General)*.

The closeness of these results makes clear that the appointment of Jamal J. to replace Abella J. this year, and the appointment of a judge to replace Moldaver J. upon his retirement next year, could have a decisive impact on a closely divided Court's constitutional rulings.

⁴⁷ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020] S.C.J. No. 13, 2020 SCC 13 (S.C.C.).

⁴⁸ *Bent v. Platnick*, [2020] S.C.J. No. 23, 2020 SCC 23 (S.C.C.).

⁴⁹ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.).

⁵⁰ *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34 (S.C.C.).

⁵¹ *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61 (S.C.C.).

In 2020, two or three of Brown, Côté and Rowe JJ. dissented in almost all of the Court's major constitutional cases.⁵² Indeed, we might say that 2020 was the year that the Brown, Rowe and Côté trio truly emerged as a cohesive force on the Court. The Court has had prominent, revered dissenters in the past — most notably the trio of Laskin, Spence and Dickson (or “LSD”) in the 1970s,⁵³ and Wilson⁵⁴ and L'Heureux-Dubé⁵⁵ in the 1980s and 1990s, respectively. But the Brown, Rowe and Côté trio is a dissenting group unlike anything the Court has seen before. They are not carrying forward the liberal or feminist perspectives of previous great dissenters, quite the contrary. They typically take a narrower approach to the protection of Charter rights and freedoms than their colleagues. They seem particularly impervious to the equality claims of disadvantaged groups. They would have struck down federal legislation aimed at reducing greenhouse gas emissions as well as federal legislation criminalizing genetic discrimination.

The pattern of opinions written or joined by Brown, Côté and Rowe JJ. is unmistakably conservative. Just as the LSD trio gave voice to liberal concerns about the protection of civil liberties and the rights of accused persons in the 1970s, the Brown, Rowe and Côté trio are giving voice to conservative legal thinking in the bench, bar and academy in the 2020s. It seems they deserve their own acronym: I will refer to them as BRoC. The acronym strikes me as apt for two reasons. One is the “go for broke” style they exhibit in their opinions. They write boldly, confidently and often at great length.

Another reason for adopting the BRoC acronym is that their dissents often identify features of the Court's broader jurisprudence they consider broken and in

⁵² *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020] S.C.J. No. 4, 2020 SCC 4 (S.C.C.) (dissent co-authored by Brown and Rowe JJ., joined by Côté and Moldaver JJ.); *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5 (S.C.C.) (one dissent co-authored by Brown and Rowe JJ., another authored by Côté J., joined by Moldaver J.); *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020] S.C.J. No. 13, 2020 SCC 13 (S.C.C.) (dissent co-authored by Brown and Rowe JJ.); *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.) (Brown and Rowe JJ. joined Kasirer J.'s dissenting opinion); *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.) (one dissent co-authored by Brown and Rowe JJ.; separate dissent authored by Côté J.); *Ontario (Attorney General) v. G.*, [2020] S.C.J. No. 38, 2020 SCC 38 (S.C.C.) (co-authored dissent by Brown and Côté JJ.).

⁵³ Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005), c. 20 “The Great Dissenter”, at 453-81.

⁵⁴ See Marie-Claire Belleau, Rebecca Johnson & Christina Vinters, “Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson” in Jamie Cameron, ed., *Reflections on the Legacy of Justice Bertha Wilson* (Markham, ON: LexisNexis Canada, 2008), at 409.

⁵⁵ Constance Backhouse, *Claire L'Heureux-Dubé: A Life* (Vancouver: University of British Columbia Press, 2017), at 373-376 [hereinafter “The Great Dissenter”].

need of an overhaul. Their opinions challenge important elements of the liberal consensus on the interpretation of the Charter that has prevailed since the landmark decisions of the Dickson Court in the mid-1980s. They favour a narrower approach to interpreting Charter rights and freedoms, one that they say places more weight on text and purpose. They give little attention to the idea that Charter rights should be interpreted in a large and liberal manner and limitations on rights interpreted strictly. In practice, they do not seem to have much truck with the idea that the meaning of constitutional provisions may evolve over time in accordance with the “living tree” principle. In these ways, the BRoC trio poses an important challenge to the Dicksonian liberal method of Charter interpretation that has dominated the Court’s jurisprudence for more than 35 years. When their colleagues adopt larger and more liberal interpretations of Charter rights and freedoms, they often accuse them of imposing their own policy preferences on the legislature in the guise of constitutional interpretation.

Even when the Court is unanimous in result, dissensus can emerge in the different reasons given by the justices. The most prominent example in 2020 was the Court’s ruling in *9147-0732 Québec*.⁵⁶ The Court unanimously held that corporations do not benefit from the protection against cruel and unusual punishment provided by section 12 of the Charter; only human beings can enjoy that protection. The majority opinion was co-authored by Brown and Rowe JJ. (joined by Wagner C.J.C. and Moldaver and Côté JJ.). Justice Abella wrote a concurring opinion that was joined by Karakatsanis and Martin JJ. Justice Kasirer wrote a separate concurrence.

The Brown and Rowe joint opinion and the Abella opinion took different approaches to the role of international and comparative law in constitutional interpretation. Justice Abella cited a wide range of international and comparative sources and was careful to distinguish between binding sources of international law and non-binding, persuasive sources.⁵⁷ Justices Brown and Rowe took issue with her approach, and went out of their way to provide a narrow characterization of the interpretive role the Court has assigned to international norms in its Charter jurisprudence: “While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation.”⁵⁸

They noted that treaties that Canada has ratified and are therefore binding at

⁵⁶ *Québec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.).

⁵⁷ *Québec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at paras. 99-104, 2020 SCC 32 (S.C.C.).

⁵⁸ *Québec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 22, 2020 SCC 32 (S.C.C.) [emphasis in original]. See also para. 28: “This Court has recognized a role for international and comparative law in interpreting *Charter* rights. However, this role has properly been to *support* or *confirm* an interpretation arrived at through the *Big M Drug*

international law have greater influence on constitutional interpretation and give rise to a presumption of conformity.⁵⁹ Other non-binding sources are “relevant and persuasive, but not determinative, interpretive tools”.⁶⁰ They also distinguished between international instruments that existed at the time of the adoption of the *Constitution Act, 1982*⁶¹ and those that were adopted later; the former have more influence, they wrote, on constitutional interpretation.⁶² As for post-1982 instruments, they wrote that:

. . . the question becomes once again whether or not they are binding on Canada and, by extension, whether the presumption of conformity is engaged. It can readily be seen that an instrument that post-dates the *Charter* and that does not bind Canada carries much less interpretive weight than one that binds Canada and/or contributed to the development of the *Charter*.⁶³

The majority in 9147-0732 *Québec Inc.* took an ambitious approach to the clarification of the roles of different sources of international law to the interpretation of the Charter. They sketched out a more comprehensive account of the interpretive role and weight to be assigned to international sources than appears elsewhere in the Court’s jurisprudence. The majority opinion shows Brown and Rowe JJ. taking a leadership role in clarifying and developing the law in a way that necessarily involves some departure from — or at least some novel and creative synthesis of — the Court’s past jurisprudence. While they claimed to be merely summarizing the Court’s past practices⁶⁴ and disclaimed any “novel” aspects of their assessment,⁶⁵ it seems to this reader that they doth protest too much. They take a narrower and more categorical approach to the use of international and comparative sources in Charter interpretation than is taken in the Court’s previous jurisprudence.

Justices Brown and Rowe were right to insist that a “principled framework” is

Mart [purposive] approach; the Court has never relied on such tools to define the scope of *Charter* rights.”

⁵⁹ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at paras. 31-34, 2020 SCC 32 (S.C.C.).

⁶⁰ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 35, 2020 SCC 32 (S.C.C.).

⁶¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁶² *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 41, 2020 SCC 32 (S.C.C.).

⁶³ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 42, 2020 SCC 32 (S.C.C.).

⁶⁴ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 27, 2020 SCC 32 (S.C.C.).

⁶⁵ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 46, 2020 SCC 32 (S.C.C.).

necessary “to provide clear consistent and clear guidance to courts and litigants”.⁶⁶ But was the appeal in *9147-0732 Québec Inc.* the right occasion on which to set out a novel and comprehensive summary of the role of international sources to the interpretation of the Charter?

The issue was barely touched upon in the submissions of most of the parties and interveners. The written and oral submissions of one intervener, the British Columbia Civil Liberties Association (“BCCLA”), focused entirely on international human rights law — including binding and non-binding sources — to elucidate the common ground between section 12 of the Charter and international norms that supported the Court’s conclusion.⁶⁷ The BCCLA argued that the international authorities it cited were “highly persuasive, both because they represent the considered opinions of human rights jurists from the leading international and regional human rights systems and because they reveal a consensus” that protection in human rights instruments against cruel and unusual punishment do not extend to corporations.⁶⁸ Counsel for the BCCLA, Gib van Ert, was asked only one question from the bench about international and comparative law in his excellent oral submissions⁶⁹ — Rowe J. was quick to point out that the jurisprudence of the European Court of Human Rights falls in the realm of comparative rather than international law, and Mr. van Ert agreed, acknowledging that it is a persuasive rather than binding source.⁷⁰

Another intervener, the Director of Public Prosecutions (“DPP”), devoted over half of its factum to the discussion of international and comparative sources.⁷¹ The DPP’s submissions devoted limited attention to the role and weight of these sources; it simply posited that they would assist the Court in the interpretation of section 12

⁶⁶ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 47, 2020 SCC 32 (S.C.C.).

⁶⁷ Factum of the Intervener the British Columbia Civil Liberties Association, Court File No. 38613, Gib van Ert and Jessica Magonet (January 9, 2020), online: https://scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM040_Intervener_British-Columbia-Civil-Liberties-Association.pdf.

⁶⁸ Factum of the Intervener the British Columbia Civil Liberties Association, Court File No. 38613, Gib van Ert and Jessica Magonet (January 9, 2020), online: https://scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM040_Intervener_British-Columbia-Civil-Liberties-Association.pdf, at para. 3.

⁶⁹ Mr. van Ert’s submissions begin at 1:14:55 of the webcast of the oral hearing, online: <https://scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38613>.

⁷⁰ Mr. van Ert’s submissions at 1:18:07 of the webcast of the oral hearing, online: <https://scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38613>.

⁷¹ Mémoire, Directrice des poursuites pénale, Numéro de dossier 38613, Mathieu Stanton et François Lacasse (January 8, 2020), online: https://scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM080_Intervenante_Directrice-des-poursuites-p%C3%A9nales.pdf.

of the Charter.⁷²

The submissions of the parties and other four interveners placed limited weight on international and comparative sources; none of the parties or interveners devoted any argument to issues about the role and weight that the Court should attach to the sources they relied upon. Moreover, the opinion of Dionne J. at the Quebec Superior Court⁷³ devoted no attention to international sources; the opinions of the justices of the Quebec Court of Appeal⁷⁴ likewise engaged in only modest discussion of international and comparative sources and did not discuss their role in constitutional interpretation.

In sum, the role and weight to be attached to international sources had not been put in issue in the courts below, nor in the written or oral submissions before the Supreme Court. Justices Brown and Rowe chose to address the issue at length in their judgment without the benefit of consideration in the courts below, and without the benefit of submissions from counsel. Doing so was not necessary to the disposition of the appeal. They acknowledged that the difference between their approach and Abella J.'s was "not determinative in the case at bar"; nevertheless, they suggested "it could very well be in a different one. We therefore find it crucial to reiterate the proper approach to Charter interpretation".⁷⁵

It appears that the Brown and Rowe JJ.'s decision to restate, and, I would argue, revise the Court's international and comparative method on this occasion, was driven more by the dynamics of dissensus than it was by a careful, deliberative approach to the Court's role in clarifying and developing the law. It was left to Kasirer J. to be the voice of appropriate caution in the circumstances of this case. Given how clearly established principles of interpretation, including reliance on international law, pointed to the conclusion that corporations could not benefit from section 12's protection, Kasirer J. found "it unnecessary to consider questions relating to the proper approach to constitutional interpretation or the place of international law and comparative law in that approach any further".⁷⁶

The Court's role clarifying and developing the law requires careful deliberation

⁷² Mémoire, Directrice des poursuites pénale, Numéro de dossier 38613, Mathieu Stanton et François Lacasse (January 8, 2020), online: https://scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM080_Intervenante_Directrice-des-poursuites-p%C3%A9nales.pdf, at paras. 7, 20, 31.

⁷³ 9147-0732 *Québec inc. c. Directeur des poursuites criminelles et pénales*, [2017] J.Q. no 16310, 2017 QCCS 5240 (Que. S.C.).

⁷⁴ 9147-0732 *Québec inc. c. Directeur des poursuites criminelles et pénales*, [2019] J.Q. no 1443, 2019 QCCA 373 (Que. C.A.).

⁷⁵ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 47, 2020 SCC 32 (S.C.C.).

⁷⁶ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 142, 2020 SCC 32 (S.C.C.).

with all of the submissions, oral and written, made to the Court. It also requires careful consideration of the responses given to questions posed by members of the Court in the course of oral hearings. Careful deliberation is not only essential to fulfilment of the Court's role, it is also part of treating counsel with respect for the efforts they have made to assist the Court in fulfilling that role. In *Reference re Environmental Management Act (British Columbia)*, and the other cases resolved summarily in oral rulings from the bench, the Court considered it unnecessary to deliberate about the oral submissions it had just heard. In *9147-0732 Québec Inc.*, the majority opinion discussed at length issues on which it had received no submissions. Both are examples of disrespect for counsel and the role of oral hearings.

Because it was not necessary to the result, Brown and Rowe JJ.'s discussion of the role of international and comparative law in Charter interpretation was a lengthy *obiter dicta*. It may not be treated as binding by the Court in future decisions. The Court would be wise to treat this aspect of the opinion with some caution. Consider, for example, the question of whether the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") ought to play a role in the interpretation of the Canadian constitution. Assuming the approach Brown and Rowe JJ. took to international and comparative law in the context of the Charter would apply to other provisions of the *Constitution Act, 1982*, their approach does not bode well for the impact of UNDRIP on the evolution of Canadian constitutional law, including the rights of Indigenous peoples recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.

UNDRIP was adopted by the UN General Assembly in 2007; Canada announced its support of the Declaration in 2016. International declarations like UNDRIP are not treaties and therefore they are not binding in international or domestic law. They are solemn and significant instruments that embody principles that are widely recognized by states as expressing the minimum standard for the rights of Indigenous peoples around the world. UNDRIP thus expresses an international consensus on the fundamental rights of Indigenous peoples. For this reason, UNDRIP has significant normative power — in Canada, it is increasingly being treated as legally influential even if it is not legally binding. For example, in the view of the Truth and Reconciliation Commission (2015), UNDRIP provides "the appropriate framework for reconciliation in twenty-first-century Canada".⁷⁷ In November 2019, the British Columbia legislature became the first in Canada to pass legislation aimed at fully implementing UNDRIP in areas within its jurisdiction.⁷⁸

⁷⁷ Truth and Reconciliation Commission, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at 190. See also the TRC's Calls to Action 43 (UNDRIP implementation) and 44 (UNDRIP action plan).

⁷⁸ *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44.

The federal Parliament enacted similar legislation in 2021.⁷⁹ These laws should mean that UNDRIP will have important impacts on British Columbia and federal laws and policies. But a statute is not a constitutional amendment and therefore does not impact directly on constitutional interpretation. The shape and force of UNDRIP's influence on constitutional interpretation and decision-making, if any, is not yet known. The Supreme Court has yet to discuss the relevance of UNDRIP to Canadian constitutional interpretation; nor has it given any normative weight to UNDRIP in any of its opinions. The appropriate role of UNDRIP, in other words, is an open question.

Because UNDRIP is a non-binding declaration that was adopted after 1982, it appears that, according to the approach taken by Brown and Rowe JJ., it would carry little weight in constitutional interpretation. As they wrote, “[i]t can readily be seen that an instrument that post-dates the *Charter* and that does not bind Canada carries much less interpretive weight than one that binds Canada and/or contributed to the development of the *Charter*.”⁸⁰ But this would be a deeply troubling conclusion in a context where there is increasing recognition that the legal path toward reconciliation between the Canadian state and Indigenous peoples must follow the norms set out in UNDRIP. Should Canadian constitutional law be interpreted in a manner that is out of step with the requirements of UNDRIP? Or should it evolve in a manner that seeks to harmonize Canadian law with the international consensus on the rights of Indigenous peoples? I would hope the answer would be the latter. Or at least that the Supreme Court of Canada would hear full argument on the issue before pronouncing on it.

IV. CONCLUSION

I have focused this paper on two features of the Court's 2020 constitutional decisions: triage and dissensus. I have argued that the Court made some questionable choices regarding the prioritization of its jurisprudential resources. It is difficult to defend the Court's practice of issuing summary oral reasons from the bench in a third of its rulings, as it did in 2020. I have argued that the Court's summary dismissal of the appeal in the *Reference re Environmental Management Act (British Columbia)* at the beginning of the year was the most egregious example of this tendency. Nevertheless, this form of radical triage enabled the Court to focus its deliberative and opinion-writing energies on a handful of important constitutional (or constitutionally-adjacent) appeals, yielding valuable and bold developments in the law in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, *Nevsun Resources Ltd. v. Araya*, *Reference re Genetic Non-Discrimination Act*, *Fraser v. Canada (Attorney General)*, and *Ontario*

⁷⁹ *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, S.C. 2021, c. 14.

⁸⁰ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, at para. 42, 2020 SCC 32 (S.C.C.).

(*Attorney General*) v. *G*. This tendency continued in 2021 with the Court's ambitious reformulation of the national concern test in *References re Greenhouse Gas Pollution Pricing Act*.

The high level of dissensus on the Court is productive and enriching in important ways. It allows a range of competing views to be aired and tested. The current Court is composed of strong independent thinkers who do not shy away from tackling big issues. The presence of three former full-time academics (Brown, Martin and Kasirer JJ.) may be part of the explanation for the Court's ambitious approach to legal clarification and development. But all nine members of the current Court are intellectually ambitious. This is so whether they are aligned with the liberal or conservative wings.

The high level of dissensus on the Court is not all positive; it may be hindering the Court's ability to optimally fulfil its role of clarifying and developing the law. A good example of the dynamics of dissensus leading the Court astray, I argued above, is Brown and Rowe JJ.'s clarification of the role of various sources of international and comparative law in Charter interpretation in their co-authored majority opinion in 9147-0732 *Québec Inc.* This part of their opinion involved novel propositions that were adopted without the benefit of extensive discussion of the issues in the courts below or in submissions to the Court. The majority's assertion that it needed to address the issue to prevent Abella J.'s reliance on international and comparative law from negatively influencing future opinions was not convincing.

Considered from the point of view of the optimal use of limited jurisprudential resources, the depth of the divisions on the Court is cause for concern, as is the length of dissents, and the frequency with which divisions are manifest in the Court's major constitutional rulings. These tendencies have continued in some of the Court's major constitutional rulings in 2021.⁸¹ Despite the many advantages of dissents explored in the academic literature, and the powerful legacy left by the Court's great dissenters of the past, it is hard to avoid the conclusion that some of the judges' dissenting energy in 2020 might have been better directed to the writing of reasons — any reasons — in some of the cases that the Court summarily dismissed from the bench.

On a closely divided Court, changes in personnel will potentially have a huge impact on the direction of future jurisprudence. The conservative BRoC dissenters are challenging important features of the Dicksonian liberal consensus that has dominated the Court's approach to Charter interpretation since 1984. Will some of their opinions turn out to be the voice of the future, as often turned out to be the case with the opinions of great dissenters in the past, such as Laskin C.J.C, Wilson J. and

⁸¹ *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 (S.C.C.) (6-3 ruling; separate dissenting opinions written by Côté, Brown and Rowe JJ.); *R. v. Desautel*, [2021] S.C.J. No. 17, 2021 SCC 17 (S.C.C.) (7-2 ruling; separate dissenting opinions written by Côté and Rowe JJ.); *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34 (S.C.C.) (5-4 ruling; dissent written by Abella J.).

L’Heureux-Dubé J.? The BRoC dissenters do not appear to be enamoured with equality as a constitutional right or value, nor with large, liberal and dynamic interpretations of Charter rights and freedoms. In that sense, the tendency of their opinions seems “back to the future” — more 1970s than 2020s. Still, their views could have a more powerful influence if they are joined on the Court by one or two other conservative jurists. That seems unlikely at the moment.

Justice Abella’s retirement on July 2, 2021 was a huge loss for the Court. Especially missed will be her leadership on human rights issues, particularly on equality rights, as well as the depth of her engagement with international and comparative law. Two of her 2020 opinions, in *Newsun Resources Ltd. v. Araya* and *Fraser v. Canada (Attorney General)*, made powerful additions to her jurisprudential legacy. For those of us attached to the Dicksonian approach to Charter interpretation, her departure creates anxiety that the BRoC dissenters are now more or less evenly matched with the liberal core (Karakatsanis, Kasirer and Martin JJ.) on Charter issues.

The appointment of Jamal J. to take Abella J.’s place on the Court should assuage these concerns. The answers Jamal J. provided on his Questionnaire for the Supreme Court of Canada Judicial Appointment Process,⁸² particularly the importance he attaches to protecting the rights of vulnerable groups, suggest he is more likely to find himself aligned with Martin, Karakatsanis and Kasirer JJ. than he is with the BRoC trio. For example, Jamal J. served as counsel for the Canadian Civil Liberties Association in *Multani v. Commission scolaire Marguerite-Bourgeois*⁸³ and *Alberta v. Hutterian Brethren of Wilson Colony*.⁸⁴ In his Questionnaire, he wrote:

My involvement in these appeals reflected my strong interest in civil liberties issues generally and freedom of religion in particular, and probably also my personal experiences as a member of a religious minority and racialized individual. These cases also marked the beginning of my involvement with the Canadian Civil Liberties Association, on whose board I served as a director for over 13 years, including as chair of the board.

One of the cases he highlighted as evidence of his analytical and writing skills was *R. v. Thompson*,⁸⁵ a Charter case in which he found a Black man had been arbitrarily detained. He concluded that the evidence obtained by the police had to be excluded and the accused acquitted. Justice Jamal wrote: “I hope the reasons show sensitivity to the role of race in evaluating whether an individual is detained under s. 9 of the *Charter* consistent with the Supreme Court of Canada’s jurisprudence.”

⁸² Online: <https://www.fja-cmf.gc.ca/scc-csc/2021/nominee-candidat-eng.html>.

⁸³ *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] S.C.J. No. 6, 2006 SCC 6 (S.C.C.).

⁸⁴ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37 (S.C.C.).

⁸⁵ *R. v. Thompson*, [2020] O.J. No. 1757, 2020 ONCA 264 (Ont. C.A.).

Given the relative youth of the judges, barring any early retirements, the membership of the Supreme Court of Canada will remain largely stable through the 2020s and into the 2030s. Justice Moldaver is the only judge on the Court whose retirement is on the near horizon; he is scheduled to retire at the end of 2022. After that, the next scheduled retirements will be Rowe J. (2028), followed by Karakatsanis J. (2030), Martin J. (2031), Wagner C.J.C. (2032), Côté J. (2033), Kasirer J. (2035), Brown J. (2040) and Jamal J. (2042). It seems likely then, that the high level of dissensus we have witnessed on the Court in recent years will persist into the near future. Going forward, the Chief Justice might want to temper his healthy encouragement of dissent⁸⁶ with some effort to rein in the negative consequences of dissensus. Justice Jamal's remarkably accomplished professional career, acting for a wide range of clients in a wide variety of legal contexts, should also put him in a good position to find common ground that might help reduce dissensus on the Court.

⁸⁶ See Jamie Cameron, "A Chief and Court in Transition: The Wagner Court and the Constitution", (2020) 94 Sup. Ct. L. Rev. (2d) 3.