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Dissents and Concurrences: Seven Debates in Charter Jurisprudence

W. David Rankin & Mahmud Jamal

The Supreme Court of Canada interpreted the *Canadian Charter of Rights and Freedoms*\(^1\) 15 times in 2012.\(^2\) Of these 15 judgments, seven — approximately half — featured a dissent or concurrence. This is a somewhat higher rate of disagreement than in the Court’s decisions generally: of the 75 judgments released in 2012, 25 judgments, or one-third, were not unanimous.

This is hardly surprising. The Charter is an open-textured instrument — a living tree, drafted for all time — that admits of flexibility and growth.\(^3\) These are the seeds of dissent. Compounding this, Charter cases often spring from the fault lines in Canadian society. The 2012 batch of cases is no exception. A woman wears a niqab owing to her sincere religious convictions. Must she take it off to testify as the complainant in a sexual assault trial? Do employees have a reasonable expectation of

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privacy in their work computers? Do the presumptions of accuracy and identity in the breathalyzer provisions in the Criminal Code limit the Charter right to be presumed innocent until proven guilty? Reasonable persons disagree about these sorts of things, often with conviction. The justices of the Supreme Court of Canada can be expected to differ with no less passion.

The following paper takes a closer look at the 2012 dissents. Taking the lead of Scalia J. of the United States Supreme Court, we define dissents to include what are technically concurrences. “[T]here is little difference” between them, Justice Scalia explains. “Legal opinions are important … for the reasons they give, not the results they announce.” Our objective is to study those reasons — to identify the rifts, the language and the trends in the 2012 Charter dissents. We begin by discussing the role of dissents in Charter cases generally. We then review the seven Charter debates that the Court could not resolve unanimously in 2012.

I. THE ROLE OF DISSENSES IN CHARTER CASES

Chief Justice McLachlin has noted that “the Charter is engrafted onto the living tree that is the Canadian constitution”. This principle has been recognized since the earliest days of Charter jurisprudence. If the Charter is “a living tree capable of growth and expansion within its natural limits”, it should come as no surprise that reasonable people will disagree on how it ought to grow — how far its branches ought to reach; how it ought to shoot and blossom. This is the nature of the Charter, with its broad, open language. Dissents and differing approaches are to be expected.

These expectations of divergence are borne out by experience. Since its adoption, the Charter has given rise to above average levels of disagreement within the highest court. In his 2004 study, Peter McCormick explains how the growing number of Charter cases on the docket resulted...
in a steady rise in non-unanimous decisions, starting with the Dickson Court, and then into the Lamer and McLachlin Courts. As the Charter matured, however, the distinctiveness of a Charter dissent (as compared to other types of dissents) was seen to diminish. On the Dickson Court, Charter cases were 2.5 times as likely to be split, whereas this figure shrank to 1.5 times during the Lamer Court — and 1.4 times in the first two years of the McLachlin Court. In 2012, our year of focus, Charter cases were about 1.4 times more likely than non-Charter cases to give rise to a dissent.

This enhanced rate of divergence must be understood in light of the distinctive role of Charter dissents. Former Justice L’Heureux-Dubé, building on the work of Brennan J., formerly of the U.S. Supreme Court, articulated three principal goals of a dissent: to prophesize, to stir dialogue, and to safeguard the integrity of the law and judicial institutions. Each of these functions takes on a special dimension, and increased importance, in the realm of Charter jurisprudence.

Take the prophetic role of a dissent. There are many celebrated examples of dissents and concurring reasons becoming the law in later cases. As L’Heureux-Dubé J. has phrased it, “dissenting opinions are often intended more for the legal minds of tomorrow than for those of today”. As Canadian law incrementally develops — and as the living tree of the Constitution grows — dissents of the past may reflect the law of the future. The great dissenters, the ones who foresee these

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10 Id., at 26, 28, 30.
13 L’Heureux-Dubé, supra, note 11, at 508-509. See also Hon. R. Bader Ginsburg, “The Role of Dissenting Opinions” (2010) 95 Minn. L. Rev. 1, at 4 [hereinafter “Ginsburg”] (“Describing the external impact of dissenting opinions, Chief Justice Hughes famously said: ‘A dissent in a Court of last resort is an appeal … to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.’”).
developments and who live them in the present, have been artfully styled the “Prophets with Honor” within the legal system.14

Prophetic dissents are not limited to Charter or constitutional cases. One need only consider the dissent of Laskin J., as he then was, in Murdoch v. Murdoch,15 or the prophetic dissents penned by L’Heureux-Dubé J. as she gradually moved parts of Canadian law in the direction of gender equality.16 But prophecy has a special role where Charter values are at stake. The living tree doctrine recognizes that there will be a future audience of constitutional opinions that will not necessarily share the constraints of our more dated institutions.17 Charter dissents will continue to facilitate the “gradual liberalization of constitutional interpretation”.18

Consider United States v. Burns, where the Court unanimously held that it would breach section 7 of the Charter to extradite an accused person to a retentionist state without an assurance that the death-penalty would not be sought (except in “exceptional” cases).19 This decision effectively foreclosed the death penalty in Canada, but it was not the first time that the Court had considered the issue. A decade earlier, in Kindler v. Canada (Minister of Justice) and Reference re Ng Extradition (Can.), the Court reached the opposite result in two deeply divided 4-3 splits (each in four opinions).20 Though the Court in Burns did not expressly

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14 A. Barth, Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court (New York: Knopf, 1974); Brennan, supra, note 11, at 432 (“Justice Harlan transcended, without slighting, mechanical legal analysis; he sought to announce fundamental constitutional truths as well. He spoke not only to his peers, but to his society, and, more importantly, across time to later generations. He was, in this sense, a secular prophet, and we continue […] to benefit from his wisdom and courage.”).
15 See supra, note 12. See also L’Heureux-Dubé, supra, note 11, at 505.
18 L’Heureux-Dubé, supra, note 11, at 508.
endorse any of the dissents in Kindler or Ng, it was no doubt easier to effectively overturn these precedents given how they splintered.

Though the doctrine of the living tree is not as firmly planted in the soils of our neighbours to the south, Brennan J. put to words — and to practice — a similar view. “Because we Justices of the United States Supreme Court are the last word on the meaning of the Constitution,” he wrote, “our views must be subject to revision over time, or the Constitution falls captive to the anachronistic views of long-gone generations.” Dissents in a court of last resort signal to lower courts, the bar, and society where (at least in the opinion of the dissenting judge) constitutional law is or ought to be moving.

The first role of Charter dissents is related to the second — the facilitation of dialogue. Dissents, in general, stir debate in many circles: professional, societal, academic, legislative, and international. They sharpen majority decisions and, by setting out both sides of the debate, they keep the court “in the forefront of the intellectual development of the law”. In some cases, they even seek to interface directly with the profession and courts below, for example, by showing how to distinguish the majority’s reasons.

Charter dissents share all of these features, perhaps taking on additional significance. Almost by definition, Charter cases are of particular interest in a democratic society. They engage societal values that are shaped and developed through dialogue between the courts, through their reasons, and society, through the bar. Dissents are a fundamental part of this forward-looking conversation. They are reported in our media, debated in our law schools, and quoted in our legislative institutions.


L’Heureux-Dubé, supra, note 11, at 509-12.

Scalia, supra, note 5, at 5 (A 5-4 dissent “at least in constitutional cases (in which, under the practice of our Court, the doctrine of stare decisis — i.e., adhering to precedent — is less rigorously observed) emboldens counsel in later cases to try again, and to urge an overruling — which sometimes, although rarely, occurs.”).
As Charter jurisprudence is informed by societal values, and as dissents inspire dialogue that may shape them, they have a sort of “feedback effect” within society.

We come, then, to Charter dissents as a safeguard of integrity and judicial institutions. As L'Heureux-Dubé J. has explained, dissents “enhance the judiciary’s legitimacy by preserving and strengthening judicial independence, by fostering collegiality among judges and by enhancing the coherence of courts’ decisions.” In the Canadian system, it is each justice’s prerogative to express his or her own opinion. This is an essential element of judicial independence, and it is an experience the discussion of L’Heureux-Dubé, supra, note 11, at 510-11 (discussing the influence of minority reasons on legislative developments following O’Connor, supra, note 16).

See Rodriguez, id., at 607, Sopinka J.: While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are “fundamental” in the sense that they would have general acceptance among reasonable people. From the review that I have conducted above, I am unable to discern anything approaching unanimity with respect to the issue before us.

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3, at paras. 49-50 (S.C.C.), per curiam (“Without resorting to opinion polls, which may vary with the mood of the moment, is the conduct fundamentally unacceptable to our notions of fair practice and justice?”; “It can be confidently stated that Canadians do not accept torture as fair or compatible with justice”).

This concept of dialogue is related to that put forward in Peter W. Hogg & Allison A. Bushell, “The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75:

Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.

See also Peter W. Hogg & Allison A. Thornton, “Reply to ‘Six Degrees of Dialogue’” (1999) 37 Osgoode Hall L.J. 529. The concept of dialogue discussed here is broader, however, in that it does not necessarily entail the involvement of a legislative body or a legislative response.

This is in contrast to other judicial systems where dissents are not accepted, such as in the French Cour de Cassation or the European Court of Justice: see Rt. Hon. Lord Mance, “The common law and Europe: differences of style or substance and do they matter?”, The Holdsworth Address (2007). Seriatim decisions are no longer in vogue in Canada, but we continue to place a premium on judges’ individual independence. This approach stems from the tradition of the House of Lords. Though our system once had at its peak the Judicial Committee of the Privy Council (which delivered unanimous decisions throughout its history as Canada’s court of last resort), its historical division from the House of Lords explained its need for unanimity. Unlike with appeals to the House of Lords (originally a parliamentary body), appeals to the Privy Council (an executive body) were resolved in the form of advice to the monarch. At least until 1966, it was considered unseemly to embarrass the monarch with conflicting advice: Kirby, supra, note 3, at 14.
lived out to a particular degree in Charter jurisprudence. The “fierce independence” of our justices is especially pronounced when it comes to the Constitution.31

Moreover, Charter cases often fall along the fault lines of Canadian society, sometimes even containing a moral element. In these cases, dissents may be necessary to the justices so as to preserve their personal integrities.32 Justice L’Heureux-Dubé, herself no stranger to vigorous dissent, put it plainly: “[I]magine the internal conflicts and the frustration experienced by judges faced with a total inability to express their profound disagreement.”33 Justice Brennan, who by one count dissented in 2,100 death penalty cases,34 had a similar view.35 “[I]t would be a great mistake,” he wrote, “to confuse [the] unquestioned duty to obey and respect the law with an imagined obligation to subsume entirely one’s own views of constitutional imperatives to the views of the majority.”36

The connection between dissents and justices’ personal integrity is most clearly expressed with “perpetual dissents” — that is, the practice of continuing to dissent after the majority has decided the point.37 Though not as much a part of the Canadian experience as it is in the United States, we do have a less barefaced version of the perpetual dissent. Canadian judges often continue to subscribe to approaches that did not gain majority favour, and may choose not to expand the holding of a decision in which they dissented. Some of this can be found in the dissents released in 2012.

II. CHARTER DISSENTS IN 2012

1. L. (S.) v. Commission scolaire des Chênes38

The first Charter decision of the year, and the first Charter “dissent”, was not a dissent at all — but a concurrence. Justice Deschamps wrote for a majority consisting of herself, the Chief Justice, and Binnie, Abella,
Charron, Rothstein and Cromwell JJ. Justice LeBel (Fish J. concurring) agreed in the outcome, but for different reasons.

The appellants in \( L. (S.) \) argued that a school board’s refusal to exempt children from a mandatory comparative religion program (the Ethics and Religious Culture Program) infringed their rights under section 2(a) of the Charter (and section 3 of the Quebec \textit{Charter of human rights and freedoms}).\textsuperscript{39} The court at first instance found that the parents’ rights had not been infringed (or at least that the parents had failed to prove otherwise). The Quebec Court of Appeal dismissed the appellants’ appeal as of right and their motion for leave to appeal.\textsuperscript{40}

For the majority, Deschamps J. stressed the necessity for the state to remain neutral when it comes to religion.\textsuperscript{41} The test, in her view, is “not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed”.\textsuperscript{42} There is a subjective element to this test, but it is limited to determining whether the person has a “sincere belief that has a nexus with religion”.\textsuperscript{43} The appellants in \( L. (S.) \) sincerely believed that they had a religious obligation to pass on the teachings of Catholicism to their children, but failed to prove (objectively) that the impugned program interfered with that obligation. In Deschamps J.’s view, “exposing children to ‘a comprehensive presentation of various religions without forcing the children to join them’ [cannot constitute] in itself an indoctrination of students that would infringe the appellants’ freedom of religion”.\textsuperscript{44}

Justice LeBel agreed in the result, but elected to pen a minority opinion. In his view, the specific record in \( L. (S.) \) did not permit the conclusion that either the program infringed the appellants’ rights or that its implementation could not, in the future, infringe the freedom of religion guarantee.\textsuperscript{45} There was simply inadequate evidence of what the implementation of the program would actually mean in Quebec classrooms. His reasons are clear that he did \textit{not} intend to finally uphold the constitutional validity of the challenged program.\textsuperscript{46}

\textsuperscript{39} R.S.Q. c. C-12. \textsuperscript{40} [2010] J.Q. no 1355, 2010 QCCA 348 (Que. C.A.); [2010] J.Q. no 1356, 2010 QCCA 349 (Que. C.A.); [2010] J.Q. no 1357, 2010 QCCA 346 (Que. C.A.). \textsuperscript{41} \textit{L. (S.)}, supra, note 38, at para. 19. \textsuperscript{42} \textit{Id.}, at para. 24. \textsuperscript{43} \textit{Id.} \textsuperscript{44} \textit{Id.}, at para. 37. \textsuperscript{45} \textit{Id.}, at para. 37. \textsuperscript{46} \textit{Id.}, at para. 44.
The “compact” minority reasons of LeBel J. are perhaps best understood for their dialogic function. The majority does not expressly state that the comparative religion program at issue could not, in the future, be challenged. By explicitly leaving open the constitutional validity of the program, LeBel J. may have intended to signal this to the profession (and to the lower courts in Quebec). Bring evidence of the program’s implementation, he effectively says, and try again. His opinion may also have been intended to signal to Quebec school authorities that they must ensure that they implement the program in a Charter-compliant way. Put otherwise, their success on appeal should not be taken as an absolute endorsement of the Ethics and Religious Culture Program.

2. **R. v. Cole**

The first true Charter dissent in 2012 was that of Abella J. in *R. v. Cole*. Writing for herself (an “outlier”, to use McCormick’s terminology), Abella J. dissented on the application of section 24(2) to the facts of the specific case — expressing her view that the Court of Appeal was correct to exclude the unconstitutionally obtained computer evidence. Justice Fish (writing for himself, the Chief Justice, and LeBel, Rothstein, Cromwell and Moldaver JJ.) wrote to allow the appeal and admit the evidence.

The significance of *Cole* is not in its application of section 24(2), but in its treatment of section 8. The essential issue was whether the accused person had a reasonable expectation of privacy in the informational content of a laptop issued to him by his employer (a school board). Technicians found contraband images on the hard drive, and authorities turned the computer material over to the police, who then searched it without a warrant. The accused argued that the police had thereby breached his rights under section 8 of the Charter.

For the majority, Fish J. agreed that the police had breached section 8. Even though the accused did not own the laptop, he had a reasonable (albeit diminished) expectation of privacy in the personal information he kept on it. Section 8 was thus engaged, and the Crown was not able to point to any law authorizing the warrantless search by the police. They were not permitted to piggyback on the authority of the school officials

47 That is, a single minority opinion signed by two judges: see McCormick, *supra*, note 9, at 15.
49 *Id.* at paras. 5-8.
to search the laptop, nor did the employer’s purported third party consent have any legal bearing.\(^50\)

Despite the infringement of the accused’s section 8 rights, however, Fish J. decided that the unconstitutionally obtained evidence should not be excluded under section 24(2) of the Charter. Applying the framework in \(R. v. Grant\),\(^51\) he found that the admission of the evidence would not bring the administration of justice into disrepute.\(^52\) The courts below had erred in concluding that the conduct of the officer was “egregious” and serious enough to favour exclusion,\(^53\) and they failed to properly take into account the diminished nature of the privacy interest or the “discoverability” of the evidence.\(^54\)

It was on this issue that Abella J. registered her sole dissent. In her view, the evidence supported the trial judge’s conclusions regarding the conduct of the officer, and she relied heavily on extracts from the record to support this position.\(^55\) She was also of the view that the search was highly intrusive (in its \textit{extent}) regardless of whether there was a diminished reasonable expectation of privacy in the laptop in question.\(^56\)

It is unlikely that Abella J.’s dissent will have a prophetic or dialogic function. Time will only tell, of course, but her disagreement had more to do with her reading of the record than any profoundly different view of the law. This is not to say that her dissent is not important. As noted, one of the purposes for dissents in the Canadian system is to enhance transparency and to preserve the personal integrity of the justices. Justice Abella’s dissent does both. She was unable to agree with the majority on their understanding of the evidence, and she registered her views on the public record.

Transparency and personal integrity are institutionally valuable, provided that the dissent does not attempt to deprive the majority reasons of their legitimacy. In the case of Abella J.’s dissent in \(Cole\), however, this is not a concern. There has recently been some attention paid to the speech acts of dissenting judges.\(^57\) Justice Abella employs not just one,

\(^{50}\) \textit{Id.}, at paras. 8-10.


\(^{52}\) \textit{Cole, supra}, note 48, at para. 97.

\(^{53}\) \textit{Id.}, at paras. 84-85.

\(^{54}\) \textit{Id.}, at paras. 92-93.

\(^{55}\) \textit{Id.}, at paras. 115-119.

\(^{56}\) \textit{Id.}, at para. 126.

but two, of the speech acts associated with dissents that are not intended to undermine the majority: First, she prefices her specific points of dissent with the language of “respect”. 58 This practice may seem to be a matter of course for the justices of the Supreme Court, but it is nevertheless a significant act. Phrases like “with respect” and “in my respectful view” soften the language of the dissenting opinion and contrast with the sort of sharply worded “assertive dissents” occasionally seen in the U.S. 59

Second, Abella J. uses outcome-oriented language (“I would dismiss the appeal”). 60 Much like the practice of Ginsburg J. of the U.S. Supreme Court, 61 Abella J.’s dissent employs non-confrontational, outcome-directed language that does not risk “jeopardizing collegiality or public respect for and confidence in the judiciary”. 62

3. R. v. St-Onge Lamoureux 63

We come then to St-Onge Lamoureux, where the Court was asked to assess certain provisions of the Criminal Code drinking and driving scheme for Charter compliance. Justice Deschamps again wrote for the majority (herself, the Chief Justice and LeBel, Fish and Abella JJ.), holding that while the provisions violated section 11(d) of the Charter, they were justified under section 1 after certain words were severed. Justice Cromwell (writing also for Rothstein J.) would have found the provisions Charter compliant.

The provisions at issue, sections 258(1)(c), 258(1)(d.01), and 258(1)(d.1) of the Criminal Code, 64 together established several presumptions regarding breathalyzer devices. First, the analysis was

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58 Cole, supra, note 48, at paras. 107, 115.
59 “From Consensus”, supra, note 57, at 1322-25. “Assertive dissents” use bare, confrontational language such as “I dissent” or “I must dissent”.
60 Cole, supra, note 48, at para. 136.
61 “From Consensus”, supra, note 57, at 1324.
   The most effective dissent, I am convinced, ‘stand[s] on its own legal footing’[footnote omitted] it spells out differences without jeopardizing collegiality or public respect for and confidence in the judiciary. I try to write my few separate opinions each year as I once did briefs for appellants — as affirmative statements of my reasons, drafted before receiving the court’s opinion, and later adjusted, as needed, to meet the majority’s presentation.
64 Supra, note 4.
presumed to be accurate and to reflect the accused’s blood-alcohol level at the time he or she was driving, unless there was evidence tending to show that: (1) the device was malfunctioning or was operated improperly; (2) that the malfunction resulted in a blood-alcohol reading in excess of the legal limit; and (3) that the accused’s blood alcohol level would not have exceeded the legal limit when behind the wheel (section 258(1)(c)). The evidence tending to show malfunction or improper operation was restricted, however, in that it could not include evidence of the amount of alcohol consumed; the absorption rate in the accused’s body; or a calculation based on that evidence (section 258(1)(d.01)). Finally, if the test registered blood-alcohol levels over the legal limit, this was presumed to be proof that the blood-alcohol levels of the accused were over 80 at the time he or she was actually driving, unless evidence was presented tending to show that the accused’s consumption of alcohol was consistent with both a concentration of alcohol below the legal limit at the time of driving and a concentration over the limit at the time of testing (section 258(1)(d.1)). The respondent in *St-Onge Lamoureux* argued that these provisions infringed sections 7, 11(c) and 11(d) of the Charter.

The majority and the minority agreed that section 258(1)(c) and (d.01) did not infringe section 7 of the Charter, and that section 258(1)(d.1) did not abridge the protection against self-incrimination in section 11(c). They could not agree, however, whether the challenged provisions were consistent with the section 11(d) right to be presumed innocent.

The majority concluded that section 258(1)(c) and (d.01) infringed this right because, unless the accused rebuts the statutory presumptions, the trier of fact would be bound to convict notwithstanding that he or she might have a reasonable doubt as to the validity of the breathalyzer test. Moreover, section 258(1)(d.1) infringed the right to be presumed innocent because, unless the presumption was rebutted, the trier of fact would have to convict even though he or she had a reasonable doubt that the accused’s blood alcohol was over 80 at the time she was actually driving (say, because the accused drank shortly before being pulled over, so that the alcohol did not absorb into the blood until after being stopped).

Having found that the impugned provisions impinged section 11(d), Deschamps J. proceeded to section 1. In her view, section 258(1)(d.01)
and (d.1) were demonstrably justified in a free and democratic society under section 1 of the Charter. So, too, was the first requirement in section 258(1)(c) to rebut the presumption of accuracy (that is, the requirement to present evidence of a malfunction or improper operation). However, with the first requirement in place, the others went too far to be justified, and they were accordingly severed from section 258(1)(c).67

Justice Cromwell’s application of section 11(d) was quite different from the majority’s. Though he “essential[ly]” agreed with Deschamps J. regarding what the section 11(d) right entailed, he took the view that none of the impugned provisions infringed it.68 To him, the section 11(d) analysis required the Court to answer two questions: (1) if the breathalyzer analysis was conducted as required in the Criminal Code and resulted in a blood alcohol reading over 80, would it be reasonable for the trier of fact to doubt that the accused was over 80 at the time of the test, in the absence of evidence raising a doubt regarding whether the improper operation or malfunctioning of the device produced a result over 80? And (2) if the accused’s blood alcohol level at the time of the test was over 80, would a reasonable trier of fact have any doubt that the blood alcohol level was in fact over 80 at the time the accused was driving, absent evidence to the contrary? In his view, in light of the evidence of reliability and accuracy of breathalyzer tests when conducted according to the statutory requirements, the answer to both of these questions was “no”. The challenged provisions did not create a risk of conviction in the face of reasonable doubt, and, as such, did not limit the presumption of innocence in section 11(d).69

Justice Cromwell’s dissent may prove to have some “prophetic” element — not in its application to the particular Criminal Code provisions in issue, but for its articulation of the test under section 11(d). In contrast to Deschamps J.’s reasons, Cromwell J. gave the analysis more structure (and lower courts more guidance) on this area of the law. It would not be surprising to see his articulation of the steps of the section 11(d) analysis adopted in future cases.70 Justice Cromwell’s statement of the law was

67 Id., at paras. 59, 63, 67.
68 Id., at para. 145.
69 Id., at paras. 166-167, 171-174.
70 See particularly, id., at para. 151, where he set out the need to: (1) determine the true nature and scope of the impugned provision; (2) determine the risk of conviction in the presence of reasonable doubt; and (3) apply the Vaillancourt “inexorably leads” test (R. v. Vaillancourt, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.)) only if the statute purports to substitute an element for a constitutionally required element of the offence.
not inconsistent with the majority’s approach, and has the benefit of being more transparent and easier to apply. Moreover, by occasionally interpreting the majority reasons, Cromwell J. expressly seeks to provide guidance to future litigants.\textsuperscript{71}

4. \textit{R. v. Dineley}\textsuperscript{72}

\textit{St-Onge Lamoureux} was heard together with \textit{Dineley}, another drunk driving case, which also resulted in a Deschamps-Cromwell split. The only judge to switch camps was the Chief Justice, who, along with Rothstein J., joined Cromwell J.’s dissent. Justices LeBel, Fish and Abella again joined Deschamps J.’s majority reasons.

\textit{Dineley} involved some of the same provisions as in \textit{St-Onge Lamoureux}, but questioned the different issue of whether they operated retrospectively.\textsuperscript{73} Justice Deschamps’ slim majority held that they did not on the basis that new legislation that affects substantive rights is presumed not to have retrospective application unless Parliament clearly intended otherwise. Applied to \textit{Dineley}, the new provisions affected the availability of the “\textit{Carter} defence” (using a toxicology report to challenge the accuracy of a breathalyzer).\textsuperscript{74} As this defence was no longer sufficient to rebut the statutory presumptions, the amendments affected substantive rights. Moreover, the amendments affected \textit{constitutional rights}, which are necessarily substantive. In Deschamps J.’s view, therefore, the general rule against retrospective operation ought to be applied.\textsuperscript{75}

\textsuperscript{71} Brennan, supra, note 11, at 430. See, for example, \textit{St-Onge Lamoureux}, supra, note 63, at para.136, where Cromwell J. states that he “do[es] not understand” Deschamps J.’s reasons “to be establishing any new principle in relation to the Crown’s obligation to make disclosure to the defence.”

\textsuperscript{72} \textit{Dineley}, supra, note 72, at paras. 10, 17-18, 21.

\textsuperscript{73} Id., only concerned ss. 258(1)(c) and 258(1)(d.01), not s. 258(1)(d.1).

\textsuperscript{74} See \textit{R. v. Carter}, [1985] O.J. No. 1390, 19 C.C.C. (3d) 174 (Ont. C.A.). In that case, Finlayson J.A. held that “any evidence as to how much alcohol the person tested had in fact consumed is relevant evidence and if accepted can raise a doubt as to the accuracy of the breathalyzer reading”, or, in that case, the blood-sample reading. The trial judge accepted that the accused had only three beers during the relevant time, and the Crown’s expert conceded that this quantity of alcohol would have resulted in no reading at all. The “\textit{Carter} defence”, as it came to be known, involved presenting sworn testimony as to the amount of alcohol consumed by the accused, together with evidence from a toxicologist that this amount of alcohol would not have resulted in a blood-alcohol concentration over 80mg/100ml. Prior to the amendments to the Code, this could constitute “evidence to the contrary” and raise a reasonable doubt. See \textit{St-Onge Lamoureux}, supra, note 63, at para. 7.

\textsuperscript{75} Id., supra, note 72, at paras. 10, 17-18, 21.
Justice Cromwell took a different view. He framed the question as whether the provisions were procedural in nature. It is a presumption of legislative intent, he explained, that the procedural provisions of a statute should apply from the moment of enactment — and the amendments at issue were purely procedural. They were evidentiary and did not change the elements of the offence. Moreover, he “respectfully” disagreed with Deschamps J. that the amendments eliminated a defence. The “Carter defence” was, in his view, nothing more than a type of evidence put forward to raise a reasonable doubt. That the evidentiary provisions increased the risk of conviction did not make them substantive. Finally, he rejected Deschamps J.’s view that the impugned provisions must be substantive because they infringe section 11(d) of the Charter. Procedural provisions, too, may infringe Charter rights. In any event, Cromwell J. held, the Code provisions as they stood following the Court’s decision in St-Onge Lamoureux did not violate the Charter.\(^{76}\)

Note that Cromwell J.’s dissent is not a “perpetual dissent”. He dissented in the concurrently released St-Onge Lamoureux, but he agreed in Dineley that the retrospectivity of the provisions should be assessed in their post-St-Onge Lamoureux form.\(^{77}\) Unlike the approach of some Justices on the U.S. Supreme Court,\(^{78}\) Cromwell J. thus accepted the result in St-Onge Lamoureux and moved on.

5. **R. v. Nedelcu**\(^{79}\)

In Nedelcu the Court split on the interpretation of one of its past Charter decisions, *R. v. Henry*\(^{80}\) was a 2005 unanimous decision in which the Court explained and clarified the law pertaining to section 13 of the Charter — the protection against using compelled testimony against a person in another proceeding. In Nedelcu, Moldaver J. (with the Chief Justice and Deschamps, Abella, Rothstein and Karakatsanis JJ.) took one view of Henry. Dissenting, LeBel J. (with Fish and Cromwell JJ.) took another.

In Nedelcu, the trial judge allowed the Crown to cross-examine the accused on prior inconsistent statements made during examination for

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\(^{76}\) *Id.*, at paras. 21, 43, 67-68, 70, 73.

\(^{77}\) *Id.*, at para. 73.

\(^{78}\) *Larsen*, supra, note 34, at 464.


\(^{80}\) *Supra*, note 17.
discovery in a tort proceeding — for the purpose of impeaching his credibility. The statements were not themselves incriminatory. Rather, he testified in the tort action that he had no memory of the events in question, whereas, in his criminal trial, he gave a detailed account of the accident. The criminal trial judge disregarded the accused’s testimony and entered a conviction.81

The majority and dissent agreed that the accused had been compelled to testify during discovery in the tort proceeding. They split, however, on whether section 13 of the Charter protected the accused from being cross-examined on his inconsistent statements from the tort proceeding at the criminal trial. The Court of Appeal had held, on the basis of Henry, that the cross-examination was impermissible and that his rights had been infringed.82

For the majority, Moldaver J. would have allowed the appeal. In his view, a person can only invoke the protection of section 13 of the Charter if, at the prior proceeding, he or she: (1) gave “incriminating evidence”, (2) under compulsion. For him, “incriminating evidence”, for the purposes of section 13 of the Charter, means “evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt”.83 If the prior evidence would be incriminating at the subsequent trial, then the Crown cannot use it for any purpose at that subsequent trial — that is, not to prove guilt or to impeach credibility — except in a prosecution for perjury. In this case, the accused’s prior testimony was not “incriminating” in this sense, so it was open to the Crown to put it to him on cross-examination to impeach his credibility. None of this, according to Moldaver J., was inconsistent with the decision in Henry.84

According to LeBel J., however, the majority’s approach would result in overturning Henry, or, at least, revisiting the principles it established. That case was clear in rejecting any distinction, for the purposes of section 13 of the Charter, between using compelled testimony to impeach or to incriminate. Moreover, Binnie J. implicitly rejected as unrealistic any distinction between “incriminating” and “innocuous” statements. As LeBel J. explains, the focus in Henry was on whether the witness was compelled, not the nature of the statements made. Justice

81  Nedelcu, supra, note 79, at para. 50.
82  Id., at paras. 1, 51.
83  Id., at paras. 8, 9.
84  Id., at paras. 15, 26.
Moldaver’s approach of drawing distinctions based on the nature of the statement is both inconsistent with *Henry*, and, as the minority argument goes, unworkable and unrealistic in practice.\(^{85}\)

The split in *Nedelcu* was almost exclusively concerned with the interpretation of the Court’s prior unanimous decision in *Henry*. Four new judges had been appointed to the Court between *Henry* and *Nedelcu*.\(^{86}\) Still, however, most of the members of the panel in *Nedelcu* also sat on *Henry* (five of the nine). For the majority in *Nedelcu*, the Chief Justice and Deschamps and Abella JJ. sat on *Henry*; for the dissent, there were LeBel and Fish JJ. All five of these judges joined the same decision in 2005, but, seven years later, they were split 3-2.

The minority reasons claim that the majority reinterpreted and reversed *Henry*; the majority reasons assert that *Henry* could not have meant what the minority says. The minority counters that the majority’s reasons are “unsupported” by the case law, “not raised” by the parties, and “entirely contrary” to the Crown’s position on the appeal.\(^{87}\) Nevertheless, both sides of the debate couched their rhetoric in the language of “respect”.\(^{88}\) As noted alongside *Cole*, speech acts like this maintain the legitimacy of the majority reasons — even if those reasons do, as put against the majority, reinterpret recent case law.

6. **R. v. Aucoin**\(^{89}\)

*Nedelcu* was released in November 2012. So, too, was another Moldaver-LeBel split: *Aucoin*. Like in *Cole*, all of the judges agreed that there was a breach of section 8 on the facts of the case. Writing for himself and Deschamps, Abella, Rothstein and Karakatsanis JJ., Moldaver J. held that the unconstitutionally obtained cocaine should be admitted into evidence. Justice Fish joined with LeBel J. in the view that it should be excluded. This time, Fish and Abella JJ. were on the opposite sides of the section 24(2) question — underscoring how case specific the application of that provision has become.

In *Aucoin*, the accused was pulled over for driving a vehicle with a mismatched licence plate (a regulatory offence). The officer smelled

\(^{85}\) Id., at paras. 72, 110, 131, 134.

\(^{86}\) Justices Rothstein, Cromwell, Moldaver and Karakatsanis.

\(^{87}\) *Nedelcu*, supra, note 79, at para. 127.

\(^{88}\) Id., at paras. 26, 40, 126.

alcohol on the detained man’s breath, which led him to conduct a roadside-screening test. The test registered 20 mg of alcohol per 100 mL of blood — well under the criminal limit, but over the zero tolerance policy for newly licensed drivers, like Mr. Aucoin, in Nova Scotia. The officer proceeded to detain the accused for the purpose of issuing him a summary offence ticket. Apparently because of the poor lighting and his fear that the accused might just “walk away”, the officer decided to place Mr. Aucoin in the back of the police cruiser — with the door closed and locked — as he himself wrote up the ticket in the front seat. Before doing so, he decided to conduct a pat-down search of the accused for “safety reasons”. This search led to the discovery of cocaine, some cash, and Mr. Aucoin’s arrest.

The majority and minority disagreed on how the officer infringed Mr. Aucoin’s Charter rights. For Moldaver J., the breach occurred when the officer decided to place the accused in the back of the cruiser. The ongoing detention for the motor vehicle infractions was lawful, certainly, but the decision to lock Mr. Aucoin in the cruiser dramatically increased the interference with his liberty and privacy interests. According to Moldaver J., the officer had the authority to do this, but only if reasonably necessary in the totality of the circumstances. The trial judge had not applied this test, and the evidence did not support a finding that the officer’s actions were necessary. The accused was thus unlawfully detained — and this deprived the pat-down search of any basis in law. Section 8 of the Charter was, accordingly, breached.\footnote{Id., at paras. 34-35, 39-42, 44, fn. 3. Justice Moldaver found it unnecessary to consider whether a pat-down search is “always” justified as a prelude to locking a detainee in the cruiser.}

Having articulated the Charter breach in this way, Moldaver J. determined that the admission of the cocaine into evidence would not bring the administration of justice into disrepute. The officer was attempting to respect the accused’s rights throughout, and he was not merely following his usual practice in alcohol-related offences. Nor was he improperly searching for evidence when he patted down Mr. Aucoin’s pockets. In short, the officer made a mistake, but he was acting in good faith throughout.\footnote{Id., at paras. 45-46, 49.}

Like Moldaver J., LeBel J. concluded that it was not reasonably necessary for the officer to place Mr. Aucoin in the back of the police car as he wrote out the ticket. The officer’s subjective fear that the accused might “walk away” was not reasonable — Mr. Aucoin could have simply
waited for his ticket on the sidewalk. This much was consistent with Moldaver J.’s approach, but LeBel J. was prepared to go further. “Generally speaking”, he said, “detaining an individual in the locked rear seat of a police car in order to write out a ticket for a motor vehicle infraction will rarely strike an appropriate balance between the public’s interest in effective law enforcement and its interest in upholding the right of individuals to be free from state interference”.92

With respect to the pat-down search, LeBel J. was again prepared to go further than Moldaver J. Like the majority, the minority holds that the search was unreasonable given that the detention was unlawful. For LeBel J., however, it was important to clarify that the search would have been unreasonable even if it had been reasonably necessary to lock the accused in the car. The officer testified that he conducted the search because it was his standard practice to do so. The officer had no reason to suspect that Mr. Aucoin was carrying a weapon. Moreover, the search went too far, going “beyond the scope of [a search] that was reasonably designed to locate weapons”.93

Thus, LeBel J. saw the Charter breaches in this case to be more serious than Moldaver J. This is particularly reflected in his analysis under section 24(2). Justice LeBel concluded that the officer’s conduct was either ignorant of or wilfully disregarded Charter values, and therefore admitting the evidence would bring the administration of justice into disrepute.94

Justice LeBel’s dissenting reasons do not once refer to the majority. They are written as an entirely different set of reasons — an alternative approach to the issues before the Court. Justice Ruth Bader Ginsburg of the United States Supreme Court has described this form of dissent as the most effective.95 It can be read independently of the majority opinion, without undercutting the legitimacy of the reasons for the Court’s final order.

7. **R. v. S. (N.)**96

We come, finally, to **S. (N.)** — the niqab case. This is the only Charter decision of 2012 to fracture into three separate sets of reasons. The Chief
Justice wrote for a majority of four: herself and Deschamps, Fish and Cromwell JJ. Justice LeBel (with Rothstein J. concurring) agreed in the result, but for other reasons. Justice Abella dissented.

S. (N.) concerned the difficult question of how to reconcile the sincere religious convictions of a sexual assault complainant with the trial rights of the accused. The complainant, N.S., maintained that she had a sincere religious belief that she was required to wear a niqab in public when men (other than close relatives) might be present. The accused objected to her wearing the niqab while testifying, however, on the theory that it interfered with the trier of fact’s ability to assess her credibility and counsel’s ability to effectively cross-examine the witness — thereby infringing the Charter guaranteed right to a fair trial. At first instance, the preliminary inquiry judge questioned the sincerity of N.S.’s religious belief and ordered her to remove her niqab. She elevated the matter to the Superior Court, which quashed the order. The Court of Appeal remitted the matter back to the preliminary inquiry judge to re-determine the issue in accordance with its reasons.97

On further appeal to the Supreme Court, the net result was to dismiss the appeal and remit the matter to the preliminary inquiry judge.98 According to the Chief Justice, (1) if a witness wears a niqab owing to a sincere religious belief, (2) she should be required to remove it while testifying in a criminal proceeding, if (a) this is “necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk”; and (b) “the salutory effects [of this], including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion”.99 In this way, the conflicting rights would have to be balanced in each case.

Justice LeBel (Rothstein J. concurring) agreed in the result — remitting the matter to the preliminary inquiry judge — but preferred a clearer rule. To him, a witness should never be allowed to wear a niqab while testifying in a criminal proceeding. Though he agreed with the Chief Justice that the Court faced a clash between religious rights, on one hand, and the right to make full answer and defence, on the other, he held that the “equation” involved other factors — including the openness and religious neutrality of the justice system. According to LeBel J., it would

97 Id., at paras. 4-6.
98 Id., at para. 57. As of the time of this paper, the matter had already been remitted to the preliminary inquiry judge, who ruled that N.S. must remove her niqab.
99 Id., at para. 3.
not be consistent with these constitutional values and traditions to permit a witness to wear a niqab while testifying.\(^{100}\)

Justice Abella also preferred a clearer rule, but she would have gone the other way. For her, the case should have been resolved with a clear direction that, where it is established that the witness has a sincere belief that she is required to wear a niqab (as here), she should always be permitted to wear it in court, unless the accused can demonstrate that her face is directly relevant (e.g., where identity is in issue). Otherwise, the harm of requiring the complainant to remove her niqab outweighs any damage to trial fairness.\(^{101}\)

\(S. (N.)\) is remarkable as a judicial work product. All three of the possible resolutions to the conflicting rights were addressed and defended by the Court: LeBel J. preferred an absolute prohibition; Abella J. emphasized the complainant’s interest in wearing her niqab; and the Chief Justice (for the majority) assumed the middle ground with a contextual balance of the competing rights. In sum, \(S. (N.)\) contains a rich spectrum of legal debate.

There can be no doubt that the strengths and weaknesses of the majority and two minority opinions in \(S. (N.)\) will continue to be debated in civil society. It is difficult to predict, however, what will come of this dialogue. The majority has only really opened the door to the debate hall. It is one thing to say that two conflicting Charter rights ought to be balanced according to the \textit{Dagenais/Mentuck} framework\(^{102}\) — it is another to actually carry this out on the ground. How does one put religious freedom and trial fairness into the same balance? Are these norms even capable of being weighed against one another? The opinions of LeBel and Abella JJ. will no doubt influence this ongoing debate.

\section*{III. Conclusion}

The seven Charter dissents (and concurrences) from 2012 provide a surprisingly rich illustration of the functions and features of dissenting opinions. Dissents do not, of course, fall neatly into categories — but 2012 has delivered dissents that emphasize the goals of prophesy (\textit{R. v. St-Onge Lamoureux} and, with any luck, \textit{Nedelev} and \textit{Aucoin}); dialogue

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\(^{100}\) \textit{Id.}, at paras. 60, 69, 70-78.

\(^{101}\) \textit{Id.}, at paras. 83, 86, 109.

and the integrity of the judicial system (Cole). 2012 also provided an instance of a justice expressly electing not to perpetually dissent (Dineley), and one dissenting opinion written entirely independent of the majority (Aucoin). All seven were outcome-oriented or (often, and) they used the language of “respect”. None undercut the majority. The 2012 Charter dissents were, all things told, an encouraging assortment.