Recent Supreme Court of Canada Jurisprudence: the Limited Constraint of Prior Precedent and the Push for Precision

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I. Introduction

I will track and review the leading decisions of the Supreme Court of Canada during 2015 and the first half of 2016. The cases I have selected are important precedents that would be of interest to both Canadian and American jurists. Each contributes to the law in its area.[1]

[1] I excluded an important case, *Goodwin v. British Columbia (Superintendent of Motor Vehicles)* 2015 SCC 46, dealing with the division of power between provincial and federal governments, because this issue is apt to be of little relevance to the American audience. Even though in Canada the federal government has exclusive jurisdiction to create criminal offences, in *Goodwin* the unanimous Court upheld British Columbia's right to create punitive legislation to deter impaired driving and help ensure the safety of its citizens. This is not a startling outcome given prior decisions in this area, but it is a socially significant case. Because of the legislation, British Columbia has stopped prosecuting the bulk of impaired driving incidents involving first offenders under the *Criminal Code* of Canada, relying instead on the punitive, administrative penalties in its own legislation. It is now open to other provinces to do the same, which would reduce criminal case loads materially, if not dramatically, with all of the financial and human costs they entail. Because the penalties are administrative, impaired drivers have fewer protections than if prosecuted criminally, and penalties are immediate. Early reports are that the incidence of impaired driving is going down even after sparing individuals criminal records. The educated inference is that this is because of the certainty and immediacy of punishment, if caught.

While I have not included the *Goodwin* decision for focussed discussion, it could prove to be a significant harbinger of a more general movement away from criminal prosecutions in favour of more efficient administrative regimes. This is already occurring in highly regulated fields where regulatory prosecutions carry crushing fines. This technique, were it to became common in the enforcement of crimes, would be tremendously controversial. This is because the *quid pro quo* for reducing criminalization is to lessen civil rights. Mindful of this, in *Goodwin* the Supreme Court of Canada was not satisfied with the safeguards for protecting the innocent in the British Columbia scheme. It required British Columbia to implement a meaningful method for reviewing the administrative penalties imposed upon failing a roadside blood alcohol test.

I have also excluded interesting criminal cases because their importance is largely domestic. Among them is a holding that the offence of bestiality is committed only if the accused engages in intercourse with the animal. This is the meaning that "bestiality" carried at common law. The Court inferred that when the *Criminal Code* was enacted, Parliamentarians had in mind the offence, as they understood it to be. The Court held that even with changing attitudes about the exploitation of animals, it is not appropriate for courts to expand the settled meaning of a criminal offence to bring it up to date. This is for Parliament to do: *R v DLW*, 2016 SCC 26.

The period under review also saw a decision, *R v Boroweic*, 2016 SCC 111, holding that the crime of infanticide should be used, instead of murder or manslaughter, where a mother kills her child while her mind was disturbed "by reason of" the fact that the accused was not recovered from the effects of giving birth or the effect of lactation." Moreover, a mind can be "disturbed" within the meaning of this provision, even without a mental illness.

If there are any clearly discernible, interesting themes that emerge from the cases they are: (1) the limited constraint that prior precedent plays in Canada's top court, and (2) the Court's insistence on precise legislation that is targeted at the mischief it is seeking to address. I will introduce these themes now, and then describe the 20 cases I have selected.

These 20 cases are a varied offering. Important cases include decisions addressing: the right to die; the right to collectively bargain and the right to strike; limits on the power of government to create punitive legislation, including mandatory minimum sentences; aboriginal law issues; the law of evidence; privacy law in both the criminal and administrative contexts; refugee law, and the right to secure damages for unconstitutional conduct.

II. Two Themes of Note

a. The Limited Constraint of Precedent

It is trite, but worth bringing to the fore, that the principle of *stare decisis*, requiring lower courts to be bound by the law established in decisions of higher courts, is essential to certainty and the orderly development of the law.[2] Courts reaching the same result in similar cases is also essential to fairness, and the rule of law. In this way precedent "enhances the legitimacy and acceptability of judge made law, and by so doing enhances the administration of justice."[3] The stated convention, therefore, is that even though the Supreme Court of Canada is not bound by its own precedents it should depart from them only with great care, where there are compelling reasons to do so.[4]

In spite of this, during the period under inquiry, the Supreme Court of Canada either replaced prior precedents, or made significant changes to legal tests it had already developed, on

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There is also a decision explaining the "private use" exception available in child pornography prosecutions: *R v Barabash*, 2015 SCC 29.

I have also made the decision to omit *R v St-Cloud*, 2015 SCC 27, even though it has importance to the law of bail release in Canada. *St-Cloud* involves the application of a limitation on bail release pending trial. This controversial provision permits bail release pending trial to be denied because of public perceptions about the administration of justice, should the accused person be released. Pretrial detention is permitted under this section even where it has not been proven that the accused person is unlikely to attend court, or is likely to commit other offences while awaiting trial.

Even though they are apt to be of international interest, I have chosen, as a matter of priority, not to address the extradition case law from the period under review.

[2] *Carter v Canada (Attorney General*, [2015] SCJ 5 at para 44

[3] D*avid Polowin Real Estate Ltd. v Dominion of Canada General Insurance Co*, (2006) 76 OR (3d) 161 at paras 119-20.

[4] *R. v. Henry*, [2005] SCJ No 76 at para 44.

(1) the right to die; (2) whether freedom of association includes the right to collective bargaining; (3) whether freedom of association includes the right to strike; (4) what constitutes unreasonable delay in the prosecution of crimes; (5) the jurisdiction of Parliament to establish minimum sentences, in criminal matters; and (6) when aboriginal status for Métis, ("mixed blood" Canadians) will be recognized.

This represents a remarkable readiness to reconsider prior decisions. Indeed, not only did the Supreme Court of Canada choose to liberate itself from its own precedents in these cases, it took the opportunity to reaffirm its opinion from *Canada (Attorney General) v Bedford*[5] that trial judges of any level can refrain from following Supreme Court of Canada precedents where there is a change in the circumstances, or evidence that "fundamentally shifts the parameters of the debate."

These cases are reminiscent of the well-worn tale of the judge who, when confronted by counsel with an earlier case on point that they had authored, asked, "Do you want me to be consistent or do you want me to be right?" In my view, the most notable general lesson in cases during this period is that, for the Court, achieving a "right" result will outpoint the theory of precedent.

These cases might be taken to raise concern about the integrity of the Rule of Law, and suggest that the law is as fickle as the personal views of the judges of the Supreme Court of Canada. Were this true, it would run counter to the long tradition in Canada that the law must be treated as something that is above the political leanings of its judges, whose oath to respect and apply the law outweighs the individual power that appointment to the bench carries with it.

Fortunately, there is no currency in the belief that Supreme Court of Canada judges are simply working to make the law in their own image.

A compelling indication to the contrary is that during some of the period under review, 6 of 9 judges of the Court were appointed by Prime Minister Stephen Harper, while for the balance of it, 7 of 9 were.[6] There is a perception held by some that the Harper government chose its judges in an effort to make the court more conservative, to end "activist" adjudication, and to protect the Harper legislative agenda. If that was indeed a driving goal – a theory that is injured by the quality of appointments made – no-one told the judges. During the period in question

[5] [2013] 3 SCR 1101.
[6] Benjamin Perrin, "Dissent from Within the Supreme Court of Canada" (2015) Year in Review, January 2016, A McDonald-Laurier Institute Production www.MacdonaldLaurier.ca [*Perrin*].

Canadian governments, typically the Federal Government [Canada], have been decimated in Supreme Court of Canada litigation.

While reviewing the cases released in the Harper Government's last year in power for the McDonald-Laurier Institute, University of British Columbia Professor Benjamin Perrin identified, as a trend, the government's losing record in major case. He selected what he considered to be the top 10 cases released between October 2014, and October 2015. Of those cases, the government position prevailed in only 2 cases, and narrowly.[7]

In the pages below I feature 20 decisions from 2015 and the first six months of 2016.[8] Of those 20 decisions there is only one private law decision. In the remaining 19 cases the government lost 15 times, or 79% of the time. Many of these cases are major *Charter* decisions. This is remarkable given that, historically, governments have succeeded in 59% of *Charter* cases.[9]

Moreover, as a review of the decisions show, it would have been perilous, during the period in question, to attempt to predict how individual judges were apt to decide based on their perceived "progressive" or "conservative" agendas. The Court arrived at unanimous decisions in 10 of the 19 cases, most producing outcomes that progressive political thinkers might prefer, and some producing results that more conservative court watchers would be apt to like. The unanimous decisions extend the "right to die"; increase protection to refugee claimants; hand out the means to acquire greater political power to "Métis" (mixed-blood aboriginal Canadians); limit the power of federal tax authorities to seek information from lawyers; protect solicitor-client information from terrorism investigators; deny criminal defence lawyers the means to access investigative files protected by international treaties; stay charges against two very serious

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[7] *Ibid*.

[8] In that assembly I have excluded 5 of the cases Prof. Perrin selected. Two of them are from 2014, a year that I am not exploring. [The 2014 cases he included are *Bhasin v Hyrnew*, 2014 SCC 71, where a unanimous Court interposed implied good faith duties into a contract, lessening the freedom of the bargain; and *R v Fearon*, 2014 SCC 77, an important case that gains mention below because it confers controlled authority on peace officers to search through cellphones seized upon arrest.] I am not including 3 of the decisions Prof. Perrin chose from 2015, because I felt them to be of lesser interest to an international audience, or beyond my preferred interest, if not my expertise. One of Professor Perin's top-10 cases, *Loyala High School v Québec (Attorney-General)*, 2015 SCC 12, deals with "freedom of religion." Another, *Québec (Attorney-General) v Canada (Attorney General)*, 2015 SCC 14, is about the governmental division of power under Canada's unique conception of federalism and is of purely local importance. He also included *R v Smith*, 2015 SCC 34, which held that it is arbitrary for Canada to prohibit authorized medical marijuana users from using "derivatives" from marijuana, rather than burning it. This case is of current interest, but when the current Government of Canada makes good on its promise to legalize marijuana, its importance will go up in smoke.

[9] *Perrin*, *supra* note 6 at 15. www.MacdonaldLaurier.ca

offenders because of delay; and reduce the prospect that offenders who are denied bail will end up spending longer in jail than offenders who were released before being convicted at their trials. If there is a leaning, it is to the liberal side. This is not, in my view, a comment on the political proclivities of the bench. It is a reflection of the fact that Canadian law has been built on liberal conceptions of justice. When a judge looks to the law to instruct their thinking, they are more apt to endorse restraint in the criminal law, and to protect perceived human rights on social issues.

As an anecdotal indication of this, judges moved between camps on issues susceptible to political allegiance. Justice Wagner, for example, joined the majority in extending Canada's conception of freedom of association to include the right to collectively bargain, but then moved to the dissent when the right to strike was at stake. For his part, Justice Moldaver, who would have preferred a more restrained approach in limiting the authority of Canada to create mandatory minimum sentences, joined the subsequent majority decision in *R v Lloyd* to strike down a minimum sentence intended to discourage drug trafficking.

Examples can also be found of judges joining decisions, or offering opinions, that are inconsistent with their anecdotally derived reputations as progressives or conservatives.

The sole predictor of a judge's inclination, disclosed by a fair reading of the decisions rendered in 2015-2016, is that, as with any population of jurists, some judges have a more restrained view than others about unelected judges limiting the will of democratically elected legislators. Different views about deference to legislators do show themselves. There are also differing views about how intensively "consistency of adjudication" should be valued.

While putting one's ear to the ground gives rumblings of differences of opinions on these matters, these proclivities relate more to one's conceptions of the nature and role of law than they do to political affiliation. This is the stuff of legal debate, not political values about the kind of society that should be built.

Simply put, the review below offers no evidence suggesting that the opinions of particular judges will be based on their perceived social agendas, but it does reveal important indications to the contrary. During the period under examination, judges decided cases after impressive legal analysis, based on their conceptions of law.

What, then, of the raft of legal adjustments that have occurred? As will be seen, these changes happened, in part, because of the tradition in the Court of treating the *Charter* as a "living tree" that evolves in a cautious but perceptible way to meet the current needs of the legal

system, to reflect current values, and to achieve efficiency. This pragmatic orientation has affected the contemporary Canadian conception of precedent. The law should not be immutable. It should remain responsive to changing circumstances, and be reflective of current values. Contemporary conceptions of "correctness" can outpoint certainty, and the case law can and will change and evolve over time.

The thinking is that, when undertaken carefully and scholarly, evolution in the law, including the constitutional law, does not cheapen the idea of law or weaken the Rule of Law. The theory is that allowing the law to evolve, as these cases do, helps to protect the law and the constitution against obsolescence, inefficiency and irrelevance.

b. The Push for Legislative Precision

There is a related trend. During the period under review, the Supreme Court of Canada insisted, in its constitutional review, that laws be directed at the mischief they were created to address. Both directly, and indirectly, it used "overbreath" analysis to keep laws that push into constitutionally protected territory from casting their nets more widely than required to fulfil their objectives.

The most obvious tool for achieving this is to use the *Charter*'s "overbreadth" doctrine, described below. This tool empowers judges to "read down" legislation that affects the "life, liberty or security of the person" of individuals so that the law is confined in its reach to cases that advance its underlying purpose. Essentially, it puts a heavy onus on legislators to avoid drafting laws that unreasonably exceed their reach.

This technique was used during the period under review in *Carter v Canada (Attorney General)*, 2015 SCC 5 to strike down laws making it criminal to assist another in taking their life, paving the way for doctor-assisted suicide. In *R v Appulonappa*, [2015] SCJ 59 the constitutional doctrine of "overbreadth" was also used to exempt individuals who act for humanitarian reasons from prosecution for helping refugees who lack legal means of entry to gain entry into Canada.

Overbreadth reasoning percolated into other 2015-2016 decisions. There are decisions, discussed below, where the Supreme Court of Canada struck down mandatory minimum sentences. The legal technique employed there is the "gross disproportionality" test under section

12 of the *Charter*, but as will become apparent, the use of this test is another way of measuring overbreadth. The problem with the provisions that were struck down is that Parliament's attempt to get tough on crime by sending sprawling, uncompromising messages that certain crimes will carry tough penalties, catches people who do not deserve those penalties. These sentencing provisions are overbroad, if not in their purpose, in their effect.

Meanwhile, in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, the Court used overbreadth analysis to support a "freedom of association" decision it made. While "freedom of association" was found to carry the right to strike, that right can be limited in appropriate cases, such as where essential services are being provided. The fatal flaw in Saskatchewan's legislation, however, is that it permitted the government to declare a service to be essential without any test being employed. This created the risk that those providing non-essential services would be denied the right to strike, contrary to the "minimal impairment" precondition to justifying a law which, on its face, compromises the *Charter*.

The same thread can be seen in the solicitor-client privilege cases described below. In these decisions the Court strikes down legislative attempts to permit searches of law offices to secure important information in aid of tax and terrorism investigations. The problem with the search powers under review is not that these goals are unworthy. They are obviously important. The problem is that these search powers are overbroad, catching and exposing material that is protected constitutionally because it is legitimately privileged as between lawyer and client. If that consequence is inevitable, it must at least be minimized.

The clear trend towards finding ways to make legislation fit its purpose, exhibited in these cases, is not new, and it is not confined to constitutional law. A corollary of this thinking is the long-standing practice in Canada of using "purposive" approaches to the interpretation of any enactment, including but not limited to the *Charter*. It even applies in the interpretation of international documents. The technique of purposive interpretation can be seen below, in this context, in *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58. There the Supreme Court of Canada interpreted a provision requiring the peremptory expulsion of refugee claimants who are denied entry "on the grounds of organized criminal activity for … engaging in … transnational crime … [including] trafficking in persons." The Court held that this provision applies only to those who engage in moving refugee claimants across the border in return for money or other material benefit, even though this limitation is not expressed. At bottom, the

unanimous Court reasoned that Parliament wanted to stop exploitive human traffickers, not prevent humanitarian assistance to those seeking refuge, and so it found a way to read the provision to prevent this unintentional mischief.

The use of "purposive interpretation" can rankle those who expect courts to listen to what is said by democratically elected bodies, rather than engaging in what can become a subjective search for what legislators may really have wanted. Some even fear that denying weight to expressed language in favour of purpose can enable judges who disagree with legislation to find ways to avoid applying it.

These risks doubtlessly exist, but efforts are made to control them through the use of legal techniques that direct how purpose is to be discerned, and require objective verification of the purpose relied upon. To be sure, the Court takes a holistic approach, bearing in mind the prior commitments made by a government, including to the *Charter*, as well as the unanticipated implications of legislation when undertaking this kind of inquiry. It does so advisedly. This is because the concept of "legislative intent" is less an attempt to reconstruct the particular conceptions of individual legislators on the day the legislation was passed; it is, rather, "a shorthand reference to the intention which the court reasonably imputes to Parliament."[10] In this way, purposive interpretation promotes the sensible fit of individual enactments into the general law created by the enacting body.

Whatever one might think about purposive interpretation and the insistence on precision in legislating, one thing is clear; to understand constitutional law and the relationship between courts and legislators in Canada, and to follow what is happening in many of the cases decided in the term under review, it is necessary to recognize that purposive interpretation is an endemic feature of the Canadian landscape. It is the predominant practice among jurists in attempting to achieve what legislators must have intended.

It remains, then, to review the case law I have described.

[10] *R v Dineley*, [2012] SCJ No 58 at para 44, per Cromwell J. dissenting in the result. The majority and the dissenting decisions agree on the interpretive principles to apply, with one exception not material here, relating to the application of laws that affect constitutional rights. Specifically, the majority held that such laws are presumed to be prospective alone. The dissenting justices disagreed.

III. The Limited Constraint of Prior Precedent

a. The Right to Die: *Rodriquez* over-ruled

Carter v Canada (Attorney General) 2015 SCC No 5

The most striking, and "by far the most politically and socially significant decision of 2015"[11] and early 2016 is the unanimous judgment in *Carter v Canada (Attorney General)*. In it, the Supreme Court of Canada declared unconstitutional provisions making it a crime to assist another to commit suicide, and making any consent to die invalid. Specifically, the Court ruled that sections 241(b) and 14 of the *Criminal Code* "are void insofar as they prohibit physician-assisted death of a competent adult person who (1) clearly consents to the termination of life, and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."[12]

The *Carter* decision turned on the application of section 7 of the *Canadian Charter of Rights and Freedoms*, Canada's analogue to the American "due process" provisions. Section 7 provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"

As is evident from its text, section 7 identifies "protected interests," namely "life, liberty and security of the person." It does not promise that these interests will never be infringed. Instead, section 7 holds out that these interests can be compromised constitutionally, only if the infringement is consistent with principles that are fundamental to justice.

Like the concept of "due process," section 7 provides an unpredictable platform for constitutional challenge. This is, in part, because the "principles of fundamental justice" it guarantees are not enumerated. They are judicially "derived from the essential elements of our system of justice."[13] Courts consult the legal system and its precedents in an effort to identify those principles that animate the law, and that would command a broad consensus as fundamental to justice. While Canadian courts have identified many such principles, "three have

[11] John Mastrangelo, "Part II: 2015 Year in Review," (March 19, 2016) online Thecourt.ca http://www.thecourt.ca/2016/03/19987/
[12] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 127 [*Carter*].
[13] *Ibid* at para 81.

emerged as central in the recent section 7 jurisprudence; laws … must not be arbitrary, overbroad or have consequences that are grossly disproportionate to their object."[14]

In *Carter*, the Court held that the criminal law provisions that make it an offence to get help in dying easily meets the first step of a section 7 analysis, since these provisions, by prohibiting "physician-assisted dying," interfere with each of section 7's "protected interests." Indeed, all three of section 7's protected interests are put at risk.

First, the right to life is infringed because, as a result of the criminal law, some people afflicted with intolerable degenerative conditions feel compelled to take their own life while still capable of doing so, leading to their premature death.

Second, by impeding the choice to live or to die the law interferes with the "liberty" interest everyone has in exercising personal autonomy, including control over one's bodily integrity, free from state interference.

Third, such a law also undermines the "security of the person" by interfering with an individual's psychological integrity, by causing serious psychological suffering. This occurs when individuals are left, by the law, without access to humane, physician controlled methods of inducing their death, leaving them to contemplate violent and distressing forms of suicide.

The *Carter* Court held that the *Criminal Code* provisions barring physician-assisted suicide compromise these protected interests in a way that does not respect the principles of fundamental justice. These laws offend principles of fundamental justice because they are overbroad.

As introduced above, an "overbreadth" determination involves identifying the purpose of the law and then assessing whether the law "goes too far by denying rights in a way that bears no relation to the object" of the law.[15] Identifying the object or purpose of the law is therefore crucial in an "overbreadth" evaluation.

Not surprisingly, the Federal Government wanted the purpose of the law to be defined broadly so that it would apply to everyone. It urged that the prohibition on "physician-assisting dying" was created in order to protect the sanctity of life. The Supreme Court of Canada disagreed, holding that these laws have a much narrower purpose, namely, to protect the vulnerable. This characterization made the law overbroad because the law purported to prevent

[14] *Ibid* at para 72. For a more complete discussion of the identification of principles of fundamental justice, see *Canada (Attorney General) v. Federation of Law Societies of Canada* 2015 SCC 7, discussed below.
[15] *Ibid* at para 85.

those who are not vulnerable from choosing to end their life. The law therefore violated section 7.

Finding that a law violates a constitutional provision such as section 2(b) is not the end of the constitutional analysis in Canada. The State has the opportunity, granted by section 1 of the *Charter*, to justify the law as a reasonable limitation on constitutional rights, applying the standards of a free and democratic society. Whether this attempt will succeed is evaluated structurally, by asking, in effect, whether "the law has a pressing and substantial objective and whether the means chosen are proportionate to that objective."[16] A law is proportionate if (1) it is a rational way of pursuing its objective; (2) the law represents a reasonable attempt to identify the least harmful means of achieving its legislative goal (the "minimal impairment" requirement); and (3) the negative impact of the law on the *Charter* right is not out of proportion to the benefits it provides.

Ultimately, the *Carter* Court held that the prohibition on "physician-assisted dying" could not be justified under section 1 because the laws imposing that prohibition are not "minimally impairing," as required by the proportionality test. Canada had tried to avoid this finding by urging that nothing less than an absolute prohibition on physician-assisted dying would work because there is no other way to prevent effectively vulnerable individuals from choosing death when not truly competent, or from being manipulated into choosing death by others, or from being led to the decision by misdiagnosis. The Court rejected this, accepting the trial judge's conclusions that Canada had not proved that these risks could not be controlled with "a carefully designed and monitored system of safeguards."[17]

Since the impugned laws could not be saved, they were declared to be unconstitutional. As is its practice when a law that pursues important interests is struck down because it goes too

[16] *R v Nur*, 2015 SCC 15 at para 111.

[17] *Carter*, *supra* note 12 at para 117. As an interesting aside, the Supreme Court of Canada applied a "reasonableness" standard, rather than a "correctness" standard, in considering whether it should accept the trial judge's findings. "Reasonableness" standards are commonly applied in administrative law; where the adjudicator has special expertise in the regulated area under consideration, courts should defer to their findings so long as they are reasonable, even if the court, having less expertise, would not have made those same findings themselves. A reasonableness standard is also used to review findings of fact made at trials. This is because of the belief that a trial judge has advantages in observing live testimony. A case can be made that when the issue is a mixed question of fact and law in the *Charter* context, such as whether there is a reasonable, less intrusive way of attaining Parliament's objectives, the standard should be correctness, and not reasonableness. This is because, technically, a reasonableness standard permits legislation to be struck down based on reasonable errors committed by courts. It is interesting, in this context, to see deference to trial judges outpointing deference to legislators.

far in serving an important purpose, the Court suspended its declaration of validity for twelve months to enable Parliament to come back with a more precise law on physician-assisted dying.

The most intriguing thing about the *Carter* decision is that in 1993 the Supreme Court of Canada encountered the same issue in *Rodriguez v British Columbia (Attorney General)*,[18] but held, in a 5-4 decision, that section 241(b) did not violate the principles of fundamental justice, and that, if it did, the law could be saved under section 1. *Carter* overturns *Rodriguez*.

Indeed, *Carter* is not simply a case of the Supreme Court of Canada reconsidering its own decision. The Supreme Court of Canada went further, recognizing that the trial judge was correct not to feel bound by its decision in *Rodriguez* despite the principles of *stare decisis*.

The seeds for this permission to a trial court to reconsider a Supreme Court of Canada precedent took firm root two years before, in *Canada (Attorney General) v Bedford*.[19] There the trial judge chose not to follow the Supreme Court of Canada's decision in *Reference re ss.193 and 195.1(1)(c) of the Criminal Code*,[20] that impugned prostitution laws were constitutionally valid. When *Bedford* got to the Supreme Court of Canada it said that the trial judge was correct to ignore its precedent. As the *Carter* Court explained, based on its authority in *Bedford*, "[t]rial courts may reconsider settled rulings of higher courts in two situations, (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate."[21] The *Carter* court was of the view that both conditions applied.

First, new legal issues were raised because the concept of "overbreadth" was still crude when *Rodriguez* was decided. In *Rodriquez* the Court asked whether the law was "over-inclusive" in the sense of being "arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs, which are said to be represented by the prohibition," instead of the current overbreadth question of whether "the law interferes with some conduct that has no connection to the law's objectives." In the Court's view, these different articulations of the test could lead to different answers.[22]

Second, the *Carter* court was satisfied that the "matrix of legislative and social facts in the case … differed." First, the widespread consensus at play when *Rodriguez* was decided that

[18] [1993] 3 SCR 519.
[19] [2013] 3 SCR 1101.
[20] [1990] 1 SCR 1123.
[21] *Carter*, *supra* note 12 at para 44.
[22] *Ibid* at para 46.

there is an ethical and moral difference between passive and active euthanasia is breaking down. Second, when *Rodriguez* was decided, none of the eight Western jurisdictions that now permit active euthanasia existed. The fact that these jurisdictions exist was seen to contradict *Rodriguez*'s finding that there is a "substantial consensus" in Western Countries against active euthanasia, and their example required reconsideration of the conclusion in *Rodriguez* that halfway measures could not protect the vulnerable.[23]

Of interest, while these changes opened the door to reconsideration, most of these developments ultimately had little to do with the about-face taken in *Carter*. The maturation of the over-breadth standard did not. To be sure, the articulation of the overbreadth test has evolved, but it has become no more generous. Prohibiting non-vulnerable people from accessing physician-assisted dying in order to protect vulnerable people, is as "unrelated to the state's interest in protecting the vulnerable" as it is overbroad when applying the current test.

The same holds true with increased controversy about the existence of a moral and ethical divide between passive and active euthanasia, and the dissent of eight Western jurisdictions from the substantial consensus that remains against active euthanasia. *Carter* turned ultimately on the holding that an absolute prohibition of physician-assisted suicide is not needed to protect the vulnerable, not on the shifting attitudes that these changes to the social matrix illustrate.

Ultimately, the only change material to the outcome is that eight Western jurisdictions now provide models that can be used to discern whether a half-way house could adequately protect the vulnerable. The evidence that these jurisdictions have managed to enact "right to die" regimes without imperilling the vulnerable was not unequivocal. Indeed, in order to act on this information, the *Carter* court had to distance itself from controversies arising from the Belgian experience, by relying upon differences in the medical environment in Canada.

I do not say any of this to criticize the outcome of the *Carter* decision. I far prefer it to *Rodriguez*, both in reasoning and result. The case does demonstrate, however, that contemporary standards of *stare decisis* and the agility that legal reasoning offers provide the opportunity to choose to be "right" rather than consistent. What may make the decision "right" is the ascendency both jurisprudentially and socially, of personal choice relating to medical treatment,

[23] *Ibid* at para 47.

even in the face of death, including for mature adolescents.[24] *Rodriguez* simply seemed out of place.

In any event, in constitutional matters, once rigid notions of "vertical *stare decisis*" may be less adept at offering certainty and the orderly development of the law than once thought. Those who consider the function of constitutions to impose lines in the sand on legislative jurisdiction may find this ironic.

By way of post-script, the legal odyssey in *Carter* is far from done. *Carter* had given the federal government 1 year to repair its legislation, or the laws would be of no force or effect, leaving the right to die entirely unregulated. The Harper government did not enact legislation before its defeat. The Liberal government did not have adequate time left after their election to be ready with a law of their choosing. They asked the Court to extend the suspension of declaration of invalidity. In 2016 in *Carter (Attorney General)* 2016 SCC 4, Canada received that four-month extension.[25] Ultimately, the current government managed to elbow its way to passing responsive legislation at the 11th hour, but critics contend that this new law does not satisfy the constitutional demands of the *Carter* decision. They are concerned that the new law appears to be restricted to those who are near death, whereas *Carter* considered that the right to physician assisted death had to include everyone who has "a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition." There will be another challenge.

When this does happen, the groundwork will be set for yet another technique available to the Court to depart from its own precedent, even if the new law fails to reflect the breadth of the *Carter* decision. In the past, when the Supreme Court of Canada has been faced with a challenge to legislation passed to remedy legislation it has struck down, it has not treated its prior decisions as establishing that firm line in the sand I have alluded to. It is prepared to treat an incomplete legislative response to one of its constitutional decisions as a form of "dialogue" with the legislative branch of government. By stopping short of achieving the line identified by the Court, legislators are inviting the Court to reconsider. In light of the deference owed to Parliament, the

[24] *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30.
[25] The Province of Québec, which has its own doctor-assisted dying legislation, did not want the exemption to apply to them, and so it does not.

Court will do so if a case for modifying the earlier decision can be made out.[26] In effect, even the *Carter* precedent itself is a line in the sand drawn close enough to the tide-line to be at risk of erosion.

b. The Labour Cases – *Delisle* and the "Labour Trilogy" Over-ruled

Mounted Police Association of Ontario v Canada (Attorney General) 2015 SCC 1

Historically the Royal Canadian Mounted Police force (RCMP) was prohibited from collective bargaining. When collective bargaining arrived in the public service in 1967 with the *Public Service Staff Relations Act*. S.C. 1966-67 (PSSRA), RCMP officers were expressly excluded from the definition of "employee" that triggered participation. In 1974, the "Division Staff Relations Representative Program" [SSRP] was established as the sole means available to RCMP members to present concerns to management. The SSRP is "simply an internal human relations scheme imposed on RCMP members by management,"[27] in which significant aspects of the program are determined by management, including any changes to its structure.

In 1999, in *Delisle v Canada (Deputy Attorney General),*[28] the plaintiff RCMP member asserted a constitutional right to collectively bargain, as part of the "freedom of association" guaranteed by section 2(b) of the *Charter*. Mr. Delisle said that defining "employee" in the PSSRA as excluding RCMP officers, in order to deny them the right to collectively bargain, was unconstitutional. A majority of the Court refused the challenge, holding that "freedom of association," in the labour context, protects only the right to form and join associations, and to engage in lawful acts collectively. Nothing in the PSSRA definition prevented individuals from joining together to pursue lawful activity, and so it denial of collective bargaining was constitutionally valid.

[26] The decision in *R v Mills* [1986] 1 SCR 863 is an example. Legislation governing rights of accused persons to use the law to compel access to the private records of complainants and witnesses gave more restricted access than the Court had identified as being constitutionally required in *R. v. O'Connor* [1995] 4 S.C.R. 411. The *Mills* Court read the new legislation restrictively, but said it passed constitutional muster.
[27] *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 118 [*Mounted Police*].
[28] [1999] 2 SCR 989.

In 2006 a non-governmental organization of RCMP members tried again. It had been emboldened by post-*Delisle* decisions, namely, *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*[29] and *Ontario (Attorney General) v Fraser*.[30] These cases had come to recognize that section 2(b) does indeed provide some protection for employees to join together, make collective representations, and have those representations considered in good faith.

The Association's challenge succeeded before the trial judge, but the Ontario Court of Appeal reversed, citing *Delisle*. The case ultimately came before a seven judge panel in *Mounted Police Association of Ontario v Canada (Attorney General).* A majority of the Court held that both the definition of "employee" in the PSSRA, and the SSRP regime were unconstitutional. *Delisle* was expressly overturned. Justices McLachlin and Lebel, writing for the majority, said that it was appropriate to overrule *Delisle* and sustain the challenge because of an evolution that had occurred in the Court's conception of "freedom of association."

The majority explained that its "freedom of association" case law had begun with the kind of "restrictive approach" used in *Delisle*. This body of law reflected the "derivative approach" understood by the Court to apply in the United States, where freedom of association is a way to enjoy existing rights, not to acquire new ones.

More recent cases, beginning shortly after *Delisle*, reflect a more generous, purposive interpretation of the provision. These cases interpret section 2(b) in a way that will encourage the "collective realization of human goals," and assist in "reducing social imbalance." This approach led to recognition in *Health Services* and *Fraser* of collective bargaining protection. In short, the gradual evolution of the law overtook *Delisle* and required that it be pushed aside.

The *RCMP* Court ruled that, understood purposively, freedom of association includes the right to collective activity "that enables those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact, and, perhaps, conflict."[31] In the labour context, this carries "the right of employees to meaningfully associate to pursue collective bargaining." The majority reasoned that "meaningful association to pursue collective bargaining" necessarily includes a "degree of choice … that enables employees… effective input into the selection of collective goals to be

[29] 2007 SCC 27.
[30] [2011] 2 SCR 3.
[31] *Mounted Police*, *supra* note 27 at para 54.

advanced by their association,"[32] as well as "the degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and the workplace."[33]

The SSRP regime does not meet these standards. It substantially interferes with the possibility of having meaningful collective negotiations on workplace matters because it does not permit adequate input by members into the collective bargaining goals, and is not independent of management in a meaningful sense. It is, therefore, unconstitutional.

The definition of "employee" in the PSSRA is also unconstitutional because its purpose in excluding RCMP members is "to prevent the formation of independent RCMP member associations for the purposes of collective bargaining."[34] In effect, the definition was chosen to prevent RCMP members from enjoying a right they are constitutionally entitled to.

Nor could the *prima facie* violation be justified under section 1 of the *Charter*. The impugned provisions in *RCMP* failed at stage (2) of this test, its "rational connection" component. Canada had claimed that its goal in excluding RCMP members from collective bargaining was "to maintain and enhance the neutrality, stability and reliability of the RCMP by providing a police force that is independent and objective."[35] The majority was not persuaded that exclusion from collective bargaining has anything to do with these objectives. There was not a rational connection between the purpose of the law and its unconstitutional effects.

Justice Rothstein issued a vigorous dissent in *RCMP*. He was troubled that the majority would take a position not rooted in the text, context or purpose of Canadian constitutional law to wander into questions of socio-economic policy and to intrude on the proper role and expertise of governments.[36] He also concluded that an accurate reading of the Court's decision in *Fraser*, rendered only 4 years earlier, is that section 2(d) is not violated unless government action "makes meaningful association to achieve workplace goals effectively impossible."[37] The Court, he said, was departing from its own precedent, one that would have caused the plaintiff's case to fail.

Justice Rothstein protested:

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[32] *Ibid* at para 83.
[33] *Ibid* at para 99.
[34] *Ibid* at para 110.
[35] *Ibid* at para 142.
[36] *Ibid* at paras 160-162.
[37] *Ibid* at para 166.

> "I respectfully disagree with this constitutional reversal…. Constitutional decisions should only be subject to change or reversal under limited and rigorous conditions. In *Fraser*, this Court issued a stern warning: 'The seriousness of overturning … recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated."[38]

The majority in *R.C.M.P.* does not agree with Justice Rothstein that it departed from *Fraser*. Justice Rothstein was reading the decision, it said, narrowly rather than contextually.

Justice Rothstein can be forgiven for doing so. The Ontario Court of Appeal made the same error, leaving Chief Justice McLachlin and Justice Lebel to agree that some of the language in the *Fraser* case was misleading. Properly understood, *Delisle* could not survive in the face of a purposive reasoning of *Fraser*, and so it was overruled.

Saskatchewan Federation of Labour v Saskatchewan [2015] S.C.J. No. 4

This case involved a "freedom of association" challenge to provincial legislation that purported to prevent some public service employees from striking. The legislation at issue permitted public employers to designate unilaterally what public services they deem to be essential. When such a designation is made, workers cannot strike, and they are bound by the existing agreement until a new one is put in place. This legislation included no mechanism for settling negotiating impasses.

Once again, a majority of a seven-person court held that this legislation violated freedom of association grounded in section 2(b). Justice Abella, writing for the Court, reasoned that "a prohibition on designated employees from participating in strike action for the purpose of negotiating the terms and conditions of their employment amounts to a substantial interference with the right to a meaningful process of collective bargaining, secured by section 2(b)."[39]

To be clear, the majority was not saying that it will always be unconstitutional to prohibit employees from taking work action. If this is done, there will be a *prima facie* violation that still can be justified as a reasonable limit on constitutional rights under section 1. The majority hinted broadly that denying the right to strike for public services that truly are "essential" is nonetheless

[38] *Ibid* at para 167. Ironically, those words from *Fraser*, setting a firm face against overturning constitutional precedents, were penned by the majority while explaining why it could not do as Justice Rothstein was requesting, by overturning its more recent decisions accepting a constitutional right to collectively bargain, to return to its original position that freedom of association does not confirm a right to bargain collectively.
[39] *Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4 at para 2 [*Sask*].

apt to be a reasonable limitation on section 2(b), justifying that *prima facie* violation, so long as there is an effective alternative dispute settlement mechanism in place.

Nor does the decision in *Saskatchewan* invalidate the "*Wagner* model," imported from the United States, which prohibits strikes during the currency of a collective agreement. The *Saskatchewan* case is about strike action to secure a collective agreement. It continues to be appropriate to outlaw striking when a collective agreement is in place. Disputes about what is done while under agreement can be settled by mediation or arbitration.

The majority reached its outcome – that *prima facie* there is a constitutionally protected right to strike for the purpose of negotiating terms and conditions - by examining the role that the right to strike plays in collective bargaining historically, and by consulting international agreements that Canada is signatory to, housing the right to strike. The majority also claimed support from Supreme Court of Canada jurisprudence, citing broad principled comments found in the case law that it considered to be supportive.

Of interest, the majority did not confront directly that it was overturning its own prior decisions in affirming a constitutional right to strike. The "Labour Trilogy," released in 1987,[40] "firmly rejected the proposition that the right to strike in Canada is constitutionally entrenched."[41] According to Justice Rothstein and Wagner dissenting, the *Fraser* decision only 4 years before, also "rejected the idea that there is a constitutional right to a dispute resolution process." [42] Instead of dealing with these cases directly, the majority rested content to comment, generically that "the arc [of its labour law decisions] bends increasingly towards workplace justice."[43] "Given the fundamental shift in the scope of s.2 (d)… the trial judge was entitled to depart from precedent and consider the issue in accordance with this Court's revitalized interpretation of s.2(d)."[44]

Once again, Justice Rothstein, joined this time by Justice Wagner, protested that the Court was furnishing a political decision, trenching on the purview of Parliament to resolve social-economic policy issues in the complex environment of labour relations. They chided the

[40] *Reference re Public Service Employee Relations Act (Alta)* [1987] 1 S.C.R 213; *PSAC v Canada* [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan* [1987] 1 S.C.R. 460, collectively, the Labour Trilogy.
[41] *Saskatchewan*, *supra* note 39 at para 106.
[42] *Ibid*.
[43] *Ibid* at para 2.
[44] *Ibid* at para 32.

majority for departing from its own precedents, when neither developments in its section 2(b) jurisprudence, nor any change in circumstances, justified the departure.

The legacy of the "freedom of association" cases is that a majority of the Court will permit a broadly trending deviation in its own authority to liberate it, and other courts, from its own precedents. Effectively, the Supreme Court of Canada found compelling reason for overturning *Delisle* and the "Labour Trilogy" in the fact that it had already stopped following its own reasoning from those cases. Understood in this way, it is not so much that something happened to change the game for the Court. Instead, by choosing to move from a restricted interpretation to a purposive one, the Court changed the game and changed its mind about *Delisle*. Nothing more impelled the rejection of precedent than a changing conception by a majority of the court about what labour justice entails.

c. The "Unreasonable Delay" Cases: *R. v. Askov*, and *R. v. Morin* overruled[45]

R v Jordan, 2016 SCC 27; *R v Williamson*, 2016 SCC 28

R v Jordan,[46] is a unanimous decision "staying" or halting drug charges against the accused because his section 11(b) *Charter* right "to be tried within a reasonable time" was breached. It had been more than 49 months between the time Mr. Jordan had been charged and his conviction, after a Superior Court trial.

While all of the judges agreed that Mr. Jordan's rights were violated and his charges had to be stayed, the Court split badly in their reasons as to why. Justice Cromwell wrote for four judges who applied a modestly refined version of the legal test that the Supreme Court of Canada had developed over the last 30 years. Justices Moldaver, Karakatsanis and Brown, writing for a majority of five, rejected the Court's existing precedents and established and applied a fundamentally different framework of analysis, one that will guide future section 11(b) challenges.

R v Williamson,[47] is a companion case in which the majority applied the new framework to stay charges against a man accused of gross sexual offences committed in breach of trust,

[45] *R v Askov*, [1990] 2 SCR 1199 [*Askov*], and *R v Morin* [1992] 1 SCR 771 [*Morin*].
[46] 2016 SCC 27.
[47] 2016 SCC 28.

because 34 months had passed between the time he was charged and convicted. The case illustrates but does not develop the law.

Justice Cromwell wrote the dissenting judgments in both cases. His decision in *R v Jordan* is a scathing critique of the majority's departure from precedent. He called it "unnecessary" and "unwise." He anticipated that the change could lead to the same kind of havoc that occurred after the Court initially adopted a rigid standard for measuring unreasonable delay in *R v Askov.*[48] Tens of thousands of charges were thrown out in its wake, doing serious damage to the repute of the administration of justice. He makes a compelling case that the new *Jordan* standards are apt to result in charges being stayed in many cases.

Justice Cromwell lamented that the *Jordan* litigation could have been resolved without changing anything, as the same result would have been achieved in Mr. Jordan's case using the established approach. He charged that the majority were behaving like legislators rather than judges, in order to make a change that no-one asked for, the merits of which had not been addressed in evidence or argument.

The majority nonetheless felt that the test needed to be redone. It felt the existing test was too complicated, too subjective, and contributed to a culture of complacency about delay. The majority believes that the new standards it has developed will impel prosecutors ("Crowns"), defence lawyers, and courts to conduct themselves differently to reduce unnecessary delay. This is in the interests not only of accused persons but also of witnesses and victims, and it will better serve public expectations.

To enable those engaged in the system of justice to adjust to the new expectations, the Court has provided for a transition, by suspending the full application of the new test until cases in the system work their way through it. It has called for an interim approach for cases in which the charges were laid before July 8, 2016, that allows for the fact that lawyers and courts would not have known what is now expected of them, when making scheduling decisions.

The Supreme Court of Canada has frequently suspended declarations of unconstitutionality to give legislators time to revise their legislation. This is the first time that it has "grandfathered" a judicially developed legal standard, prompting scathing criticism from Justice Cromwell that the majority has granted a "*Charter* amnesty."[49]

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[48] [1990] 2 SCR 1199.
[49] *R v Jordan*, 2016 SCC 27 at paras 286-288 [*Jordan*].

Without question, *Jordan* is now the leading case on trial delay, and it represents a "significant shift from past practice," as the *Jordan* majority acknowledged.[50]

i. The Basic Structure of the New Test

The *Askov*; *R. v. Morin* regime[51] that *Jordan* has now replaced, had required the identification of the "length of the delay" by attributing stage-by-stage responsibility. Delay inherent in the case, including the intake period and necessary preparation time, had to be estimated and deducted from imputable delay. Delay caused by the defence was also deducted, as were periods of unavoidable delays caused by special circumstances, such as illness. The delay that remained was attributable to the Crown, either because it was caused by the prosecutor or by a shortage of institutional resources. If the over-all period of Crown delay exceeded 8 to 10 months for provincial court trials, or 14 to 16 months for superior court trials, proceedings could be stayed, depending upon the intensity of the prejudice that this delay caused to the accused.

The new test deviates from this approach in significant ways.[52] It removes the need to quantify the inherent time requirements of the case and it reduces, and in some cases removes, the need to micro-examine responsibility for every period of delay. Most significantly, it removes the need to evaluate the prejudice that delay caused for the accused.

In simple terms, the new test revolves around "presumptive ceilings," and the analysis differs depending upon whether those presumptive ceilings are exceeded. Those presumptive ceilings are 18 months for matters tried in provincial court, or 30 months for matters going to trial in superior court. They run from the time of charge, until the case is actually or expected to be completed, depending upon when the section 11(b) analysis is being applied.

In spite of the effort by the majority to simply the analysis, it will still be necessary in the typical case to allocate responsibility for delay between the Crown and the defence. This is because these presumptive ceilings are quantified by deducting "defence delay" from the overall delay.

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[50] *Ibid* at para 108.
[51] *Askov* and *Morin*, *supra* note 45.
[52] That test is neatly summarized at *Jordan*, *supra* note 49 at para 105. In explaining the test, I have not simply reproduced that summary because of the benefit in fleshing out some of the test's components.

Defence delay embraces: (1) delay that has been formally or informally waived by the defence; and (2) delay that has been caused solely by the defence, such as delays caused by frivolous defence applications, or defence unavailability.

ii. Cases that Exceed the Presumptive Ceiling

If the presumptive ceilings are exceeded the delay is presumptively unreasonable. If a case exceeds the presumptive ceiling, the Crown will therefore have the onus of rebutting the presumption that the *Charter* has been violated, by pointing to exceptional circumstances - such as unexpected events or the inherent complexity of the case - that caused the delay reasonably to exceed the presumptive period. Even where there are exceptional circumstances explaining why extra delay has occurred, this will not help the Crown avoid the presumption of constitutional breach unless the Crown can also show that it has made reasonable efforts to mitigate or limit that delay.[53]

If the delay that remains, after exceptional circumstances that could not have been mitigated are accounted for, exceeds the presumptive ceiling section 11(b) will have been violated. This is so regardless of the seriousness of the charges or the guilt of the accused.[54]

In his dissenting opinion in *R v Williamson*, *supra* Justice Cromwell would not have had it this way. He urged that the impact of the public interest in having trials within a reasonable time must be understood and applied in light of the public interest in seeing serious cases adjudicated on their merits. Yet the law holds otherwise. The right to a trial within a reasonable time does not provide less protection for serious cases.

iii. Cases that do not Exceed the Presumptive Ceiling

It is still possible for section 11(b) to be violated in cases that do not exceed the presumptive ceiling, but this will occur only in clear cases.[55] In such cases the defence bears the onus of showing unreasonable delay, by establishing two things, (1) it took meaningful steps that

[53] *Jordan*, *supra* note 49 at para 74.
[54] *Ibid* at paras 63 & 81, *R v Williamson* 2016 SCC 28 [*Williamson*]
[55] *Jordan*, *supra* at para 83.

demonstrate a sustained effort to expedite the proceedings; *and* (2) the case took markedly longer than it reasonably should have.[56]

d. The Sentencing Cases: Modifying Legal Standards

Canada does not use sentencing tariffs. Instead, Canadian law embraces an individualized sentencing regime in which the "fundamental principle" of sentencing is that a sentence must reflect the seriousness or gravity of the offence and the degree of responsibility of the offender.[57] Aggravated forms of an offence committed by a repeat offender should therefore receive a much harsher sentence than a less serious form of the offence committed by someone with little or no criminal history, or whose "moral fault" is limited by mental deficiencies, or by normative pressures. To accommodate the individualization of sentencing, offences in Canada tend to carry a wide legislated sentencing range.[58]

In spite of this, there are some offences that carry "mandatory minimum sentences," provisions requiring that, regardless of how aggravated the offence may be and irrespective of the individual's circumstances, all offenders must receive at least the stipulated minimum penalty. Other provisions, such as those found in the *Truth in Sentencing Act*,[59] have been passed to impose uniform rules intended to ensure longer jail sentences.

These provisions, meant to emphasize deterrence and denunciation or otherwise protect the public, do not sit well with the Canadian approach to individualized sentencing. They require that the stipulated minimum sentence or extended period of incarceration must be applied, even if a judge, using general sentencing principles, would find the minimum sentence to be disproportionately high in the particular circumstances of the case for the offender.

The conventional way for someone to challenge "tough on crime" sentencing initiatives is to invoke section 12 of the *Charter*, the right "not to be subjected to any cruel and unusual treatment or punishment." In interpreting this provision, the Supreme Court of Canada has recognized the wide latitude that Parliament should have in establishing sentencing policy. The

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[56] *R. v. Jordan*, *supra* note 49 at para 82.
[57] *Criminal Code*, RSC 1985, c C-49, s 718.1.
[58] The importance of individualized sentencing was given emphasis in the 2016 Supreme Court of Canada decision, *R v Lacasse*, 2015 SCC 64. A majority of the Court reinstated the trial judges' sentence, even though it was harsher than the usual range of sentence. It commented that proportionality is the central consideration in sentencing, not parity of sentences. The two dissenting justices agreed, but concluded that the trial judge had not evaluated proportionality properly by overlooking important facts related to the offender that mitigated his responsibility.
[59] SC 2009, c 29

Court is also mindful that there is little precision in identifying whether a particular sentence is objectively proportional or not. It has therefore adopted a deferential constitutional standard. A sentencing provision will not violate section 12 simply because it is too harsh, and provides for a disproportionate penalty. To violate section 12 a sentence must be "grossly disproportionate."[60] This requires that the sentencing outcome be "so excessive as to outrage standards of decency."[61]

In spite of the halting language of this test, in 2015-2016 the Supreme Court of Canada made it easier to challenge "tough on crime" sentencing legislation by changing the way "gross disproportion" is evaluated. The change increases dramatically the likelihood that statutory provisions limiting the individualization of sentencing will be found to be unconstitutional.

During this period, the Supreme Court of Canada put to rest, however, a movement to draw an even more aggressive constitutional line by prohibiting all disproportionate sentences, whether the disproportion is "gross" or not.

To achieve these results, the Court had to modify the approach it established, in effect, rejecting prior direction it had given. It also side-stepped the constitutional test it has developed for identifying principles of fundamental justice.

i. Modifying the Approach to Identifying Gross Disproportion

R v Nur; *R v Charles*, 2015 SCC 15

Section 95(1) of the *Criminal Code* makes it an offence to possess a prohibited or restricted loaded firearm,[62] such as a pistol, where the accused does not have a licence to possess it in the place where it is found. To enhance deterrence and denunciation for this offence, Parliament created "mandatory minimum sentences" in section 95(2)(a) of 3 years in custody for a first offender, and 5 years in prison for someone who has committed a prior firearms offence.

Mr. Nur, a person with no prior criminal history and a good personal record, was found guilty of this offence after being discovered in possession of a prohibited semi-automatic 22 calibre pistol with an oversized clip. He was discovered in possession of the gun outside a community centre with a group of men, after another man had sought refuge inside the

[60] *R v Smith* [1987] 1 SCR 1045 [*Smith*].
[61] *Ibid* at 1072.
[62] A firearm is treated the same as if it was loaded if ammunition for the weapon is "readily accessible."

community centre because he felt threatened by those outside. Under the legislation, Mr. Nur had to be sentenced to at least 3 years in jail. Taking this to be the entry level sentence, the trial judge imposed a 40 month sentence because Mr. Nur's crime was not an entry-level offence deserving of the minimum available penalty.

Mr. Charles was a repeat offender with a bad criminal record. Police were called to his room in a rooming house after a disturbance. They searched the room and found a loaded 9 mm Ruger semi-automatic handgun with ammunition nearby. The serial number had been removed. Because Mr. Charles was prohibited from possessing firearms by court order, the minimum sentence the legislation called for was 5 years in prison. He was sentenced to 7 years in custody.

Both men challenged the mandatory minimum sentences provided for in section 95(2)(a) as "grossly disproportionate," contrary to section 12 of the *Charter*. Even though both men had received more than the minimum, they urged that the designated minimum sentence operated as a floor, causing the sentencing tariff to be harsher, leading to unduly long sentences being imposed on them.

The Supreme Court of Canada heard the *Nur* and *Charles* appeals together, and issued a 6-3 joint decision in a decision commonly called *R v Nur*. The men achieved a pyrrhic victory. The Supreme Court of Canada agreed with the men that the minimum sentencing provisions violated section 12 and had to be struck down, but their sentences were nonetheless upheld as fit.

The Court achieved this result by asking not only whether the impugned sentencing provisions produced grossly disproportionate sentences for the men, but whether they would do so in reasonable hypothetical cases. The Supreme Court of Canada has long permitted this to be done whenever a legislative provision is challenged. This is because statutory provisions are either constitutionally valid for everyone, or no-one. Section 52 of the *Constitution Act*, the provision used to enable legislative challenges, recognizes this. It is distinct from the individual remedies provision in section 24 of the *Charter*, and provides generally that a law that infringes the *Charter* is "of no force or effect." A law that is of no force or effect cannot be used against anyone.

The practice of focusing on the validity of the law and not just a law's impact on the *Charter* complainant also has the virtue of enforcing the rule of law by limiting authorities to the use of constitutionally valid laws. Such challenges also enable individuals who do not have the funds or wherewithal to challenge a provision to benefit from the initiative of others.

The way the general validity of the statute is evaluated is by asking whether there are "reasonable hypothetical" cases where the law would produce an unconstitutional effect. If so, the law must be struck down. Simply put, if, reasonably, there are going to be cases where the law would apply unconstitutionally, the law is void.

Using this approach the Court in *Nur* concluded that section 95(2)(a) is unconstitutional, not because it produced offensive penalties for Mr. Nur and Mr. Charles, but because, given the many ways in which the offence can be committed, it would, intolerably, require the same minimum penalties for "a person who has a valid licence for an unloaded restricted firearm at their residence [and who] safely stores it with ammunition in another residence, e.g., at her cottage…"[63] A similar sentence would also have to be imposed on "a person who inherits a firearm and before she can apprise herself of the licence requirements commits an offence," or on "a spouse [who] finds herself in possession of her husband's firearm…"[64] These "regulatory" failings would be punished as if they were gun crimes committed in a criminal milieu, an outcome the majority considered to be grossly excessive.

Nur is a critically important case not because it strikes down the mandatory minimum sentences for this offence. It is a ground-breaking authority because it became the battle-ground over how the reasonable hypothetical standard is to work.

Since neither Mr. Nur nor Mr. Charles had sympathetic claims to having received grossly excessive punishment, the Crown took the opportunity to ask the Court to reconsider its practice and to restrict the use of the reasonable hypothetical by putting predominant emphasis on the impact of the sentencing provision on the offence. In other words, courts should assess whether the sentence is grossly disproportionate without considering the possibility that there will be cases where the personal circumstances of those caught by the provisions are mitigating. The entire Court balked at this. A 6-3 majority went further, turning the tables on the Crown effort to restrict the use of reasonable hypotheticals by making it easier to do. In a concurring decision penned by Justice Moldaver, the 3 dissenting justices would have tightened the test up, but not as far as the Crown had suggested.

The *Nur* majority made the standard for constitutional challenge far more accessible by washing away a raft of practices Supreme Court of Canada judgments had developed after *R v*

[63] *R v Nur*, 2015 SCC 15 at para. 79 [*Nur*].
[64] *Ibid* at para 83.

Smith,[65] the first case to apply section 12 to a mandatory minimum. The reasoning of the Court in *Smith* had been broad; if the law could operate unconstitutionally against any possible offenders, it was gone.[66] The decision immediately generated fear that if the use of hypotheticals was left unrestrained, mandatory minimum sentences could not survive.[67]

This realization caused the Court to begin speaking of "reasonable hypotheticals" and to impose restrictions on how these hypothetical cases could be constructed. Most significantly, in *R v Goltz*[68] Justice Gonthier, for the Court, held that hypothetical cases used to test the constitutional validity of legislation have to be "reasonable" and not "far-fetched," and he explained that a reasonable hypothetical requires "focus on imaginable circumstances which could commonly arise." Justice Gonthier explained that cases that would be uncommon should not be used as hypothetical cases, but if such rare cases were to occur, they should be dealt with as and when they arise.[69]

A few years later, in *R v Brown*,[70] the Court rejected a hypothetical based on a different mode of committing the offence than Brown had used. On this authority, it came to be understood that where a crime can be committed in a range of ways, a reasonable hypothetical must relate to the form of crime the accused committed.[71] For example, if this rule was applied, the hypotheticals used in *Nur* would have been unavailable because they reflect regulatory

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[65] *Smith*, *supra* note 60.

[66] In *Smith*, even though Smith's own offence was serious, the Court struck down a 7-year minimum sentence for drug importation because that penalty could be imposed on someone who brought a few grams of marijuana back from a holiday.

[67] See the comments of Doherty J.A., in *Nur*, supra note 63 at para 116, aff'd in the result [2015] 1 SCR. 773.

[68] [1991] 1 SCR 485.

[69] The dissenters in the Supreme Court of Canada in *Nur*, *supra* note 63 would have tightened the "common" case limitation even more. They would have treated hypotheticals as far-fetched unless such circumstances had come up before in reported case law. They also sought ways to limit the operation of section 12 for "hybrid offences," those charges where the Crown has the choice to prosecute the offence as a summary crime for a lesser maximum penalty (much like a misdemeanour), rather than an indictable offence (not unlike a felony). Specifically, the dissenters reasoned that courts should assume that the Crown would choose the less serious form of prosecution for less serious hybrid offences. In this way, the hypothetical penalty would be lowered to match the hypothetical facts. The problem with this approach is that the Court has never accepted that the discretionary decisions of the Crown can be relied upon to avoid an unconstitutional outcome, because discretionary decisions taken by prosecutors cannot be controlled by courts unless they are so abusive as to render an entire trial unfair, or otherwise bring the administration of justice into disrepute: *R v Anderson* 2014 SCC 41. In spite of this, the dissenters in *Nur* advocated that the proper way to deal with Crowns that put a grossly disproportionate sentence into play by electing indictably is by challenging the prosecutorial authority, rather than the mandatory minimum sentence. Of interest, both decisions, the *Anderson* majority imposing strict limits on the review of prosecutorial discretions, and the *Nur* dissent advocating review of prosecutorial discretion to prevent unconstitutional outcomes, were penned by Justice Moldaver.

[70] [1994] 3 SCR 749.

[71] See *R v Nur*, 2013 ONCA 677 at para 116-142, aff'd in the result [2015] 1 SCR 773.

failings rather than firearms possession in a criminal milieu that both Mr. Nur and Mr. Charles were convicted of.

Then there was the limit requested by the Crown, which would have required the reasonable hypothetical to be confined to the kind of offence at stake, with no consideration being given to the personal characteristics of persons who might reasonably by prosecuted for the crime. At the Ontario Court of Appeal level in *Nur*, Justice Doherty had accepted this, interpreting prior Supreme Court of Canada authority as confining courts to the "conduct that includes all of the elements of the offence that triggers the mandatory minimum, but no more. Characteristics of individual offenders, whether they aggravate or mitigate, are not part of the reasonable hypothetical analysis."[72]

Goltz also held that in assessing a reasonable hypothetical a judge is to consider not simply the sentence imposed, but the effect of the sentence.[73] As a result, a judge should evaluate the sentence on the understanding that an accused person is likely to make parole or receive statutory release before serving all of the time imposed. By reducing the sentence in this way, by at least 30% or so, it is more likely to fall within a reasonable range.

Together, these techniques weakened the use of "reasonable hypotheticals" to the point where, prior to *Nur*, every *Charter* challenge to the constitutional validity of minimum sentences since 1987 and prior to *Nur* failed, both in the Ontario Court of Appeal and the Supreme Court of Canada.

As indicated, the majority decision in *Nur* did affirm that a reasonable hypothetical case cannot be far-fetched, but it went on to wash away all of these techniques, dramatically increasing prospects of success for challenges to mandatory minimum penalties. Specifically, Justice McLachlin explained that "the question is simply whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some people's situations."[74] This evaluation "is not confined to situations that arise in the day-to-day application of the law" and there is no need for the hypothetical case to be common or even precedented.[75] Nor should courts refrain from imagining hypothetical offenders with personal considerations that bear on the proportionality of a sentence. Of course, courts should avoid

[72] *Ibid* at para 142, aff'd in the result 2015 SCC 15.
[73] *R v Goltz* [1991] 1 SCR 485 at 500, and see *R v Morrissey* [2000] 2 SCR 90 at para 41.
[74] *Nur, supra* note 63 at para 57.
[75] *Ibid* at paras 68 & 72.

striving to construct the most innocent and sympathetic accused imaginable. They are to use common sense in anticipating who might be caught up in the sentencing provision.[76]

And as the *Nur* majority's own hypothetical cases illustrate, it is not necessary for a reasonable hypothetical to reflect the mode of offence committed by the accused. At issue is the sentencing provision at large. The Court's own precedent in the *R v Brown* case was put aside with a mere footnote reference.[77]

Finally, things such as the prospects of early release on parole should not be factored into the evaluation because it is unknown at the time of sentencing whether an offender will receive early release.[78]

By stripping away impediments to using reasonable hypotheticals, the Court poured new life and vigour into section 12 challenges.

R v Lloyd, [2016] SCJ No 13

Any lingering doubt about the reach of the Court's approach in *Nur* has been removed by the decision in *R v Lloyd*.[79] In this 2016 case the Court once again relied on a "reasonable hypothetical" to strike down a mandatory minimum sentence, specifically, the one year minimum sentence provided for in section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*. This mandatory minimum sentence was to apply to anyone convicted of possession of drugs for the purpose of trafficking in a drug listed in Schedule I of the act, who had a prior conviction for a "designated substance offence" (being any drug offence other than simple possession, in the preceding 10 years).

In a 6-3 plurality, again penned by Chief Justice McLachlin, the Court held that this sentencing provision contravenes section 12 because it can result in grossly disproportionate sentences. For example, given the range of drugs included in Schedule I, the breadth of the definition of trafficking, and the range of seriousness of "designated substance offences", the minimum sentence could have to be imposed on someone who has a prior conviction for trafficking a small amount of marijuana, who now possesses a small quantity of cocaine that they intend to share with a friend. The minimum sentence could also be imposed on a drug addict

[76] *Ibid* at paras 73-75.
[77] *Ibid* at note 1.
[78] *Ibid* at para 98.
[79] [2016] SCJ No 13.

with a prior similar conviction who sold a small amount to feed their habit and who has since overcome their addiction.

In an important passage in the decision the majority stated:[80]

> "As this Court's decision in *R. v. Nur* 2015 SCC 15, [2015] 1 S.C.R. 773 illustrates, the reality is that mandatory minimum sentences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence."

This passage not only brings home how close mandatory minimum sentences challenges are to overbreadth challenges, it hints that many mandatory minimum sentences are apt to be at risk. Indeed, the majority went so far as to suggest that in an effort to comply with section 12 Parliament should narrow the reach of such provisions, or confer discretion on judges to impose a fit sentence in exceptional cases.[81]

This aspect of the *Lloyd* decision provoked a vigorous dissent. Justices Wagner, Gascon and Brown protested that prior Supreme Court of Canada authorities would permit section 12 challenges to succeed only in rare cases. The dissenting Justices urged that the kind of cautious approach that had been in place is needed to acknowledge Parliament's legitimate role. They found the hypotheticals used by the majority to be either far-fetched, or unconvincing as examples of gross disproportionality. Ultimately, they protested that "few mandatory minimums can survive the scrutiny exemplified by the Chief Justice's reasons on s.12," and that this represents a departure from the Court's prior jurisprudence.[82]

ii. The Constitutional Standard is about Gross Disproportion, not Simple Disproportion

Prior to the 2015-2016 period there were signs that an even more aggressive constitutional standard was developing, namely, recognition that section 7's principles of fundamental justice require all sentences to be proportional. If this standard was to be adopted, it would create decidedly more stringent constitutional limits on sentencing provisions. This development would also render section 12's "gross disproportionality" standard moot, since

[80] *Nur, supra* note 63 at para 3.
[81] *Ibid* at paras 3, 35-36.
[82] *Ibid* at para 106.

sentencing laws would contravene section 7 at a point well before they would violate section 12's more guarded standard.

In *R v Malmo-Levine*,[83] the Supreme Court of Canada had said, in a different context, that it would be doctrinally incoherent for section 7 and section 12 to hold different proportionality standards. In spite of this, the notion that the principles of fundamental justice require only that any deprivations of liberty be proportional was achieving momentum. It was fueled by expressed recognition by Justice Lebel in *R v Ipeelee*[84] and by Justice Moldaver, in *R v Anderson*,[85] that proportionality is a principle of fundamental justice.

Safrazadeh-Markhali 2016 SCC 14, and *R v Lloyd*, *supra*

In two cases that came before the Supreme Court of Canada in 2015-2016, the Court considered the role that section 7 plays in limiting the harshness of sentencing laws.

In *R v Lloyd*, Mr. Lloyd argued that he could rely on section 7 to challenge the minimum sentence as disproportionate, without establishing it to be grossly disproportionate.

In *R v Safarzadeh-Markhali*,[86] the issue was more subtle. There the Ontario Court of Appeal found that a provision in the *Truth in Sentencing Act* that prohibited judges from giving "enhanced credit" for time served in custody before sentencing violated section 7. This was because the *Truth in Setencing Act* would have the effect of requiring individuals to serve longer in custody than they would if they had not been denied bail, simply because a justice at a bail hearing endorsed the court record that the accused was denied release because of their prior criminal record. The Ontario Court of Appeal reasoned that the fact a bail judge endorsed on the record that they had denied bail because of the criminal record of the accused has nothing to do with the assessment of a fit and proportional sentence. The legislation therefore presented a realistic risk that a sentencing judge would be impelled to impose a disproportionate sentence, contrary to section 7. The Crown appealed, including by challenging the notion that section 7 protects simple proportionality.

Lloyd, *supra* and *Safrazadeh-Markhali* were released the same day, April 15, 2016. In both decisions the Supreme Court of Canada unanimously ruled that the constitutional standard

[83] [2003] 3 SCR 571 at para 160.
[84] [2012] 1 SCR 433.
[85] 2014 SCC 41.
[86] [2014] ON No 4194.

is gross disproportionality under section 7 and section 12, putting an end to the suggestion that *Charter* challenges can be brought in cases of simple disproportion between crime and sentence.

The policy reasons for this outcome are clear, namely, (1) ensuring doctrinal coherence between sections 7 and 12, which both share the mission of protecting principles of fundamental justice, and (2) showing deference to Parliament to pursue sentencing policy. Determinations of proportionality can be subjective, so permitting this standard would support an aggressive constitutional jurisprudence. By insisting on gross disproportion, judicial interference is limited to clearer cases.

In spite of the sense in this, the decision to deny constitutional stature to the principle of proportionality is, doctrinally, intriguing. This is because the Supreme Court of Canada had developed a test for identifying principles of fundamental justice,[87] and by the standards of that test, the principle of proportionality clearly qualifies. Indeed, if the criminal justice system is examined to identify what sentencing principles are considered to be fundamental to justice, the notion that a just sentence is a proportionate sentence is perhaps the most obvious candidate. For this reason, section 718.1 of the *Criminal Code* describes proportionality as "the fundamental principle of sentencing," and, not surprisingly, in *R v Ipeelee* Justice Lebel called proportionality a *sine quo non* of a just sentence.[88]

The Court did not, however, apply its usual test for discerning principles of fundamental justice in either *Lloyd*, *supra*, or *Safardazeh-Markhali*, *supra*. Instead, in *R v Lloyd*, *supra* the majority judgment said, for the first time, that "the starting point … [is] that the principles of fundamental justice must be defined in a way that promises coherence within the *Charter* and conformity to the respective role of Parliament and the courts."[89]

This passage is surprizing. The former reason – coherence – does not support either the proportionality or gross disproportion standards. It simply calls for consistency.

It is the latter consideration that is intriguing and potentially ground-breaking. The reference to conformity to the respective role of Parliament and the courts is a nod to deference or restraint in identifying principles of fundamental justice. Yet deference has never been allowed to influence the content of the principles of fundamental justice. As Justice Abella said

[87] As indicated above, the test for identifying principles of fundamental justice is explained in depth, and with clarity, in *Canada (Attorney-General) v Federation of Law* Societies 2015 SCC 7, at paras 87-103. All of the characteristics of that test are easily met when applied to the principle of proportionality.
[88] *R v Ipeelee*, *supra*.
[89] *R v Lloyd*, *supra* note 79 at para 40.

in *Saskatchewan Federation of Labour v Saskatchewan*, "In the context of constitutional adjudication, deference is a conclusion, not an analysis…. If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?"[90] For this reason, deference has typically been brokered through section 1.

Ultimately, the Supreme Court of Canada concluded in *Safardazeh-Markhali* that proportionality is a fundamental sentencing principle, but not a principle of fundamental justice. Further guidance is awaited on how the line will be drawn between fundamental principles that are constitutionally protected, and fundamental principles that are not.

It may therefore be that the long-term significance of *Lloyd* is not its impact on mandatory minimum sentences, but its influence on the way principles of fundamental justice are identified in light of their need to conform to the respective roles of Parliament and the courts.

e. Confining the Reach of the test for determining Métis Status

Daniels v Canada (Indian Affairs and Northern Development) 2016 SCC 12

The term "Métis" was used to describe a historic community of persons of French-Indian blood who lived in Manitoba's Red River Settlement. It has now come to describe anyone with mixed Aboriginal and non-Aboriginal heritage.

The *Daniels* case, is a unanimous 2016 decision of tremendous significance to Métis peoples, and to Canada generally. The *Daniels* Court has declared that Métis are "Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*. This means that the Federal government has legislative and executive responsibility not only for Indians, but also for Métis. Prior to Daniels, the Federal Government had not accepted this. Meanwhile, provinces refused to address Métis claims, saying they fell under federal jurisdiction. This had left the Métis in a "jurisdictional wasteland."[91]

While the holding that Métis are "Indians" within the meaning of section 91(24) does not require the Federal government to pass any specific laws, historically section 91(24) has resulted in extensive legislation and government initiatives supporting status Indians. The Federal

[90] *Sask*, *supra* note 39 at para 76.
[91] *Daniels v Canada (Indian Affairs and Northern Development*), 2016 SCC 12 at para 14 [*Daniels*].

government will now be under tremendous pressure to make similar accommodation for Métis people and non-status Indians.

The *Daniels* Court also affirmed that Métis' status as Indians carries with it an obligation on the Federal government to consult and negotiate in good faith with Métis on matters affecting their interests, as well as fiduciary obligations on the part of the Federal government towards Métis. The power of the Métis in Canada's constitutional democracy has been elevated significantly.

The legal reasoning in this remarkable decision is generally unremarkable. The Court reasoned that "historical, philosophical and linguistic" examination, including a review of the past-practices of the Federal government itself (including with the residential school system) shows that "'Indians' in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis."[92] This holding found support in reasoning employed by the Supreme Court of Canada in other cases dealing with distinct, but related issues.[93]

The only legal dexterity required in achieving the *Daniels* holding called for the Supreme Court of Canada to distinguish one of its earlier decisions, *R. v. Blais* [2003] 2 S.C.R. 236, that had held that the term "Indian" did not include "Métis" in a constitutional agreement, and the awkward fact that section 35 of the *Constitution Ac*t speaks disjunctively of "Indian, Inuit, and Métis."

Blais could be sidestepped because the Court in that case had stated expressly that it was not ruling on whether "Indian" in section 91(24) includes Métis, and the methods of interpreting constitutional agreements differ from those used in interpreting the Constitution itself.

As for the claim that the distinction between "Indian" and "Métis" in section 35 should prevent "Indian" from including "Métis" in section 91(24), the Court had already overcome this with the ruling in *R v Sparrow*,[94] that the provisions should be read purposively, and together in an integrated way. This principle displaces the usual practice of assuming that if an expression is used differently in legislation, it must mean different things.

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[92] *Ibid* at para 19.
[93] *Reference as to whether "Indians" in s.91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Québec,* [1939] SCR 104; and *Attorney General v Canard,* [1976] 1 SCR 170.
[94] [1990] 1 SCR 1075.

Of interest, even though the issue did not have to be resolved, the Court also confined the reach of its earlier decision in *R v Powley*,[95] which had set out a test for individuals claiming Métis status. *Powley* dealt with the prosecution of a man charged with violating a hunting regulation who claimed to be exempt from the legislation because he was Métis. He succeeded, even though only 1/64th Métis by blood. The *Powley* Court set out a three-part test for identifying Métis:

1. Self-identification as Métis
2. An ancestral connection to an historic Métis community; and
3. Acceptance by the modern Métis community.

The *Daniels* Court held, however, that, for the purposes of section 91(24), the "acceptance by the modern Métis community" component of the test does not apply. It reasoned that section 35 of the *Constitution Act*, the section at issue in *Powley*, "is about protecting historic community-held rights" and therefore calls for a community acceptance test.[96] Community acceptance is not material under section 91(24), which therefore extends its protection to persons no longer accepted by their communities.

The *Daniels* decision is therefore significant in its own right. Doctrinally, it also illustrates how non-confining prior precedents can be. It shows how, in matters of purposive interpretation, familiar legal techniques can be pushed aside, to the point that both the term "Indian" and "Métis" now have distinct meanings within the Constitution, depending upon the section at stake.

IV. Other Notable Cases

a. Aboriginal Law

There have been two important cases addressing aboriginal issues during the relevant period, *Daniels v Canada (Indian Affairs and Northern Development)*, just discussed, and *R v Kokopenace* 2015 SCC 28.

[95] [2003] 2 SCR 207.
[96] *Daniels*, *supra* note 91 at para 49.

R v Kokopenace, 2015 SCC 28.

Kokopenace is not, strictly speaking, an aboriginal law case. It is about how the *Charter* protects the representativeness of a criminal jury. The case deals, however, with the alleged underrepresentation of aboriginals on juries, a general problem in the administration of justice. In dissent, Justice Cromwell urged that the case is ultimately about the "dissonance between traditional Aboriginal approaches to conflict resolution and the approaches of the criminal justice system."[97] It is also, he said, about racial discrimination and Aboriginal alienation, and the state obligation to find solutions. From that lens, he would see the majority decision in *Kookpenance* as a defeat for aboriginal interests and equality.

Mr. Kokopenance, an aboriginal, was charged with murder, but convicted of manslaughter by jury. He later discovered that the jury list compiled by Ontario to summon jurors to the jury pool from which the "petit jury" of 12 would be chosen grossly underrepresented aboriginal persons in his Northern Ontario region of Kenora. The *Juries Act*,[98] calls for the list of potential jurors to be complied from property tax assessment rolls, with the exception of jurors from aboriginal reservations, who are summoned under section 6(8) of the Act. That exception authorizes Ontario to obtain the names of the inhabitants of an Indian reserve from any records available. Ultimately, the lists Ontario had collected were out of date, and omitted four of thirty-two district reserves. Approximately one-third of the juror cards mailed to the reserve were retuned for want of a correct address, and the response rate from the balance of the cards was so low that only 4.1 percent of the potential jurors on the roll were aboriginal, despite that aboriginals made up 30% of the regional populace.

Upon discovering this, Mr. Kokopenace appealed his conviction, claiming that his constitutional right to a fair trial, assured by section 11(d) of the *Charter*, and his right to a jury trial, assured him by section 11(f) of the *Charter*, were violated because the jury pool from which his jury had been selected was not representative. A majority of the Ontario Court of Appeal allowed his appeal and ordered a new trial. In *R v Kokopenace* a 7-2 majority of the Supreme Court of Canada disagreed, upholding Mr. Kokopenace's conviction.

[97] *R v Kokopenace*, 2015 SCC 28 at para 279 [*Kokopenance*].
[98] RSO 1990.

Justice Moldaver wrote the majority decision. The majority concluded that the constitutional demands for a representative jury had been met because Ontario had created a system in which a fair opportunity was given to a broad cross-section of the community, including aboriginals, to participate in the jury.

Mr. Kokopenace had attempted to challenge the underrepresentation of aboriginals in the jury pool, rather than in his own jury, because the Supreme Court of Canada had already rejected a constitutional requirement of proportionate representation in the jury itself.[99] Justice Moldaver took from this and related authority, as did every other member of the Court, that the *Charter* does not assure the composition of the jury pool either.[100] In evaluating representativeness a results-based test is therefore inappropriate. He concluded, again as all other members of the Court did, that the right to representativeness of juries housed in the *Charter* focuses not on actual jury composition but on the manner in which the jury is selected.

The relevant contribution section 11(d), the fair trial right, makes is to assure juror independence and impartiality, as viewed through the eyes of a reasonable person. So long as the State provides for a fair opportunity for a broad cross-section of society to participate in the jury process, a reasonable person would not apprehend partiality, bias or discrimination in the process used. The representativeness demands of section 11(d) would therefore be satisfied.

The majority recognized that "representativeness" plays a more robust role under section 11(f)'s right to a jury trial.[101] Since "representativeness" legitimizes the role of the jury as the "conscience of the community" it is a necessary component of that right.[102] Even under this provision, however, representativeness is not about assuring the ultimate composition of the jury. It is about the process by which the jury is selected.

Justice Moldaver therefore concluded that the constitutional test for representativeness of a jury is:

> "whether the state provided a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will have been provided when the state makes reasonable efforts to: (1) compile the jury roll using random selection from lists that draw on a broad cross-section of society, and (2) deliver jury notices to those who have been randomly selected. In other words, it is the act of casting a wide net that

[99] *R v Biddle*, [1995] 1 SCR 761.
[100] *Kokopenace*, *supra* note 97 at para 40.
[101] The right to a jury trial is provided to those who are charged, other than in a military court, with an offence carrying five years in prison or more.
[102] *Kokopenace*, *supra* note 97 at para 55.

> ensures representativeness. Representativeness is not about targeting particular groups for inclusion on the jury."[103]

Nor is there any obligation on the State to act when there are low response rates from a particular community. To expect this would go beyond the constitutional assurance of a fair opportunity to be included, and would come perilously close to interfering in the composition of the jury.[104]

The majority therefore concluded that the Ontario Court of Appeal decision in *Kokopenace* had to be set aside. The Ontario Court of Appeal had applied the wrong test of representativeness by looking at the ultimate makeup of the jury roll, as opposed to the process used to compile it. They also erred by using "[section] 11 *Charter* rights as a vehicle for repairing the long-standing rupture between Aboriginal Canadians and Canada's justice system."[105] The right to a jury is an individual right, connected to trial fairness, and has nothing to do with Aboriginal inclusion in the justice system.

When Justice Moldaver's test for evaluating the efforts that Ontario took to improve its jury lists was applied, the majority concluded that while those lists were imperfect, and the use of the mail system problematic, Ontario's efforts were reasonable. The inadequacy of the list and the delivery problems this posed was the result of numerous challenges outside of Ontario's control.[106]

In dissent, Justice Cromwell, with Chief Justice McLachlin's concurrence, protested that even though the focus when evaluating "representativeness" is on the process used to select jurors, the results of the process should be considered in evaluating representativeness. Where, as here, the results show a significant departure from a properly conducted random selection process, the Courts should act.[107] The dissenters took issue with the majority position that merely providing a "fair opportunity" to achieve representativeness is enough. Justice Cromwell said, "We do not speak of a 'fair opportunity' to have a fair trial or an 'invitation' to be free from unreasonable searches and seizures."[108] The *Charter*, the dissenters said, must be seen to protect

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[103] *Ibid* at para 61.
[104] *Ibid* at paras 122-124.
[105] *Ibid* at para 101.
[106] Justice Karakatsanis concurred in the result but would have applied a slightly more exacting test in which a *Charter* violation could be grounded in "unintentional but substantial exclusion" of a group from the jury pool: *Ibid* at para 134.
[107] *Ibid* at para 233.
[108] *Ibid* at para 249.

representativeness itself, albeit through the proxy of random selection, not just a chance at representativeness.

In the opinion of the dissenters, the *Charter* assures two relevant things. "First, the lists from which random selection will be made must be substantially representative of the district…. [This will only be achieved] if the list of people to whom notices are sent is as complete and accurate as possible and is substantially similar to a random selection among all potentially eligible jurors in the district."[109] "Second, the group of eligible persons who return the questionnaires must be substantially similar to a random sample of the list."[110]

In this case, the jury roll disclosed a "substantial departure from what random selection among all potentially eligible jurors in the district would produce," missing, as it did, close to 30% of the population, overwhelmingly aboriginals. The *Charter* was therefore breached, in the view of the dissenters, by "the failure to assemble a representative jury roll."[111] This was brought about, they said, by (1) the inadequacy and incompleteness of reserve lists, (2) the failure to ensure delivery by not evaluating the number of returned notices, (3) the failure to take all reasonable steps to attempt to address the low rate of return of delivered jury questionnaires, and (4) the failure to take steps to address Aboriginal disengagement in the legal system. The former two factors were matters within Ontario's power, and the latter two it had some capacity to address, but failed to make reasonable efforts to do so.[112]

Kokopenace is a useful general authority on the representativeness component of the right to a jury trial. Its greatest significance, however, is the majority's conclusion that the *Charter*'s trial guarantees cannot be used to attempt to redress Aboriginal displacement in the criminal justice system, and that the State has no obligation arising from those provisions to take steps to encourage Aboriginal participation, or address Aboriginal disengagement.

b. Constitutional Remedies

Henry v British Columbia (Attorney General), 2015 SCC 24

Mr. Henry was convicted of numerous sexual offences, and served 27 years in prison. In the meantime, another man was convicted, with the use of DNA, for remarkably similar offences

[109] *Ibid* at para 246.
[110] *Ibid* at para 247.
[111] *Ibid* at para 259.
[112] *Ibid*. at para 287.

committed in the same area as Mr. Henry's alleged crimes, while Mr. Henry was in custody. This man had been a suspect in the offences Mr. Henry was convicted of before Mr. Henry was on police radar. As a result, Mr. Henry was ultimately vindicated and a review of his convictions was called. That review showed that the police and prosecutors had not disclosed important evidence that would have been of assistance to Mr. Henry in discrediting the eye witness identifications.[113]

Mr. Henry sued civilly. Included was a claim for damages based on the violation of his *Charter* rights, pursuant to the *Charter*'s remedies section 24(1), the provision that empowers judges to grant the remedy they consider "appropriate and just in the circumstances."

The Supreme Court of Canada had already provided guidance on when damages can be provided by way of *Charter* remedy, in *R v Ward*.[114] The *Ward* test has four steps:

(1) The applicant must establish a *Charter* breach by the state;
(2) The applicant must establish that damages would serve at least one of the functions of compensation, vindication or deterrence;
(3) If (1) and (2) are established, the onus shifts to the state to show that there are countervailing considerations (such as alternative remedies or good governance concerns) that would make *Charter* damages inappropriate and unjust; and
(4) Finally, if the government fails to establish that the countervailing considerations make *Charter* damages inappropriate or unjust, the last step in the *Ward* analysis is to determine the quantum of damages.[115]

The *Henry* case came to the Supreme Court of Canada on the issue of the sufficiency of Mr. Henry's civil pleadings relating to the *Charter* remedy being claimed. The Crown urged that the appropriate test for damages involving decisions made by the prosecuting Crown was not the *Ward* test, but is to be found, instead, in the Court's malicious prosecution case law dealing with actionable misuse by prosecutors of their discretion to bring or continue charges. The Crown contended that, applying this standard, Mr. Henry's pleadings required an allegation of malice and the presentation of an evidentiary foundation for a finding that the Crown prosecutor had, indeed, acted "with malice."

To be clear, proof of malice requires more than intent. It requires that the defendant act for "a primary purpose other than of carrying the law into effect," in other words, through "a

[113] It is surprising that Henry had been convicted in the first place, even on the evidence that was before the court. The photo of Mr. Henry used in the photo lineups leading to his identification included an officer holding a reluctant Mr. Henry in a headlock so his picture could be snapped.
[114] 2010 SCC 27.
[115] *Henry v British Columbia (Attorney General)* 2015 SCC 24 at para 107 [*Henry*]

willful and intentional effort on the Crown's part to abuse or distort its proper role in the criminal justice system." If the Crown position carried the day, damages could not be awarded even in cases of a failure to make disclosure because of gross negligence, or even based on well-meaning but intentional non-compliance.[116]

All judges of the Supreme Court of Canada rejected the Crown's position, distinguishing the Court's malicious prosecution authority. The Court explained that its malicious prosecution case law calls for proof of malice to make out a cause of action because charging decisions involve highly discretionary judgment, necessitating a cautious standard so that the public interest in "good governance" can be promoted. By limiting the opportunity to challenge charging choices, the risk of a chilling effect on prosecutorial judgment is reduced, as is the chance that prosecutors will be distracted from their function by defending civil suits.

Meanwhile, failure to disclose evidence is different. There is little discretion to be exercised by prosecutors in the disclosure context since prosecutors have a constitutional obligation to disclose the entire fruits of the investigative file, other than material that is clearly irrelevant or privileged.[117] They also have a duty to request other relevant information from government agents if they are put on notice that such information exists. If relevant information is received upon inquiry, it too must be disclosed. [118] The Court reasoned that since duties rather than a discretion is at stake, a less guarded damages standard is appropriate for unconstitutional non-disclosure.

The Court split 4-2, however, on how less guarded the test for damages should be. Chief Justice McLachlin and Justice Karakatsanis wanted the *Ward* test to apply. The majority did not agree, with Justice Moldaver authoring the majority decision.

The test to secure damages for unconstitutional non-disclosure adopted by the majority requires the claimant to prove, on the balance of probabilities, that: (1) the prosecutor intentionally withheld information; (2) the prosecutor knew or ought reasonably to have known that the information would be material to the defence and the failure to disclose would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her *Charter* rights; and (4) he or she suffered harm as a result.[119]

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[116] *Ibid* at 45-48.
[117] *R. v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*]; *R v Mills*, [1999] 3 SCR 668 at para 5.
[118] *R v McNeil*, 2009 SCC 3, cited at *Henry, supra* note 115 at para 86.
[119] *Ibid* at para 85.

Of these requirements, the third is, in fact, redundant. A non-disclosure *Charter* breach will always be established in cases where the other 3 prerequisites are met. This is because all that is needed to prove such a breach is to show that non-disclosure occurred and that there is a reasonable possibility that non-disclosure could have affected the reliability of the result reached or the overall fairness of the trial process.[120] These things are subsumed in the other three components of the majority's damages test.

The second requirement, that non-disclosure be intentional, is a hurdle, to be sure, but it is not as onerous as appears. The majority recognized an informal rebuttable presumption that non-disclosure is intentional if the non-disclosed information was in the prosecutor's possession.[121] Most information that must be disclosed will be in the prosecutor's possession. This presumption will apply to all non-disclosure *Charter* breach claims, therefore, except those arising from the failure of the police to fulfil their duty to share the fruits of their investigation with the police.[122]

Requirements 2 and 4, in contrast, are steep requirements. As indicated, a non-disclosure *Charter* breach can be established by showing a reasonable possibility that the non-disclosed material could have affected full answer and defence. Yet requirements 2 and 4 insist on more; simply having a right that has been violated, does not mean that a damages award will follow. Specifically, to secure damages for a non-disclosure breach, interference with full answer and defence must not only be a reasonable possibility, it must be foreseeable that non-disclosure would likely impinge on full answer and defence. More importantly, damages are based not on the reasonable possibility of harm the way the *Charter* right is, but as with civil damage awards, on actual established harm.

Justice Moldaver explained that the harm he was contemplating can include wrongful conviction; overturned convictions because of non-disclosure; or delay in the termination of a prosecution that has been ended by stay or withdrawal.[123] Although the majority did not say that these illustrations were exhaustive, the list of examples where non-disclosure damages can be

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[120] *R v Dixon*, [1998] SCJ No 17. The test is worded in the past tense because *Charter* claims only become relevant at the appeal stage, where a *Charter* claim is needed to secure an appellate remedy. At trial the accused need not invoke the *Charter*, relying instead on the common law disclosure test *Stinchcombe*, *supra* note 117.
[121] *Henry*, *supra* note 115 at para 86.
[122] By focusing only on disclosure the *Henry* Court does not address if or when damages can be imposed for the Crown's failure to comply with its constitutional obligation to request relevant information not in its possession.
[123] *Henry*, *supra* note 115 at para 96.

obtained does not include non-disclosure in the case of those who are ultimately convicted, or those whose convictions have been overturned for reasons unrelated to non-disclosure.

The majority explained that they imposed these significant restrictions because of the public interest in discouraging a flood of litigation, including for inconsequential errors. A more aggressive damages regime would chill prosecutors from properly vetting disclosure, and distract them from other duties.

For their part, Chief Justice McLachlin and Justice Karakatsanis found no reason why countervailing "good governance" considerations should not be handled under the *Ward* test, where they have to be established on a case-by-case basis, context specific basis by the Crown.

c. Evidence Cases

Two decisions rendered during the period under consideration will have a material impact on the law of evidence. Of the two, *White Burgess Langille Inman v Abbot and Haliburton* 2015 SCC 23 is more significant, but *R v Lacasse*, 2015 SCC 64, could affect the way the law of judicial notice is applied.

White Burgess Langille Inman v Abbot and Haliburton, 2015 SCC 23

The Supreme Court of Canada has long recognized not only the inevitability and utility of expert evidence, but also the risks it presents. During the 1980's and early 1990's, in particular, there were a rash of cases where witnesses were presented as experts, yet offered unreliable evidence. The law of evidence gradually adapted to deal with this.

In 1994, in *R v Mohan*,[124] a decision inspired by American authority, the Court offered a structured approach to use in determining whether expert evidence will be admitted. Judges were made gatekeepers against expert evidence, responsible for ensuring that expert evidence is worth hearing, given the costs it can present.

These costs include the risk that unreliable evidence presented by an expert will go undetected because of the specialized knowledge needed to evaluate the subject, or the impenetrability of jargon, or the seduction of the expert's credentials.

[124] [1994] 2 SCR 9.

There are also risks to the adversarial system when expert evidence is received, since expert evidence can steal the focus, take significant time to present, and raise access to justice issues for underfinanced or poorly represented litigants.

To deal with this the *Mohan* Court required judges, as part of their gatekeeping role, to ensure that expert evidence is admitted only if it is: (1) relevant, (2) necessary, (3) does not violate any other exclusionary rules, and (4) is presented by a qualified expert. The concept of "relevance" identified required more than a demonstrated logical connection. The judge was required to balance the costs and benefits of the evidence to see if it was "relevant enough" – or sufficiently probative - to receive.

There were two weaknesses in the *Mohan* test, as it developed. First, the *Mohan* cost-benefit analysis became clumsy. Over time, the Supreme Court went beyond asking whether the evidence was relevant enough to admit, and invited judges to consider whether the evidence was needed badly enough to warrant its costs. Judges were also to consider, even where the four-part test is met, whether as a matter of discretion the evidence was worth receiving given the costs and benefits it presented. Simply put, judges were asked to consider cost-benefit considerations redundantly. As indicated, the test had become clumsy.

The second weakness in the *Mohan* test is that it paid no dedicated attention to what may be the most pressing problem with expert witnesses, namely, partiality and lack of independence. Experts who are presented are sometimes closely connected to the litigation, and even when they are not, they often appear to act as advocates, rather than persons with special training whose information would be received to assist the court. Beyond asking whether the evidence was relevant enough to admit – which carries an inherent threshold reliability inquiry – the *Mohan* test did not give guidance on how to deal with "hired gun" experts.

Both of these problems were corrected in the civil litigation case of *White Burgess Langille Inman v Abbot and Haliburton,* 2015 SCC 23 [herein *Abbot*].[125] *Abbot* involved an attempt by a company to sue its auditors for defective work said to have caused loss to the company and its shareholders. When the defendant auditors brought a motion for summary dismissal of that action, the plaintiff company responded with an affidavit from a member of the audit firm that had identified the allegedly defective work. The defendant auditors argued that

[125] A civil litigation case rarely becomes an important evidence law precedent in Canada, given that major developments in the law of evidence tend to occur in criminal cases.

the affiant was not independent, as the firm he worked for had discovered the error and stood to gain by claiming that the defendant auditors were incompetent. That firm also stood to be sued themselves, if their audit opinion proved wrong in the litigation. The plaintiffs asked that the expert's evidence be excluded because of bias or partiality. The trial judge agreed that the *Mohan* test accommodates exclusion as a remedy for bias and partiality, and excluded the affidavit containing the expert testimony.

The case, of course, made its way to the Supreme Court of Canada, and during the course of its decision the Court took the opportunity to tidy up the *Mohan* analysis. It held that the test for the admissibility of expert evidence should be taken in two steps. First, the party calling the evidence must satisfy each of 4 *Mohan* elements as fixed threshold requirements. It must prove that the evidence: (1) has "relevance", (2) is "necessary", (3) there is an "absence of an exclusionary rule", and (4) "a properly qualified expert." It is not proper to do a cost-benefit analysis at this stage, so "relevance" now means nothing more than logical relevance. The *Abbot* Court also made clear that the "necessity" component is not met by mere helpfulness, a point that had become obscure in some appellate authority.[126]

If these 4 threshold prerequisites - relevance, necessity, absence of an exclusionary rule, and a qualified expert - are established, then a cost-benefit analysis is undertaken as the second stage in determining admission; "As the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks." In this way, the *Abbot* decision cleans up the general test for admitting expert evidence.

The *Abbot* Court also fixed the failure of *Mohan* to address directly the problem of advocate experts. It began by recognizing that experts have a special duty at common law to assist the court by giving fair, objective and non-partisan evidence.[127] The Court then recognized, for the first time, that the failure of the expert to live up to that duty can cause expert evidence to be excluded, and exclusion can take place at either step in the analysis.

[126] *White Burgess Langille Inman v Abbot and Haliburton* 2015 SCC 23 at para 23.
[127] *See ibid* at paras 2, 10, 26 and 31.

At the first stage, a witness will not qualify as an expert if they are unable or unwilling to fulfil their duty as an expert to give fair, objective, non-partisan evidence.[128] Witnesses who will not or cannot do so are not acting as "experts" and should not be qualified as such.

The *Abbot* Court made clear, however, that exclusion on this basis will not be common. This is because when a witness is presented as an expert, they should be made aware of their duty to be fair, objective and non-partisan.[129] Where the expert acknowledges their duty, a judge need not consider the dependence or partiality of the expert at stage 1 of the admissibility test unless there is a realistic concern, in the circumstances, that the witness may be unable or unwilling to live by that undertaking.

If there is such basis for concern, the party calling the evidence must establish that the expert is able and willing to live up to their duty. If an expert witness passes this threshold, a trial judge may still exclude their evidence at stage 2, after assessing whether, in all of the circumstances, the benefit of the expert evidence will outweigh its costs, including the risk or unreliability presented by bias or dependency concerns.[130]

Even where the evidence of an expert witness has passed these two hurdles, interest or partiality concerns should not be disregarded. The fact-finder should take this into account in weighing the evidence.

In *Abbot*, when these rules were applied, it was found that the evidence of the auditor should not have been excluded because the risk of bias raised by the dependence of the expert, and interest of his corporation, was not intense enough to meet the "particularly onerous" standards for exclusion. This should have been a factor to use in weighing his evidence. The trial judge erred by denying the plaintiffs access to the affidavit.

Abbot, therefore, is an important case in the law of evidence. It (1) modifies the *Mohan* test, as described, (2) confirms that the standard is necessity, not merely helpfulness, and (3) it arms judges with a direct tool for addressing the problem of "hired gun" experts.

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[128] *Ibid* at para 10.
[129] *Ibid* at para 10. Some Canadian jurisdictions have statutory rules or rules of the court that already require this, but the common law now imposes this requirement generally.
[130] *Ibid at* para 543.

R v Lacasse, 2015 SCC 64

"Judicial notice" is the mechanism the law uses to accept a fact or matter without proof. Judicial notice issues can arise in several contexts. A court may be asked to resolve a factual issue to be adjudicated between the parties by taking judicial notice of that fact ("judicial notice of adjudicative facts"). Or a court may be asked to accept, as true, a fact that can give context to the application of a legal standard ("judicial notice of framework facts"). Or a court may be asked to accept a fact as true that is useful in the interpretation or development of the law ("judicial notice of legislative facts"). In Canada the legal test for taking judicial notice is said to be the same, regardless of the nature of the issue, although the test is applied with more intensity for adjudicative facts, and imposes a higher standard for more dispositive facts than for incidental findings.

That generic test requires that judicial notice should be taken only of a fact that is so generally known and accepted in the community that it cannot reasonably be questioned, or of any fact or matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned.[131] These standards speak to two concerns. First, the fact must objectively be true before a judge acts on it without evidence. Second, the fact must be "accepted in the community" or verifiable by trusted sources so that the appearance of justice is observed; this is because if a fact is broadly known to be true, the impartiality of the judge will not be questioned simply because they accepted that fact without evidence.

R v Lacasse 2015 SCC 64 raised the question of whether a trial judge can take judicial notice of the prevalence of a kind of crime in the community, in the sentencing context. The issue was raised because the trial judge had concluded, without any evidence and without notice to the parties, that there was a scourge of impaired driving in the Beauce district of Québec. He then went on to comment that drunk driving appeared to be trivialized there more than elsewhere. The sentencing judge then imposed a deterrent, denunciatory sentence.

Notably, all 7 judges sitting on the case agreed that a judge can, for sentencing purposes, take into account the prevalence of an offence in the community where they are sitting. This decision settles a controversy. In *R v Priest*,[132] for example, the Ontario Court of Appeal ruled

[131] *R v Spence*, 2005 SCC 71 [*Spence*].
[132] [1996] OJ No 3369.

that this is not proper, while in *R v Provost*,[133] the Newfoundland and Labrador Court of Appeal held otherwise.

Not only did all of the Supreme Court of Canada judges find it to be permissible to take judicial notice of the prevalence of a crime in a community, a 5-2 majority of the Court held that once the sentencing judge draws this conclusion about the prevalence of the offence, it is an error of law for an appellate court reviewing the sentence to fail to take this into account, if it falls to them to determine an appropriate sentence.[134]

Justice Wagner wrote for that majority. He explained the entitlement of sentencing judge to take judicial notice of the frequency of a type of crime in their community is an example of the principle that "judges can take judicial notice of the contexts in which they perform their offices."[135] "The frequency of impaired driving offences is something that can be determined objectively by consulting the court rolls," public information that is "known and umcontroversial."[136]

Chief Justice McLachlin wrote for the two remaining judges. She agreed that a sentencing judge can take judicial notice of the prevalence of the crime in their community, noting the rules of evidence are applied less strictly in sentencing matters.[137] She did not go beyond this in explaining why this kind of judicial notice is appropriate. This may be because she had other more pressing issues with what the sentencing judge did.

Specifically, she was concerned that the sentencing judge not only took judicial notice of the frequency of the offence in the Beauce Region, he also suggested that impaired driving is trivialized there more than elsewhere. Chief Justice McLachlin felt that it is one thing for a sentencing judge to take judicial notice of what occurs in their own community; it is quite another for a judge to take judicial notice of comparative frequency relative to other communities.[138] She reasoned that before the trial judge took into account something he could

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[133] 2006 NLCA 30.
[134] *R v Lacasse* 2015 SCC 64 at para 104 [*Lacasse*].
[135] This principle is illustrated by the case of *R v Cobham* [1994] 3 SCR 360. There Chief Justice Lamer felt it appropriate for a judge to rely on the fact, repeatedly shown in court, that there is a system of duty counsel in Prince Edward Island. This was known by all concerned to be a "fact," and while this may not be generally known by members of the public at large, it would be known by those who attend courts regularly. In effect, so long as the fact is clearly right, the notoriety component can be met if those who "have taken the trouble to inform themselves" can confirm that this is so (*Spence*, *supra* note 131 at para 65).
[136] *Lacasse*, *supra* note 134 at para 95.
[137] *Ibid* at para 156-159.
[138] *Ibid* at para 158.

not know to be obviously true – the comparative prevalence of the crime in his community – procedural fairness required that he should have informed the parties of his concern and requested submissions.

The majority did not have to resolve these issues because they interpreted the comment about trivializing the offence as a judge simply posing a question "out loud," which did not influence his decision.[139] In *obiter* comments the majority explained that a sentencing judge is free to consult the "rolls" in different districts to achieve a comparison, if they choose, and can make comparative comments if they sit regularly in more than one community.

Lacasse therefore holds that while a sentencing judge can take judicial notice of the frequency of an offence in their district, the ability to make comparative findings is limited.

d. Privacy Cases

i. Criminal Searches

R v Saeed, 2016 SCC 24

Warrantless searches are presumptively unreasonable, in violation of section 8 of the *Charte*r. Exceptions are made for some searches conducted incidental to a lawful arrest. Speaking generally, permissible searches that are truly incidental to the arrest are conducted for a valid law enforcement purpose related to the reasons for the arrest; are conducted reasonably; and occur only where the privacy interests at stake are not so high as to require prior judicial authorization.[140]

Accordingly, officers have long been permitted to conduct searches of legally arrested subjects, including pat-down searches of the person, and searches of the area under the control of the person at the time of arrest, in order to assure officer safety and prevent the destruction or loss of evidence.

In *R v Stillman,*[141] however, the Court held that it would go too far to secure without warrant as incidental to arrest, bodily samples or even dental impressions. The privacy interest implicated by securing bodily samples is so high, and the procedure for taking dental

[139] *Ibid* at para 97.
[140] *R v Saeed*, 2016 SCC 24 at paras 37-38 [*Saeed*].
[141] *R v Stillman,* [1997] 1 SCR 607.

impressions so intrusive, that a warrant should be obtained for such searches, especially given that this kind of evidence is not at risk of disappearing.

After *Stillman* the power of warrantless search incidental to arrest began to grow. In *R v Caslake*,[142] the power to conduct a warrantless search of a motor vehicle linked to an arrested subject, in order to discover evidence of the offence, was recognized. In *R v Monney*,[143] the entitlement of customs agents to conduct "bed pan vigils" of suspected drug smugglers was affirmed. In *R v Golden*,[144] the Supreme Court of Canada even recognized a limited power to conduct strip searches incident to arrest, where there are reasonable grounds to believe that a strip search will yield evidence, or a weapon capable of injuring an officer. Although highly invasive, this kind of search can include manipulation of the genitals and buttocks area, if necessary. And then in late 2014, in *R v Fearon*[145] the Court accepted that officers can also conduct controlled warrantless cell-phone searches of those they arrest, for evidence linked to the crime.

Both *Golden* and *Fearon* were highly controversial decisions. Critics argued that prior judicial authorization should be required before such searches, given the significant privacy interests engaged. In both cases, however, the Supreme Court of Canada opted to permit these kinds of searches after developing rigid quasi-legislative protocols that must be followed.

In *R v Saeed* 2016 SCC 24, the Court has now recognized another significantly intrusive power of search incidental to arrest. Provided detailed guidelines are followed, police may take a penile swab from a lawfully arrested suspect if they have reasonable grounds to believe that doing so will afford evidence. The caveat is that penile swab searches incidental to arrest cannot be used to acquire the accused's own DNA, since a search for this kind of evidence requires prior judicial authorization through a warrant.

These guidelines seek to ensure that penile swabs are not conducted unnecessarily by requiring authorization from supervisory officers, and the preservation of a detailed record for judicial review. The dignity of the suspect should also be respected by informing the suspect, in advance, of the nature, purpose, and authority for the procedure beforehand. The invasion of privacy should be minimized. Generally the swab should be conducted at a police station, by

[142] *R v Caslake,* [1998] 1 SCR 51.
[143] *R v Monney,* [1999] 1 SCR 652.
[144] *R v Golden,* 2001 SCC 23.
[145] *R v Fearon,* [2014] 3 SCR 621.

male officers if the accused is a male, and only the minimum number of persons reasonably required should be present. The accused must be invited to conduct the swab himself, and should remain as covered as possible. Finally, the swab should be conducted in a manner that ensures everyone's health and safety. If the accused does not agree to conduct the swab, it should be taken by a trained officer or medical professional, with minimum force.[146]

Based on the guidelines it had developed, Jusitce Moldaver wrote for a 7-2 majority, that the *Charter* was not violated when a penile swab was secured from Mr. Saeed, a sexual assault suspect, in a case where vaginal penetration was alleged to have recently occurred and where there was no indication that Mr. Saeed had washed himself. All of the guidelines had been respected.

The decision of the majority prompted strong disagreement by Justice Karakatsansis, in her concurring decision, and Justice Abella, who dissented. Justice Karakatsanis's decision, in particular, is a powerful homage to privacy and personal dignity of the kind that characterized Canadian *Charter* law in its formative years.

For her, a genital swab is far too invasive to support a warrantless search regime. She was particularly troubled that it is not possible to carry out the purpose of the search – to test for the complainant's DNA - without also securing without warrant the DNA of the accused, contrary to the Court's decision in *Stillman*. She was not satisfied with the embargo on using the subject's DNA if it is incidentally revealed, that the majority imposed.

Justice Karakatsanis also felt that the search was not conducted reasonably in this case. Mr. Saeed was left handcuffed to a wall in a "dry cell" for 45 minutes to prevent him from destroying any DNA that might be there. This did not trouble the majority, as it was a necessary precaution while waiting for the trained "evidence officer" to return from another call.

Justice Abella agreed with Justice Karakatsanis's opinion that section 8 had been violated, but she parted company with Justice Karakatsanis on the result. Justice Karakatsanis would have allowed the unconstitutionally obtained evidence to be admitted, notwithstanding the breach, and so she agreed with the majority that Mr. Saeed's appeal from his conviction should be denied. Justice Abella would have excluded the evidence and ordered a new trial.

[146] *Saeed, supra* note 140 at paras 73-78. The majority was explicit that while penile swabs are appropriate, vaginal swabs may not be.

Ultimately, Justice Abella and Justice Karakatsanis came to these disparate conclusions primarily because of their different conceptions of how the seriousness of the offence plays into the exclusionary remedy.

For a time, the seriousness of the offence was an important consideration in determining whether the admission of unconstitutionally obtained evidence would bring the administration of justice into disrepute. It seemed anecdotally, for example, that exclusion was unlikely to occur in firearms cases. Some expressed fear that the habit of admitting evidence in particularly serious cases will embolden police to disregard the *Charter* in serious crime investigations, knowing they can do so with impunity.

In *R v Grant*,[147] the Supreme Court of Canada accepted that while the seriousness of the offence can be considered, it cuts both ways. It is true that the more serious the offence, the greater the public interest in deciding the case on the merits. It is also true, however, that the more serious the offence is the more important the constitutional rights of the accused are, given the elevated stakes for the accused facing a more serious charge.

Justice Abella is of the view that this makes the seriousness of the offence a neutral or unimportant factor, and, in her opinion, the trial judge erred by giving the seriousness of the violent sexual offence alleged against Mr. Saeed too much weight as a pro-inclusionary factor.

Justice Karaktsanis recognized that the seriousness of the offence can cut both ways in some cases, but nonetheless used it as a significant pro-inclusionary factor in this case, because the facts were so horrendous:

> "[A]ggravated sexual assault is a serious offence; while society has an interest in a justice system that is beyond reproach when penal stakes are high, this brutal public assault of an adolescent girl was particularly heinous, and society also has a keen interest in the adjudication on the merits." [148]

ii. Privacy and International Agreements

World Bank Group v. Wallace, 2016 SCC 15

World Bank Group v Wallace, 2016 SCC 15 is a Canadian prosecution arising from the allegedly corrupt business practices of the accused individuals, overseas. The charges relate to

[147] *R v Grant*, [2009] 2 SCR 353.
[148] *Saeed*, *supra* note 140 at para 128.

allegations that, in Bangladesh, the accused individuals bribed public authorities to secure a contract. The Canadian investigation that led to the charges began when investigators from the integrity arm of the World Bank (the "INT") tipped off the RCMP, and supplied evidence that led to Canadian search warrants.

In a pre-trial motion, the accused men sought production of the entire INT investigation to assist in bringing a "*Garofoli* Application," in other words, a challenge to the constitutional validity of executed search warrants. To facilitate this application for production the accused men subpoenaed INT officials to bring the documents to court.

The Supreme Court of Canada ultimately and unanimously rejected the entitlement of the accused men to the INT's investigative files. It also held that INT investigators cannot be subpoenaed to bring documents to a Canadian court, or to testify. The accused men would therefore have to conduct their search warrant challenges, and their ultimate defence, using the information the INT had shared with the RCMP, as well as any other evidence gathered by the RCMP. All of this information had already been disclosed to the accused men according to the Canadian law of disclosure.

The case has important implications both for the Canadian treatment of international agreements containing informational and personal immunities, and for the domestic limits that exist in Canadian trials for discovering information to assist in challenging search warrants.

In terms of the international implications, the case deals with agreements generated by the World Bank's "International Bank of Reconstruction and Development" (the IBRD). Those agreements, joined in by Canada, have been implemented in Canada by subordinate legislation (Orders in Council). These agreements exist to facilitate international development projects. In order to enable confidential negotiations, and to permit candid information sharing with international governments, these agreements contain articles that make "the archives of the [World] Bank inviolable," and provide immunity from legal process for employees of the Bank, including of the INT.

The trial judge had read these articles narrowly. He interpreted "archive" as including only historical documents, and constructed the immunity of World Bank employees as a "functional immunity" that applies only where immunity is shown to be necessary for the organization to carry out its responsibilities. He held that by sharing some of their investigation with the RCMP, the INT had waived any privileges that might apply to the balance of the

investigation. Relying on a Canadian doctrine, he ruled that by "benefitting" from the RCMP investigation, the INT implicitly chose to take on the burdens of Canadian law.

The Supreme Court of Canada held that each of these holdings was wrong. According to the *Vienna Convention on the Law of Treaties*, which applies, the articles have to be given their natural interpretation, consistent with their purpose. Given the need to ensure confidentiality for the IBRD to carry out its function, "archive" must be understood as extending to all bank documents.

Moreover, given this purpose and the "sweeping term" "inviolable," only an absolute immunity will suffice. That immunity is not, in law, capable of being waived. Of course, the World Bank and its organizations can share documents with others and give up the immunity, but so long as documents are not released, they are archived, and "free from any form of unilateral interference on the part of a state." Hence, the IRT decision to share some investigative documents does not support an implied waiver.

As for the immunity of INT employees, these personal immunities are subject to waiver, but only expressed waiver. Since there was no expressed waiver in this case, the employees are not subject to Canadian court processes.

In terms of domestic significance, the case makes clear that while a judge has jurisdiction to order a third party to produce relevant documents through an "*O'Connor* Application"[149] for the purpose of supporting a *Garofoli* Application to bring a challenge to a search warrant, the kind of information that can be obtained is limited. The first leg of an *O'Connor* third party record application requires the applicant to demonstrate that the information sought is "likely relevant." Likely relevance has to relate to the use for which the information is sought. It follows that if those records are being sought to enable a warrant challenge, only information relevant to a warrant challenge should be ordered produced. This imposes significant limits on what can be produced because the issue in a warrant challenge is not whether the information relied upon to secure the warrant is true. It is whether the affiant reasonably believed the information relied upon to be true, and whether the information shared to secure the warrant is facially sufficient.

As a result, in this case, even if no immunities and privileges applied, an *O'Connor* Application brought in aid of a *Garofoli* Application is not an appropriate way to seek to obtain

[149] An "*O'Connor* Application," named after the decision of *R v O'Connor* [1995] 4 SCR 411 is Canada's general test to enable a criminal defendant to secure relevant "third party information," being information that is not controlled by the prosecuting Crown agency or the investigating police force as the fruits of the investigation.

the entire investigative file into the truth of a criminal allegation. Only information shown to be reasonably likely to be relevant to the reasonableness of the officer's belief, or the officer's honesty when swearing the affidavit, should be ordered produced for inspection by the Court. Simply put, information that the officer swearing the search warrant did not know about, or did not unreasonably disregard, cannot be secured in a disclosure application linked to a search warrant challenge.

iii. Privacy and Client Documents held by Lawyers

For many years, the Supreme Court of Canada has aggressively protected solicitor-client privilege. In the past four decades, solicitor-client privilege has evolved from a mere rule of evidence to be invoked at hearings, to a constitutionally protected principle of fundamental justice that supports a substantive rule of law capable of significantly restricting searches of all law offices.[150] This aggressive protection has developed because the Supreme Court of Canada sees solicitor-client confidentiality as a cornerstone of the legal system, essential to enjoying the rule of law.

To reflect this, the Supreme Court of Canada has adopted what have come to be known as the *Lavallee* principles. "The core principle is that solicitor-client privilege must remain as close as possible to absolute if it is to retain relevance."[151] As a result, the reasonableness of searches that risk exposing presumptively privileged solicitor-client communications are not to be tested the way that the reasonableness of search powers ordinarily are, namely, by balancing the privacy interest against competing public interest considerations. Instead, a power of search "that interferes with professional secrecy more than is absolutely necessary will be labelled unreasonable."[152]

To assure protection, even though solicitor-client privilege covers only confidential solicitor-client communications, when a search purports to permit access to solicitor-client

[150] See the ground-breaking decisions in *Solosky v The Queen* [1980] 1 SCR 821, and *Lavallee, Rackel, Heintz v Canada (Attorney-General)*, [2002] 3 SCR 209.
[151] *Canada (Attorney General) v Federation of Law Societies* 2015 SCC 7 at para 44.
[152] *Attorney General Canada and Canada Revenue Agency v Chambre des notaires du Québec and Barreau du Québec* 2016 SCC 20 at para 38 [herein, *CRA v Québec*].

communications the law presumes that all communications between a lawyer and client are confidential.[153]

To respect these principles, the *Lavallee* court established a number of restrictions apt to be imposed on searches that threaten to expose solicitor-client privileged information. Where the risk of exposure of privileged information exists, the client should be notified before documents are inspected so that the client can attempt to protect their confidential information. It is not sufficient to depend on the lawyer to defend the client's interests by invoking and defending the privilege since the client should not be expected to rely upon the initiatives of a lawyer who is not retained to represent the client with respect to the search, and who may not entirely share the client's interest. Moreover, law office searches should not be undertaken where there are reasonable alternative ways to secure the information, and documents seized should be sealed before inspection, pending a judicial vetting of privilege. These principles do not represent fixed legal requirements, but they do provide guidance on whether a search power exposing potentially privileged documents is valid.[154]

This past year has been an important one for solicitor-client privilege and the application of these principles. Three 2015 decisions reinforce just how sacred the privilege has become, and how intensely the Supreme Court of Canada protects it. I will begin with *Canada (Attorney General) v. Federation of Law Societies of Canada* [2015] SCC 7 ["*Federation of Law Societies*"] and then describe the litigation in *Attorney General of Canada and Canada Revenue Agency v Chambre des notaires du Québec and Barreau du Québec* 2016 SCC 20 ["*CRA v. Québec Bar*"], and *Canada (National Revenue) v. Thompson* 2016 SCC 21.

Canada (Attorney General) v Federation of Law Societies of Canada, [2015] SCC 7

Following 911, the Federal Government responded with legislative initiatives to counter terrorism and money-laundering. Included was the creation of FINTRAC (the Financial Transactions and Reports Analysis Centre) in the *Proceeds of Crime (Money Laundering) And Terrorist Financing Act* 2000 S.C. 2000, c.17. This enactment and its regulations creates

[153] *Ibid* at para 40.
[154] See *Lavallee*, *supra* note 150 and the summary in *Federation of Law Societies*, *supra* note 151 at paras 43-56.

obligations on financial intermediaries - including lawyers - to collect, confirm the accuracy of, record and preserve designated information about clients and their transactions.

Provisions in the Act also authorize FINTRAC to "examine the records and inquire into the business and affairs" gathered by lawyers under the statute's regime, and to search business computers and print or copy records. This examination can be achieved by demand, or through warrantless entry and physical search of law offices. Meanwhile, search warrants are required to enter home offices.

Section 64 was included in the legislation to provide some protection for solicitor-client privilege. This provision was drafted to permit lawyers to assert the privilege on behalf of their clients; to then seal, identify and retain the subject documents, and to claim the privilege in court within 14 days. If no such privilege claim was made before a court, the documents were to be handed over by the lawyer. The provision purported to make it a crime for the lawyer to fail to comply.

In 2002, the Federation of Law Societies, a national umbrella group for Canada's provincial governing bodies in the legal profession, challenged this legislation in a test case. This was done with the agreement of Canada.

Every level of court found the legislative scheme to be unconstitutional. So, too, did the Supreme Court of Canada. In *Federation of Law Societies*, the Supreme Court of Canada determined, unanimously, that, as drafted, the search provisions are unreasonable, violating section 8 of the *Charter*.

In general, the search powers were problematic because they "give the authorized person licence to troll through vast amounts of information in the possession of lawyers," creating a significant risk that some privileged material will be among the records, without adequate safeguards.[155] As a result, the search provisions in the legislation interfere with solicitor-client privilege more than "absolutely necessary" and are therefore unreasonable.[156]

Specific concerns included (1) that the legislation does not require notice to the client; (2) it requires the lawyer claim a privilege that belongs to the client; (3) the warrantless search powers for law offices permit searches of documents in possession of lawyers whether or not there are alternative means to access the information; and (4) the law enables lawyers'

[155] *Federation of Law Societies*, *supra* note 151 at paras 40-42.
[156] *Ibid* at para 44.

documents to be searched until privilege is asserted by the lawyer. This regime is unreasonable and, since it is not minimally impairing, is not a reasonable limit on the high privacy interest protected by the *Charter*.

Instead of declaring the search powers to be of "no force or effect" in their entirety, the Supreme Court read them "down" to exclude legal counsel and law firms from their reach. Meanwhile, section 64 was declared to be of no force or effect because it would be so complex to fix, requiring intervention amounting to "judicial legislation." The Court considered it better to leave it to Parliament to design the remedy for its deficiencies.

The *Federation of Law Societies* Court also addressed the provisions requiring the creation and retention of client information. Justice Cromwell, writing for 7 of 9 justices, did not have a problem with the concept of requiring collection and retention of information, particularly not by regulatory bodies such as law societies. The particular scheme in this legislation was problematic, however, because it requires lawyers to collect and retain information without providing adequate protection for confidential information. Since lawyers can be jailed for not complying, their liberty is imperilled by the legislation in a way that does not respect "the principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients."[157] As a result, the law violated section 7 of the *Charter* and could not survive as passed, and much of it was struck down.

The most difficult part of Justice Cromwell's analysis was in the identification and articulation of the relevant principle of fundamental justice. He gleaned the relevant principle - that lawyers must have a duty of commitment to their clients - by verifying that it played a role in the legal system, including the common law, statute and international law. Moreover, this principle, precise enough to guide legal reasoning, has long been recognized as essential to maintaining confidence in the administration of justice. There is therefore a strong, widespread consensus that this principle is fundamental to justice. Justice Cromwell reasoned that, given this, it would be contrary to fundamental justice for the state to impose duties that undermine that duty of commitment by having lawyers collect, retain and then share information unrelated to the discharge of the lawyer-client relationship without adequate protection for solicitor client privilege.

[157] *Ibid* at para 84.

The two concurring judges, Chief Justice McLachlin and Justice Moldaver, agreed that section 7 was violated, but they disagreed with the way Justice Cromwell framed the principle of fundamental justice. They took the simpler path of relying, instead. on established recognition that solicitor-client privilege is a principle of fundamental justice that is put at risk, and that is the principle of fundamental justice they used.

Attorney General of Canada and Canada Revenue Agency v Chambre des notaires du Québec and Barreau du Québec 2016 SCC 20; *Canada (National Revenue) v Thomspon* 2016 SCC 21

These cases raise similar issues in the income tax enforcement context. *CRA v Québec Bar* addressed efforts by CRA tax officials to compel some lawyers (including Québec lawyers called "notaries") to disclose client information and documents to assist in enforcing the tax obligations of their clients. *Canada (National Revenue) v Thompson* involved efforts by tax officials to compel Thompson, a lawyer, to provide the accounting records from his law firm so that his own taxable income could be calculated.

Of the provisions in issue, section 231.1(1) authorizes the Minister to require any person to provide requested information and documents, while section 231.7 enables the CRA to secure judicial "compliance orders" if someone fails to make disclosure. Subsection 231.7(b) does not permit compliance orders of documents protected by solicitor-client privilege, as defined in the *Income Tax Act*. That definition includes oral and written communications generally, "except that … an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication." In simple terms, section 231.1(1) compelled lawyers to hand over all client accounting records, which the statute deems not to be privileged.

The litigation in *CRA v Québec Bar* arose when legal regulators sought a declaration that these laws violate the *Charter*. A unanimous Court held that the disclosure demands indeed constituted unreasonable searches, contrary to section 8 of the *Charter*. For reasons that mirror those in *Federation of Law Societies*, it held that the disclosure regime interferes with professional secrecy more than is absolutely necessary. Specifically, it does not require that clients be notified; it leaves lawyers to invoke the privilege; it permits potentially privileged information to be exposed even when unnecessary because there are alternative avenues for collecting the information, and it does all of this without any legislative attempt to mitigate the

impact of CRA's need for tax information about clients and client interests, even though protocols arrived at in settlement of prior cases show this to be possible.

The Court again responded by "reading down" the demand and enforcement order provisions so that they exclude records held by lawyers and notaries. The Court made clear, however, that more restricted legislation could pass constitutional muster.

The unanimous Court in *CRA v Québec Bar* was not so magnanimous with how solicitor-client privilege is defined in the *Income Tax Act*. The definition was struck down in its entirety, as it represented an attempt by Parliament to deem accounting records not to be protected, even though they are inherently capable of revealing confidential communications. Accounting records can disclose client confidences, for example, where those records reveal the client's name in cases where the client sought advice while seeking to protect their anonymity; or where records can include a description of the lawyer's mandate; or reveal litigation strategy. Yet because of the way solicitor-client privilege is defined, a judge would be required to make a compliance order even after identifying privileged information in accounting records. As drafted, the exemption for accounting records was found to be too broad and undefined to survive *Charter* review.

These holdings also put an end to the demand made in *Canada (National Revenue) v. Thompson* to have Mr. Thompson provide his law firm's accounting records to assist in computing Mr. Thompson's taxable income. Again, the decision was unanimous.

In coming to this conclusion Justices Wagner and Gascon recognized that a lawyer's accounting records may be required to verify their taxable income. Still, this legislation granted access that was too generous because it failed to safeguard privileged information adequately. Indeed, given that there are no statutory restrictions on the use that government can make of information secured in this way, the Court expressed disquiet about the prospects that confidential information secured to enable the taxes of the lawyer to be assessed could be circulated and used more widely within government.[158]

e. Refugee Law

> "Participating in the unauthorized entry of other people into Canada may have two consequences under IRPA [*the Immigration and Refugee Protection Act*]. First, it may

[158] *Canada (National Revenue) v Thompson*, *supra* note 152 at paras 86-87.

> result in prosecution or imprisonment and/or substantial fines upon conviction under section 117. Second, it may render a person who engages in certain proscribed activities inadmissible to Canada under section 37(1)(b)."[159]

In late 2015 the Supreme Court of Canada issued two important unanimous decisions, one dealing with each of these provisions. Section 117 was found to be unconstitutional in *R v Appulonappa*, 2015 SCC 59 and section 37 (1)(b) was interpreted narrowly, limiting the circumstances in which refugee claimants can peremptorily be denied entry, in *B010 v. Canada (Citizenship and Immigration)* 2015 SCC 58. These cases will be discussed, in turn, beginning, for convenience, with latter decision.

B010 v Canada (Citizenship and Immigration) 2015 SCC 58

B010 is a code assigned to identify a Tamil refugee claimant who arrived on the British Columbian coast in a decrepit ship that had embarked from Thailand. He and three others who were on the ship were found to be engaged in organized criminal smuggling. As a result, the men were declared inadmissible to Canada under section 37(1)(b) of the *Immigration and Refugee Protection Act* (IRPA). In relevant part, this provision denies entry "on the grounds of organized criminal activity for … engaging, in the context of transnational crime … [in] trafficking in persons." The Refugee Board's finding that the men were caught by this provision and therefore subject to peremptory deportation was upheld by the Federal Court of Appeal, but overturned by the Supreme Court of Canada.

The circumstances of the alleged "trafficking in persons" were unusual. The men contended that they had purchased passage on the ship, but ended up assisting in taking charge of the ship after the smugglers abandoned the refugees. The interpretation imposed by the Refugee Board made this irrelevant, even if true. The men would still be caught by section 37(1)(b), a position the Crown advanced.

Before the Supreme Court of Canada, the men argued that section 37(1)(b) is unconstitutionally overbroad, contrary to section 7 of the *Charter*, if it is interpreted to apply to migrants aiding one another and to humanitarian workers. The Supreme Court of Canada did not resolve the *Charter* issue, concluding, as a matter of statutory interpretation, that section 37(1)(b) applies "only to people who act to further the illegal entry of asylum-seekers in order to obtain,

[159] *R v Appulonapa*, 2015 SCC 59 at para 22.

directly or indirectly, a financial or other material benefit in the context of transnational crime."[160] It does not apply, therefore, to migrants aiding one another, or to humanitarian workers.

This elaborate refinement of the comparatively general language used by Parliament in section 37(1)(b) followed necessarily, held the Court, when the Canadian approach to statutory interpretation of statutes passed to fulfil international obligations is applied.

Ordinary principles of statutory interpretation hold that "the words of an Act … [must be read] in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." [161] "Where legislation is enacted in the context of international commitments, international law may also be of assistance"[162] in understanding the object of the Act and the Intention of Parliament.[163]

First, to bear a particular meaning, a legislative provision must be capable of doing so. The Court was of the view that even though there is no mention in section 37(1)(b) of financial or other material benefit, the term "organized criminal activity … in the context of transnational crimes," establishes a context that makes an interpretation requiring proof of financial or other material benefit possible, as these things are implicit when organized criminal activity in the context of transnational crimes is considered.

Second, the Court concluded that when the words used are interpreted harmoniously with the Act, the object of the Act, and the intention of Parliament, to limit section 37(1)(b) to trafficking in persons for profit or material benefit becomes clear. Other provisions of IRPA; a related enactment in section 476.1(1) of the *Criminal Code,* passed to deal with criminal aspects arising from the same mischief as IRPA section 37(1)(b); expressions of purpose from government officials responsible for passage of the legislation; and the nature and purpose of the international obligations Canada was addressing when it enacted section 37 (1)(b), all point in this direction.

Section 37(1)(b) must therefore be interpreted so that it addresses "acts of illegally bringing people into Canada, if that act is connected to transnational organized criminal

[160] *B010* v *Canada (Citizenship and Immigration)* 2015 SCC 58 at para 76 [*B010*].
[161] *Ibid* at para 29.
[162] *R v Appulonappa*, 2015 SCC 59 at para 33 [*Appulonappa*].
[163] *B010*, *supra* note 160 at para 47.

activity,"[164] and "targets organized criminal activity in people for financial or other material benefit,"[165] Interpreting the words in this way also avoids absurd outcomes, such as treating a fleeing family that assists each other in securing false documentation as all engaged in human smuggling.

As a result, if the Crown wishes the men to be denied admission peremptorily it will have to prove at a Refugee Board hearing that the men actually acted for financial or other material gain. "The applicants can escape inadmissibility under section 37(1)(b) [and have their refugee claims determined on their merits] if they merely aided in the illegal entry of other refugees or asylum-seeks in the courts of their collective flight to safety."[166]

R v Appulonappa, 215 SCC 59

Mr. Appulonappa and his co-accused were charged under IRPA section 117, which makes it a crime to "aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act." They urged that section 117 is unconstitutional because it is overbroad, contrary to section 7. They did not contend that the legislation should not apply to persons who have done what was being alleged against them - working in a "for-profit" smuggling ring. They relied, instead, on a "reasonable hypothetical" case in which section 117 would catch migrants aiding one another, or humanitarian workers.

Chief Justice McLachlin, writing for a unanimous Supreme Court of Canada, agreed that the legislation was overbroad after accepting that section 117 is intended to battle human smuggling in the context of organized crime. Although the Crown was able to invoke many indications that the legislation is intended to secure Canada's borders, the Court concluded that Parliament meant to respect humanitarian principles reflected in Canada's international commitments when doing so.

The Crown tried to defend Parliament's choice to include all human smugglers in section 117 as measured rather than overbroad. It argued that the safety valve of requiring the Attorney General to consent to prosecutions would prevent section 117 from being used to catch refugees who engage in acts of human traffic to assist other refugees or persons who offer humanitarian assistance to refugees seeking to gain entry. This argument was destined to fail. The Supreme

[164] *Ibid* at para 35.
[165] *Ibid* at para 36.
[166] *Ibid* at para 72.

Court of Canada has been clear that, because it is all but unreviewable, "prosecutorial discretion provides no answer to the breach of a constitutional duty."[167] By the terms of section 117, it would not be unlawful for the Attorney General to choose to prosecute refugees who assist other refugees, or those acting for humanitarian purposes. A court could not, therefore, control such choices, if made, leaving it reasonably possible that section 117 could be applied in an overbroad manner. Section 117 is therefore contrary to section 7 of the *Charter*.

Nor is section 117 saved under section 1. Section 117 is not minimally impairing. The Crown's bare claim that Parliament had to pass legislation of this breadth to avoid unacceptable loopholes was rejected, because it was not established, and section 1 requires "demonstrable justification."

[167] *Appulonappa*, *supra* note 162 at para 74, citing *Nur*, *supra* note 63 at para 17.