

# Developments in Constitutional Law: The 2010-2011 Term

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## I. INTRODUCTION

The 2010-2011 Term was relatively quiet. The 2010 federal election ended with the crushing defeat of Michael Ignatieff's Liberal party, and a clear mandate to govern for Stephen Harper's Conservatives. As a result, there has not been the sort of brinksmanship between the government and Parliament that we saw in the 2009-2010 Term, which, at one point, led Prime Minister Harper to seek and obtain a prorogation of Parliament. Canadians, in 2010-2011, could enjoy the luxury of once again forgetting that there is such a thing as Parliamentary tradition.

With its battles in Parliament somewhat abated, the Harper government returned to a familiar antagonist: the judiciary. In February, Immigration Minister Jason Kenney sparked an outcry when he suggested that Federal Court judges should facilitate government attempts to remove immigrants and refugees with criminal pasts or connections.<sup>1</sup> He accused the Court of delaying cases, and adopting a "heavy-handed" approach to the review of immigration decisions.<sup>2</sup> In response, the Canadian Bar Association criticized the Minister: "Your public criticism of judges who follow the law but not the government's political agenda", the organization stated, "is an affront to our democracy and freedoms".<sup>3</sup> In August, Chief Justice McLachlin weighed in, commending the CBA for its intervention and suggesting that the Minister's comments were inconsistent with respect for the rule of law.<sup>4</sup>

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<sup>1</sup> See Richard Foot, "Chief Justice supports criticism of Kenney", *National Post* (August 13, 2011) [hereinafter "Foot"].

<sup>2</sup> *Id.*

<sup>3</sup> Rod Snow, President of the Canadian Bar Association, Letter to The Honourable Jason A. Kenney (February 22, 2011), available online at: <<http://www.cba.org/CBA/submissions/pdf/11-12-eng.pdf>>.

<sup>4</sup> Foot, *supra*, note 1.

The biggest news of the 2010-2011 Term came from within the Supreme Court, when both Justice Binnie and Justice Charron announced their retirements. This is a heavy blow. Both are intellectual leaders on the Court, particularly in matters concerning public law, criminal law and procedure and evidence. By tradition the new justices will hail from Ontario, the home province of Justice Binnie and Justice Charron, and there is now considerable speculation as to who will fill the vacancies.

The federal government has indicated that it intends to use the judicial appointment process unveiled when Justice Rothstein was nominated several years ago. This process, in which the nominees must submit to public questioning by a Committee of the House of Commons, was set aside when Justice Cromwell was appointed. This, however, was due to the perceived urgency of installing him in his post, not because the government rejected the process in principle. With its reintroduction, we can expect vigorous arguments over the merits of the Rothstein hearing. Some, like Peter Hogg,<sup>5</sup> regarded it as a success insofar as the wider public had an opportunity to “meet” Justice Rothstein and hear some of his views on adjudication and the relationship between courts and legislatures. (It did not hurt that Justice Rothstein himself came across as quite personable and likeable.) Others have criticized both the questions and the answers given during the Rothstein hearing as “vacuous”, and as a poor replacement for the sort of sustained, in-depth, and sophisticated conversation that judges need to have with the public about how constitutional decisions are made.<sup>6</sup> The object of Canadian-style judicial confirmation hearings cannot be just to show how telegenic our judges are.

This year, we have reviewed 10 decisions: *Canadian Owners and Pilots Assn.*,<sup>7</sup> *Lacombe*,<sup>8</sup> *Reference re Assisted Human Reproduction Act*,<sup>9</sup> *Globe and Mail v. Canada*,<sup>10</sup> *Canadian Broadcasting Corp. v.*

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<sup>5</sup> See Peter W. Hogg, “Appointment of Thomas A. Cromwell to the Supreme Court of Canada”, Working Paper of the Institute of Intergovernmental Relations, School of Public Policy, Queen’s University (2009).

<sup>6</sup> See Michael Plaxton, “The Neutrality Thesis and the Rothstein Hearing” (2008) 58 U.N.B.L.J. 192.

<sup>7</sup> *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) [hereinafter “*Canadian Pilots*”].

<sup>8</sup> *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, 2010 SCC 38, [2010] 2 S.C.R. 453 (S.C.C.) [hereinafter “*Lacombe*”].

<sup>9</sup> [2010] S.C.J. No. 61, 2010 SCC 61, [2010] 3 S.C.R. 457 (S.C.C.) [hereinafter “*AHRA Reference*”].

<sup>10</sup> *Globe and Mail v. Canada (Attorney General)*, [2010] S.C.J. No. 41, 2010 SCC 41 (S.C.C.) [hereinafter “*Globe and Mail*”].

*Canada*,<sup>11</sup> *Canadian Broadcasting Corp. v. Canada*,<sup>12</sup> *Ontario (Attorney General) v. Fraser*,<sup>13</sup> *R. v. Ahmad*,<sup>14</sup> *Withler v. Canada*<sup>15</sup> and *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*.<sup>16</sup> The decisions include a number of important and high-profile rulings concerning, among other things, the scope of the criminal law power, freedom of the press, the constitutional standing of collective bargaining, the right to a fair trial in terrorism prosecutions and the right to equality. We will begin with the division of powers cases.

## II. DIVISION OF POWERS

The 2010-2011 Term was marked by several important decisions concerning the division of powers. Two of those, *Canadian Pilots Assn.* and *Lacombe*, were issued as companion cases. Both involve the federal power over aeronautics. Together with the Court's opinion in the *AHRA Reference* and its two decisions involving Aboriginal child welfare (which we have opted not to discuss here),<sup>17</sup> they reveal a Court divided over the correct approach to disputes arising under sections 91 and 92 of the *Constitution Act, 1867*.<sup>18</sup>

### 1. The Aeronautics Cases

The aeronautics cases were heard before full panels. In each, the Chief Justice wrote the majority opinion for seven judges. Justice Deschamps dissented. Justice LeBel wrote brief separate opinions. In *Canadian Pilots* he agreed with Deschamps J.; in *Lacombe* he also agreed with much of her approach but not her reading of the facts, and would have resolved the case under paramountcy.<sup>19</sup>

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<sup>11</sup> *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, 2011 SCC 2 (S.C.C.).

<sup>12</sup> [2011] S.C.J. No. 3, 2011 SCC 3 (S.C.C.).

<sup>13</sup> [2011] S.C.J. No. 20, 2011 SCC 20 (S.C.C.) [hereinafter "*Fraser*"].

<sup>14</sup> [2011] S.C.J. No. 6, 2011 SCC 6 (S.C.C.) [hereinafter "*Ahmad*"].

<sup>15</sup> *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, 2011 SCC 12 (S.C.C.) [hereinafter "*Withler*"].

<sup>16</sup> [2011] S.C.J. No. 37, [2011] 3 C.N.L.R. 36 (S.C.C.) [hereinafter "*Cunningham*"].

<sup>17</sup> *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] S.C.J. No. 45, 2010 SCC 45, [2010] 2 S.C.R. 696 (S.C.C.); *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, [2010] S.C.J. No. 46, 2010 SCC 46, [2010] 2 S.C.R. 737 (S.C.C.).

<sup>18</sup> (U.K.), 30 & 31 Vict., c. 3.

<sup>19</sup> Justice LeBel's opinions are not further canvassed here.

(a) *Lacombe*

The *Lacombe* case arose from a dispute over the location of a private aerodrome in Gobeil, Quebec. Cottagers and other residents of Gobeil Lake objected to the aerodrome erected by the claimant air excursion operators. The aerodrome was erected under a federal licence granted by the Minister of Transport pursuant to the *Canadian Aviation Regulations*.<sup>20</sup> In 2006 the municipality obtained a zoning-based injunction against the operators.

The provincial legislative scheme under which the initial complaint arose is somewhat complex and was the subject of dispute on the Court. The overarching framework is provided by the *Act respecting land use planning and development*<sup>21</sup> which authorizes municipalities to adopt zoning by-laws for their territory. Such a code was adopted by the municipality here — Sacré-Coeur — in 1993. The code included a by-law that prohibited any construction without a permit (209), and a by-law that created zones with associated land uses (210). By-law 210 made no specific reference to uses relating to “aerodromes” or “aeronautics”. The majority found that by-law 210 had been interpreted to permit water aerodromes in at least some locations by analogy to other approved uses. The Chief Justice noted that all parties agreed with this point.<sup>22</sup>

After receiving public complaints about aerodrome activity, in 1995 the municipality enacted by-law 260. The by-law split the original zone containing Gobeil Lake — zone 33-RF — into two: zone 33-RF and zone 61-RF. Zone 61-RF contained a note that authorized the landing of float planes and the deplaning of passengers. The majority interpreted the amendment as “effectively prohibit[ing] aerodromes”<sup>23</sup> in zone 33-RF.

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<sup>20</sup> SOR/96-433.

<sup>21</sup> R.S.Q., c. A-19.1.

<sup>22</sup> In her dissent, Deschamps J. took issue with the conclusion that by-law 210 permitted aerodromes. She rejected the parties’ say-so as a sufficient basis for such a conclusion, preferring to investigate more closely the relevant statutory language. Relying on the different types of land use contemplated in the various categories, she found as follows:

No interpretation based on the ordinary meanings of the words in this list can lead to the conclusion that the takeoff and landing of float planes were in any way authorized in zone 33-RF [the original zone containing Gobeil]. None of the examples of extensive uses set out in the by-law was similar to the use of part of a territory for the takeoff and landing of float planes or the operation of a water aerodrome, nor could any specific authorization applicable to zone 33-RF be interpreted in that way. Aviation activities were therefore prohibited on both Long Lake and Gobeil Lake from the time the by-law was adopted in 1993.

*Lacombe*, *supra*, note 8, at para. 83.

<sup>23</sup> *Id.*, at para. 14.

The aerodrome operators challenged the injunction. Their challenge was dismissed at first instance but succeeded in the Quebec Court of Appeal, which applied the doctrine of interjurisdictional immunity to shield the claimants from the application of the by-law.

The Chief Justice set out the following constitutional questions:

1. Does zoning by-law No. 210 of the Municipality of Sacré-Cœur, adopted pursuant to s. 113 of the *Act respecting land use planning and development*, R.S.Q., c. A-19.1, encroach on the power of the Parliament of Canada over aeronautics under the introductory paragraph to s. 91 of the *Constitution Act, 1867* and, if so, are ss. 4.1 and 4.2 of and Schedule B to that by-law *ultra vires*?
2. Is zoning by-law No. 210 of the Municipality of Sacré-Cœur constitutionally inapplicable under the doctrine of interjurisdictional immunity to an aerodrome operated by the respondents?
3. Is zoning by law No. 210 of the Municipality of Sacré-Cœur constitutionally inoperative under the doctrine of federal paramountcy, having regard to the *Aeronautics Act*, R.S.C. 1985, c. A-2, and the *Canadian Aviation Regulations*, SOR/96-433?<sup>24</sup>

The Chief Justice concluded that the answer to question 1 was “yes”, making it unnecessary to consider either injurisdictional immunity or paramountcy. This prompted disagreement from LeBel and Deschamps JJ. Justice Deschamps wrote a lengthy dissent. Her analysis in *Lacombe* and *Canadian Pilots* will be considered at the end of this summary.

(i) The Majority: Pith and Substance Rules the Day

The Chief Justice began with the usual pith and substance analysis. Noting that a law’s “matter” is determined by reference to its purpose and effect, she considered both with respect to by-law 260. Reviewing the by-law’s purpose as reflected in its preamble; the admissions made by the Crown in its factum and in oral argument;<sup>25</sup> and the by-law’s effect, she concluded that the matter of the provision was “the regulation of aeronautics”.<sup>26</sup>

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<sup>24</sup> *Id.*, at para. 88.

<sup>25</sup> The Chief Justice placed great emphasis on the following passage from oral argument of the Attorney General of Quebec: “[I]f N10 is quashed, then it will be the *status quo ante*, and given this situation, the Municipality believed this amendment was necessary if it was to succeed in limiting the operation of a float plane base to a single lake in the Municipality. ... The Municipality assumed that the float plane base was not prohibited.” *Id.*, at para. 22.

<sup>26</sup> *Id.*, at para. 23.

The next stage in a pith and substance analysis assigns the particular subject matter of legislation to one or more of the powers allocated to either the federal or provincial government (or, in rare cases, both). Since 1952, the regulation of aeronautics has been accepted as falling within the general federal power to regulate for the “peace, order and good government” (“POGG”) of Canada.<sup>27</sup> This would appear to settle the question here, but the provinces had argued that the narrow question of *where aerodromes can be located* is a subject matter of concurrent jurisdiction relating to both the federal aeronautic power and the provincial power to regulate land use within its territory.

The Chief Justice rejected this argument, noting that the Supreme Court has consistently found the regulation of aeronautics to be an exclusively federal jurisdiction.<sup>28</sup> For good reason, she stated, the scope of such regulation has always been held to include “terrestrial installations that facilitate flight”. In support of this finding she cited Estey J. in *Johannesson*:

[I]t is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other.<sup>29</sup>

Thus, the location of aerodromes is part and parcel of the aeronautics powers. But, the fact of exclusive federal jurisdiction does not mean that provincial legislation may never affect aeronautics. Valid zoning choices may run into some conflict with aeronautical facilities. Those conflicting rules, though, must emanate from laws that are truly provincial. In this case, the majority found, by seeking to regulate aeronautical activity through the location of aerodromes, by-law 260 was *ultra vires* the province.

The analysis of constitutional validity was not complete, though, because one must next consider the ancillary powers doctrine. Under that doctrine either level of government may enact a provision that falls outside of its jurisdiction so long as the provision is justified as part of a larger, valid regulatory scheme. The majority took pains to distinguish the ancillary powers doctrine from the doctrine of incidental effects, and from double aspect. Incidental effects arise when a valid law has an

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<sup>27</sup> *Johannesson v. West St. Paul (Rural Municipality)*, [1951] S.C.J. No. 50, [1952] 1 S.C.R. 292 (S.C.C.) [hereinafter “*Johannesson*”].

<sup>28</sup> *Lacombe*, *supra*, note 8, at para. 26.

<sup>29</sup> *Id.*, at para. 27, citing *Johannesson*, *supra*, note 27, at 319.

effect on a subject within the opposing government's area of constitutional competence. Under double aspect, a subject matter can legitimately fall under the powers of both levels of government. The ancillary powers rule, by contrast, concerns a provision which in and of itself does *not* correspond to the enacting government's legislative authority, but ultimately is upheld because of its relationship to a larger, *intra vires* regime.<sup>30</sup>

The majority then briefly discussed the debate in the jurisprudence over the precise relationship that must obtain between the offending provision and the larger scheme. Earlier cases, emphasizing the "water-tight compartments" approach to the division of powers, adopted a strict view that the impugned provision had to be *necessary* to the regulatory regime. That view eventually gave way to a much looser test requiring only a *rational, functional connection* between the smaller and larger portions.

In the seminal case of *General Motors*,<sup>31</sup> Dickson C.J.C. proposed a continuum whereby the degree of connection required would depend on the degree of intrusion into the other government's jurisdiction. Less serious intrusions would require only a rational connection, while more serious intrusions would require a stricter test. While the test has been criticized for the vagueness of its distinctions — and its tendency to favour the less strict end of the continuum — the majority noted that it consistently has dominated the ancillary powers doctrine. Applied to the case at bar, the majority found that by-law 260 did not represent a serious intrusion into federal jurisdiction and thus was subject to review on the basis of the rational test. But, it noted, under that test the provision cannot merely "supplement" the existing, *intra vires* scheme; it must "complement" or "actively further" it. This would require, for example, that the smaller provision have a functional relationship with the larger regime, that it fill a gap, or that it otherwise assist in avoiding inconsistent application or uncertainty.

Applying the above test to by-law 260, the majority found that the by-law did not have a rational, functional connection to the larger zoning by-law. In the majority's view, by-law 260 did not further the general objectives of zoning, namely, the rationalization of land use for the benefit of the general populace. Instead, the by-law enacted a general

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<sup>30</sup> *Lacombe, id.*, at para. 36.

<sup>31</sup> *General Motors of Canada Ltd. v. City National Leasing*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.).

prohibition on the creation of aerodromes throughout the municipality “without reference to the underlying land use regime”:

By-law No. 260 treats similar parcels of land differently by expressly permitting aerodromes in zone 61-RF, but not in the adjacent zone 33-RF. These two zones are identical in essentially banning all but a few land uses. The only difference [...] is that zone 61-RF] permits aerodromes. If the purpose of the broader zoning scheme in zone 33-RF — to protect use by vacationers — is established by these land use restrictions, then the same must hold for zone 61-RF. Yet it does not. Conversely, by-law No. 260 treats different parcels the same by broadly banning water aerodromes throughout the municipality, not only in areas used by vacationers. Again, this broad prohibition does not correlate with the land uses in the area covered.<sup>32</sup>

Ultimately, the majority found no “evidence of any purpose for by-law No. 260 other than the prohibition of certain aeronautical activities in a significant portion of the municipality”.<sup>33</sup> By-law 260 neither filled a gap, nor addressed any inconsistency or uncertainty. Indeed, the majority concluded, by-law 260 evidenced an “arbitrary focus on banning aeronautics without regard to underlying land use”.<sup>34</sup> Thus, the *ultra vires* nature of the by-law could not be saved through an application of the ancillary powers doctrine.

The Chief Justice next addressed Deschamps J.’s objection to characterizing by-law 260 as a specific prohibition on aerodromes (as opposed to simply clarifying a prohibition which already existed in by-law 210). As will be discussed below, Deschamps J. argued that by-law 210 could be read to contemplate aerodromes within the category of “intensive uses” by analogy to the presence in that category of “marinas”. The Chief Justice rejected this argument, though she did not extensively engage with the analogy. Instead she placed particular emphasis on the conduct of the parties as proof that the argument could not hold:

The conduct of the summer home owners after the passage of by-law 210 belies the assertion that they understood by-law 210 as prohibiting aerodromes on Gobeil Lake. The aerodromes continued to operate on Gobeil Lake after the passage of by-law 210. No one suggested the operation was prohibited. The suggestion was rather that a new by-law should be introduced which would, unlike by-law 210, prohibit aerodromes on the lake.

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<sup>32</sup> *Lacombe, supra*, note 8, at paras. 54-55.

<sup>33</sup> *Id.*, at para. 57.

<sup>34</sup> *Id.*



... It seems implausible that the summer home owners would have sought legislative action, had water aerodromes already been prohibited on their lake, as my colleague contends. Nor does it seem plausible that the water aerodrome on Gobeil Lake would have been permitted to continue its operations if, in fact, they were illegal.<sup>35</sup>

Had by-law 210 already prohibited aerodromes, the Chief Justice continued, it would be inapplicable in this case under the doctrine of interjurisdictional immunity. Such a prohibition “would result in an unacceptable narrowing of Parliament’s legislative options” in such a way as to “[impair] the core of the federal power over aeronautics”.<sup>36</sup> The Chief Justice’s resort to interjurisdictional immunity as an alternative analytical method will be discussed in the comment section of this summary.

(b) *Canadian Pilots*

*Lacombe’s* companion case, *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*,<sup>37</sup> also dealt with aerodromes but under a different provincial law. Here, an aerodrome was built on land designated as strictly agricultural, sparking a dispute over which level of government has the final say over the placement of airfields and similar facilities.

Bernard Laferrière and Sylvie Gervais owned a woodlot near Shawinigan. In 1998, they built an airstrip and constructed a hangar. In July 1999, the Commission de protection du territoire agricole du Québec (“the Commission”) ordered them to return their land to its original state. Laferrière and Gervais challenged the Commission’s jurisdiction. The decision was upheld by the Administrative Tribunal of Quebec, and the Quebec Superior Court and Court of Appeal. In 2009, after Laferrière was killed in an airplane accident, the Canadian Owners and Pilots Association replaced Laferrière and Gervais as respondent before the Supreme Court of Canada.

The provincial law authorizing the Commission’s order is *An Act respecting the preservation of agricultural land and agricultural activities*.<sup>38</sup> Section 22 of the Act authorizes the provincial government to designate certain areas as agricultural regions. Sixty-three thousand

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<sup>35</sup> *Id.*, at paras. 64-65.

<sup>36</sup> *Id.*, at para. 66.

<sup>37</sup> *Canadian Pilots*, *supra*, note 7.

<sup>38</sup> R.S.Q., c. P-41.1 [hereinafter “ARPALAA”].

square kilometres — about four per cent of Quebec — have been so designated. Section 26 of the Act prohibits all non-agricultural uses in such areas unless Commission authorization is obtained. Laferrière and Gervais did not obtain such authorization. Instead, they registered their aerodrome under the federal *Aeronautics Act*, which does not require pre-authorization in the case of facilities associated strictly with private aviation.

As in *Lacombe*, the Chief Justice articulated three main issues: (1) whether the ARPALAA is *intra vires* the province and, if so (2) whether its application to the aerodrome at bar is subject to the doctrine of interjurisdictional immunity and if not (3) whether it is rendered inoperative via the doctrine of federal paramountcy.

(i) Pith and Substance

With respect to the *vires* of the legislation, the majority had little difficulty finding the provincial law a valid exercise of section 92 provincial powers. It noted that the ARPALAA's purpose is to “secure a lasting territorial basis for the practice of agriculture”, and that its effect furthers this goal. This purpose and effect are mirrored in the specific provision at issue — section 26 — which prohibits the construction of aerodromes within agricultural zones. Since land use planning and agriculture may fall within section 92(13), 92(16) or 95 of the *Constitution Act 1867*, section 26 is valid provincial legislation. The majority noted, too, that the law's provincial provenance was not affected by the concurrent federal jurisdiction over agriculture.

(ii) A Surprise: Interjurisdictional Immunity

The first issue having been resolved in favour of the province, the majority turned next to interjurisdictional immunity. The Chief Justice characterized the issue as whether section 26 applies in a situation where it affects the federal power over aeronautics.<sup>39</sup> She set forth the applicable test in two parts:

The first step is to determine whether the provincial law — 26 of the Act — *trenches on the protected “core” of a federal competence*. If it does, the second step is to determine whether the provincial law's

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<sup>39</sup> *Canadian Pilots, supra*, note 7, at para. 25.

effect on the exercise of the protected federal power is *sufficiently serious* to invoke the doctrine of interjurisdictional immunity.<sup>40</sup>

With respect to the first step, the Chief Justice stated that the location of aerodromes is part of the exclusive federal jurisdiction over aeronautics. She relied on previous jurisprudence confirming that the power includes not only the operation of aircraft but the regulation of airports including their location and design.<sup>41</sup> She rejected the argument that local aerodromes are excluded from the reach of the POGG power because they are not of national importance, noting that aerial navigation is a “non-severable”<sup>42</sup> subject matter.

Having found that aerodromes are part of the exclusive federal jurisdiction over aeronautics, the Chief Justice went on to conclude that their location comes within the protected core: the “basic, minimum and unassailable content” of the power.<sup>43</sup> Despite noting that *Canadian Western Bank v. Alberta*<sup>44</sup> had cautioned that interjurisdictional immunity should be reserved for cases largely covered by precedent,<sup>45</sup> the Chief Justice relied on case law which has “consistently held that the location of aerodromes lies within the core of the federal aeronautics power.”<sup>46</sup>

Turning to the second step, whether the provision impairs the core competency, the Chief Justice found that it did. She noted, first, that the impairment standard represents a midpoint between the earlier threshold of “sterilization” and more recent one of “affects”. In *Canadian Western Bank* the Court noted that a higher standard than “affects” was necessary to respect the “dominant tide” of Canadian federalism:

A broad application [of interjurisdictional immunity] ... appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. ... It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable.<sup>47</sup>

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<sup>40</sup> *Id.*, at para. 27 (emphasis in original).

<sup>41</sup> *Air Canada v. Ontario (Liquor Control Board)*, [1997] S.C.J. No. 66, [1997] 2 S.C.R. 581, at para. 72 (S.C.C.), per Iacobucci J.

<sup>42</sup> *Canadian Pilots*, *supra*, note 7, at para. 33, citing *Johannesson*, *supra*, note 27.

<sup>43</sup> *Canadian Pilots*, *id.*, at para. 35.

<sup>44</sup> [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.) [hereinafter “*Canadian Western Bank*”].

<sup>45</sup> *Id.*, at para. 77.

<sup>46</sup> *Canadian Pilots*, *supra*, note 7, at para. 37, citing *Johannesson*, *supra*, note 27, and *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)*, [1978] S.C.J. No. 110, [1979] 1 S.C.R. 754 (S.C.C.).

<sup>47</sup> *Canadian Western Bank*, *supra*, note 44, at para. 42.

The impairment standard suggests “an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power.”<sup>48</sup> Looking at the ARPALAA, the Chief Justice concluded that its effect “may be to prevent the establishment of a new aerodrome or require the demolition of an existing one”,<sup>49</sup> and it thus “significantly restricts”<sup>50</sup> Parliament’s power.

The province raised two arguments against interjurisdictional immunity. First, it argued that Parliament remains free to designate particular locations for the construction of aerodromes, a legislative choice that would prevail under the paramountcy doctrine. Second, it argued that interjurisdictional immunity is not appropriate where a subject matter has a double aspect.

The majority rejected both contentions. With respect to the possible resort to paramountcy, the majority noted that this would require the federal government to enact legislation in respect of each and every private aerodrome. The majority found that reliance on this federal option “impermissibly mingles the distinct doctrines of interjurisdictional immunity and paramountcy.”<sup>51</sup> It also would prevent Parliament from exercising its exclusive power (aeronautics) through “broad, permissive legislation”.<sup>52</sup>

With respect to the argument that interjurisdictional immunity is not available where there is a double aspect, the majority acknowledged that there appears to be some support for this notion in *Lafarge Canada* (the companion case to *Canadian Western Bank*). In *Lafarge*, the majority stated:

For the reasons we gave in *Canadian Western Bank v. Alberta* ... we agree with the approach outlined by the late Chief Justice Dickson in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18, in which he characterized the arguments for interjurisdictional immunity as not particularly compelling, and concluded that they ran contrary to the “dominant tide” of Canadian constitutional jurisprudence. In particular, in our view, the doctrine should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect. Both federal and provincial authorities have a compelling interest. Were there to be no valid federal land use planning

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<sup>48</sup> *Canadian Pilots*, *supra*, note 7, at para. 45.

<sup>49</sup> *Id.*, at para. 47.

<sup>50</sup> *Id.*, at para. 48.

<sup>51</sup> *Id.*, at para. 52.

<sup>52</sup> *Id.*, at para. 53.

controls applicable to the site, federalism does not require (nor, in the circumstances, should it tolerate) a regulatory vacuum, which would be the consequence of interjurisdictional immunity.<sup>53</sup>

In spite of the above passage, the majority noted that in *Lafarge* itself the Court went on to consider interjurisdictional immunity (though it did not prevail) even though the subject matter — ports and port lands — did have a double aspect. The majority characterized the Province's real objection as being to the idea that a valid provincial law can have "its application cut down merely because it impairs the core of a federal competence".<sup>54</sup> This amounted to an attack on the very idea of interjurisdictional immunity, an attack the majority refused to permit:

Among the reasons for rejecting a challenge to the existence of the doctrine is that the text of the *Constitution Act, 1867*, itself refers to exclusivity. ... The doctrine of interjurisdictional immunity has been criticized, but has not been removed from the federalism analysis. The more appropriate response is the one articulated in *Canadian Western Bank* and *Lafarge Canada*: the doctrine remains part of Canadian law but in a form constrained by principle and precedent. In this way, it balances the need for intergovernmental flexibility with the need for predictable results in areas of core federal authority.<sup>55</sup>

Therefore, the existence of a double aspect — which the majority in any event did not acknowledge to be present in this case — was no bar to the application of interjurisdictional immunity.

### (iii) A Brief Discussion of Paramountcy

Finally, though it was not necessary to the result, the majority considered the doctrine of paramountcy. The majority noted that paramountcy functions to save a federal law when it runs into conflict with a valid provincial one. The conflict may be of two kinds. Either a person cannot obey both laws simultaneously — what has often been referred to as "operational conflict" — or the provincial law would frustrate the intent of the federal one. In the case at bar, there was no operational conflict.<sup>56</sup> The federal government had authorized Laferrière and Gervais

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<sup>53</sup> *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 4 (S.C.C.).

<sup>54</sup> *Canadian Pilots*, *supra*, note 7, at para. 56.

<sup>55</sup> *Id.*, at para. 58.

<sup>56</sup> *Id.*, at para. 65.

to build an aerodrome; it had not ordered them to do so. As well, the broad, permissive nature of the federal regulation of aerodromes suggested that the operation of valid provincial land use planning regimes did not frustrate the federal intent. The respondents had not established that the purpose for the broad regime was to encourage widespread construction of aerodromes unencumbered by provincial law.<sup>57</sup>

In the result, the provincial agricultural uses law was inapplicable to aerodromes registered under the *Aviation Act*.

(c) *The Dissents of Justice Deschamps*

Justice Deschamps dissented in both cases. Her analysis is chiefly found in her lengthy opinion in *Lacombe*. She made three main doctrinal points: an argument in favour of a much broader understanding of double aspect; a challenge to the majority's ready resort to interjurisdictional immunity and a more nuanced approach to federal paramountcy.

(i) A Broader Understanding of Double Aspect

In her pith and substance analysis, Justice Deschamps points out that the application of any given rule is to a set of facts. Where the rule must be justified under the division of powers, it is important to note that the connection between a set of facts and an enumerated power is not always self-contained. Instead:

In many cases, a single fact situation can be viewed from two different normative perspectives, one of which may fall under exclusive federal jurisdiction and the other under exclusive provincial jurisdiction. The double aspect doctrine will then come into play. In *Canadian Western Bank*, Binnie and LeBel JJ. summarized this doctrine as follows ...

The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the *perspective* from which the legislation is considered, that is, depending on the various "aspects" of the "matter" in question.<sup>58</sup>

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<sup>57</sup> *Id.*, at para. 68.

<sup>58</sup> *Lacombe*, *supra*, note 8, at para. 99 (emphasis in original).

This led her to propose three different “levels” of double aspect:

(1) that of the facts themselves regardless of their legal characterization; (2) that of the legal perspectives represented by the various rules (statutory, regulatory, etc.) — each of which has its own pith and substance — adopted by the central government or the provinces to govern the fact situations; and (3) that of the power — in the context of the constitutional division of powers — to adopt a given rule.<sup>59</sup>

She went on to situate the primary meaning of double aspect in level 2, namely, that certain facts at level 1 might have “two different normative aspects”. This would then lead to a distinct connection between each of those “normative aspects” and a different power at level 3. In the case at bar, she argued, the Chief Justice had failed to consider the location of aerodromes from distinct legal perspectives at level 2, those perspectives being the regulation of aeronautics and land use planning.

#### (ii) Concerns about Interjurisdictional Immunity

Justice Deschamps’ next argument related to interjurisdictional immunity. Echoing other criticisms, she noted the doctrine’s awkward fit with a model of cooperative federalism. In her view, the 2007 decisions in *Canadian Western Bank* and *Lafarge* had attempted to compensate for that bad fit in two ways:

... (1) by establishing a principle against the proliferation of cores of power found by the courts to require protection, and (2) by introducing a new test according to which a valid rule of a government at one level is inapplicable only to the extent that it impairs activities that relate to the core of a power exclusive to the other level.<sup>60</sup>

Justice Deschamps criticized the Chief Justice for appearing to suggest in *Canadian Pilots* that interjurisdictional immunity is limited to the protection of federal powers, characterizing this as a move “away from both the letter and spirit of *Canadian Western Bank*”.<sup>61</sup> That case, she argued, clearly *critiqued* the asymmetrical results of interjurisdictional immunity which have favoured the federal government. Therefore, the caution in *Canadian Western Bank* against proliferating the protected

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<sup>59</sup> *Id.*, at para. 101.

<sup>60</sup> *Id.*, at para. 107.

<sup>61</sup> *Id.*, at para. 109.

cores of power must be read as an injunction chiefly in relation to cases involving *federal* immunity.

Justice Deschamps was also disturbed by the Chief Justice's continued references to the impact of a provincial law on a federal "power" or "competency":

[The Chief Justice] focuses on a direct effect of the impugned provincial rule on the federal *power* rather than an effect on the *activities* of federal undertakings ... But since an "impairment" ... can be assessed only on the basis of the effects of the impugned legislation on the operation of the undertaking, a federal one in this instance, the analysis must necessarily relate to the concrete effects of the measure in question. Focussing on a direct effect of the impugned measure on the power of the other level of government leads to confusion between the issue of validity and that of applicability.<sup>62</sup>

In Deschamps J.'s view, the majority approach is more consistent with Bastarache J.'s dissenting opinion in *Canadian Western Bank*. It thus represents an unwarranted departure from a recent doctrinal development that is harmful to legal certainty. It, further undermines the principle of subsidiarity (a point to which Deschamps J. would return in *AHRA Reference*); and is "antithetical to co-operation between the levels of government".<sup>63</sup>

### (iii) A Restrained Approach to Paramountcy

With respect to the paramountcy doctrine, Deschamps J. generally agreed that one must search for "conflict" between validly enacted laws, and that conflict can arise either in respect of rules, or legislative purpose. Her comments focused on the notion of conflicting purposes. She stressed the importance of avoiding "impressionistic interpretations":

To avoid [too easy a resort to paramountcy], the initial enquiry must be limited to situations in which compliance with the rule of a government at one level results in the loss not of a simple freedom that exists in the absence of an express prohibition, but of a right positively created in the rule of a government at the other level. Since that which is not prohibited is permitted, the freedom to perform an act or engage in an activity simply means that the act or activity is not prohibited.<sup>64</sup>

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<sup>62</sup> *Id.*, at para. 115.

<sup>63</sup> *Id.*, at para. 116.

<sup>64</sup> *Id.*, at para. 121.



Thus, in order to qualify for the paramountcy rule, the federal rule must (1) positively authorize some act, as opposed to simply not prohibit it and (2) be similar in nature to the provincial law to which the federal rule is to form an exception for the purpose of inoperability:

“Conflict of legislative purposes” is simply another term for what is also known as “implicit inconsistency” or “implied conflict”. The purposes of legislators are not as easily frustrated as one might be tempted to think. Quite the contrary. In short, there will be implicit inconsistency [TRANSLATION] “when the cumulative application of the two statutes, although technically possible, creates such unlikely and absurd results that it is fair to believe this was not what the legislature desired”.<sup>65</sup>

Justice Deschamps thus proposed a more restrictive reading for applying paramountcy in the case of conflicting legislative purposes.

(iv) Justice Deschamps’ Analysis of the Facts

Applying her analysis to the facts of *Lacombe*, Deschamps J.’s statutory interpretation led her to a different conclusion on the interaction between by-laws 210 and 260. Recall that the majority found that by-law 210 simply did not contemplate aerodrome facilities or uses, and that by-law 260 was specifically enacted to govern such uses leading the province to run afoul of the exclusive federal jurisdiction. Justice Deschamps took issue with this. Reviewing by-law 210’s list of uses, she found that because the “intensive uses” category (which generally are subject to greater limitation) included “marinas”, this was a sufficient basis to conclude that aerodromes were similarly prohibited. Thus, she rejected the argument that the municipality through by-law 260 had set out to *specifically* regulate aerodromes.

Justice Deschamps also characterized “the location of aerodromes” as a factual matter with a double aspect. In her view, the location of aerodromes must be understood from two perspectives: “(1) a broader perspective, that of zoning in the exercise of the exclusive provincial power to make laws in relation to municipal institutions; and (2) a narrower perspective, that of regulating aerodromes in the exercise of the exclusive federal aeronautics power.”<sup>66</sup>

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<sup>65</sup> *Id.*, at para. 126.

<sup>66</sup> *Id.*, at para. 136.

Looking, then, at by-law 260 and specifically note N-10 which deals expressly with “[r]afts, wharves or any other structures for landing or docking float planes or deplaning their passengers”, Deschamps J. found that it did *not* intrude into the pith and substance of the aeronautics power. If it did, it nonetheless was saved by the rational and functional connection test of the ancillary powers doctrine:

If the necessary connection test associated with that doctrine were applicable, note N-10 would not meet it. The municipality could very well have achieved the same result by deeming the contemplated use to be included, pursuant to the mechanism established in s. 2.2, in the one provided for in s. 2.2.4.3(5) of the by-law, namely [translation] “marinas, boat rentals and sightseeing services”.

However, the test to be met here is not that of a necessary connection, but only that of a functional relationship. This case involves an authorization, not a prohibition. As well, the rule relates only to the location of water aerodromes. This means that the overflow can only be minor. What must therefore be determined is whether the note N-10 mechanism has a meaningful function in the zoning by-law, and particularly in the specifications grid. The answer is yes. This mechanism gives the municipality the flexibility needed to ease the effect of certain limitations by means of a specific authorization. Given the increased flexibility made possible by the specific authorization based on note N-10, as compared with the relative inflexibility of the mechanism of classes of uses, the impugned provisions ... most certainly do have a functional relationship with the zoning by-law as a whole.<sup>67</sup>

Though her analysis made it unnecessary to do so, Deschamps J. turned next to the doctrines of interjurisdictional immunity and paramountcy. With respect to interjurisdictional immunity, Deschamps J. accepted that “there is a fairly well-established line of authority according to which the exclusive federal aeronautics power does indeed have a protected core”.<sup>68</sup> She accepted that this core included the design and operation of airports, as well as their location. She also did not take issue — as some of the parties had — with the idea that the core includes the location of aerodromes. Thus, the by-law in question affects the protected core of the federal power.

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<sup>67</sup> *Id.*, at paras. 146-147.

<sup>68</sup> *Id.*, at para. 152.

With respect to the second part of the test — whether the law “impairs” activities at the core of the exclusive power — Deschamps J. parted company with the majority. She found no evidence that land use planning rules would have the effect of *impairing* the activities of aviation undertakings. It is not enough, she said, that there is overlap:

As we have seen, the purpose of the doctrine of interjurisdictional immunity is to protect powers of one level of government from certain *effects* of *valid* rules adopted by a government at the other level. A government at one level can therefore affect an exclusive power of the other level for the purposes of that doctrine only indirectly, that is, through *effects* on a *matter* to which that power applies. This means that the effect of the application of a valid rule will be an “impairment” as that term is used in the context of the doctrine of interjurisdictional immunity only if it hinders or “impairs” activities that fall under the core of an exclusive power of the other level of government. But it should not be thought that such an impairment can limit a government’s legal capacity to validly adopt rules in the exercise of its own exclusive powers. A government can always legislate and, if the government in question is the federal government, its legislation will even be paramount in the event of a conflict. Thus, in skipping the step of analysing the real effects of the zoning by-law on *activities* of federal undertakings and in limiting her analysis to the effects of the impugned legislation on the other level’s *power*, the Chief Justice effectively eliminates the impairment test.<sup>69</sup>

Indeed, she noted, the majority’s approach makes the impairment test “superfluous” since “the issue is no longer whether a zoning by-law limits activities in, for example, 1 per cent or 50 per cent of the territory, but whether the legislation has an effect on the power”.<sup>70</sup>

Returning to her preferred approach — investigating the law’s effect on the *activities* at the core of the power — she found that it did not:

Determining whether an impairment exists involves reviewing the conditions for engaging in the activities that correspond to the protected core of power, which in this case relates to the location of aerodromes. In this regard, small-scale aviation requires a sufficient area for the construction of an aerodrome. ... [R]ecreational or “small-scale” aviation activities require less space than a commercial transport service. ...

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<sup>69</sup> *Id.*, at para. 158.

<sup>70</sup> *Id.*

I do not think it can be inferred here that the municipal by-law allows insufficient space for small-scale aviation activities. ... Not only have such activities been specifically authorized since 1995 on Long Lake, where the respondents ran their business for three years, but they are also authorized indirectly in at least one other zone — zone 40-REC — as a use similar to the ones listed as examples of intensive recreational uses.<sup>71</sup>

Justice Deschamps argued, further, that the finding of “impairment” in the relevant sense cannot be aided by the fact that certain business expectations of individuals or groups have been frustrated:

Gobeil Lake may be an ideal choice of location for an operator, but the fact is that the municipality is the local democratic institution established to ensure that citizens’ divergent interests are considered. In the context of co-operative federalism, the municipality’s acts must be allowed to stand if they are valid from the standpoint of the constitutional division of powers, if the implementation of the resulting measures does not impair activities within the protected core of an exclusive federal power and if they do not actually conflict with a valid and applicable federal rule.<sup>72</sup>

Thus, she would not have used interjurisdictional immunity to vindicate the appellants’ claims.

With respect, finally, to paramountcy, Deschamps J. found no operational conflict, since the federal registration system does not *require* building an aerodrome in a particular location. With respect to the frustration of purpose branch, she found no incompatibility between the municipal by-law and the exercise of any positive right granted in the federal legislation. The ministerial registration procedure does not constitute an “authorization” in the administrative law sense. Nor does registration depend on approval of the choice of the aerodrome’s location. The registration system is merely designed to create an information bank. With respect to the air operator certificate, Deschamps J. likewise found no conflict between it and the municipality’s power to designate land use in particular areas. While the certificate grants a positive right to operate aircraft, it does not grant a positive right to operate those craft within a particular area:

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<sup>71</sup> *Id.*, at paras. 163-164.

<sup>72</sup> *Id.*, at para. 165.

[Part III of the authorization] expressly states that it “does not authorize aircraft operations”. The only purpose of this part is to state that the holder of the certificate must operate its business, have its principal place of business and control its own operations at the places it has itself indicated.

It is therefore clear from the regulations that the sole purpose of the requirements that the bases of operations be indicated and that this information be kept up to date is to keep the records up to date and enable inspectors to do their work, that is, to go to the right places to carry out safety inspections.

... Part III of the respondents’ air operator certificate grants no positive right to operate aircraft or an aerial work undertaking in a given territory.<sup>73</sup>

In *Canadian Pilots*, using the same analysis, Deschamps J. found no impairment sufficient to trigger interjurisdictional immunity:

The record shows that the designated agricultural land represents only about 63,000 km<sup>2</sup>, or about 4 per cent of the province’s territory. Located mainly in southern Quebec, ... the zones in question are undoubtedly of special interest to the small-scale, indeed also to the large-scale, aviation sector. It is unfortunate that there was little discussion on this point despite its great importance. However, it is apparent from the record in *Lacombe* that there are major small-scale aviation centres in Quebec outside the protected agricultural zones. One example is the Lac-à-la-Tortue airport, which is among the bases of operations indicated in the air operator certificate relied on by the respondents in *Lacombe*, and which is in fact located in the Shawinigan area where the land of the owners represented by the Association in the instant case is situated. It can also be seen from the record in *Lacombe* that the float plane company had been operating for three years in full compliance not only with the municipal by-law, but also with the *ARPALAA*, since it had not been operating on designated agricultural land.

The foregoing is sufficient for me to conclude that there is no evidence of an incidental effect that would amount to an impairment of the core of the federal aeronautics power.<sup>74</sup>

Justice LeBel agreed with this analysis.

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<sup>73</sup> *Id.*, at paras. 178-180. Justice LeBel expressly disagreed with this analysis, finding instead a conflict requiring the application of the paramouncy doctrine.

<sup>74</sup> *Supra*, note 7, at para. 89.

(d) *Commentary*

Though only two judges found it necessary to issue separate reasons, even this modest level of division on the Court represents a worrisome step away from a coherent division of powers framework. In the 2007 companion cases of *Canadian Western Bank* and *Lafarge* the Court appeared to seriously cut down the scope of interjurisdictional immunity, leading to expectations that its future use would be somewhat curtailed. Yet in *Canadian Pilots* and in *Lacombe*, strong majorities endorsed its use. Further indication of a division on the Court is demonstrated by the fact that the co-authors of *Canadian Western Bank* — Binnie and LeBel JJ. — did not agree on the doctrine's application here.

The two cases suggest an underlying and deeply entrenched attitudinal difference on the Court with respect to the depth of problems in the current balance of power between the federal and provincial governments. Justice Deschamps viewed the jurisprudential breakthrough in 2007 as being chiefly about the essential unfairness of interjurisdictional immunity in its historical application to *federal* entities. She was clearly stunned by the majority's casual application of it to protect the entirety of the federal aeronautics power from the slightest hint of provincial interference. Her other objection to the majority's focus on impairment *vis-à-vis* a federal *power* (as opposed to impact on a specific federal undertaking) also has some merit (though it must be pointed out that in *Canadian Western Bank* there is conflicting language on this point).<sup>75</sup> She correctly argues that interjurisdictional immunity is most reasonably read as protecting *things* rather than *powers* writ large, given (a) its historical roots in protecting federally incorporated companies and (b) the tendency for a focus on a federal *power* to morph into a situation where numerous legitimate provincial laws are rendered inapplicable by their *potential* impact on a federal power that is unexercised.

The majority's approach to interjurisdictional immunity appears somewhat detached from the doctrine's potentially destabilizing effect on the balance of powers as described in *Canadian Western Bank*. This may be explained by the particular federal power involved — aeronautics — which historically has been described in terms redolent of an older approach to the division of powers that emphasizes exclusivity. Thus, the majority largely does not remark on the imbalance created by the

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<sup>75</sup> In that case, the majority mentioned both of interference with “the core of the power” and with “activities”. *Canadian Western Bank*, *supra*, note 44, at paras. 42, 48.

doctrine, focusing instead on the precedents that appear to cut a wide swath of immunity for federally regulated aviation undertakings. That said, the majority seems rather too enthusiastic in its approach to the scope of the aeronautics power. Given that the power was recognized under the national concern branch of POGG, it is reasonable to limit it when particular aeronautical activity has only a tenuous connection with the purpose that justifies allocating the power to the federal Parliament in the first place. Such limits could be recognized either in defining the power or in evaluating its protection against valid provincial legislation. Certainly it seems a stretch to permit a purely administrative federal regime for registering private aerodromes to translate into a wholesale immunity from valid local land use laws.

## 2. *Reference re Assisted Human Reproduction Act*<sup>76</sup>

The Supreme Court's opinion in the *AHRA Reference* was the most anticipated decision of the year. The culmination of decades of policy and law reform and intense political debate, the reference provided an opportunity for the Court to give much-needed guidance about the scope of the federal criminal law power, and to identify the most appropriate actors in the realm of assisted human reproduction. Regrettably, neither potential was realized.

The reference was initiated by the province of Quebec which objected to several provisions of the federal *Assisted Human Reproduction Act*.<sup>77</sup> Supported by numerous provinces, Quebec argued that the law was *ultra vires* to the extent that it attempted to regulate the provision of medical services, an activity which ordinarily falls under provincial jurisdiction. The Quebec Court of Appeal agreed. Quebec subsequently passed its own legislation, an *Act respecting clinical and research activities relating to assisted procreation*.<sup>78</sup>

The government of Canada appealed as of right. After reserving their opinion for 20 months, the Supreme Court issued its ruling in December, 2010. The Court split 4-4-1. Four justices, led by the Chief Justice, would have upheld the law in its entirety. In an opinion authored by LeBel and Deschamps JJ., four justices agreed with the provinces. Justice Cromwell wrote the deciding opinion. While he largely agreed

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<sup>76</sup> *Supra*, note 9.

<sup>77</sup> S.C. 2004, c. 2 [hereinafter "AHRA"].

<sup>78</sup> R.S.Q., c. A-5.01.

with the second opinion, he found that some of the impugned provisions were valid exercises of the criminal law power. The appeal was thus allowed only in part, but must be counted as a provincial victory and a serious blow to federal involvement in assisted human reproduction.

This summary will proceed in the same order as the opinion itself, dealing with the Chief Justice's analysis, then LeBel and Deschamps JJ. and finally Cromwell J. It will, first, offer a summary of the essential features of the impugned legislation.

*(a) Legislative History*

As noted by the Chief Justice, over the last few decades human reproduction has undergone monumental change. While "since time immemorial, human beings have been conceived naturally",<sup>79</sup> technology has advanced so as to enable human fertilization outside of the human body. This has gone hand in hand with developments in genetic manipulation and even cloning. These shifts raise moral, religious and juridical questions that "do not fit neatly within the traditional legal frameworks that have developed in a world of natural conception".<sup>80</sup> They have inspired a debate spanning medical ethics, religion, law and politics. These shifts also have created intense fears about the fundamental nature of human life and society, and the possibility that new reproductive technologies might change us in irreversible ways.

Against this backdrop, the Parliament of Canada established the Royal Commission on New Reproductive Technologies (the "Baird Commission"). The Commission issued its report in 1993, expressing concern about certain practices and urging legislation to limit their use. The justices who concurred in the majority result interpreted the Committee as having made two principal recommendations: that legislation be enacted to prohibit certain activities and that a "national regulatory body for reproductive technologies be established".<sup>81</sup> The Commission defended the latter recommendation as an acceptable use of the federal power to regulate for the "peace, order and good government of Canada":

In summary, the significance of research, development, and use of new reproductive technologies for Canadian society as a whole; the national as well as international character of the issues involved; the inter-

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<sup>79</sup> *AHRA Reference, supra*, note 9, at para. 2.

<sup>80</sup> *Id.*, at para. 4.

<sup>81</sup> *Id.*, at para. 160.



relatedness of their intra- and extraprovincial dimensions; and the potential effects of provincial failure to regulate the intraprovincial aspects of the subject, taken together, indicate the need for national uniformity in legislative treatment rather than provincial or regional diversity. ...[R]egulation of new reproductive technologies must occur at the national level, although provincial and professional involvement will be essential to the success of this endeavour. Only then will it be possible to overcome an increasing fragmentation of regulatory control and the difficulty of monitoring as practices and technologies expand and multiply.

The Commission therefore proposes that federal legislation be passed making some uses of the technologies illegal, thus establishing boundaries around what Canada considers acceptable use.<sup>82</sup>

Between 1993 and 1995, the federal government engaged in consultation with various stakeholders and experts. After several bills died on the order paper, Parliament passed the AHRA in 2004.

The Act identifies a series of categories of prohibited activities, supplemented by provisions designed to administer and enforce those prohibitions. One category of provisions — sections 5 through 9 — is cast in absolute terms. Here, the Act prohibits:

- (a) human cloning (s. 5(1)(a)) and the use, manipulation and transplantation of reproductive material of a non-human life form, chimera or hybrid, in order to create a human being (s. 5(1)(g) to (j));
- (b) the creation of an in vitro embryo for any purpose other than creating a human being or improving or providing instruction in assisted reproduction procedures (s. 5(1)(b));
- (c) the creation of an embryo from a cell taken from an embryo or foetus (s. 5(1)(c)) or the maintenance of such an embryo outside of the body after the fourteenth day of its development (s. 5(1)(d));
- (d) the determination of an embryo's sex for non-medical reasons (s. 5(1)(e));
- (e) the alteration of the genome of an in vitro embryo or cell of a human being such that the alteration is capable of being transmitted to descendants (s. 5(1)(f));

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<sup>82</sup> *Id.*, at para. 204, citing *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies* ("Baird Report"), at 22.

- (f) the commercialization of the reproductive functions of women and men, particularly the payment of consideration to surrogate mothers (s. 6) and the purchase and sale of *in vitro* embryos or the purchase of human reproductive material (s. 7);
- (g) any use of *in vitro* embryos unless the donor has given written consent, as well as the use and posthumous removal of human reproductive material unless the donor has given written consent, when the purpose of the use or removal is the creation of an embryo (s. 8); and
- (h) the removal or use of sperm or ova from a donor under 18 years of age, except for the purpose of preserving the sperm or ova or for the purpose of creating a human being where it is reasonable to believe that the human being will be raised by the donor (s. 9).<sup>83</sup>

In the category of “controlled activities” — sections 10 through 13 — the Act prohibits numerous endeavours unless carried out in accordance with the standards prescribed either in the Act or in its regulations:

- (a) altering, manipulating, treating, obtaining, storing, transferring, destroying, importing and exporting human reproductive material or *in vitro* embryos for certain purposes (s. 10);
- (b) combining any part of the human genome with any part of the genome of another species (s. 11);
- (c) reimbursing a donor for an expenditure incurred in the course of donating sperm or ova and a surrogate mother for an expenditure incurred by her in relation to her surrogacy (s. 12);
- (d) undertaking a controlled activity in an unlicensed facility (s. 13).<sup>84</sup>

These provisions are followed by numerous sections that relate to administration and enforcement, including: mechanisms for data storage and retrieval (sections 14 to 19); the establishment of the Assisted Human Reproduction Agency of Canada (sections 20 to 59); the imposition of penalties (sections 60 to 61); the power to make regulations (sections 65 to 67) and the power to exempt certain provinces with equivalent regimes from certain provisions (section 68).

The federal government justified the entire Act as an exercise of the federal criminal law power. Contrary to the analysis of the Baird Commission, it did not invoke POGG.

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<sup>83</sup> *Id.*, at para. 11.

<sup>84</sup> *Id.*, at para. 12.

The Attorney General of Quebec conceded that sections 5 through 7 are valid criminal prohibitions. It challenged sections 8 to 19, 40 to 53, 60, 61 and 68.

*(b) The Opinion of the Chief Justice*

*(i) Pith and Substance and a Tweak to Ancillary Powers*

The Chief Justice began by acknowledging that the province had challenged individual sections of the AHRA, as opposed to the law in its entirety. She stated that the challenge to individual sections fell to be resolved under the ancillary powers (necessarily incidental) doctrine according to which one level of government may enact individual provisions that intrude on the other level's jurisdiction in order to further a valid legislative scheme. In previous cases, this doctrine has begun with examining the impugned sections to see the extent of any intrusion. In this case, the Chief Justice decided to begin the inquiry with the overall regime:

[I]n the case at bar it is necessary to examine the whole scheme first before we can make sense of the challenged provisions. This Court has often underlined that the impugned provisions must be considered in their proper context (see, e.g., *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669, at paras. 17-35). In this case, the Attorney General of Quebec is challenging the bulk of the *Assisted Human Reproduction Act*. While it concedes that ss. 5 to 7 of the Act are valid, it challenges almost all the remaining operative provisions. Under these circumstances, it is impossible to meaningfully consider the provisions at issue without first considering the nature of the whole scheme.<sup>85</sup>

The Chief Justice employed a traditional pith and substance analysis to the entire Act, looking at both its purpose and its effects. She noted the disagreement between the parties about the Act's purpose:

The Attorney General of Canada says that the dominant purpose and effect of the legislative scheme is to prohibit practices that would undercut moral values, produce public health evils, and threaten the security of donors, donees, and persons conceived by assisted reproduction. The Attorney General of Quebec, focussing mainly on

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<sup>85</sup> *Id.*, at para. 17.

the effects of the Act, says that its dominant characteristic is the regulation of reproductive medicine and research.<sup>86</sup>

The Chief Justice found that the text of the Act revealed a purpose “to prohibit inappropriate practices, rather than to promote beneficial ones”.<sup>87</sup> While the law does enact a scheme to control assisted reproduction, “the dominant thrust of the Act is prohibitory”.<sup>88</sup> The Act is a set of prohibitions followed by a set of subsidiary provisions. Noting that the Attorney General of Quebec conceded the validity of sections 5 through 7, the Chief Justice found that the prohibitions in sections 8 through 13 advanced similar goals. Viewed in context, sections 8 through 13 were not aimed at promoting the beneficial aspects of reproduction. They prohibit harmful conduct, in some cases absolutely and in others by stating the conditions under which the risk of harm becomes unacceptable. The provinces remain free to regulate in the area of human reproduction, subject to prohibitions enacted at the federal level in furtherance of a valid criminal law purpose.

The Chief Justice addressed LeBel and Deschamps JJ.’s reliance on the Baird Report as evidence that Parliament sought not just to prohibit harmful practices, but to “impose national medical standards”.<sup>89</sup> The opposing opinion argued that only the provinces may promote beneficial health practices, or at least, that such a purpose is not germane to the criminal law. The Chief Justice rejected this argument, first, on the basis that the Baird Report did not provide evidence of parliamentary intent, and second and more fundamentally, that the argument rests on “an artificial dichotomy between reprehensible conduct and beneficial practices”.<sup>90</sup> That criminal laws have beneficial effects does change their dominant purpose and character as criminal law. The Act targets conduct found by Parliament to be “reprehensible”.

Turning next to effects, while the Act clearly has a significant impact on health care practitioners and hospitals, “the doctrine of pith and substance permits either level of government to enact laws that have ‘substantial impact on matters outside its jurisdiction’”.<sup>91</sup> Viewed as a whole, the Chief Justice concluded:

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<sup>86</sup> *Id.*, at para. 20.

<sup>87</sup> *Id.*, at para. 24.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*, at para. 28.

<sup>90</sup> *Id.*, at para. 30.

<sup>91</sup> *Id.*, at para. 32.

The dominant effect of the prohibitory and administrative provisions is to create a regime that will prevent or punish practices that may offend moral values, give rise to serious public health problems, and threaten the security of donors, donees, and persons not yet born.<sup>92</sup>

Although the Chief Justice's language and analysis would seem to make the second step of pith and substance — assignment to an enumerated power — redundant, she proceeded to determine whether the law's subject matter conformed to the standard test for valid criminal laws: prohibitions backed by penalties enacted for a criminal law purpose. She found this to be the case notwithstanding that several of the provisions contain exceptions, and that a large portion of the Act is regulatory. Exceptions, she stated, are a common feature of criminal law. And Parliament is entitled to create regulatory schemes under section 91(27) provided that those schemes further a valid criminal law purpose.

The Chief Justice attempted to address the argument of the opposing justices that, by prohibiting activities only to the extent they are outside of federal regulations, the law effectively ousts the provincial governments from the field of health regulation. The Chief Justice relied heavily on the fact that the law first enacts prohibitions. The existence of exceptions as a "carve-out" from those prohibitions does not mean that such conduct "is positively *allowed*" by the federal law.<sup>93</sup> She noted that a province would be free to enact more *stringent* regulations without running afoul of any federal purpose which might invoke paramountcy. A more lenient provincial scheme could not oust the Act, but in that case paramountcy would favour the federal prohibition on the particular conduct at issue.

#### (ii) The Scope of the Criminal Law Power

With respect to the issue of valid criminal law purpose, the Chief Justice had little difficulty accepting that the "detrimental aspects"<sup>94</sup> of some forms of assisted human reproduction are amenable to criminal prohibition relating to "morality, health and security".<sup>95</sup> While she acknowledged the risks of a too broad criminal law power, she insisted

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*, at para. 38 (emphasis in original).

<sup>94</sup> *Id.*, at para. 42.

<sup>95</sup> *Id.*

on the importance of anchoring the analysis in the division of powers, as opposed to a policy debate over the *wisdom* of *particular* prohibitions:

[T]his case does not require us to balance the impact of the Act on liberty against the importance of Parliament’s legislative objective. The only question is whether the Act comes within the scope of s. 91(27). In this respect, I differ from my colleagues LeBel and Deschamps JJ., who argue that there is insufficient societal consensus to justify the restrictions that the Act imposes on individual liberties. With respect, the language of justification has no place in the pith and substance analysis.<sup>96</sup>

The Chief Justice concluded that “upholding morality” was the principal criminal object of the Act, while the objectives of “prohibiting public health evils and promoting security play[ed] supporting roles”.<sup>97</sup> With respect to public health evils, the Chief Justice stated that no constitutional threshold of harm is required (though a non-existent harm may suggest a colourable law). Parliament is entitled to legislate in order to target conduct that “elevates the *risk* of the harm to individuals, even if it does not always crystallize in injury”.<sup>98</sup> Notice also the Chief Justice’s description of the security interests at issue in assisted human reproduction:

It is beyond dispute that one of the most fundamental purposes of criminal law — indeed its most fundamental purpose — is the protection of personal security. To preserve human life and security is the state’s most fundamental concern. Traditionally, the criminal law has played a central role in the pursuit of this objective. This extends to life before birth; control over the termination of pregnancy has long been recognized as a valid criminal law subject: see *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616. It is beyond the scope of the present appeal to decide whether such laws infringe individual liberties in a manner that is unconstitutional. In the context of the federalism analysis, it suffices that the protection of vulnerable groups has been recognized as a valid criminal law purpose.<sup>99</sup>

Thus, the Chief Justice concluded, the AHRA is grounded in valid criminal law purposes.

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<sup>96</sup> *Id.*, at para. 45.

<sup>97</sup> *Id.*, at para. 48.

<sup>98</sup> *Id.*, at para. 55.

<sup>99</sup> *Id.*, at para. 58.

(iii) Pushing Back on “Subsidiarity”

The Chief Justice specifically disagreed with the underlying tenor of the majority’s opinion that the criminal law power “must be circumscribed to prevent trenching on provincial powers to regulate health”.<sup>100</sup> She found the reasoning to reach into “untravelling constitutional territory”:<sup>101</sup>

“Double occupancy” of a field of endeavour, such as health, is a permanent feature of the Canadian constitutional order. It leads to a standard “double aspect” analysis under which both aspects subsist side by side, except in case of conflict, when the federal power prevails ... In holding that the double aspect doctrine does not apply to this field of double occupancy, my colleagues assert a new approach of provincial exclusivity that is supported by neither precedent nor practice.<sup>102</sup>

The Chief Justice noted the majority’s reliance on the principle of “subsidiarity”:

In support of their contention that the criminal law must be circumscribed to preserve space for provincial regulation, my colleagues repeatedly refer to the principle of subsidiarity ... The idea behind this principle is that power is best exercised by the government closest to the matter. Since the provincial governments are closest to health care, the argument goes, they should exercise power in this area, free from interference of the criminal law. Subsidiarity therefore favours provincial jurisdiction.

Despite its “initial appeal”, the Chief Justice found such an argument to “misconstrue” subsidiarity which she characterized as a recognition that competing jurisdictions may enact “complementary laws”, as opposed to a trump for regional governments.<sup>103</sup> She noted, in this regard, section 68 of the Act, which provides for provincial laws to operate in certain circumstances.<sup>104</sup> She continued:

More fundamentally, subsidiarity does not override the division of powers in the *Constitution Act, 1867*. L’Heureux-Dubé J. cautioned that “there is a fine line between laws that legitimately complement each other and those that invade another government’s protected legislative sphere” ... and she noted that subsidiarity allows only the former. Subsidiarity might permit the provinces to introduce legislation

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<sup>100</sup> *Id.*, at para. 65.

<sup>101</sup> *Id.*, at para. 67.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, at para. 70.

<sup>104</sup> *Id.*, at para. 71.

that complements the *Assisted Human Reproduction Act*, but it does not preclude Parliament from legislating on the shared subject of health. The criminal law power may be invoked where there is a legitimate public health evil, and the exercise of this power is not restricted by concerns of subsidiarity.<sup>105</sup>

She rejected, as well, the majority's invocation of a "slippery slope" of federal regulation of risky medical practices leading to the obliteration of provincial jurisdiction:

It is not the degree of risk that brings a medical procedure within s. 91(27), but a genuine criminal law purpose, whether grounded in morality, a public health evil, or security. "Playing God" with genetic manipulation engages moral concerns that my colleagues' example of risky cardiac bypass surgery does not. Different medical experiments and treatments will raise different issues. Few will raise "moral" issues of an order approaching those inherent in reproductive technologies. The federal criminal law at issue in this case does not threaten "the constitutional balance".<sup>106</sup>

#### (iv) Conditional Prohibitions and Controlled Activities

Having determined the law's pith and substance to be largely federal, the Chief Justice turned to the impugned provisions more directly. She considered, first, sections 8 through 13 which prohibit activities but either permit exceptions (sections 8-9) or institute a regulated field of activity in which those activities can occur (sections 10-13). The Attorney General of Quebec challenged these provisions first, on the basis of their exceptions, and second, for the role that they play in "promulgat[ing] a scheme to regulate medicine and research in the area of assisted reproduction."<sup>107</sup>

The Chief Justice stated that the mere form of the provisions could not sustain a constitutional challenge. Quebec appeared particularly concerned with the fact that the majority of the regulations were yet to be published but the Chief Justice found this to be of little import. Unpublished regulations could not affect the validity of their enabling provisions. In future, such regulations might sustain an argument that they betray a different legislative purpose but for the moment such an argument is completely

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<sup>105</sup> *Id.*, at para. 72.

<sup>106</sup> *Id.*, at para. 74.

<sup>107</sup> *Id.*, at para. 80.



speculative. As for the extent of a regulatory scheme, comprehensiveness does not work against validity. The question is whether the scheme “reflects and furthers proper criminal law goals.”<sup>108</sup>

The Chief Justice then posited — and rejected — Quebec’s “real”<sup>109</sup> objection to the law:

The Attorney General of Quebec’s real point appears to be that the regulatory scheme imposed by ss. 8 to 13 is of such magnitude that medical and research regulation becomes the dominant character, or pith and substance, of these provisions, notwithstanding the criminal prohibitions they purport to create.

This argument, to the extent it gains any traction, requires that the prohibitions in ss. 8 to 13 be viewed in isolation from the rest of the Act (and it ignores the fact that s. 9 is truly an absolute prohibition like ss. 5 to 7, without any accompanying regulations). The Attorney General of Quebec sees these prohibitions as a stand-alone regulatory scheme divorced from ss. 5 to 7, which are conceded to be valid criminal laws. I agree with the Attorney General of Quebec that the proper approach is to rigorously scrutinize what each provision says and does. But it must be scrutiny in context, which takes into account the relationship between the absolute and selective prohibitions, as well as the other provisions of the Act.<sup>110</sup>

The Chief Justice then considered each provision in turn. Section 8, which prohibits the use of reproductive material for the creation of embryos without donor consent, was characterized as having a valid criminal law purpose — the recognition that gamete donors have a unique moral interest in the use of their reproductive material that must be protected:

At the heart of s. 8 lies the fundamental importance that we ascribe to human autonomy. The combination of the embryo’s moral status and the individual’s interest in his or her own genetic material justify the incursion of the criminal law into the field of consent. There is a consensus in society that the consensual use of reproductive material implicates fundamental notions of morality. This confirms that s. 8 is valid criminal law.<sup>111</sup>

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<sup>108</sup> *Id.*, at para. 85.

<sup>109</sup> *Id.*, at para. 86.

<sup>110</sup> *Id.*, at paras. 86-87.

<sup>111</sup> *Id.*, at para. 90.

Section 9 prohibits underage donation, unless such donation is for the purpose of creating a human being that it is reasonable to believe will be raised by the donor. The Chief Justice accepted the Attorney General of Canada's argument that this provision is meant to protect vulnerable youth from exploitation. Such a purpose easily qualified as valid criminal law.

Section 10 prohibits all manner of medical and genetic manipulation of human reproductive material unless such activities are performed in accordance with the regulations and pursuant to a licence. Quebec argued that this provision represented a significant intrusion into the provincial jurisdiction over health.

The Chief Justice noted, first, that there is no dispute that Parliament could prohibit such activities in their entirety. Parliament chose not to enact an absolute prohibition but rather to regulate activities in the furtherance of preventing the "novel harms to society" raised by such new reproductive technologies as sex selection and "saviour siblings".<sup>112</sup> In addition, such activities pose threats to the health of women and children that are unquestionably within the purview of criminal law. The selective nature of the prohibitions recognizes that these technologies may be beneficial, but the provision remains directed at preventing those uses which Parliament deems unacceptable. Similar regulatory schemes have been upheld as valid exercises of the criminal law power in the areas of environmental protection<sup>113</sup> and firearms control.<sup>114</sup> The Chief Justice rejected the argument that Parliament ought to have ceded all control over regulation to the provinces, as this would be a policy choice not a constitutionally mandated principle:

I cannot accept that if Parliament wishes to prevent the problematic outcomes of otherwise beneficial medical treatments, it must prohibit the treatment until the provinces are able to act. Parliament came to the conclusion that it would be inappropriate to prohibit all fertility treatments in a province that had not yet adopted sufficient oversight. ... [S]uch an absolute ban would have imposed major hardships on individuals. Further, the form of legislation adopted in this case reflects the fact that assisted reproduction is a developing field, and that

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<sup>112</sup> *Id.*, at para. 100.

<sup>113</sup> *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.).

<sup>114</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.) [hereafter "*RJR-MacDonald*"].

Parliament may need to enact further regulations to meet newly discovered criminal concerns ...<sup>115</sup>

Section 10 was thus characterized as valid legislation.

Section 11 essentially prohibits transgenics — the combination of human and non-human genomes — unless permitted by regulation and licence. Characterizing transgenics as a field with “profound ethical and moral implications”,<sup>116</sup> the Chief Justice accepted the selective prohibition on similar grounds to those used to validate (in her view) section 10.

Section 12 prohibits reimbursing sperm and ova donors subject to regulatory authorization and licensing. The Chief Justice found section 12 to be complementary to sections 6 and 7, which prohibit the commercialization of reproduction. She noted that the Baird Report expressed concerns about the potential for financial transactions to “undermine respect for human life and dignity” leading to “the commodification of women and children”.<sup>117</sup> Parliament may, under the criminal law power, draw the line between acceptable and unacceptable commercial activity relating to human reproduction. Section 12, thus, embodies a valid criminal law purpose.

Finally, section 13 absolutely prohibits licensed activities in unlicensed facilities. The Attorney General of Quebec argued that licensing of medical procedures is a quintessentially provincial activity. Canada, though, argued that it is essential to restrict the places in which “clandestine”<sup>118</sup> activities may be conducted. The Chief Justice accepted the importance of controlling where assisted reproduction occurs, noting that “the suitability of assisted reproduction facilities is vital to avoiding harms related to morality and health”.<sup>119</sup> Indeed, “the production of human life in clandestine facilities may well constitute a public health evil”.<sup>120</sup> The health and morality concerns are interlinked, supporting the conclusion that the criminal law is appropriately applied to this sector:

Parliament is entitled to prohibit the performance of assisted reproduction procedures in secret, lest human reproductive material be manipulated and put to purposes that are considered immoral. Parliament is also entitled to prohibit the performance of assisted reproduction procedures in facilities that are unable to appropriately

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<sup>115</sup> *AHRA Reference, supra*, note 9, at para. 104.

<sup>116</sup> *Id.*, at para. 107.

<sup>117</sup> *Id.*, at para. 111.

<sup>118</sup> *Id.*, at para. 116.

<sup>119</sup> *Id.*, at para. 117.

<sup>120</sup> *Id.*, at para. 118.

support human life. ... These prohibitions speak to our fundamental notions of humanity. Consequently, the morality interest validates the use of criminal sanctions to prevent assisted reproduction from being practised in unsuitable venues.<sup>121</sup>

The Chief Justice would have upheld all of the provisions in sections 8 through 13 as valid criminal law in and of themselves.

(v) Administration and Enforcement — The Heart of Ancillary Powers

The Chief Justice next considered the administration and enforcement mechanisms challenged in the reference — sections 14 through 61, and 65 through 68. As noted above:

Sections 14 to 19 set up a system of information management. Sections 20 to 39 of the Act establish the Assisted Human Reproduction Agency of Canada. Sections 40 to 59 charge the Agency with administering and enforcing the Act and regulations, and authorize it to issue licences for certain activities related to assisted reproduction. Finally, ss. 60 and 61 provide for penalties, ss. 65 to 67 authorize the promulgation of regulations, and s. 68 addresses the equivalency agreements with the provinces.<sup>122</sup>

Chief Justice McLachlin acknowledged that in pith and substance a number of the above provisions did not constitute valid exercises of criminal law. The Attorney General of Canada defended them under the ancillary powers doctrine, which permits governments to enact laws that fall outside of their jurisdiction if those laws are part and parcel of a valid legislative regime. The ancillary powers doctrine operates under a “rational functional test” for determining whether the impugned provisions can be justified, with the caveat that in cases of extreme intrusion, the provisions must be “necessary” to the overall regime. Thus an application of ancillary powers requires determining, first, the extent of the intrusion and second, whether the connection is strong enough.

In past cases the severity of the intrusion has been evaluated in light of several factors: the scope of heads of power in play (broad powers being understood to withstand occasional intrusions more than narrow ones); the nature of the impugned provision (in particular, whether it was remedial or supplementary to the larger scheme); and finally, the legislative history in

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<sup>121</sup> *Id.*, at para. 119.

<sup>122</sup> *Id.*, at para. 124.

the area.<sup>123</sup> In the present case, the Chief Justice found that all of those factors supported the finding that the intrusion was not serious. The offended provincial powers are extremely broad. None of the impugned provisions create free-standing rights of entitlements — rather they “function merely to assist in enforcing the Act”.<sup>124</sup> And finally, Parliament has long sought to address issues of morality, health and security; and it has long invoked the criminal law power when enacting regulatory schemes. Thus the intrusion into provincial areas of competence in the present case was not serious.

Therefore, the rational functional test was sufficient. The impugned provisions must be rationally related to the overall scheme, and must complement rather than supplement it. The Chief Justice found this to be the case with respect to all of the provisions. Sections 14 through 19 address access to information. As informed consent and privacy are central to the values and goals of the Act, some mechanism is required to enforce compliance with such activities. Sections 14 through 19 function in just such a way and thus meet the rational functional test.

Sections 20 through 59 and 65 through 67 relate to the establishment of the agency, the issuance of licences, inspection and enforcement, and promulgating regulations. The Attorney General of Quebec did not challenge all of these provisions — only the licensing requirements and certain provisions regarding inspection and enforcement. The Chief Justice found all of these provisions a valid exercise of ancillary powers to further the overall purpose of the Act.

The penal consequences provided for in sections 60 and 61 were clearly ancillary to the criminal prohibitions.

Section 68 institutes the equivalency provision regarding provincial laws. It permits the Governor in Council to declare provisions of the Act inapplicable in a province with similar provisions. The Chief Justice noted that such equivalency provisions have long been a feature of federal legislation, and were not attacked specifically here. Rather, section 68 was used as evidence that the legislation is predominantly regulatory in nature rather than criminal. In the result, she found no constitutional infirmity.

Four justices, then, found in favour of the federal government.

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<sup>123</sup> *Id.*, at paras. 129-131.

<sup>124</sup> *Id.*, at para. 135.

(c) *Justices LeBel and Deschamps*

Writing for four justices, LeBel and Deschamps JJ. disagreed entirely with the Chief Justice. They answered the constitutional question in the affirmative, finding every impugned provision *ultra vires* the Parliament of Canada, save for the penalty provisions in sections 60 and 61 that related to *intra vires* sections. In their view, the impugned provisions related not to the criminal law, but to the regulation of hospitals, to civil rights and to local matters within the provinces.

(i) A Different View of the History

The justices first looked at the history of the legislation. Here, they differed from the Chief Justice on the degree to which the Baird Report shaped the goals of the legislation. The Baird Report was described as making two key recommendations: that certain aspects of new reproductive technologies be prohibited; and that a national regulatory body be established. Justices LeBel and Deschamps noted that early bills introduced in the House of Commons addressed both of these recommendations separately.<sup>125</sup>

Turning to the AHRA itself, the justices cited its statement of principles:

2. [Declaration] The Parliament of Canada recognizes and declares that
  - (a) the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;
  - (b) the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;
  - (c) while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies;

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<sup>125</sup> *Id.*, at paras. 160-161.

- (d) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies;
- (e) persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status;
- (f) trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition; and
- (g) human individuality and diversity, and the integrity of the human genome, must be preserved and protected.<sup>126</sup>

The justices interpreted Parliament's approach to the controlled activities in sections 10 through 13 as a clear adoption of both of the Baird Report's recommendations: that access to procedures be facilitated if they "have been demonstrated to be safe and effective",<sup>127</sup> and the Report's description of a "near consensus" on the acceptability of such activities as *in vitro* fertilization and assisted insemination.<sup>128</sup> Further, they noted that the law draws both substantive and formal distinctions between controlled and prohibited activities<sup>129</sup> and that this distinction was relevant to the division of powers analysis. They criticized the Chief Justice for dismissing the weight of the Baird Report in determining the legislative purpose as lacking a factual foundation and contrary to the "usual approach to constitutional analysis".<sup>130</sup>

#### (ii) General Division of Powers Principles

The justices noted that federalism is an unwritten constitutional principle that demands attention in any case in which it plays a role. The powers of the two levels of government are coordinate and require mutual respect. They cited the *Secession Reference*<sup>131</sup> as endorsing the principle of subsidiarity, which was described as follows:

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<sup>126</sup> *Id.*, at para. 164.

<sup>127</sup> *Id.*, at para. 168.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*, at para. 176.

<sup>130</sup> *Id.*, at para. 177.

<sup>131</sup> *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, 1998] 2 S.C.R. 217 (S.C.C.).

[L]egislative action is to be taken by the government that is closest to the citizen and is thus considered to be in the best position to respond to the citizen's concerns (on the application of this principle in public law ...). In *Reference re Secession of Quebec*, the Court expressed the opinion that "[t]he federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity" (para. 58). In taking this position, the Court recognized the possibility inherent in a federal system of applying the principle of subsidiarity, thereby enhancing its democratic dimension and democratic value added.<sup>132</sup>

According to the four justices, this precedent, combined with the traditionally broad interpretation given to section 92(13), proves that the principle of subsidiarity is "an important component of Canadian federalism".<sup>133</sup>

The justices then turned to a discussion of more general doctrines that apply to division of powers disputes. Similar to Deschamps J.'s analysis in *Canadian Pilots* and *Lacombe*, the justices noted that "activities, acts or conduct can sometimes be viewed from different normative perspectives",<sup>134</sup> each of which corresponds to a different level of governmental jurisdiction. In such a situation, one may speak of a double aspect. Where there is no double aspect, and the law's pith and substance is connected to an exclusive power belonging to the opposing level, the law is invalid. Where the connection exists only in respect of *some* provisions, it may be possible to apply the ancillary powers doctrine to save those provisions. Justices LeBel and Deschamps cited Dickson J.'s approach to that doctrine in *General Motors*:<sup>135</sup>

First, the court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent (if it does not intrude, then the only possible issue is the validity of the act). Second, the court must establish whether the act (or a severable part of it) is valid; in cases under the second branch of s. 91(2) this will normally involve finding the presence of a regulatory scheme and then ascertaining whether that scheme meets the requirements articulated in [past cases]. If the scheme is not valid, that is the end of the inquiry. If the scheme of regulation is declared valid, the court must then determine whether the impugned provision is sufficiently integrated

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<sup>132</sup> *AHRA Reference*, *supra*, note 9, at para. 183.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*, at para. 185.

<sup>135</sup> *Supra*, note 31.



with the scheme that it can be upheld by virtue of that relationship. This requires considering the seriousness of the encroachment on provincial powers, in order to decide on the proper standard for such a relationship. If the provision passes this integration test, it is *intra vires* Parliament as an exercise of the general trade and commerce power. If the provision is not sufficiently integrated into the scheme of regulation, it cannot be sustained under the second branch of s. 91(2).<sup>136</sup>

The justices stated their preference for the term “overflow” over “encroachment” when describing the character of impugned provisions which cannot be deemed *intra vires* on their own, noting that “laws may validly overflow from the jurisdiction of the government that enacted them so long as the overflow remains ancillary”.<sup>137</sup>

The justices noted that the first step in the *General Motors* test is to examine the impugned provisions as opposed to the law a whole. This must be done as precisely as possible, since “vague and general characterization[s]” could have “perverse effects”.<sup>138</sup> Care must be taken not to assign, as a subject matter, a topic so vast as to be capable of supporting the exercise of legislative power by either level of government. “Health care” and “the environment” are two such examples. The pith and substance of a provision necessarily will be less general than that of the statute as a whole. The need for precision assumes greater importance where a connection must be drawn with a power with imprecise contours. In the case of very broad powers, resort to other principles such as subsidiarity may assist.<sup>139</sup>

The justices criticized the Attorney General of Canada for proposing that the ancillary powers analysis begin with an evaluation of the scheme as a whole. This approach, they noted, was rejected in *General Motors*.<sup>140</sup> Consequently, they rejected the Chief Justice’s choice to first analyze the AHRA in its entirety. They also declined to put much weight on the remedial nature of the provisions; whether the overflow was “limited”; or whether it was unprecedented. What is required instead is an evaluation of “the observable tangible effects of the impugned provisions on the relevant heads of power”.<sup>141</sup>

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<sup>136</sup> *AHRA Reference*, *supra*, note 9, at para. 187.

<sup>137</sup> *Id.*, at para. 188.

<sup>138</sup> *Id.*, at para. 190.

<sup>139</sup> *Id.*, at paras. 190-191.

<sup>140</sup> *Id.*, at para. 194.

<sup>141</sup> *Id.*, at para. 195.

(iii) Evaluating the Impugned Provisions

Having set out a general approach, the justices turned to the impugned provisions. With respect to pith and substance, they found that the provisions were meant to adopt the dual recommendations of the Baird Commission, namely: (1) that unacceptable practices be prohibited and (2) that national standards be maintained for the promotion of the benefits of assisted human reproduction technologies. The justices placed great reliance on the evolving nature of such technologies, and their shift from fantastical, even freakish acts, to aids necessary to promote reproductive choice:

[W]hile it is true that certain groups in Canadian society are opposed to assisted human reproductive technologies and fundamentally challenge their legitimacy, the evidence shows that assisted human reproduction is usually regarded as a form of scientific progress that is of great value to individuals dealing with infertility problems. The same attitudes are adopted with respect to research into reproductive technologies. ... Despite the agreement that technologies related to assisted human reproduction need to be regulated, it is clear from the evidence that research into such technologies is considered to be not only desirable, but necessary.<sup>142</sup>

At least with respect to those activities the AHRA seeks to control, one cannot posit a simple criminal law purpose. That Parliament intended for people to maintain access to the benefits of such activities is evident from the fact that they are *not* simply prohibited. The impugned provisions thus have the purpose of setting up “a national scheme to regulate the activities in question”.<sup>143</sup>

Aside from legislative purpose, the justices found the impugned provisions to seriously affect the practice of medicine, and to conflict or overlap with many provincial laws. For example, section 8, which sets out a consent regime “ha[s] a direct impact on the relationship between physicians called upon to use assisted reproductive technologies, donors, and patients”.<sup>144</sup> They also duplicate consent rules found in the *Civil Code of Quebec*.<sup>145</sup> The same kinds of effects exist with respect to the sections regulating reimbursement of surrogate mothers, licensing of research facilities, permits, and access to information:

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<sup>142</sup> *Id.*, at para. 213.

<sup>143</sup> *Id.*, at para. 217.

<sup>144</sup> *Id.*, at para. 220.

<sup>145</sup> S.Q. 1991, c. 64.

[E]ven though an integrated system already exists in Quebec for all medical and related research activities, including those that, from ethical, moral and medical standpoints, are similar to activities associated with assisted human reproduction, the *AHR Act* establishes a distinct framework and special rules for those associated with assisted human reproduction. As a result, the *AHR Act's* special system for assisted reproductive activities, with all its potential for red tape, has a considerable impact on all those who participate in such activities, both professionals who undertake them and the institutions where they take place.<sup>146</sup>

Thus, the pith and substance of the impugned provisions was deemed to be “the regulation of assisted human reproduction as a health service”.<sup>147</sup>

#### (iv) Narrowing the Criminal Law Power

The justices then turned to where such a pith and substance falls in the division of powers. They rejected the idea that provisions had a sufficient connection with the criminal law power. Importantly, they appeared to enact a stricter approach to section 91(27), by emphasizing the need for a true criminal law purpose to be directed at an “evil” that is “real”.<sup>148</sup> Importantly, the risk of harm must be described precisely enough that a connection can be established between the apprehended harm and the evil in question.<sup>149</sup> This was easily established in cases involving narcotics use, tobacco advertising and firearms regulation. In the instant case, though, the connection was more tenuous.

The justices took especial exception to the idea that alleged “morality” will always suffice to ground a criminal law purpose:

In [the Chief Justice’s] view, to justify having recourse to the criminal law by relying on morality, Parliament need only have a reasonable basis to expect that its legislation will address a concern of fundamental importance. ... If her interpretation were adopted, the decision to bring certain conduct within the criminal law sphere would never be open to effective review by the courts. The issue would simply be whether a moral concern is addressed and whether there is a consensus that the concern is of fundamental importance.

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<sup>146</sup> *AHRA Reference*, *supra*, note 9, at para. 225.

<sup>147</sup> *Id.*, at para. 227.

<sup>148</sup> *Id.*, at para. 236.

<sup>149</sup> *Id.*, at para. 237.

This approach in effect totally excludes the substantive component that serves to delimit the criminal law.<sup>150</sup>

The justices rejected the above noted formulation as a limitless definition that would jeopardize the balance between federal and provincial powers. Not every “social, economic or scientific issue [is] a moral problem”.<sup>151</sup>

In 1931, in *Proprietary Articles Trade Association*, the Privy Council rejected any conception of the criminal law that did not take into account the evolution of society. Thus, when Parliament criminalizes an act, its decision remains subject to review by the courts, which will take society’s attitude into account. And it must be borne in mind in this area that a broad range of philosophical and religious ideas coexist in a society as diverse as contemporary Canadian society. Although the rules in the *Criminal Code* have long been understood in light of the principles of Judeo-Christian morality, societal changes have freed them from those fetters.<sup>152</sup>

In the instant case, the justices found an insufficient connection between the impugned provisions and the criminal law power. They relied heavily on the distinction between absolutely prohibited, and conditionally prohibited or controlled activities to show that in the latter cases, the AHRA seeks to control activities that are largely beneficial but may pose risks in certain circumstances. This feature of the law prevents the establishment of a connection with the criminal law in two ways. First, the Act identifies no “evil” with respect to those provisions which do not absolutely prohibit an activity. Second, the Act extends to *all* reproductive activities, many of which do not constitute “reprehensible” conduct at all.

The justices noted that the Baird Commission had engaged in frank discussions about the federal power to establish a national regulatory regime and ultimately had concluded that POGG was the natural home for it. Without pronouncing on the validity of POGG in this area, the justices relied on this fact to demonstrate that it was well known that the Act could extend beyond federal jurisdiction:

It is clear from the Commission’s report that its mandate and its recommendations were conducive to actions involving more than just the federal government’s legislative powers:

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<sup>150</sup> *Id.*, at para. 238.

<sup>151</sup> *Id.*, at para. 239.

<sup>152</sup> *Id.*

It is clear, then, that many sectors of society beyond the health care sector and public institutions beyond the federal government will have crucial roles to play. Concerted action and cooperation by the provinces/territories, the professions, and other key participants in the context of the proposed national framework are the only way to ensure ethical and accountable use of new reproductive technologies in Canada — now and in the future.<sup>153</sup>

In the result, the criminal law power could not sustain the impugned provisions. (Importantly, because of the justices' finding of the lack of a criminal law purpose, the impugned provisions did not partake of a double aspect.)<sup>154</sup> Rather, the provisions had a firm connection with provincial powers, for example, hospitals,<sup>155</sup> property and civil rights,<sup>156</sup> and local matters.<sup>157</sup>

(v) Ancillary Powers: Insufficient Connection

The justices next considered whether the provisions could be saved under the ancillary powers doctrine. They noted that the connection must be established between the provisions and the outright prohibitions. First, they characterized the overflow as serious, requiring a relationship of necessity. None was established. The absolute prohibitions did not depend on the regulatory scheme in order to be effective. Legislative history showed a clear delineation between the prohibited activities and those subject to control. Any connection was “artificial”:

[R]eproductive technologies do not constitute a matter over which Parliament or the provinces can claim exclusive jurisdiction. Two very different aspects of genetic manipulation have been combined in a single piece of legislation. The social and ethical concerns underlying these two aspects appear to be distinct, and in some cases even divergent. While the prohibited activities are deemed to be reprehensible, the controlled activities are considered to be legitimate. Parliament has therefore made a specious attempt to exercise its criminal law power by

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<sup>153</sup> *Id.*, at para. 252, citing the *Baird Report*, at 202.

<sup>154</sup> *Id.*, at paras. 269-271.

<sup>155</sup> *Id.*, at para. 260.

<sup>156</sup> *Id.*, at paras. 264-265.

<sup>157</sup> *Id.*, at para. 266.

merely juxtaposing provisions falling within provincial jurisdiction with others that in fact relate to the criminal law.<sup>158</sup>

Thus, the constitutional question was answered in the affirmative.

(d) *Justice Cromwell*

As the two opinions canvassed above reflected a 4-4 split, Cromwell J. acted as tie-breaker. Though he largely agreed with LeBel and Deschamps JJ., he parted company from them in a few important respects.

First of all, Cromwell J. rejected both opinions' characterizations of pith and substance, preferring to see it as "regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction".<sup>159</sup> In this regard, he agreed with the Court of Appeal for Quebec and found the ambit of the law to extend beyond even what LeBel and Deschamps JJ. proposed. He did characterize the "matter" of the provisions in the same way they did — as related to hospitals, property and civil rights and local matters. He rejected the idea that the impugned provisions *as a whole* served any criminal law purpose.

But some of Cromwell J.'s conclusions differed from those of LeBel and Deschamps JJ. In particular, he found that sections 8 and 9 *did* serve a valid criminal law purpose:

Sections 8 and 9 set out prohibited activities and are aimed at protecting each person's control over the "products" of his or her own body; they focus on consent. The purpose and effect of s. 8 is to prevent use of a donor's reproductive material or an *in vitro* embryo for purposes other than those for which the donor gave free and informed consent. Section 9 addresses the age of consent. It prohibits the use of sperm or ova from a donor under 18 years of age. In my view, the issues of consent and the age of consent to otherwise prohibited activities fall within the traditional boundaries of criminal law.

And, so did section 12:

I reach the same conclusion with respect to s. 12. It must be read with ss. 6 and 7. Those provisions, which the Attorney General of Quebec concedes to be valid federal criminal law, prohibit various forms of

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<sup>158</sup> *Id.*, at para. 278.

<sup>159</sup> *Id.*, at para. 285.

commercializing the reproductive functions of women and men. Section 12 sets out an extension of the regime established by ss. 6 and 7; s. 12 is a form of exemption from the strictness of the regime which they impose and, to some extent, defines the scope of the prohibitions provided for in those sections.<sup>160</sup>

In the result, Cromwell J. answered the constitutional question as follows:

With respect to ss. 10, 11, 13, 14 to 18, 40(2), (3), (3.1), (4) and (5) and ss. 44(2) and (3) I would answer yes. With respect to ss. 8, 9, 12, 19 and 60, I would answer no. With respect to ss. 40(1), (6) and (7), 41 to 43, 44(1) and (4), 45 to 53, 61 and 68, to the extent they relate to constitutionally valid provisions, I would also answer no.<sup>161</sup>

*(e) Commentary*

The *AHRA Reference* is disappointing for failing to provide sufficient guidance for future cases concerning the criminal law power. It is discouraging that 20 months of deliberation would produce no more than a 4-4-1 split. In the main, the stricter attitude toward section 91(27) in the LeBel-Deschamps opinion is a welcome development. Over the last two decades, the criminal law power has been defined out of all reasonable bounds, with a corresponding negative impact on the fragile balance between federal and provincial authority. It is inappropriate for section 91(27) to function as a sort of catch-all power by which the federal government can regulate all manner of activities.

That said, LeBel and Deschamps JJ. appeared to be unduly influenced by the human stories at the centre of assisted reproduction, arguing that many of the activities prescribed by the Act are not really “criminal” because they have the potential to do good. Such an approach entrenches value judgments as a definitional limit to section 91(27) in a way that runs counter to the purpose of the division of powers. Under the division of powers “the criminal law” properly refers to laws that *function* in a particular manner, not to laws that seek to proscribe particular kinds of *behaviour*. The Chief Justice had the better argument that Parliament is well within its constitutional law-making role to seek to limit access to certain technologies so long as it has made a moral judgment that access

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<sup>160</sup> *Id.*, at paras. 289-290.

<sup>161</sup> *Id.*, at para. 294.

*should* be so limited. The Chief Justice, though, was far too quick to accommodate a regulatory scheme under the umbrella of criminal law.

Most likely, the *AHRA Reference* represents an unfortunate result reached for the correct reasons. The federal government should have tried to justify the law under the POGG power. Its insistence on section 91(27) was an understandable strategy (given the precedents) but was not the correct approach in law. It is more than reasonable to classify assisted human reproduction as a field requiring national coordination due to provincial inability and national concern. The justices forming the majority would have had greater difficulty dismissing the federal interest (though the recurring emphasis on “subsidiarity” may well have been the deciding factor for at least some of them).

The AHRA signals a rather stark divide on the Court *vis-à-vis* federal and provincial powers. The split may well be repeated in decisions expected over the next term, namely, the *Insite* case<sup>162</sup> and the *Securities Reference*.<sup>163</sup> There has emerged a strong Quebec-based judicial block intent on protecting provincial jurisdictions from federal overreach. It will be interesting to see whether this new approach to division of powers disputes takes greater hold on the Court as its composition changes over the next several years. If so, we could be seeing the start of a new era.

### III. THE CHARTER CASES

The 2010-2011 Term featured a number of high-profile decisions concerning the *Canadian Charter of Rights and Freedoms*.<sup>164</sup> Three arose out of alleged infringements of the freedom of expression; one involved a challenge to Ontario legislation under Charter section 2(d), which guarantees freedom of association; one rested on a claim that section 38 of the *Canada Evidence Act*<sup>165</sup> violated the right to a fair trial under section 7; and two addressed the right to equality under Charter section 15. We will begin by considering the free expression decisions.

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<sup>162</sup> *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.). In fact, the Court issued a unanimous decision.

<sup>163</sup> *Reference re Canadian Securities Act (Can.)*, [2010] S.C.C.A. No. 190 (S.C.C.).

<sup>164</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>165</sup> R.S.C. 1985, c. C-5.



## 1. Section 2(b): Practising Journalism in Quebec

The Court's free expression case law in 2010-2011, like that in 2009-2010, focused on the freedom of the press. Interestingly, all three free expression decisions address Quebec law. *Globe and Mail v. Canada*<sup>166</sup> considered whether and how the Court's 2010 decision in *R. v. National Post*<sup>167</sup> should apply in Quebec, where the *Quebec Charter*<sup>168</sup> and *Code of Civil Procedure*<sup>169</sup> reflect subtly different values and approaches to law-making. The two *C.B.C.* decisions<sup>170</sup> concern a more general question; namely, the scope of press freedom in courthouses.

### (a) *Globe and Mail v. Canada (Attorney General)*

Daniel Leblanc, a journalist for *The Globe and Mail* ("the Globe"), wrote a number of articles in which he alleged that public funds had been misused in the administration of the federal government's Sponsorship Program.<sup>171</sup> He attempted to keep the identity of his source confidential. Groupe Polygone, sued in Quebec Superior Court by the Attorney General of Canada for the recovery of money paid to it under the Sponsorship Program, obtained an order requiring Leblanc to answer questions which would reveal the identity of his source.<sup>172</sup> The Globe sought to have this order revoked.<sup>173</sup> Leblanc testified on the revocation motion.<sup>174</sup> Under cross-examination he was asked a number of questions to which counsel for the Globe objected.<sup>175</sup> These questions, it was argued, were either irrelevant or would lead to a breach of journalist-source privilege.<sup>176</sup> Justice de Grandpré perfunctorily dismissed these objections.<sup>177</sup> The Globe applied to discontinue the revocation proceed-

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<sup>166</sup> *Supra*, note 10.

<sup>167</sup> [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477 (S.C.C.).

<sup>168</sup> *Quebec Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 [hereinafter "*Quebec Charter*"].

<sup>169</sup> R.S.Q., c. C-25 [hereinafter "*Code*"].

<sup>170</sup> *Supra*, notes 11 and 12.

<sup>171</sup> *Globe and Mail*, *supra*, note 10, at paras. 4, 6.

<sup>172</sup> *Id.*, at paras. 7-8.

<sup>173</sup> *Id.*, at para. 9.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

ings, but this application was refused.<sup>178</sup> The Quebec Court of Appeal dismissed the *Globe's* appeal on the motion to discontinue.<sup>179</sup>

A second issue arose during the discontinuance hearing. Groupe Polygone was, at the time, engaged in settlement negotiations with the federal government. Leblanc published an article reporting that, in the course of these negotiations, Groupe Polygone had made an offer of \$5 million.<sup>180</sup> At the hearing, counsel for Groupe Polygone openly expressed frustration at this breach of confidentiality.<sup>181</sup> Justice de Grandpré, on his own motion and without taking submissions from either party, ordered Leblanc not to publish further articles on the negotiations.<sup>182</sup>

On appeal, the Supreme Court unanimously held that de Grandpré J. had erred in his approach to the issue of journalist-source privilege. It also quashed the publication ban.

(i) Journalist-Source Privilege in Quebec

In *National Post*,<sup>183</sup> the Supreme Court held that the confidentiality of journalistic sources implicates Charter section 2(b)'s right to free expression. Some matters of public importance, Binnie J. observed, can be meaningfully discussed only "through the cooperation of sources who will not speak except on condition of confidentiality".<sup>184</sup> For this reason, it will sometimes be the case that "the public interest in protecting the secret source from disclosure outweighs other competing public interests".<sup>185</sup> The Court refused, however, to confer upon journalist-source privilege the status of a class or constitutional privilege. Instead, the Court found that the right to free expression would be given adequate protection by recognizing a case-by-case privilege, at common law, for journalist-informant communications.<sup>186</sup>

Writing for the Court in *Globe and Mail*, LeBel J. reaffirmed that section 2(b) requires *some* degree of protection for the identity of journalistic sources.<sup>187</sup> The core question, here, is whether the manner

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*, at para. 10.

<sup>181</sup> *Id.*, at para. 11.

<sup>182</sup> *Id.*

<sup>183</sup> *R. v. National Post*, [2010] S.C.J. No. 16, 2010 SCC 16 (S.C.C.).

<sup>184</sup> *Id.*, at para. 28.

<sup>185</sup> *Id.*, at para. 34.

<sup>186</sup> *Id.*, at para. 51.

<sup>187</sup> *Globe and Mail*, *supra*, note, 10, at 28.

and degree of protection in Quebec court proceedings should reflect that province's civil law tradition.<sup>188</sup> The *Quebec Charter* contains several provisions that might be said to mandate a higher level of protection: section 3, which protects freedom of expression; sections 4 and 5, which protect the dignity of the person and his or her private life; section 9, which protects professional secrecy; and section 44, which protects access to information.<sup>189</sup> There was, moreover, a question about the appropriateness of importing a common law mechanism for assessing claims of journalist-source privilege into Quebec civil procedure, which is “primarily made up of the laws adopted by the National Assembly, found in the [*Code of Civil Procedure*], and not of judge-made rules”.<sup>190</sup>

The Court rejected claims that any provision of the *Quebec Charter* could support “a class-based, quasi-constitutional journalist-source privilege”.<sup>191</sup> Section 3 protects freedom of expression, a right which may indeed be compromised by attempts to uncover the identity of journalistic sources. For the same reasons that section 2(b) of the Charter does not give rise to a constitutional privilege for journalistic sources, however, section 3 of the *Quebec Charter* cannot generate a quasi-constitutional privilege. Referring to Binnie J.'s reasons in *National Post*, LeBel J. noted that the class of journalists is simply too uncertain and porous — that, without a clear means of distinguishing journalists from non-journalistic bloggers, tweeters, and amateur town-criers, it would be impossible to determine when the proposed class privilege would apply and when it would not.<sup>192</sup> Section 44 of the *Quebec Charter* protects “access to information”, which arguably could be impaired by discouraging potential sources from approaching journalists. But LeBel J. replied that section 44 grants a right of access to information only to an extent already recognized by law: it cannot be used to “broaden the scope of the right, and cannot be the source of a quasi-constitutional right to the protection of journalists' sources”.<sup>193</sup>

Finally, although section 9 purports to protect professional secrecy, the section does not apply to journalists.<sup>194</sup> The practices of journalists, who need not be members of any professional organization, are essen-

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<sup>188</sup> *Id.*, at para. 26.

<sup>189</sup> *Id.*, at 29.

<sup>190</sup> *Id.*, at para. 30.

<sup>191</sup> *Id.*, at para. 32.

<sup>192</sup> *Id.*, at para. 33. See also *National Post*, *supra*, note 183, at para. 40.

<sup>193</sup> *Globe and Mail*, *id.*, at para. 34.

<sup>194</sup> *Id.*, at para. 35.

tially unregulated.<sup>195</sup> Furthermore, LeBel J. observed that the right of professional secrecy is supposed to protect individuals who seek *help* from professionals. Sources, however, do not seek help from journalists in any straightforward sense.<sup>196</sup> Section 9, therefore, does not say anything at all about journalist-source privilege. This is underscored by the fact that the Quebec legislature “has not seen fit to include journalists in the list of professions subject to professional secrecy. It has spoken, and done so clearly.”<sup>197</sup>

Justice LeBel found it “difficult to accept” that, where there is a “gap” in the *Code of Civil Procedure*, Quebec courts cannot “resort to common law legal principles to fill” it.<sup>198</sup> Given that many of the rules contained in the Code emerged out of the common law, and given that Quebec continues to be a “mixed jurisdiction”, it is entirely appropriate to refer to the common law when “interpreting and articulating” those rules.<sup>199</sup> The Code says nothing about journalist-source privilege, and it would be wrong to exempt journalists from testifying about the identity of their sources on the basis of a class privilege that, for reasons discussed above, finds no support in either the Charter or *Quebec Charter*.<sup>200</sup> Since the right to free expression *does* engage journalist-source privilege, however, it is necessary for the courts to provide it with *some* form of legal protection.<sup>201</sup> Specifically, the Court held, Quebec courts should apply the Wigmore test for privilege on a case-by-case basis.<sup>202</sup> This approach would allow the courts to balance the competing rights or interests at stake,<sup>203</sup> and would guarantee some “consistency across the country”.<sup>204</sup> In determining whether the claim of privilege should prevail over competing interests — for example, our interest in having matters properly adjudicated in civil trials — we should consider the stage of the proceedings in which journalist-source privilege is asserted, and the centrality of the question posed to the journalist in the dispute at hand.<sup>205</sup> Where the question, if answered, would yield information that is irrelevant or only tenuously relevant to the dispute, the Wigmore test will

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<sup>195</sup> *Id.*, at para. 36.

<sup>196</sup> *Id.*, at para. 38.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*, at paras. 45, 41.

<sup>199</sup> *Id.*, at para. 45.

<sup>200</sup> *Id.*, at paras. 46-47.

<sup>201</sup> *Id.*, at para. 48.

<sup>202</sup> *Id.*, at para. 54.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*, at para. 55.

<sup>205</sup> *Id.*, at para. 58.

almost certainly lead to exclusion.<sup>206</sup> Furthermore, if there are any other means of acquiring the information sought, the balance should be struck in favour of the privilege.<sup>207</sup>

In the case at bar, the Court had little trouble concluding that de Grandpré J. had erred by failing not only to apply the Wigmore test, but by failing to recognize journalist-source privilege in the first place. The case was remitted back to the Superior Court of Quebec.

#### (ii) Publication Bans

Given that de Grandpré J. issued a publication ban “on his own motion and without having heard submissions from either party”, it will come as no surprise that the Court quashed the order.<sup>208</sup> In the course of doing so, though, LeBel J. made a number of remarks that warrant attention. Affirming that there is an implied undertaking of confidentiality in settlement negotiations, he nonetheless found that neither Leblanc nor *The Globe and Mail* had violated that duty, or otherwise committed a civil wrong, by publishing the information they received about Group Polygone’s settlement offer. The duty of confidentiality, LeBel J. stated, applies only to the parties to the negotiation themselves and their agents — not to third parties.<sup>209</sup> A publication ban cannot, therefore, be justified simply on the basis that it will prevent journalists from breaching a duty of confidentiality. “Provided a journalist has not participated in the breach of confidentiality”, he noted, “a publication ban will only be appropriate in cases where the balancing test otherwise favours non-publication”.<sup>210</sup> Justice LeBel remarked that “there are sound policy reasons for not automatically subjecting journalists to the legal constraints and obligations imposed on their sources”:

The fact of the matter is that, in order to bring to light stories of broader public importance, sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process. History is riddled with examples. In my view, it would also be a dramatic interference with the work and operations of the news media to require a journalist, at the risk of having a publication ban imposed, to ensure that the source is not providing the information

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<sup>206</sup> *Id.*, at para. 65.

<sup>207</sup> *Id.*, at paras. 62-63.

<sup>208</sup> *Id.*, at para. 75.

<sup>209</sup> *Id.*, at para. 81.

<sup>210</sup> *Id.*

in breach of any legal obligations. A journalist is under no obligation to act as legal adviser to his or her sources of information.<sup>211</sup>

These are, needless to say, intriguing comments.

Since de Grandpré J. did not even entertain submissions on the publication ban he issued, the Court did not, strictly speaking, need to consider whether one might properly be ordered in the circumstances of this case. Nevertheless, it briefly examined the question. Under *Dagenais*<sup>212</sup> and *Mentuck*,<sup>213</sup> a court is to decide whether to order a publication ban by asking itself two questions. First, “[i]s the order necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk?” and second, “[d]o the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the right to free expression and the efficacy of the administration of justice?”<sup>214</sup> The Court concluded that there was little if any evidence that Leblanc’s article on Groupe Polygone’s offer of settlement posed any risk to the administration of justice. It was, LeBel J. observed, already a matter of public record that Groupe Polygone was in settlement negotiations with the federal government.<sup>215</sup> Moreover, if public reporting of the details of settlement offers was problematic for the administration of justice, it was still unnecessary to resort to a publication ban — Groupe Polygone could have sought an injunction prohibiting government officials from leaking information about the negotiations.<sup>216</sup> Finally, and assuming only for the sake of argument that “the publication ban was necessary to prevent a serious risk to the administration of justice”, LeBel J. found no evidence that the negotiations were compromised.<sup>217</sup> The public, meanwhile, had a considerable interest in a dispute concerning “an alleged fraud against a government program”.<sup>218</sup> It followed that the salutary effects of the publication ban could not have outweighed its deleterious effects.<sup>219</sup> The publication ban was quashed.

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<sup>211</sup> *Id.*, at para. 84.

<sup>212</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.).

<sup>213</sup> *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.).

<sup>214</sup> *Globe and Mail*, *supra*, note 10, at para. 90.

<sup>215</sup> *Id.*, at paras. 91-93.

<sup>216</sup> *Id.*, at para. 95.

<sup>217</sup> *Id.*, at para. 96.

<sup>218</sup> *Id.*, at para. 97.

<sup>219</sup> *Id.*, at paras. 96, 99.

(iii) Commentary

The *Quebec Charter* plainly and explicitly shows a concern, not just for freedom of expression, but for access to information and professional confidentiality. The Court nonetheless found that no protection for the relationship between source and journalist, over and above that recognized in *National Post*, should be provided in Quebec. That is a striking, if understandable, result. Let us accept at face value LeBel J.'s analysis of what sections 9 and 44, strictly speaking, protect. We might agree, for the reasons he gives, that these sections could not, by themselves, ground a class privilege for journalist-source confidences. But the Court, in *National Post*, has already acknowledged that section 2(b) values make it necessary to give *some* degree of protection to the identity of sources — it would plainly be wrong to treat the professional (or quasi-professional) relationship between journalists and sources as deserving no weight at all when balancing competing interests and claims. In light of that fact, it seems strange that we cannot look to sections 9 and 44 as providing additional emphasis of the importance of a free press. Indeed, there is a dizzying logic at work: because the Quebec government has not seen fit to regulate the activities of journalists, the Court effectively denied that sections 9 and 44 say anything at all about the significance of those activities, and the degree of protection they warrant. But, if anything, it surely suggests that the Quebec government decided not to limit the newsgathering efforts of journalists. Again, none of this necessarily is to deny that a constitutional or class-based privilege may be inappropriate for journalistic sources. It may have been more appropriate, however, to give added weight to the journalist-source relationship in the Wigmore analysis as applied in Quebec — if only to avoid giving the impression that the *Quebec Charter* does little more than provide a gloss on the Charter. Alternatively, it may have been desirable to explain how the other provinces have similar regard for access to information and professional confidentiality, such that any difference in emphasis was more apparent than real.

There is, as well, something rather jarring about the suggestion that journalists and their sources are not — or, at least, cannot be — engaged in a “helping” relationship. One assumes that Leblanc's source, Machouette, approached him because she could not otherwise bring government corruption to light without exposing herself. She was not, to be sure, obtaining help from Leblanc in the sense that a patient seeks help from her doctor or psychiatrist, or in the sense that a criminal defendant seeks

help from her lawyer; these are cases of straightforward self-interest. But to deny that Leblanc helped Machouette to “blow the whistle” on the Sponsorship Scandal seems flatly counterintuitive. Justice LeBel’s point may have been just that journalists do not (or do not always) help their sources for what we might describe as professional *motives* — that is, out of a desire to help their sources, rather than a desire to publish great stories. The point may have been, in other words, that the relationship between journalist and source more closely resembles that of collaborators or partners than that of lawyer and client. Indeed, we may think that many journalists simply exploit their sources, in the way that Truman Capote is sometimes thought to have exploited Perry Smith in his reporting of the Clutter farm murders.<sup>220</sup> In this sense, LeBel J.’s observation that there is no professional regulation of journalists is closely tied to his point that journalists and sources do not have a helping relationship. Still, it is worrying that the Quebec legislature can effectively diminish (though not completely remove) the level of protection conferred upon government whistleblowers merely by refusing to create a regulatory regime for journalists.

The Court’s decisions in *National Post* and *Globe and Mail* reflect a fundamental tension in the idea that journalist-source communications warrant section 2(b) protection. In the absence of “whistleblowers”, many instances of corporate or government corruption would not come to light.<sup>221</sup> There would be little point in having a free press if sources were systematically discouraged from bringing such matters to the media. At the same time, it would be problematic to claim that section 2(b) requires us to *encourage* government leaks or whistleblowing. To some extent, the effective functioning of institutions depends on a degree of trust among the people working within them — on the belief that gaffes and missteps will not be exposed but will, rather, be addressed in-house. For this reason, whistleblowers often provoke a sense of “betrayal”.<sup>222</sup> Moreover, information (or misinformation) may be “leaked” for reasons that have nothing to do with the public interest — to smear or embarrass political enemies, for example — and it is not always clear that journalists can be relied upon not to publish empty gossip or rumours.<sup>223</sup> One might, in fact, suggest that journalists who publish

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<sup>220</sup> See the film *Capote* (2005). See also Truman Capote, *In Cold Blood* (Penguin, 1966).

<sup>221</sup> See *National Post*, *supra*, note 183, at para. 28.

<sup>222</sup> Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage, 1989),

at 214.

<sup>223</sup> *Id.*, at 217.



government leaks change the character of our institutions in the same way that, as Deschamps J. observed in *Canadian Broadcasting Corp. v. Canada*, journalists who broadcast the testimony of witnesses effectively change the character of courtrooms.<sup>224</sup> In this light, it is interesting that LeBel J. was so ready to hold that the implied undertaking of confidentiality in settlement negotiations does not apply to third parties.

(b) *Canadian Broadcasting Corp. v. Canada (Attorney General)*

Rule 38.1 of the *Rules of practice of the Superior Court of Quebec in civil matters* states:

In order to ensure the fair administration of justice, the serenity of judicial hearings and the respect of the rights of litigants and witnesses, interviews and the use of cameras in a courthouse shall only be permitted in the areas designated for such purposes by directives of the chief justice.<sup>225</sup>

Rule 38.2 states: “Any broadcasting of a recording of a hearing is prohibited.” These rules are mirrored by sections 8.A and 8.B of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*.<sup>226</sup> Furthermore, Directive A-10 of Quebec’s Ministère de la Justice prohibits “obstructing or hindering the free movement of users or blocking their passage” and “harassing or following persons in and in front of courthouses, including with cameras and microphones”. It also bars the audio or video recording of a person inside courthouses, except in areas designated by pictograms, or where expressly authorized by the director of the courthouse. This is true even where the interviewee consents to being recorded. Moreover, “it is permitted to request an interview from a person, but not to block the person’s passage or to prevent him or her from moving about freely”.<sup>227</sup>

Several media outlets challenged these provisions, claiming that they are incompatible with section 2(b) of the Charter and not justified under section 1. Justice Lagacé accepted that they infringed section 2(b), but found them justified under section 1. A full bench of the Quebec Court of Appeal dismissed the appeal. The Court unanimously held that restrictions on the media’s ability to engage in newsgathering in courthouses

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<sup>224</sup> *Supra*, note 11. See *infra*, note 225, and accompanying text.

<sup>225</sup> R.R.Q. 1981, c. C-25.

<sup>226</sup> SI/2002-46.

<sup>227</sup> *Supra*, note 11, at para. 5.

did not limit their section 2(b) rights. A majority also found that the broadcasting restriction under Rule 38.2 did not offend section 2(b). Justices Nuss and Bich, dissenting, would have struck down the broadcasting restriction as a violation of section 2(b) that was not “saved” by section 1. The Supreme Court of Canada unanimously dismissed the appeal.

(i) Was There an Infringement of Section 2(b)?

In deciding whether an activity is protected by section 2(b) of the Charter, we must employ the three-part test prescribed in *Montréal (City) v. 2952-1366 Québec Inc.*<sup>228</sup> First, we must ask whether “the activity in question [has] expressive content”.<sup>229</sup> If it does, then the activity is *prima facie* “within the scope of s. 2(b) protection”, and we move to the second branch of the test. At that point, we must consider whether “the activity [is] excluded from that protection as a result of either the location or the method of expression”.<sup>230</sup> If it is not, then the activity is protected by section 2(b), and the sole question remaining is whether the right to engage in it has been infringed by either “the purpose or the effect of a government action”.<sup>231</sup>

In this case, the appellant media outlets alleged two limitations on section 2(b): restrictions on their ability to move, gather news, and conduct interviews freely in courthouses (“the newsgathering restriction”); and restrictions on their ability to broadcast recordings of court hearings (“the broadcast restriction”). We will follow the Court’s lead and first consider the application of the *Montréal* test to the newsgathering restriction.

There was no dispute that “filming, taking photographs and conducting interviews ... are activities that have ... expressive content” and so are *prima facie* protected by section 2(b).<sup>232</sup> There was, though, an issue as to whether these activities should nonetheless be excluded from the ambit of section 2(b) to the extent that the appellants sought to pursue them in *courthouses*.<sup>233</sup> The Court of Appeal had held that:

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<sup>228</sup> [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141, at para. 56 (S.C.C.) [hereinafter “*Montréal*”].

<sup>229</sup> *Canadian Broadcasting Corp. v. Canada*, *supra*, note 11, at para. 38.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*, at para. 41.

<sup>233</sup> *Id.*, at para. 44.

crowds, pushing and shoving, and pursuing possible subjects in order to interview, film or photograph them were incompatible with the purposes of a courthouse, namely, *inter alia*, to provide an ordered environment so as to ensure the serenity of judicial proceedings.<sup>234</sup>

Justice Deschamps, writing for the Court, agreed that the unrestrained power of journalists to gather news in courthouses could, at least occasionally, lead to the loss of order to which the Court of Appeal referred. It was not, however, the goal of media outlets to produce these effects. In deciding whether an activity is protected by section 2(b), she appeared to suggest, we should construe that activity in terms of what the claimant intended to do — to gather and report newsworthy events in courthouses — and not in terms of what the incidental effects of that activity could or would be.<sup>235</sup> When we characterize the activity in this light, Deschamps J. argued, it is clear that it is in no way incompatible with section 2(b) values, and that it should not be excluded from section 2(b) protection. Quite the contrary:

[T]he presence of journalists in courthouses is essential. When they conduct themselves appropriately, their presence, far from undermining the values underlying s. 2(b), generally enhances those values. Without it, the public's ability to understand our justice system, would depend on the tiny minority of the population who attend hearings, and the inevitable result would be to erode democratic discourse, self-fulfilment and truth finding. Moreover, for journalists, the public areas [in courthouses] serve not only as spaces they pass through to enter courtrooms, but also as places where they can gather information that may enhance the public's understanding of trials.<sup>236</sup>

Finally, the impugned measures restricted the ability of journalists to approach witnesses, take photographs, film, and conduct interviews. “These measures”, remarked Deschamps J., “limit news gathering techniques even when those techniques are used in a way that is compatible with the function of a courthouse and that ensures the serenity of hearings.”<sup>237</sup> That being the case, they infringe section 2(b) of the Charter.

The Court next applied the *Montréal* test to the broadcasting restriction. Justice Deschamps quickly found that “reporting constitutes an

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<sup>234</sup> *Id.*, at para. 43, citing the Court of Appeal's opinion, [2008] Q.J. No. 9949, at paras. 65-66.

<sup>235</sup> *Canadian Broadcasting Corp., id.*, at para. 43.

<sup>236</sup> *Id.*, at para. 45.

<sup>237</sup> *Id.*, at para. 46.

expressive activity”<sup>238</sup> She also concluded that there was no basis for excluding the broadcasting of a recording of court proceedings from section 2(b) protection. The broadcast is not confined to any particular location.<sup>239</sup> Nor is it possible to separate the method of engaging in the expressive activity from what the activity aims to express.<sup>240</sup> Justice Deschamps remarked: “[I]t must be conceded that the message conveyed by broadcasting the official audio recordings of hearings is not the same as one conveyed using another method of expression.”<sup>241</sup> The “[s]ound and tone of voice ... in the context of a trial” can add so much “value ... to the message ... that the content of the message and the method by which the message is conveyed are indissociable.”<sup>242</sup> Given that the content of the expression itself could not be incompatible with section 2(b), the activity must be protected by section 2(b). Rule 8.2, by prohibiting that activity, plainly infringes section 2(b).<sup>243</sup>

(ii) Are the Infringements Prescribed by Law?

In *Greater Vancouver Transit Authority*, the Supreme Court laid down this approach for determining whether a Charter limitation has been “prescribed by law”:

In assessing whether the impugned policies satisfy the “prescribed by law” requirement, it must first be determined whether ... the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application. If so, the policies can be “law” for the purposes of s. 1. At the second stage of the enquiry, to find that the limit is “prescribed” by law, it must be determined whether the policies are sufficiently precise and accessible.<sup>244</sup>

It was clear from this test that a wide range of instruments — including regulations, common law rules, municipal by-laws, collective agreements, and rules of regulatory bodies — can count as “laws” within the meaning of section 1.<sup>245</sup> The precision requirement, moreover, requires

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<sup>238</sup> *Id.*, at para. 48.

<sup>239</sup> *Id.*, at para. 49.

<sup>240</sup> *Id.*, at paras. 52-53.

<sup>241</sup> *Id.*, at para. 52.

<sup>242</sup> *Id.*, at para. 53.

<sup>243</sup> *Id.*, at para. 54.

<sup>244</sup> *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295, at paras. 50-53 (S.C.C.).

<sup>245</sup> *Id.*, at paras. 52-53.

only that the “law” in question set out an “intelligible standard” which the courts can sensibly interpret.<sup>246</sup>

Though the appellants conceded that the impugned practice rules are “laws” within the meaning of section 1, they argued that Directive A-10 is not.<sup>247</sup> They did not, it seems, seriously challenge the idea that the Minister was authorized to issue the directive under section 3(c) of the *Act respecting the Ministère de la Justice*.<sup>248</sup> There was, however, some debate over whether the directive is a binding rule of general application, and whether the rules it imposed meet the precision and accessibility requirement.<sup>249</sup> Justice Deschamps held that Directive A-10 satisfies all these conditions. She cited three reasons for thinking so. First, she observed that the directive was devised because “the rules of practice did not apply to all judicial activities in Quebec”.<sup>250</sup> It was designed to ensure that the rules of practice in all judicial proceedings were consistent with those in the Superior Court.<sup>251</sup> This effectively meant that the Minister was constrained in determining the content of the directive. Given the close connection between the directive and the rules of practice, it was significant that the appellants were prepared to concede that the impugned practice rules are “laws” for section 1 purposes.<sup>252</sup> Justice Deschamps particularly noted that the precision of the language in the practice rules, which was “almost identical” to that in Directive A-10, was not in dispute.<sup>253</sup>

Second, the impugned directive is not an “interpretive tool to guide courthouse employees in performing their duties”.<sup>254</sup> Rather, it “imposes standards of behaviour on [courthouse] users”.<sup>255</sup> On that basis, Deschamps J. found that Directive A-10 amounts to a policy of general application.

Finally, the Court ruled that the precision and accessibility requirements were met. Justice Deschamps noted that the impugned directive had been published by the Minister, and was available for consultation on

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<sup>246</sup> *Id.*, at paras. 54-55.

<sup>247</sup> *Canadian Broadcasting Corp.*, *supra*, note 11, at para. 58.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*, at para. 58.

<sup>250</sup> *Id.*, at para. 23.

<sup>251</sup> *Id.*, at paras. 23, 59.

<sup>252</sup> *Id.*, at para. 59.

<sup>253</sup> *Id.*, at para. 62.

<sup>254</sup> *Id.*, at para. 60.

<sup>255</sup> *Id.*

the Internet.<sup>256</sup> She rejected, somewhat out of hand, suggestions that “harassing” and “following” lack sufficient precision.<sup>257</sup>

(iii) Are the Limits Justified?

In determining whether a Charter infringement is justified under section 1, we must of course apply the *Oakes* Test.<sup>258</sup> This requires the government to show that the infringement was animated by a pressing and substantial objective; that there was a rational connection between the objective and the limitation; that the impugned law impairs the infringed right as little as possible; and that the salutary effects of the limitation outweigh its deleterious effects. Justice Deschamps had no trouble finding that the impugned measures had the objective of “maintain[ing] the fair administration of justice by ensuring the serenity of hearings”.<sup>259</sup> As one would expect, she concluded that this objective was indeed pressing and substantial:

The fair administration of justice is necessarily dependent on maintaining order and decorum in and near courtrooms and on protecting the privacy of litigants appearing before the courts, which are measures needed to ensure the serenity of hearings. There is no question that this objective contributes to maintaining public confidence in the justice system.<sup>260</sup>

The Court likewise found that the impugned measures were rationally connected to the objective. Justice Deschamps cited evidence that, before the measures were adopted, there had been an increase in the number of journalists in courthouses, and that this had produced “adverse consequences for the administration of justice”.<sup>261</sup> She stated:

For example, photographers and camera operators climbed onto furniture to take photographs or to film. Some journalists filmed courtroom interiors through glass doors or doors left ajar. Some accused persons or family or friends of accused persons had to be escorted by special constables because they were unable to enter or exit courtrooms.<sup>262</sup>

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<sup>256</sup> *Id.*, at para. 61.

<sup>257</sup> *Id.*, at para. 62.

<sup>258</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

<sup>259</sup> *Canadian Broadcasting Corp.*, *supra*, note 11, at para. 69.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*, at para. 72.

<sup>262</sup> *Id.*

Plainly, the Court was most vexed by the effect that a lack of “serenity” in courthouses could or would have on witnesses. Justice Deschamps referred to evidence that the increased number of journalists had, prior to the creation of the impugned rules of practice and Directive A-10, significantly added to the stress experienced by witnesses and their families. In some cases, witnesses refused to testify altogether. Expert evidence, furthermore, suggested that witnesses forced to endure this added stress may suffer from “memory loss, confusion or poor thought structure” — making them worse witnesses.<sup>263</sup> Measures which increase the degree of serenity and decorum in courthouses, the Court accepted, would relieve witnesses of at least some nervousness and anxiety. Insofar as they would be better witnesses as a result, such measures can be expected to help maintain the fair administration of justice.<sup>264</sup> The rational connection test, therefore, is satisfied.

The Court next turned to the minimal impairment branch of the *Oakes* Test, emphasizing that it was necessary for the state to show only that the impugned measures “[fell] within a range of reasonable alternatives”.<sup>265</sup> Justice Deschamps concluded they did. She noted that neither the challenged rules of practice nor Directive A-10 imposed a “total ban” on newsgathering in courthouses,<sup>266</sup> and that more extensive intrusions on media conduct in courthouses had been upheld in Ontario.<sup>267</sup> Indeed, Deschamps J. made a point of reminding the appellants of all the things they were *permitted* to do under the impugned measures:

[J]ournalists are expressly authorized to ask a person who is heading toward or exiting a courtroom if he or she would agree to give an interview while being photographed or filmed in an area provided for that purpose. Such areas are designated on every floor, near places participants must go through in order to enter and exit the courthouse... And journalists remain free to go anywhere in the courthouse and report on what they see.<sup>268</sup>

The Court accepted that there were few alternatives that could reasonably be adopted. Justice Deschamps observed that *professional* rules of courthouse conduct could not be imposed on journalists, since there is no need to belong to a professional association in order to practice as a

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<sup>263</sup> *Id.*, at paras. 73-74.

<sup>264</sup> *Id.*, at para. 76.

<sup>265</sup> *Id.*, at para. 77, quoting *RJR-MacDonald*, *supra*, note 114, at para. 160.

<sup>266</sup> *Canadian Broadcasting Corp.*, *id.*, at paras. 79-80.

<sup>267</sup> *Id.*, at para. 80, citing *R. v. Squires*, [1992] O.J. No. 2738, 11 O.R. (3d) 385 (Ont. C.A.).

<sup>268</sup> *Canadian Broadcasting Corp.*, *id.*, at para. 81.

journalist in Quebec.<sup>269</sup> It would also be inappropriate to leave it to judges to make *ad hoc* orders restricting the activities of journalists on an as-needed basis — *i.e.*, when an especially newsworthy trial was in progress. Different journalists and news outlets are attracted to different kinds of “stories”, and it would be difficult to determine in advance which court proceedings would stir up a media frenzy.<sup>270</sup> Witnesses would not have the assurance that they could testify in an atmosphere of serenity and decorum.<sup>271</sup> Moreover, since witnesses are frequently unrepresented by counsel, they would effectively have no say over whether an *ad hoc* “serenity order” was issued.<sup>272</sup>

Justice Deschamps argued that nothing short of a complete ban on the broadcasting of audio recordings of hearings would suffice to maintain the fair administration of justice. A witness who knows that his or her courtroom testimony *could* be broadcast later may be tempted to address it, not to the court, but to the wider news audience.<sup>273</sup> To allow even the possibility of broadcast, therefore, “would be to alter the forum in which the testimony is given”.<sup>274</sup> Something like Rule 8.2 is necessary to ensure “that witnesses can participate as calmly as possible in the truth finding process”.<sup>275</sup>

Finally, the Court considered whether the salutary effects of the impugned measures outweigh their deleterious effects. Justice Deschamps found that they do. Acknowledging that the challenged rules of practice and Directive A-10 limit newsgathering in courthouses, including at locations where it was once permitted, she found the benefits to the administration of justice compelling. Again, the Court emphasized the positive effect of the measures on witnesses:

The evidence shows that witnesses, parties, members of the public and lawyers can now move about freely near courtrooms without fear of being pursued by the media. Lawyers can hold discussions with their witnesses and with counsel for the opposing party in hallways adjacent to courtrooms without being disturbed ... Those who adopted the impugned measures took the vulnerability of participants in the judicial process into consideration and made sure that when such people consent to co-operate with the media they do so as freely and calmly as

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<sup>269</sup> *Id.*, at para. 79.

<sup>270</sup> *Id.*, at para. 82.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*, at para. 83.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*



possible. The controls on journalistic activities thus facilitate truth finding by not adding to the stress on witnesses who must participate in a process that, for most of them, is already distressing enough.<sup>276</sup>

The broadcasting restriction indeed interferes with the media's ability to convey what has happened in a judicial hearing.<sup>277</sup> But the alternative would allow the media actually to affect what happens in proceedings; to distort the fact-finding process.<sup>278</sup> And, Deschamps J. observed, limits on newsgathering in courthouses — often more stringent than those in issue here — have been imposed in most other provinces, and in several other countries.<sup>279</sup> The Court concluded that the limits were justified as reasonable limits in a free and democratic society.

#### (iv) Commentary

Though it is comforting that the Court chose to resolve the constitutional questions at the section 1 stage, and not at the section 2(b) stage, we may find aspects of Deschamps J.'s reasoning troubling. The Court placed the need for “serenity” and “decorum” in court proceedings at the heart of its analysis. There can be little doubt that some minimum threshold of serenity and decorum are needed to allow lawyers to do their work, to prevent the disruption of court proceedings, and to ensure that witnesses are able to “perform” — to preserve, in short, the fair administration of justice. But serenity is not obviously a pressing and substantial objective in itself. (Indeed, the price of free expression is often a hefty measure of serenity.) At times, though, the Court seems to lose sight of that fact — or, at least, fails to explain with sufficient clarity how a loss of decorum would compromise the administration of justice. For example, it is not at all obvious that the administration of justice is threatened merely because journalists are “climbing onto furniture”. It is certainly indecorous conduct, but it is far from clear how it represents any more grave a threat to the fair administration of justice than the use of the furniture for any other purpose. We may have a particular vision in our mind's eye of what a courthouse should look or be like — a vision spoiled by the spectre of journalists crashing into each other and scaling the walls like spider monkeys. This fear does not, without more, justify

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<sup>276</sup> *Id.*, at para. 89.

<sup>277</sup> *Id.*, at para. 92.

<sup>278</sup> *Id.*, at para. 93.

<sup>279</sup> *Id.*, at paras. 95-96.

limiting rights to free expression. The section 1 analysis should make that clear.

As in *Globe and Mail*, the absence of professional regulation of Quebec journalists was used as a partial basis for limiting the protection of newsgathering techniques. One way or another, the Court seems to say, journalists must submit to some form of limitation on how they go about their work. Either they must subject themselves to the Scylla of professional regulation and accountability, or they will crash against the wandering rocks of rules imposed by the government and judges.

(c) *Canadian Broadcasting Corp. v. Canada*

Section 8.A of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002* states that “[a]ny broadcasting of a recording of a hearing is prohibited.”<sup>280</sup> At a criminal trial, the Crown adduced a videotaped statement by the accused. Journalists were permitted to view the recording, and to make a copy of it by filming the screen. They were not, however, permitted to broadcast any recordings they made. The claimant media outlets applied to Lévesque J. for permission to broadcast. This was refused on the basis of section 8.A. The claimants appealed to the Supreme Court. Before judgment was rendered, the accused was acquitted. Nonetheless, the Court opted to clarify a number of points that had arisen.

(i) The Ruling

The Supreme Court unanimously found that section 8.A of the *Rules of Practice* does not apply to video recordings adduced as evidence. Justice Deschamps, writing for the Court, noted that “[e]xhibits are created independently of and prior to the proceedings at the hearing”, and so “cannot be equated with those proceedings”.<sup>281</sup> It did not automatically follow, however, that an order like that issued by Lévesque J. must constitute a “publication ban” within the meaning of *Dagenais* and *Mentuck*. Those decisions, as the Court implicitly recognized, rested on the presupposition that a publication ban engages section 2(b) of the

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<sup>280</sup> *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, *supra*, note 225.

<sup>281</sup> *Canadian Broadcasting Corp. v. Canada*, *supra*, note 12, at para. 8.

Charter. The Crown argued that section 2(b) does not protect the right of media outlets to broadcast exhibits.<sup>282</sup>

The Court noted that the purpose of broadcasting exhibits is “to inform ... viewers of the message contained in the video recording”.<sup>283</sup> For that reason, Deschamps J. ruled that it amounts to an expressive activity.<sup>284</sup> Moreover, the Court held that “[a]ccess to exhibits is a corollary to the open court principle.”<sup>285</sup> It was, therefore, clear that the *Dagenais/Mentuck* test applied. As we have seen, the person whose statement the appellant sought to broadcast had since been acquitted. Notwithstanding that fact, Deschamps J. highlighted a number of considerations that may be relevant when applying *Dagenais/Mentuck* to an application to broadcast videotaped statements by criminal defendants. Interestingly, she remarked that the effect of broadcasting such statements may have both positive and negative effects on the administration of justice:

The context of a statement made by an accused person or a suspect in the course of a police investigation is different from that of testimony given in a courtroom. A person who testifies at a hearing usually does so under compulsion of law, pursuant to a subpoena. Witnesses must, to the extent possible, be protected from any external pressure that could influence their testimony. The controlled environment of the courtroom contributes to this objective. The circumstances specific to compelled testimony do not exist in the case of an out-of-court statement. But if the person who makes the statement knows that it could end up as the lead story on the local or national television news, this could cause him or her to think carefully before deciding whether to make it. Thus, the possibility that the statement will be broadcast could have a negative effect on the search for the truth, but it could also have a salutary effect on the voluntariness of the statement and, consequently, on the administration of justice.<sup>286</sup>

Furthermore, Deschamps J. pointed out that an application should be assessed in light of “the impact that broadcasting the statement might have on the trial of a co-accused or on the accused personally”.<sup>287</sup> This is particularly true where the defendant has already been acquitted, or is vulnerable — for example, because of an intellectual disability.<sup>288</sup> Given

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<sup>282</sup> *Id.*, at para. 9.

<sup>283</sup> *Id.*, at para. 10.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*, at para. 12.

<sup>286</sup> *Id.*, at para. 17.

<sup>287</sup> *Id.*, at para. 19.

<sup>288</sup> *Id.*

that the accused in the case before the Court was just such a vulnerable person, it is difficult to construe these remarks as anything other than a warning — or a plea — to media outlets not to apply again for permission to broadcast his statement.

(ii) Commentary

This is an intriguing decision. The Court recognizes, importantly, that the decision not to allow media outlets to broadcast videotaped statements must be justified under the *Dagenais/Mentuck* framework. It will be interesting to see whether more such statements are televised in the future — and, if so, whether lower courts will take Deschamps J. up on her invitation and more readily accept their voluntariness for confessions rule purposes. At the same time, the Court suggests that there should be some hesitation to permit the media to broadcast statements by defendants who have already been tried — but only, it seems, if they have been *acquitted*. If that is what Deschamps J. meant to say — and, as noted above, it may be that the Court's preoccupation was simply with the plight of this particular defendant — then it is troubling. Those convicted of criminal offences are often quite “vulnerable” themselves, however guilty they may be. On the flipside, we might do much to educate the public about the risk of false confessions by broadcasting inculpatory statements made by suspects who were ultimately acquitted.

**2. Freedom of Association and Collective Bargaining:  
*Ontario (Attorney General) v. Fraser***

In *Dunmore v. Ontario (Attorney General)*,<sup>289</sup> a majority of the Supreme Court declared that section 3(b) of Ontario's *Labour Relations Act*<sup>290</sup> was unconstitutional. The majority found that section 2(d) of the Charter encompasses a right of employees to form associations. The exercise of this right would, at least sometimes, require the state to create a legislative framework. Insofar as section 3(b) of the LRA excluded agricultural workers from its general labour relations regime, denying them the organizational opportunities available to other classes of workers, the provision was unconstitutional.

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<sup>289</sup> [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.) [hereinafter “*Dunmore*”].

<sup>290</sup> S.O. 1995, c. 1, Sch. A [hereinafter “LRA”].

In response to *Dunmore*, the Ontario legislature enacted the *Agricultural Employees Protection Act, 2002*.<sup>291</sup> The statute recognizes that agricultural workers are entitled to form employees' associations, through which they can make representations to their respective employers on the conditions of employment. It bars employers from interfering with the right of employees to engage in these activities, or discriminating against workers who belong to associations. Moreover, the AEPA created a tribunal designed to settle disputes about the application of the Act.

Relying on *Dunmore*, the United Food and Commercial Workers Union Canada ("UFCW") attempted to negotiate with two industrial farms on behalf of agricultural workers in their employ. The employers refused to enter into negotiations with the UFCW. Rather than approach the AEPA Tribunal for redress, the claimants sought a declaration that the labour law regime, as it applies to agricultural workers, is unconstitutional. They complained that the AEPA inadequately protects the right to collectively bargain, and improperly excludes agricultural workers from the protections given to workers in other fields by the LRA. The Ontario Court of Appeal agreed. A majority of the Supreme Court allowed the appeal.

(a) *The Core of the Majority's Reasons*

At bottom, the majority's opinion, co-authored by McLachlin C.J.C. and LeBel J., is fairly straightforward. It reaffirmed the proposition, articulated in *Health Services*,<sup>292</sup> that section 2(d) of the Charter encompasses both the right of employees to form associations for the purposes of collective bargaining *and*, derivatively, the right to a legislative regime that makes collective bargaining "meaningful".<sup>293</sup> This latter right entails, among other things, a process whereby employee associations can engage in "good faith bargaining" with employers — that is, one that "requires the employer to engage in a process of consideration and discussion".<sup>294</sup> The majority heavily emphasized, however, that section 2(d) "does not impose a particular process";<sup>295</sup> that it does not protect "a

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<sup>291</sup> S.O. 2002, c. 16 [hereinafter "AEPA"].

<sup>292</sup> *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*Health Services*"].

<sup>293</sup> *Fraser*, *supra*, note 13, at para. 38.

<sup>294</sup> *Id.*, at para. 40.

<sup>295</sup> *Id.*, at para. 41.

particular model of labour relations, nor to a specific bargaining method”.<sup>296</sup> The AEPA expressly recognizes “the right of [agricultural] employees’ associations to make representations to their employers” and “provide[s] that [employers] shall listen to oral representations, and read written representations, and acknowledge having read them”.<sup>297</sup> By implication, the majority held, the AEPA imposes a duty on employers to “consider employee representations in good faith”.<sup>298</sup> Furthermore, the AEPA “provides a tribunal for the resolution of disputes”.<sup>299</sup> In the absence of evidence that this tribunal will fail to ensure “good faith consideration by employers”, McLachlin C.J.C. and LeBel J. found, there was no basis for concluding that the AEPA regime was constitutionally inadequate.<sup>300</sup> The majority therefore concluded that the AEPA was not contrary to section 2(d) of the Charter.

*(b) The Debate Between the Majority and Justice Rothstein: Should Health Services Be Overruled?*

The bulk of the majority opinion amounts to an at-length rebuttal to the concurring opinion by Rothstein J. Writing for himself and Charron J., Rothstein J. argued that the majority decision in *Health Services* was wrongly decided and should be overruled — that, although section 2(d) protects the freedom of employees to form associations for the purposes of collective bargaining, it does not require legislatures to “impose a complex set of statutorily defined reciprocal rights and duties on employers and workers associations, including a duty to bargain in good faith”.<sup>301</sup> In the absence of such a constitutional requirement, there was no basis for striking down the AEPA.

It is, of course, no small matter to overrule a relatively new precedent supported by a firm majority of the Supreme Court. Justice Rothstein argued that several considerations could justify doing so. First, he observed that the doctrine of *stare decisis* could support overturning precedent, where the impugned decision was itself inconsistent with other existing precedents.<sup>302</sup> As we will see, Rothstein J. took care to

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<sup>296</sup> *Id.*, quoting *Health Services*, *supra*, note 292, at para. 91.

<sup>297</sup> *Fraser*, *id.*, at paras. 100 and 101, respectively.

<sup>298</sup> *Id.*, at para. 101. See also *id.*, at paras. 102-106.

<sup>299</sup> *Id.*, at para. 109.

<sup>300</sup> *Id.*, at para. 108. See also *id.*, at paras. 109-112.

<sup>301</sup> *Id.*, at para. 124.

<sup>302</sup> *Id.*, at para. 138.

point out that, in his view, *Health Services* had indeed been decided in a manner contrary to other section 2(d) cases. Second, and rather interestingly, he argued that, as *Health Services* sets out foundational principles of constitutional law and cannot be “fixed” by legislatures, the Supreme Court should be more ready to overrule it — particularly in light of the (many) flaws that Rothstein J. found in the ruling.<sup>303</sup> Third, he claimed that the approach set down in *Health Services* was “unworkable”.<sup>304</sup> Finally, Rothstein J. claimed that the volume of academic criticism of the case made it appropriate for the Court to “take notice and acknowledge the errors that have been identified”.<sup>305</sup>

The majority, for reasons that will become clear, took the position that *Health Services* followed directly from the reasoning which animated its decision in *Dunmore*. Immediately, then, the majority “upped the stakes” of overruling *Health Services*, claiming that Rothstein J. was effectively proposing to overrule not just one important recent precedent, but *two*. Moreover, the majority (not surprisingly) resisted the suggestion that constitutional cases should be more readily overruled than other cases — especially when doing so would have the effect of “diminish[ing] Charter protection”.<sup>306</sup> Chief Justice McLachlin and LeBel J. also observed that academic opinion surrounding *Health Services* was, at best, equivocal.<sup>307</sup> Finally, they questioned the appropriateness of overruling *Health Services*, given that it was not asked to do so.<sup>308</sup> This met with an acrid response by Rothstein J.: the parties in *Health Services* had not asked the Court to recognize a constitutional right to collective bargaining, and yet it was not thought “procedurally improper” to take that step. Why should the Court *now* stand on ceremony?<sup>309</sup>

Justice Rothstein’s argument for overruling *Health Services* was grounded in a number of premises. He classed his reasons under three broad headings. First, he argued that *Health Services* was “inconsistent with both precedent and principle relating to the purpose of s. 2(d)”.<sup>310</sup> (We will, for ease of reference, devote a separate section to each.) Second, he rejected the basis given in *Health Services* for “providing

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<sup>303</sup> *Id.*, at paras. 141-142.

<sup>304</sup> *Id.*, at para. 145.

<sup>305</sup> *Id.*, at para. 148.

<sup>306</sup> *Id.*, at para. 58, quoting *R. v. Henry*, [2005] S.C.J. No. 76, [2005] 3 S.C.R. 609, at para. 44 (S.C.C.).

<sup>307</sup> *Fraser, id.*, at paras. 86-88.

<sup>308</sup> *Id.*, at para. 59.

<sup>309</sup> *Id.*, at para. 149.

<sup>310</sup> *Id.*, at para. 231.

s. 2(d) protection to collective bargaining”.<sup>311</sup> Third, he described the approach laid down in *Health Services* as “unworkable”.<sup>312</sup>

(c) *Did Health Services Depart from Precedent?*

Justice Rothstein claimed that *Health Services* departed from existing law — and, notably, went beyond the rule in *Dunmore*. In *Dunmore*, the majority held that the state had an obligation to devise a legislative regime capable of protecting the right of employees to form associations for the purposes of collective bargaining. Justice Rothstein argued that in *Health Services*, the majority went further: it required the labour regime to make collective bargaining “meaningful”. The *Fraser* majority suggested that *Health Services* “follow[ed] directly from the principles enunciated in *Dunmore*”,<sup>313</sup> that it made precious little sense to recognize a right to form employee associations without also recognizing a right to processes which would make the formation of employee associations worthwhile in the first place.<sup>314</sup> For this reason, the *Fraser* majority suggested that one could not overrule *Health Services* without effectively overruling *Dunmore* as well.<sup>315</sup> Justice Rothstein disagreed. It is one thing to say that the legislature must step in to create the conditions necessary for workers to form associations at all. It is quite another to say that it must create conditions which will allow those associations to achieve their goals and, therefore, to *encourage* individuals to form them.<sup>316</sup> In this sense, he claimed, *Health Services* represented a radical break from *Dunmore*, and the former could be overruled without affecting the status of the latter.

Underscoring this point, Rothstein J. argued that the balance of pre-*Health Services* Charter jurisprudence had rejected the view that section 2(d) protects the goals of associations — like the effective collective bargaining of unions. To that end, he drew particular attention to Sopinka J.’s remarks in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*.<sup>317</sup> There, he remarked:

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<sup>311</sup> *Id.*

<sup>312</sup> *Id.*, at para. 256.

<sup>313</sup> *Id.*, at para. 38.

<sup>314</sup> *Id.*, at paras. 38-43.

<sup>315</sup> *Id.*, at para. 55.

<sup>316</sup> *Id.*, at para. 169.

<sup>317</sup> [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367 [hereinafter “*PIPSC*”].



... I have come to the view that four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association emerge...: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, *that s. 2(d) protects the exercise in association of the lawful rights of individuals.*<sup>318</sup>

Justice Sopinka's fourth point appears to suggest that "only individual goals were protected" under section 2(d),<sup>319</sup> that the provision protects an individual's right to do, in association with others, only what he or she has a right to do alone. The goals of an association have no independent constitutional significance. But, McLachlin C.J.C. and LeBel J. argued, the majority in *Dunmore* rejected such a claim. Justice Bastarache, writing the majority opinion in *Dunmore*, observed that the activities of a group may be "qualitatively different" from "those activities [when] performed solely by an individual".<sup>320</sup> Collective bargaining, for example, is qualitatively different from the bargaining that takes place between an individual employee and his or her employer. Employees seek to form associations precisely to acquire the ability to do something — collectively bargain — that they could not do otherwise. That being the case, the government could "attack" an individual's freedom of association by preventing the collectivity from engaging in that activity, thereby making it pointless. Section 2(d), Bastarache J. concluded, forbids the government from doing so. According to the *Fraser* majority, this amounted to a holding that section 2(d) categorically protects the goals of employee associations, and that the government is constitutionally required to create a regime allowing their pursuit — by imposing a duty of good faith bargaining on employers.

Justice Rothstein, for his part, acknowledged Bastarache J.'s point in *Dunmore* that a collectivity may engage in certain activities that have no individual analogue. Just as an individual cannot produce a harmony without a choir, he observed, an employee cannot engage in collective bargaining without a union. And, Rothstein J. continued, it would be constitutionally unacceptable for the state to ban harmony.<sup>321</sup> This is not,

<sup>318</sup> *Id.*, at 401-402 (emphasis added), cited in *Fraser, supra*, note 13, at para. 160.

<sup>319</sup> *Fraser, id.*, at para. 25.

<sup>320</sup> *Id.*, at para. 31, citing *Dunmore, supra*, note 289, at para. 17.

<sup>321</sup> *Fraser, id.*, at para. 185.

however, because it would be contrary to the goals of the choir, or that it would fail to encourage individuals to join a choir. It is because it would be contrary to the goals of the individuals *in* the choir, each of whom wants to sing in association with the others.<sup>322</sup> To deny them that opportunity, without banning singing as such, is just as surely an attack on the freedom to associate as an explicit ban on singing with others.<sup>323</sup> In the same way, Rothstein J. suggested, it would be constitutionally unacceptable for the state to ban collective bargaining, without also barring individual employees from doing so, since this too would amount to a direct assault upon section 2(d) itself.<sup>324</sup> But this is just to say that section 2(d) protects the right of individuals to do, in association with each other, what they have a right to do alone. In Rothstein J.'s view, then, Bastarache J.'s analysis in *Dunmore* did not call into question Sopinka J.'s fourth point in *PIPSC*. It merely recognized that attacks on associational freedom may be done constructively. On this narrow interpretation, *Dunmore* does not impose a positive duty on the state to foster collective bargaining — a result which, Rothstein J. hinted, would be no less absurd than a constitutional duty to foster musical harmony. It requires only that the state permit employees to negotiate alongside their peers just as they are permitted to negotiate individually. Justice Rothstein agreed with this narrow approach.<sup>325</sup> He observed that, since the majority in *Health Services* was not prepared to recognize a duty on employers to bargain in good faith with individual employees, it could not recognize a duty on employers to bargain in good faith with unions without departing from *PIPSC* and *Dunmore*.<sup>326</sup>

(d) *Was Health Services Unprincipled?*

Justice Rothstein cited a number of reasons to believe that *Health Services* was wrong in principle. We will examine each of those objections, with the majority's reply, in turn.

First, Rothstein J. argued, the text of section 2(d), which provides that “*everyone* has ... freedom of association”, suggests that it protects an

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*, at para. 271: “*Because* such individual bargaining is generally lawful, it necessarily follows that the decision of individuals to band together to approach their employer must necessarily be protected.”

<sup>325</sup> *Id.*, at para. 186.

<sup>326</sup> *Id.*, at para. 187.

individual freedom, not a collective right.<sup>327</sup> Yet *Health Services* imposed a duty on employers to bargain with employee associations. This produced what Rothstein J. characterized as a perverse result: employees who are members of a union enjoy a constitutional benefit that employees acting alone do not.<sup>328</sup> In reply, McLachlin C.J.C. and LeBel J. agreed that section 2(d) is an individual right, but denied that *Health Services* treats it as if it was anything else; it merely recognized that “to meaningfully uphold this individual right, s. 2(d) may properly require legislative protection of group or collective activities”.<sup>329</sup> They also agreed that individual employees now lack a constitutional protection that employee associations have, but denied that this is “anomalous”.<sup>330</sup> Since collective bargaining is only a derivative right, one which depends on the individual’s decision to exercise his or her rights under section 2(d), it naturally follows that individuals who do not exercise those rights will not receive the derivative constitutional benefit.<sup>331</sup>

Second, Rothstein J. suggested that *Health Services*, by effectively requiring employers to bargain in good faith, “transform[ed] s. 2(d) from a freedom into a ‘positive’ right”<sup>332</sup> — or, to use the language of Isaiah Berlin, transformed a negative right into a positive right.<sup>333</sup> Though section 2(d) confers upon individuals the liberty to associate with others without the state placing “obstacles” in their path, it does not require the state to positively help individuals to associate with each other.<sup>334</sup> Justice Rothstein agreed with the majority that the Charter may, in “exceptional circumstances”, require positive state action.<sup>335</sup> For positive state action to be required, though, it must be a “necessary precondition” for the exercise of the liberty in question.<sup>336</sup> Since section 2(d) does not give individuals the right to “require an employer to meet and make a reasonable effort to arrive at an acceptable employment contract”, it cannot

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<sup>327</sup> *Id.*, at para. 180, citing the Charter, s. 2(d) and P.W. Hogg, *Constitutional Law of Canada*, Vol. 2, 5th ed., Supp. (Toronto: Carswell, 2007 (updated 2009, release 1)), at 37-1 and 37-2 [hereinafter “Hogg”].

<sup>328</sup> *Fraser, id.*, at para. 179.

<sup>329</sup> *Id.*, at para. 65.

<sup>330</sup> *Id.*, at para. 66.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*, at para. 190.

<sup>333</sup> *Id.*, at para. 191. See also Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford, 1969), at ch. 3.

<sup>334</sup> *Fraser, id.*, at para. 192.

<sup>335</sup> *Id.*, at para. 193, quoting *Dunmore, supra*, note 289, at para. 21.

<sup>336</sup> *Fraser, id.*, at para. 194, quoting *Ontario (Public Safety and Security) v. Criminal Lawyers’ Assn.*, [2010] S.C.J. No. 23, [2010] 1 S.C.R. 815, at para. 30 (S.C.C.).

require the state to devise a legislative process whereby employers can be made to bargain in good faith.<sup>337</sup> In reply, the majority argued that a state-guaranteed duty of good faith on the employer *is* necessarily derived from the right to form employee associations, inasmuch as there would be precious little reason to form such associations in the absence of such a guarantee.<sup>338</sup> Justice Rothstein rejected that contention, again observing that individuals are not entitled to meaningful contract negotiations with their employers, and are therefore not entitled to be part of associations that can engage in meaningful contract negotiations on their behalf.<sup>339</sup> In a rejoinder, the majority emphasized that several sections of the Charter — notably, the legal rights provisions — guarantee “a mixture of negative and positive rights”.<sup>340</sup>

Justice Rothstein levelled a third objection at the decision in *Health Services*: it “privileg[es] some associations over others” and so “requires [the] Court to decide which associations and associational objectives are worthy of constitutional protection and which are not”.<sup>341</sup> Earlier section 2(d) decisions, he claimed, adopted a content-neutral approach to freedom of association; they did not consider whether or not it was important or salutary that people engage in a particular kind of association, nor whether it was sufficiently important that a given association achieve its goals that the Charter should require the legislature to facilitate their pursuit. The majority in *Health Services* and *Fraser* denied that this content-neutral approach was consistent with the purposive approach to Charter interpretation. We cannot understand what it means to interfere with a given association, they said, without considering what that particular kind of association needs to function or thrive.<sup>342</sup> But, Rothstein J. retorted, to apply this kind of reasoning is to misunderstand what the purposive approach entails:

[T]he “context” that is relevant to a purposive interpretation of *Charter* freedoms is not the context of the individuals who happen to be exercising that freedom in a given case. Rather, a purposive interpretation of s. 2(d) requires that one place *freedom of association* in its linguistic, philosophic and historical contexts. The origins of the concept, the words used to describe it, and the philosophical principles

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<sup>337</sup> *Fraser, id.*, at para. 197.

<sup>338</sup> *Id.*, at para. 43.

<sup>339</sup> *Id.*, at para. 199.

<sup>340</sup> *Id.*, at para. 72.

<sup>341</sup> *Id.*, at para. 203.

<sup>342</sup> *Health Services, supra*, note 292, at para. 30.

on which it relies will define the scope of s. 2(d) protection. The extent of that protection should not change depending on the particular *factual* context or circumstances in which s. 2(d) is being applied.<sup>343</sup>

Reading section 2(d) “purposively” in this sense, Rothstein J. held that a content-neutral approach to the section is appropriate.<sup>344</sup> Just as the Court should not recognize different levels of constitutional protection to different religious groups and practices, so it should not give different levels of protection to different associations and their goals.<sup>345</sup> “[T]he purpose of s. 2(d)”, he remarked, “is to protect associational activity against precisely such value judgments”.<sup>346</sup> In a rather quick reply, the majority observed that individuals frequently join associations to “realize common purposes” — and that the purpose of section 2(d) is to protect their ability to do so.<sup>347</sup> “A content-neutral right,” they concluded, “is too often a meaningless right.”<sup>348</sup>

Fourth, Rothstein J. argued that *Health Services* “places contracts above statutes in the traditional hierarchy of laws”.<sup>349</sup> In that case, as we have seen, the majority struck down a B.C. statute on the basis that it effectively made the collective bargaining process for health care workers meaningless. The implication, noted Rothstein J., is that legislatures are not entitled to interfere with labour contracts, conferring upon the latter “virtually the same status as the provisions of the Charter itself”.<sup>350</sup> Chief Justice McLachlin and LeBel J. disagreed with this assessment. The legislation at issue in *Health Services* was constitutionally problematic not just because the government had nullified the terms of a contract that had been reached through collective bargaining. Rather, legislation will only be constitutionally infirm under *Health Services* where it involves “the unilateral nullification of significant contractual terms, by the government that had entered into them or that had overseen their conclusion, coupled with effective denial of future collective bargaining”.<sup>351</sup>

Finally, Rothstein J. claimed that “the approach to s. 2(d) taken in *Health Services* ... explicitly rejected judicial deference by judges

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<sup>343</sup> *Fraser, supra*, note 13, at para. 207 (emphasis in original).

<sup>344</sup> *Id.*, at para. 208.

<sup>345</sup> *Id.*, at paras. 209-211.

<sup>346</sup> *Id.*, at para. 212.

<sup>347</sup> *Id.*, at para. 75.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*, at para. 216.

<sup>350</sup> *Id.*, at paras. 217-218, quoting Hogg, *supra*, note 327, at 44-9.

<sup>351</sup> *Fraser, id.*, at para. 76.

towards the legislature in labour relations”.<sup>352</sup> This was, he argued, inappropriate for two reasons. First, “the management of labour relations requires a delicate exercise in reconciling conflicting values and interests and ... the political, social and economic considerations that this exercise raises lie largely beyond the expertise of the courts”.<sup>353</sup> Though the courts would be required to intervene if a legislature, for example, “permitted discrimination in labour relations or precluded the ability to form an employee association”,<sup>354</sup> they should not require legislatures to strike a particular balance between the power of unions and those of employers.<sup>355</sup> Second, “courts should avoid extending constitutional protection to a particular statutory model of labour relations”.<sup>356</sup> Justice Rothstein observed that different labour models may be appropriate in different contexts, and it should fall to legislatures — with their superior expertise — to decide which models are appropriate in which employment spheres.<sup>357</sup> *Health Services*, he argued, essentially constitutionalized the “Wagner model” of labour relations by effectively imposing a duty of good faith on employers.<sup>358</sup> It did so in spite of the fact that other countries do not recognize such a duty, and in spite of the fact that Canadian lawmakers might reasonably have chosen to depart from the Wagner model in the future.<sup>359</sup>

Chief Justice McLachlin and LeBel J. quickly responded that *Health Services* did not constitutionalize the Wagner model merely because it recognized that one aspect of it — the duty to negotiate in good faith — needed legislative protection.<sup>360</sup> They proceeded to say that the labour context is not a “Charter-free zone”,<sup>361</sup> and that the courts should not defer to legislatures in determining the content of Charter rights.<sup>362</sup> The courts should show deference, the majority stated, when deciding whether a legislative scheme satisfies Charter demands,<sup>363</sup> and at the

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<sup>352</sup> *Id.*, at para. 219.

<sup>353</sup> *Id.*, at para. 220.

<sup>354</sup> *Id.*, at para. 222.

<sup>355</sup> *Id.*, at paras. 223-224.

<sup>356</sup> *Id.*, at para. 225.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*, at para. 227.

<sup>359</sup> *Id.*, at paras. 228-229.

<sup>360</sup> *Id.*, at para. 77.

<sup>361</sup> *Id.*, at para. 78.

<sup>362</sup> *Id.*, at para. 79.

<sup>363</sup> *Id.*

section 1 stage of analysis,<sup>364</sup> but not when deciding what Charter rights entail in the first place.<sup>365</sup>

(e) *The Rationale in Health Services*

Justice Rothstein argued that the reasons given by the majority in *Health Services* were incapable of supporting its conclusion that section 2(d) includes a right to collective bargaining. For the reasons given above, he rejected the claims by the *Fraser* majority that *Health Services* was grounded in precedent.<sup>366</sup> He also noted that, contrary to suggestions in *Health Services*, collective bargaining, to the extent we understand it as encompassing a legal duty on employers to bargain in good faith, has not “historically been recognized in Canada as an integral component of freedom of association”.<sup>367</sup> Collective bargaining in that narrow sense is a pure creature of statute.<sup>368</sup> Furthermore, he noted, courts were often ready to issue injunctions against attempts to bargain collectively.<sup>369</sup> Given this historical record, Rothstein J. held, it was inappropriate for the majority in *Health Services* to treat collective bargaining as an activity lying at the “core” of section 2(d), warranting special constitutional protection. The majority agreed that the historical record shows that Canadian labour law has been traditionally “hostil[e]” to collective bargaining, but denied the significance of this point.<sup>370</sup> The Charter can provide protection going beyond that provided at common law. What matters, said McLachlin C.J.C. and LeBel J., is that Canadians *themselves* have historically understood collective bargaining as a core reason to form associations.<sup>371</sup> Justice Rothstein was underwhelmed by this argument, observing that the majority provided no evidence to back up its historical analysis.<sup>372</sup>

Justice Rothstein also rejected the suggestion in *Health Services* that international law regards collective bargaining, again understood as encompassing a duty on employers to negotiate in good faith, as “an

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<sup>364</sup> *Id.*, at para. 81.

<sup>365</sup> *Id.*, at para. 79.

<sup>366</sup> *Id.*, at para. 233.

<sup>367</sup> *Id.*, at para. 234.

<sup>368</sup> *Id.*, at para. 240.

<sup>369</sup> *Id.*, at para. 244.

<sup>370</sup> *Id.*, at para. 89.

<sup>371</sup> *Id.*, at para. 90.

<sup>372</sup> *Id.*, at para. 245.

integral component of the freedom of association”.<sup>373</sup> He noted that Canada has not ratified the International Labour Organisation *Convention (No. 98)*,<sup>374</sup> which deals with collective bargaining.<sup>375</sup> Even if it had, he argued, *Convention (No. 98)* “conceives of collective bargaining as being a process of ‘voluntary negotiation’ that is fundamentally distinct from [a] model of collective bargaining” that imposes a duty of good faith on employers.<sup>376</sup> In reply, the majority cited a decision of the ILO Committee on Freedom of Association which largely echoed the reasoning of the majority in *Health Services*.<sup>377</sup> It also observed that the ILO Committee of Experts “has not found compulsory collective bargaining to be *contrary* to international norms” and approved of regimes that made collective bargaining compulsory.<sup>378</sup> Needless to say, this response hardly shows that international law dictated the approach used in *Health Services*.

Finally, Rothstein J. held that the majority in *Health Services* was wrong to invoke Charter values as a basis for constitutionalizing a right to good faith collective bargaining. It is appropriate to appeal to Charter values, he observed, when interpreting the text of a statutory provision fraught with ambiguity.<sup>379</sup> It is not appropriate, however, to use Charter values to stretch the meaning of Charter provisions beyond what their text can reasonably bear.<sup>380</sup> On this basis, Rothstein J. noted, it simply does not matter that a right to good faith collective bargaining would promote “human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy”.<sup>381</sup> The text of section 2(d) refers only to “freedom of association”.<sup>382</sup> It says nothing about “collective bargaining” and, as we have seen, Rothstein J. found no historical evidence that “freedom of association” would be understood by Canadians as a kind of shorthand for “a right to collective bargaining”.<sup>383</sup> By inferring a right to good faith collective bargaining from Charter

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<sup>373</sup> *Id.*, at para. 247.

<sup>374</sup> International Labour Organisation, *Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively*, 96 U.N.T.S. 257.

<sup>375</sup> *Fraser, supra*, note 13, at para. 248.

<sup>376</sup> *Id.*, at para. 249.

<sup>377</sup> *Id.*, at para. 94.

<sup>378</sup> *Id.*, at para. 95 (emphasis added).

<sup>379</sup> *Id.*, at paras. 252-253.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*, at para. 251, citing *Health Services, supra*, note 292, at para. 81. See also *Fraser, id.*, at para. 255.

<sup>382</sup> *Fraser, id.*, at para. 254.

<sup>383</sup> *Id.*, at para. 254.



values, the majority in *Health Services* effectively rewrote section 2(d) to suit their own ends. The majority said little in reply to this argument, noting only that “a value-oriented approach to the broadly worded guarantees of the Charter has been repeatedly endorsed by Charter jurisprudence over the last quarter century”.<sup>384</sup>

(f) *Arguing over Unworkability*

The third category of objections levelled by Rothstein J., against the majority decision in *Health Services*, amounts to the claim that the approach it prescribes is “unworkable”. This is ostensibly so for two reasons. First, it is not possible to constitutionalize only part of the Wagner model of collective bargaining — *i.e.*, the duty to bargain in good faith. A statutory regime can only ensure good faith collective bargaining if it also recognizes the principle of “majoritarian exclusivity” and devises “a mechanism for resolving bargaining impasses and disputes regarding the interpretation and administration of collective agreements”.<sup>385</sup> In the absence of the former, employers would face a “chaotic” scenario in which they were required to negotiate in good faith with multiple employee representatives making mutually incompatible demands.<sup>386</sup> In the absence of the latter, there would be no means of enforcing the duty of good faith.<sup>387</sup> “I cannot agree,” Rothstein J. remarked, “that a right can be workable without the imposition of an appropriate remedy”.<sup>388</sup> He did not say why the right to good faith bargaining was “unworkable” merely because it required statutory recognition of other principles in order to work. This point was seized upon by the majority, which did not seem particularly bothered by the suggestion that something more closely resembling the Wagner model might need to receive constitutional standing in order to make the approach in *Health Services* effective.<sup>389</sup> In any case, the majority shrugged aside the unworkability objection, noting that it was too soon to tell just how workable the *Health Services* approach would be.<sup>390</sup>

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<sup>384</sup> *Id.*, at para. 96.

<sup>385</sup> *Id.*, at para. 257.

<sup>386</sup> *Id.*, at para. 260, citing *Fraser v. Ontario (Attorney General)*, [2008] O.J. No. 4543, 92 O.R. (3d) 481, at para. 92 (Ont. C.A.).

<sup>387</sup> *Fraser* (S.C.C.), *id.*, at paras. 258-259.

<sup>388</sup> *Id.*, at para. 261.

<sup>389</sup> *Id.*, at para. 85.

<sup>390</sup> *Id.*, at para. 83.

Second, though *Health Services* purports to constitutionalize only the process of collective bargaining, and not “its substantive fruits”, Rothstein J. found it “impossible to divorce the process of collective bargaining from its substantive outcomes”.<sup>391</sup> He claimed that, in *Health Services* itself, the majority wound up granting constitutional protection to the “significant terms” of the collective agreements that the B.C. legislature had attempted to undo.<sup>392</sup> Furthermore, the very requirement that employers recognize unions and bargain with them in good faith represents a substantive victory for workers, “tip[ping] the economic balance between the parties in [their] favour”.<sup>393</sup> Finally, and inasmuch as the duty to bargain in good faith can be guaranteed only if some remedial mechanism is installed, any remedies that are awarded (*e.g.*, an arbitration award) will amount to a substantive outcome.<sup>394</sup>

(g) *The Debate between the Majority and Justice Deschamps: What Did Health Services Decide?*

Justice Deschamps issued a concurring opinion, writing for herself alone. She argued that the majority judgment in *Health Services* was based only on the proposition “that freedom of association includes the freedom to engage in associational activities and the ability of employees to act in common to reach shared goals related to workplace issues and terms of employment”.<sup>395</sup> It was, in her view, unnecessary for the majority to find a constitutional right to collective bargaining in order to decide *Health Services* as it did, making any remarks about the existence of such a right nothing more than *obiter dicta*.<sup>396</sup> Since, she claimed, section 2(d) does not protect a right to good faith collective bargaining, the AEPA cannot offend the Charter.

Chief Justice McLachlin and LeBel J. dispatched Deschamps J.’s argument in short order. They remarked:

If s. 2(d) merely protected the right to act collectively and to make collective representations, the legislation at issue in [Health Services] would have been constitutional. The legislation in that case violated s. 2(d) since it undermined the ability of workers to engage in

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<sup>391</sup> *Id.*, at para. 263.

<sup>392</sup> *Id.*, at para. 264.

<sup>393</sup> *Id.*, at para. 266.

<sup>394</sup> *Id.*, at para. 268.

<sup>395</sup> *Id.*, at para. 308.

<sup>396</sup> *Id.*, at paras. 304, 49.

meaningful collective bargaining, which the majority defined as good faith negotiations.<sup>397</sup>

(h) *Justice Abella's Lone Dissent*

Writing in dissent, Abella J. would have struck down the AEPA. She agreed with Rothstein J. that the right to a process of good faith collective bargaining entailed some sort of statutory enforcement mechanism, as well as statutory recognition of the principle of majoritarian exclusivity.<sup>398</sup> She found that neither of these requirements were satisfied by the AEPA. Furthermore, the limitation on section 2(d) was not justified under section 1. The failure of the state to provide sufficient constitutional protection for the collective bargaining rights of agricultural workers was designed to reach two objectives: the protection of the family farm and the continued viability and production of farms.<sup>399</sup> Justice Abella, following *Dunmore*, had no trouble concluding that these objectives were sufficiently pressing and substantial. She was, moreover, prepared to assume for the sake of argument that there was a rational connection between the limitation and the objectives.<sup>400</sup> It was nonetheless clear to her that the section 2(d) rights of agricultural workers had not been minimally impaired.<sup>401</sup> In an effort to protect family farms, the Ontario legislature had “prevent[ed] all agricultural workers from access to a process of collective bargaining”.<sup>402</sup> Justice Abella observed that the legislature could just as easily have crafted an exemption for farms employing fewer than three workers.<sup>403</sup> Furthermore, she argued, there was little basis for finding that the agricultural sector would cease to thrive if its workers were allowed to meaningfully bargain collectively. Indeed, most other provinces confer upon farm workers the same collective bargaining rights as those enjoyed by workers in other labour sectors.<sup>404</sup> The province, she held, had failed to show “why achieving protection for agricultural viability and production requires so uniquely draconian a restriction on s. 2(d) rights”.<sup>405</sup>

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<sup>397</sup> *Id.*, at para. 50, citing *Health Services*, *supra*, note 292, at para. 90.

<sup>398</sup> *Fraser*, *id.*, at paras. 339, 343.

<sup>399</sup> *Id.*, at para. 353.

<sup>400</sup> *Id.*, at para. 355.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*, at para. 358 (emphasis in original).

<sup>403</sup> *Id.*, at para. 356.

<sup>404</sup> *Id.*, at para. 364.

<sup>405</sup> *Id.*, at para. 367.

(i) *The Section 15 Argument*

Acknowledging that the Ontario legislature had drawn a formal distinction between agricultural workers and workers in other fields, the majority rejected the suggestion that this was a section 15 problem. Chief Justice McLachlin and LeBel J. found no evidence that the AEPA regime “utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage”.<sup>406</sup> We will only know if the AEPA regime is discriminatory within the meaning of section 15, they stated, once it has been “tested”.<sup>407</sup> Justice Rothstein, in a lapse of solidarity, agreed with the majority on this point.<sup>408</sup>

(j) *Commentary*

It would be easy to focus on how badly the Court splintered in *Fraser*. Let us, for a moment, focus on one point of commonality between the judgments. Both Rothstein and Abella JJ. agree that the right to a process that ensures good faith bargaining by employers requires statutory guarantees of majoritarian exclusivity as well as some form of enforcement mechanism. The majority opinion, though it does not definitively accept that claim, nonetheless acknowledges that it might be the case. That concession might sound modest, but it is startling. Once we say that the right to collective bargaining entails a process including all of these features, we have essentially constitutionalized the Wagner model in all but name. And if that is the case, then some of Rothstein J.’s criticisms of *Health Services* have real bite — in particular, his argument that it represents an impermissible, or at least ill-advised, encroachment by the judiciary into labour policy. Whatever the merits of the Wagner model, it hardly seems appropriate for the courts to direct a legislature that it cannot, as a constitutional matter, devise new ways of managing employee-employer relationships.

It is indeed remarkable that, having conceded that *Health Services* may require more than just a bare statutory direction to employers to bargain in good faith with unions, the majority chose not to settle the question. Instead, it simply observed that the existing regime had not been given a chance to fail, and chastised the claimants for not doing enough to “make it work”. (There is, here, an interesting parallel between

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<sup>406</sup> *Id.*, at para. 116.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*, at para. 295.

*Fraser* and the Court's decision in *Ahmad*.<sup>409</sup> There, too, there is an emphasis on the parties working together to make the legislative regime in question function as well as it might, partly for the sake of constitutional values.)

We will need to wait and see whether it is enough for the AEPA to merely exhort employers to bargain in good faith, without holding out the threat of binding arbitration; also whether, in the absence of some formal recognition of the principle of majoritarian exclusivity, employers will have any incentive to bargain with unions. To some extent, that is fair enough. If legislatures can protect the right of collective bargaining without using the full Wagner model, and they choose to do so, then that is their prerogative. That, surely, is the core of the *Fraser* majority's reasoning, and nothing in Rothstein J.'s opinion challenges it in principle. What his opinion — and that of Abella JJ. — *does* challenge, as unduly speculative, is the suggestion that we *can* have *part* of the Wagner model without having *all* of the Wagner model. From their point of view, the majority's "wait and see" approach is surely frustrating, since it requires agricultural workers to make the most of a statutory regime that is not fit for purpose — even though the point of *Health Services* was to give effect to their section 2(d) rights by making membership in employee associations *worthwhile*. These employees may well wonder how long they should try to make the AEPA work before bothering to challenge the regime in the courts once again.

The Ontario legislature, meanwhile, will have a difficult choice of its own to make. Eight judges have now said that the AEPA regime *might* be unconstitutional. The legislature could take a "wait and see" approach of its own, or it may decide that this kind of uncertainty is undesirable as a matter of labour policy. If it takes the latter course, the path of least resistance is surely to do what Abella J. prescribed in her dissenting opinion: move further towards the Wagner model. Justice Abella, the lone dissenter in *Fraser*, may have the last word in more than one sense.

There is something ironic about the majority's dispute with Rothstein J. The latter is the member of the Court arguing most vociferously for the need to defer to legislatures by virtue of their superior expertise in labour concerns. It is the *majority*, however, that takes more seriously the legislature's ability to productively tinker with the Wagner model — to create new statutory processes capable of giving effect to the right to

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<sup>409</sup> *Supra*, note 14.

collective bargaining, and thereby make the *Health Services* decision work without simply reifying the Wagner model in its existing form.

There is no doubt that Rothstein J. delivered some damaging broadsides to *Health Services*. The majority does not convincingly answer his criticism that international law does not, in fact, require constitutional protection for collective bargaining — that Canada was praised for providing a certain kind of protection is no reason to think that protection required. (Indeed, praise is typically offered for going above and beyond what is, strictly speaking, necessary.) We may quibble over whether a choir is truly analogous to an employee association, but the majority does not decisively show that Rothstein J.'s attempt to reconcile *Dunmore* with Sopinka J.'s fourth point in *PIPSC* misses the mark. But the most potent aspect of Rothstein J.'s concurring opinion is the idea running through it that section 2(d) sets out only to protect the right of individuals to form associations, not to *encourage* them to do so. This is not to take issue with the point in *Dunmore* that section 2(d) will, under some circumstances, require positive state action. It is not intuitively obvious, though, that the state's job is to make associations *desirable*, as opposed to only possible. If *Health Services* presents an intellectual stumbling block for many, it is in this respect.

### 3. Legal Rights under Section 7: *R. v. Ahmad*

Under section 38 of the *Canada Evidence Act*, the Minister of Defence or the Attorney General may refuse to grant the participant in a legal proceeding access to “sensitive” or “potentially injurious information” — that is, information pertaining to international relations, national defence or national security.<sup>410</sup> Where access is not granted, either the litigant or the Attorney General may apply to Federal Court for a ruling on disclosure. The judge hearing the application must ask three questions. First, the judge must ask whether the information sought is relevant, in the sense that it may reasonably be useful to the litigant in the proceedings in question. If it is, then the judge will ask whether disclosure would be injurious to international relations, national security, or national defence. If so, then the judge will consider whether the public interest in disclosure outweighs the public interest in non-disclosure. In deciding whether the balance of reasons favours access, the judge will consider a number of factors:

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<sup>410</sup> *Id.*, at para. 17.

- (a) The extent of the injury;
- (b) The relevancy of the [withheld] information to the procedure in which it would be used, or the objectives of the body wanting to disclose the information;
- (c) Whether the [withheld] information is already known to the public, and if so, the manner by which the information made its way into the public domain;
- (d) The importance of the open court principle;
- (e) The importance of the [withheld] information in the context of the underlying proceeding;
- (f) Whether there are higher interests at stake, such as human rights issues, the right to make a full answer and defence in the criminal context, etc.;
- (g) Whether the [withheld] information relates to the recommendations of a commission, and if so whether the information is important for a comprehensive understanding of the said recommendation.<sup>411</sup>

Where the balance of reasons indeed favours disclosure, the judge will order it, devising conditions which will limit any injury to international relations, national security, or national defence.<sup>412</sup> Even if disclosure is ordered, the Attorney General may nonetheless issue a certificate prohibiting access to the information in question, effectively overriding the order.<sup>413</sup>

The fact that the Federal Court may refuse to order disclosure, coupled with the fact that the Attorney General may issue a certificate prohibiting access, poses constitutional problems in some criminal cases. A criminal defendant may be able to exercise her section 7 Charter right to full answer and defence only by obtaining information that falls within the ambit of section 38 of the CEA. Where disclosure of such information is withheld, criminal trial judges can ignore neither the Federal Court's determination under section 38, nor the Attorney General's certificate, but otherwise "may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a

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<sup>411</sup> *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, [2007] F.C.J. No. 1081, [2008] 3 F.C.R. 248, at para. 98 (F.C.).

<sup>412</sup> CEA, s. 38.06. See also *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, 2007 SCC 9, at para. 77 (S.C.C.).

<sup>413</sup> CEA, s. 38.13.

fair trial”.<sup>414</sup> The criminal trial judge may, for example, dismiss a count of the indictment or reduce the charge to a lesser included offence, or even stay the proceedings outright.<sup>415</sup> In this way, criminal trial judges can protect the accused’s right to a fair trial while respecting the need for state secrecy.<sup>416</sup> The difficulty, of course, is that the criminal trial judge is unable to see the information that has been withheld as a result of either the Federal Court ruling or the security certificate. This raises concerns that the trial judge will either grant an unwarranted stay or fail to craft a remedy that is appropriate under the circumstances.

The defendants in *Ahmad* were charged with conspiring to commit terrorist offences in Canada. Pursuant to section 38 of the CEA, the prosecuting attorney alerted the Attorney General of Canada that the trial might result in the disclosure of potential injurious or sensitive information. The Attorney General went to Federal Court and argued that the defendants should not be granted access to the information in question. The accused brought an application to the Superior Court of Ontario, claiming that the section 38 regime offends section 7 of the Charter and section 96 of the *Constitution Act, 1867*. The judge accepted this argument and struck down the legislation. The Supreme Court of Canada unanimously allowed the appeal.

(a) *Interpreting Section 38*

The Court, writing *per curiam*, noted that Parliament could have intended to devise neither a regime that would result in needless stays of (expensive) terrorism prosecutions, nor one which would impair trial fairness contrary to the dictates of the Charter and the express language of section 38.14.<sup>417</sup> Yet, as we have seen, it is unclear how the criminal trial judge is to provide an appropriate remedy in the absence of the withheld information. The problem can be resolved, the Court found, only if we presume that Parliament “expected [criminal] trial judges to be provided with a sufficient basis of relevant information on which to exercise their remedial powers judicially”.<sup>418</sup> Indeed, it would scarcely make sense for Parliament to set out a range of statutory remedies, unless

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<sup>414</sup> CEA, s. 38.14.

<sup>415</sup> *Id.*

<sup>416</sup> See Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin, 2008), at 410.

<sup>417</sup> *Ahmad*, *supra*, note 14, at paras. 31-32.

<sup>418</sup> *Id.*, at para. 33.



it proceeded on the basis that the criminal trial judge possessed sufficient information to know whether one remedy was more appropriate than another. The Court remarked:

Dismissing a specified count of the indictment (or proceeding only on a lesser included offence) as suggested by the legislation, would generally require a thorough enough understanding of the s. 38 information to evaluate it against specific elements of the offences charged. Conversely, if the trial judge lacks that understanding, it will often be impossible to determine what charge, element or component of the defence that information might relate to. In such circumstances, the trial judge may have no choice but to enter a stay. This possibility was referred to in argument as putting the Attorney General and the trial courts in the dilemma of playing *constitutional chicken*, an outcome which a sensible interpretation of s. 38 will help to avoid.<sup>419</sup>

The need to avoid such a dilemma was underscored with the observation that the criminal trial judge could, under section 38.14, order a stay of proceedings more readily than she could under section 24(1) of the Charter — *i.e.*, that the remedy need not be confined to “the clearest of cases”.<sup>420</sup> A stay must be ordered so long as “the trial judge is unable to conclude affirmatively that the right to a fair trial ... has not been compromised”.<sup>421</sup>

In light of the fact that Parliament “must” have intended criminal trial judges to have as much information as possible when exercising their remedial powers under section 38.14, the Court concluded that the Attorney General and the Crown prosecutor “should take all steps available to them within the limits of the legislation ... to provide trial judges with [enough] information” to discharge that function, giving due regard *both* to society’s interest in terrorism prosecutions *and* to the accused’s Charter rights.<sup>422</sup> Furthermore, section 38.04(5) of the CEA should be understood as requiring notice to the criminal trial judge that a section 38 application has been made, and as *ordinarily* requiring notice to the accused.<sup>423</sup>

The Court emphasized the flexibility of the section 38 regime. The Federal Court judge ruling on the application for disclosure has the

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<sup>419</sup> *Id.*, at para. 34 (emphasis in original).

<sup>420</sup> *Id.*, at para. 35, citing *R. v. O’Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.).

<sup>421</sup> *Ahmad, id.*, at paras. 35, 52.

<sup>422</sup> *Id.*, at para. 37.

<sup>423</sup> *Id.*, at paras. 39-40.

authority to order “partial or conditional disclosure to the trial judge, provide a summary of the information, or advise the trial judge that certain facts sought to be established by an accused may be assumed to be true for the purposes of the criminal proceeding.”<sup>424</sup> Such an order, the Court continued, may pay due regard to state secrecy concerns by requiring the disclosed information or summary not to be disclosed to the accused, or by requiring it to be reviewed only in a secure facility. More often than not, the Court suggested, the best option will simply be to disclose the information to the trial judge alone, and “*for the sole purpose* of determining the impact of non-disclosure on the fairness of the trial”.<sup>425</sup> Where the trial judge is unable to assess the significance of the information without submissions from counsel, security-cleared “special advocates” may be appointed.<sup>426</sup>

Ultimately, of course, it falls to the Attorney General to decide whether partial or conditional disclosure of the information in issue should be made to the criminal trial judge.<sup>427</sup> The Court acknowledged that there is no obligation on the Attorney General to disclose information covered by section 38 to anyone — including the criminal trial judge. If the Attorney General decides to exercise her authority in that manner, however, she runs the risk that a stay of proceedings will be ordered.<sup>428</sup> The trial judge must presume that trial fairness has been undermined, if the information before her is equivocal on the point.<sup>429</sup> At the same time, the trial judge cannot be *too* quick to order a stay — she must give the Attorney General an opportunity to decide whether “further and better disclosure” should be made to the trial judge.<sup>430</sup>

(b) *The Section 96 Issue*

The respondents argued that the section 38 regime offends section 96 of the *Constitution Act, 1867*. They based this claim on the premise that the conferral of a power upon a non-section 96 tribunal will violate the Constitution where: (a) “the power conferred broadly conforms to a power or jurisdiction exercised by a superior, district or county court at

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<sup>424</sup> *Id.*, at para. 44.

<sup>425</sup> *Id.*, at para. 45 (emphasis added).

<sup>426</sup> *Id.*, at para. 47.

<sup>427</sup> *Id.*, at para. 43.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*, at para. 51.

<sup>430</sup> *Id.*

the time of Confederation;” (b) “the power is a judicial power” and (c) the power is either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function”.<sup>431</sup> Insofar as section 38 gives the Federal Court — a non-section 96 tribunal — the power to protect the section 7 rights of criminal defendants, the respondents claimed that all three criteria were satisfied. The Supreme Court disagreed. In doing so, it did not decide whether the test used by the respondents was appropriate.<sup>432</sup> Even if that was the correct way to approach the issue, the Court held, it did not follow that a section 96 violation had occurred, since superior courts have traditionally lacked jurisdiction to review Crown claims of public interest immunity.<sup>433</sup>

The Court acknowledged that, pursuant to its decision in *MacMillan Bloedel*,<sup>434</sup> section 96 is violated if legislation purports to strip superior courts of a power that is part of their “core or inherent jurisdiction”.<sup>435</sup> The respondents argued that section 38, insofar as it prevents superior courts from safeguarding the fair trial rights of criminal defendants, has that effect.<sup>436</sup> The Court agreed that, if the section 38 regime actually stripped superior courts of the power to provide an appropriate remedy for prospective Charter violations, the impugned legislation would indeed be contrary to section 96.<sup>437</sup> But, it observed, section 38 only gives Federal Court judges the authority to decide whether potentially injurious or sensitive information should be disclosed. It does not prevent superior court judges from remedying Charter concerns that arise as a result of non-disclosure.<sup>438</sup> This is sufficient for section 96 purposes.

(c) *The Section 7 Issue*

Having interpreted section 38 in light of the presumption that parliament could not have intended to compromise the Charter rights of criminal defendants, it will surprise no one that the Court found section 38 of the CEA compatible with section 7 of the Charter. Inasmuch as

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<sup>431</sup> *Id.*, at para. 58, citing *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] S.C.J. No. 13, [1996] 1 S.C.R. 186, at para. 74 (S.C.C.).

<sup>432</sup> *Ahmad, id.*, at para. 58.

<sup>433</sup> *Id.*, at paras. 59-60.

<sup>434</sup> *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725 (S.C.C.) [hereinafter “*MacMillan Bloedel*”].

<sup>435</sup> *Ahmad, supra*, note 14, at para. 61, citing *MacMillan Bloedel, id.*, at para. 15.

<sup>436</sup> *Ahmad, id.*, at para. 61.

<sup>437</sup> *Id.*, at para. 62.

<sup>438</sup> *Id.*, at paras. 64-65.

Federal Court judges and the Attorney General have the authority to provide criminal trial judges with sufficient information to craft an appropriate Charter remedy, there is ostensibly little danger that the accused's right to a fair trial will be compromised by the lack of disclosure. Where a criminal trial judge nonetheless lacks sufficient information to determine whether section 7 rights would be undermined by carrying on with the trial, the judge should order a stay of proceedings. In either case, the constitutional problem disappears.

(d) *Commentary*

The section 38 regime appeared to raise well-nigh intractable problems. Insofar as the Court was able to interpret it in a way that accommodated both the Charter interests of criminal defendants and the public's interest in preserving state secrets and conducting effective (and pricey) terrorism prosecutions, we should consider *Ahmad* a success.<sup>439</sup> Ultimately, the regime's effectiveness will depend on the Attorney General — on how much information the Attorney General decides should be withheld in the first place, on his or her willingness to work with the other parties (including the respective judges involved in the process) in determining just how much information the criminal trial judge “needs” to decide whether the right to a fair trial has been compromised, and how the Attorney General responds if the judge finds that he or she needs more. The Attorney General may be tempted to release as little information as possible (short of complete refusal) to the trial judge, since the Court has instructed judges to give the Crown notice of their intention to issue a stay if more information is not forthcoming.<sup>440</sup> By taking this approach, the Crown could provide the trial judge with the bare minimum of information needed to avoid a stay of proceedings, and string out terrorism prosecutions for a considerable period of time.

This would be unfortunate on several levels. Obviously, it is a concern whenever criminal defendants face long delays in going to trial, especially when they have such serious charges hanging over their heads. Over and above that concern, though, the Court referred to the cost of terrorism prosecutions (somewhat surprisingly) when interpreting the

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<sup>439</sup> See Janine Benedet, Annotation to *R. v. Ahmad* (2011) 81 C.R. (6th) 201.

<sup>440</sup> See the comments of Justice Major in Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy, Volume 3: The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions* (Ottawa: The Commission, 2010). See also *Ahmad, supra*, note 14, at para. 51.

section 38 regime. Extended delays under that regime will only increase those costs. Releasing information “slice by slice” also seems somewhat inconsistent with the spirit of cooperation that runs through *Ahmad*. On the other hand, it may be objected that the Attorney General has an obligation to the public not to permit the needless disclosure — even to Superior Court judges — of information it regards as too “sensitive” or “potentially injurious” to fall into the public domain. This attitude, that we cannot afford to be generous with Charter rights in light of the grave threat posed by terrorism to national security, was perhaps expressed most concisely by the Minister of Justice when he described the *Anti-Terrorism Act*<sup>441</sup> as “Charter-proofed”.<sup>442</sup> At the time, this was taken by some commentators as a hint that, in vetting the provisions of the ATA, the Attorney General had concerned itself with ensuring only that it would not be struck down, not with giving generous recognition to the Charter rights of those who might be prosecuted or otherwise caught in the anti-terrorism net.<sup>443</sup>

In many ways, then, the success or failure of the section 38 regime will depend on the Attorney General. We should not, however, delude ourselves. If a terrorism prosecution is stayed, because there is a lack of adequate disclosure to the judge or the accused, or because of unreasonable delay, it will be the courts — and not the Attorney General or Parliament — who will experience the brunt of the public’s wrath.

#### 4. The Equality Rights Cases

This term the Supreme Court decided two section 15 decisions. In each, the Court grappled with particular aspects of equality law that have been the focus of both concern and critique. This sort of re-engagement with equality law has characterized much of the last decade. In the 1999 decision of *Law v. Canada*,<sup>444</sup> the Supreme Court overcame previous split decisions to present a united front regarding the appropriate structure of a section 15 claim. But in doing so the Court merged elements from several disparate (even conflicting) approaches, resulting in a

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<sup>441</sup> Hereinafter “ATA”.

<sup>442</sup> See Kent Roach, *September 11: Consequences for Canada* (MQUP, 2003), at 75-9.

<sup>443</sup> See Michael Plaxton, “Charter-Proofing in Canada” (2005) 8 Y.B. N.Z. Juris. 217.

<sup>444</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.).

burdensome section 15 framework.<sup>445</sup> At the *prima facie* stage of Charter argument, the burden of proof falls on claimants; a more complex test therefore makes it harder for them to succeed, relieving the state from having to justify laws or policies which have real negative impact on disadvantaged persons. In 2008's *Kapp* decision,<sup>446</sup> the Court appeared to draw back from much of *Law*'s framework, in favour of a simpler approach reminiscent of earlier section 15 case law. In particular, the Court rejected *Law*'s focus on "human dignity" as an essential component of discrimination in law, replacing it with the terminology of "prejudice, stereotype and disadvantage".

In *Withler*,<sup>447</sup> the Court appears to have reconsidered another entrenched element of section 15, namely, the role of "comparator groups" in establishing differential treatment (though the degree to which "comparison" has truly been ejected from section 15 remains to be seen). In *Cunningham*, the Court implicitly answers those who wondered "were they serious?" in regards to *Kapp*'s remarkably generous approach to the "ameliorative programs" that are singled out for protection by section 15(2).

(a) *Withler v. Canada*

(i) Legislative and Lower Court History

Like so many section 15 cases, *Withler* was a challenge to a large-scale government program. The claimants were all widows challenging their exclusion from a supplementary death benefit scheme available to spouses of federal civil servants (under the *Public Service Superannuation Act*)<sup>448</sup> and of armed forces members (under the *Canadian Forces Superannuation Act*).<sup>449</sup> Both legislative schemes provide a package of work-related benefits including several which kick in upon the death of the insured member. Akin to life insurance, the supplementary death benefit pays out a lump sum on death, equal to twice the plan member's last salary. In both schemes, the death benefit is subject to a reduction of 10 per cent for each year the plan member was over a certain age at the

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<sup>445</sup> C. Mathen, "What Religious Freedom Jurisprudence Reveals About Equality" (2009) 6(2) *J.L. & Equality* 163.

<sup>446</sup> *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter "*Kapp*"].

<sup>447</sup> *Supra*, note 15.

<sup>448</sup> R.S.C. 1985, c. P-36, s. 47(1).

<sup>449</sup> R.S.C. 1985, c. C-17, s. 60(1).

time of death — in the case of civil servants, 65, and in the case of armed services members, 60.<sup>450</sup>

*Withler* was pursued as a dual class action — relating to the two schemes — by spouses of plan members whose death benefit was subject to reduction. The plaintiffs, represented by Hazel Ruth Withler and Joan Helen Fitzsimmonds, claimed discrimination on the basis of age. They sought monetary judgments of over \$2 billion for the excluded spouses of civil servants, and \$285 million for spouses of armed services members. Each member of the class received a survivor's pension; and they represented a broad continuum of individual economic well-being.

The thrust of the equality argument was that it was arbitrary for the federal government to reduce a death benefit based on age, as such a reduction did not correspond to the actual needs of the recipients; was based on inaccurate stereotypes that increased age is correlated with decreased need for financial assistance; and perpetuated the discriminatory belief that as they grow older people become less worthy of benefit, care and concern.<sup>451</sup>

Both class actions were dismissed at trial. Justice Garson “reluctantly”<sup>452</sup> accepted as a comparator group those plan members who received an unreduced death benefit. She found, though, that the provisions did not discriminate because the benefit was only one part of a larger scheme that “takes into account the whole population of civil servants, and members of armed forces ... [and] balances the interests of the public to ensure that the civil service is treated equitably but not over generously”.<sup>453</sup> Accordingly, there was in her view a correspondence between the entire benefit plan and the claimants' needs and circumstances, and no violation of human dignity.

The Court of Appeal upheld the initial decision 2-1. Justice Ryan agreed that the scheme did not violate section 15 in a substantive sense. She also rejected the claimants' submission that the proper comparator group consisted of those members who were entitled to both a supplementary death benefit *and* a survivor's pension, because using that group would “deprive the court of the ability to fully analyse whether the impugned legislative distinction was discriminatory”.<sup>454</sup> Writing in dissent, Rowles J.A. accepted the claimants' suggested comparator

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<sup>450</sup> *Withler, supra*, note 15, at paras. 5-6.

<sup>451</sup> *Id.*, at para. 14.

<sup>452</sup> *Id.*, at para. 16.

<sup>453</sup> *Id.*, at para. 17.

<sup>454</sup> *Id.*, at para. 20.

group, noting that the proper inquiry cannot be broad and generalized but must be directed at the four contextual factors in *Law*. She found in the case at bar pre-existing disadvantage; lack of correspondence; no ameliorative effect and a serious impact on the claimants' sense of worth and dignity. The provisions therefore violated section 15 and, in her view, could not be justified under section 1.

In a decision authored by the Chief Justice and Justice Abella, the Court unanimously dismissed the claimants' appeal. The Court stated at the outset that the decision would address the issues of comparison and "mirror comparator groups" under section 15. First, though, it considered a preliminary issue of standing, and took the opportunity to recap the current state of equality law.

#### (ii) Standing

The Attorney General of Canada had challenged the claimants' standing on the basis that the benefit was pegged to the age of the deceased members not the members of the class. Though the Court ultimately found no discrimination, making the issue moot, it took pains to state that the claimants did indeed have standing. The Court agreed with the trial judge's reasoning that "[w]here the target of the impugned provision is the plaintiff and it is the plaintiff who suffers the discrimination associated with her spouse's age, the plaintiff should have standing".<sup>455</sup> No one was more directly affected by the provision than the claimants: a plan member likely would not challenge the reduction and surviving spouses tended to be of a similar age to the members.<sup>456</sup> Therefore, standing was appropriate.<sup>457</sup>

#### (iii) Equality — A Recap

Moving to the substantive question in the appeal, the Court noted that the core of section 15 prohibits state discrimination. "Discrimination" is evaluated on the basis of two questions: (1) does a law create a distinction that is based on an enumerated or analogous ground? and (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The inquiry into the nature of legislative distinctions

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<sup>455</sup> *Id.*, at para. 28.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*



reflects the fact that equality does not simply mean identical treatment. Section 15 prohibits, instead, *discriminatory distinctions* that can manifest in two principal ways: (a) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (b) stereotyping on the basis of these grounds that results in the allocation of benefits or imposition of burdens that do not correspond to an individual's or group's actual circumstances and characteristics.<sup>458</sup>

The focus on prejudice and disadvantage, and on stereotype, requires a court to examine the full context of a particular case. It involves “looking at the circumstances of members of the group and the negative impact of the law on them”.<sup>459</sup> The analysis must always be grounded in the group's actual situation and the potential of the impugned law to worsen it. For this reason, a “formal analysis based on comparison between the claimant group and a ‘similarly situated’ group does not assure a result that captures the wrong to which s. 15(1) is directed”.<sup>460</sup> the wrong of substantive inequality.

#### (iv) Comparison — Concerns and Context

Turning to the role of comparison more specifically, the Chief Justice and Abella J. noted that while equality always has a comparative aspect, any comparison must be based on “the condition of others in the social and political setting in which the question arises” and not a simplistic tally between apparently similar groups. This inquiry is the essence of substantive equality, with context its handmaiden. From *Andrews* to *Kapp*,<sup>461</sup> the Court opined, section 15 jurisprudence consistently has repudiated “a formalistic, ‘treat likes alike’ approach”.<sup>462</sup> Even when a section 15 analysis has required comparison between groups, “those comparisons have generally been accompanied by insistence that a valid s. 15(1) analysis must consider the full context of the claimant group's situation and the actual impact of the law on that situation”.<sup>463</sup>

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<sup>458</sup> *Id.*, at para. 32, citing *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.), as paraphrased in *Kapp, supra*, note 446, at para. 18.

<sup>459</sup> *Withler, id.*, at para. 37.

<sup>460</sup> *Id.*, at para. 40.

<sup>461</sup> *Kapp, supra*, note 446.

<sup>462</sup> *Withler, supra*, note 15, at para. 43.

<sup>463</sup> *Id.*

In a brief review of the jurisprudence, the Court characterized decisions in which comparison was essential to the analysis as involving a fully contextualized inquiry focused on the claimant's actual situation. For example, referring to *Law* itself it said:

While [*Law*] referred to "relevant comparators", it also recognized that discrimination was the central concern and that the focus should be on the nature of the scheme and the appropriateness of the impugned distinctions having regard to the purpose of the scheme and the situation of the claimant. In the end, it was found that discrimination was negated by the purpose of the scheme of addressing long-term financial needs and ameliorating the situation of older spouses, and the particular circumstances of the claimant's situation as a younger spouse.<sup>464</sup>

Similarly, in *Gosselin*,<sup>465</sup> the majority decision on section 15 emphasized that the proper question was:

... whether a reasonable person in Ms. Gosselin's position, would, having regard to all the circumstances and the context of the legislation, conclude that the Regulation in purpose or effect treated welfare recipients under 30 as less worthy of respect than those 30 and over, marginalizing them on the basis of their youth.<sup>466</sup>

So what, then, was the issue here? The Court characterized it as relating to so-called mirror comparator groups. In *Hodge*, Binnie J. described the proper comparator group as one that "mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except for the personal characteristic on which the claim was based".<sup>467</sup> In that case involving a pension scheme that provided benefits to surviving *married* spouses, the Court found the proper comparator group to the claimant, a *former common law* spouse, to be *divorced* spouses. The Court emphasized the provision's purpose, namely, a concern with "the financial dependency of a couple who at the date of death are in a relationship with mutual legal rights and obligations". A

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<sup>464</sup> *Withler, id.*, at para. 45.

<sup>465</sup> *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, 2002 SCC 84, [2002] 4 S.C.R. 429 (S.C.C.) [hereinafter "*Gosselin*"].

<sup>466</sup> *Withler, supra*, note 15, at para. 46, citing *Gosselin, id.*, at para. 28.

<sup>467</sup> *Withler, id.*, at para. 49, citing *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 65, [2004] 3 S.C.R. 357, at para. 23 (S.C.C.).

similar emphasis on legislative purpose and design was noted as determinative in *Auton*,<sup>468</sup> and in *Granovsky*.<sup>469</sup>

The Court noted several concerns that have been raised about the use of “mirror” comparator groups. First, too great a focus on the comparator may inappropriately truncate the equality analysis, such that “factors going to discrimination — whether the distinction creates a disadvantage or perpetuates prejudice or stereotyping — may be eliminated or marginalized”.<sup>470</sup> Second, the search for a mirror group may devolve into a search for “sameness” rather than a search for disadvantage. Third, the focus on mirroring may be inadequate in a case involving interwoven grounds of discrimination:

An individual or a group’s experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt.<sup>471</sup>

Fourth, a mirror comparator group process places an unfair burden on complainants to the extent that there may not be an appropriate group for comparison; and because different persons may perceive different characteristics as relevant to who or what the “mirror” is.

The Court noted that in *Kapp*, which rejected much of the *Law* framework, comparison did not receive a heightened role. Instead the Court in that case warned of the dangers of a “sterile” comparison of “likes”, and reiterated the need for a fully contextual analysis.<sup>472</sup> The key to finding discrimination was noted as whether a particular provision resulted in “the perpetuation of disadvantage and stereotyping”.<sup>473</sup>

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<sup>468</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, 2004 SCC 78, [2004] 3 S.C.R. 657 (S.C.C.). In that case the Court found that the benefit sought by the claimant (a specific form of therapy for autistic children) was not a denial of “equal benefit of the law” since the medical services scheme neither provided nor purported to provide funding for novel forms of therapy.

<sup>469</sup> *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, 2000 SCC 28, [2000] 1 S.C.R. 703 (S.C.C.). In that case, because the legislative scheme was designed to provide an “opt-out” provision to assist those who were permanently disabled, Granovsky was found to have no basis to argue that the scheme discriminated against him on the basis of his temporary, intermittent disability (debilitating back pain).

<sup>470</sup> *Withler*, *supra*, note 15, at para. 56.

<sup>471</sup> *Id.*, at para. 58.

<sup>472</sup> *Id.*, at para. 52.

<sup>473</sup> *Id.*

(v) Comparison — A Two-Step Approach

What, then, is the proper approach to comparison? The Court said that any comparative analysis must be oriented to the two chief questions in a section 15 claim: whether there is a distinction on a prohibited ground; and whether that distinction creates disadvantage through either prejudice or stereotyping. Comparison often is relevant in determining whether the law creates a distinction, because a legal distinction must exist in relation to some other group or individual. However, “[it] is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination”.<sup>474</sup> The claimant need only show that there *is* a distinction on an enumerated or analogous ground. The Court noted that for some laws, the distinction may be harder to grasp, because the negative impact is indirect. In such a case, the claimant may well need to point to “historical or sociological”<sup>475</sup> disadvantage to illuminate the nature of the distinction.

The second step more closely engages with the idea of substantive equality as it squarely interrogates the notion of disadvantage through prejudice or stereotype. At this step, the Court stated, “comparison may bolster the contextual understanding of a claimant’s place within a legislative scheme and society at large”,<sup>476</sup> though the “probative value of comparative evidence”<sup>477</sup> will vary. Significantly, where the impugned provision is located *within a benefits scheme*, the contextual inquiry “will typically focus on the purpose of [that] provision. ... Whom did the legislature intend to benefit and why?”<sup>478</sup> The court “will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors such as age”.<sup>479</sup> Additionally:

Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.<sup>480</sup>

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<sup>474</sup> *Id.*, at para. 63.

<sup>475</sup> *Id.*, at para. 64.

<sup>476</sup> *Id.*, at para. 65.

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*, at para. 67.

<sup>479</sup> *Id.*

<sup>480</sup> *Id.*

## (vi) Outcome

Applying the foregoing analysis to the facts, the Court acknowledged that the supplementary death benefit draws a distinction on the basis of age. That distinction, though, creates no substantive inequality. The Court endorsed the findings of the court of first instance, stating that although Garson J. utilized the now outdated *Law* approach she nonetheless conducted “a full contextual inquiry into whether [the *Law* factors] established discrimination”.<sup>481</sup> She concluded that no such discrimination was at play because the Reduction Provisions, when considered in relation to the entire benefit plan, corresponded to the claimants’ needs and circumstances. The Court endorsed this view, and cited with approval the following statement by Ryan J.A. in the Court of Appeal:

This case demonstrates the difficulty that arises when one attempts to isolate for criticism a single aspect of a comprehensive insurance and pension package designed to benefit an employee’s different needs over the course of his or her working life ... The comprehensive plan, while not a perfect fit for each individual, did not meet the hallmarks of discrimination given that it was a broad-based scheme meant to cover the competing interests of the various age groups covered by the plan.<sup>482</sup>

The Court acknowledged that the supplementary death provision did not perfectly correspond to the claimants’ actual needs and circumstances since the costs of last illness and death increase after age 65. But the claimant spouses were not unable to meet their expenses and indeed they compared favourably with most Canadians in this regard. In addition, to focus solely on the supplementary benefit missed an important part of the context:

[T]he government’s statutory benefit package must account for the whole population of civil servants, members of the armed forces and their families. Each part of the package is integrated with other benefits and balanced against the public interest. The package will often target the same people through different stages of their lives and careers. It attempts to meet the specific needs of the beneficiaries at particular moments in their lives. It applies horizontally to a large population with different needs at a given time, and vertically throughout the lives of the members of this population.<sup>483</sup>

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<sup>481</sup> *Id.*, at para. 72.

<sup>482</sup> *Id.*, at para. 73.

<sup>483</sup> *Id.*, at para. 76.

The Court accepted the trial judge's conclusion that "when combined with the entire benefit package including pension, dental, prescription, and extended health as well as the other universal government programs ... the law does not fail to take into account the plaintiffs' actual situation".<sup>484</sup> Rather, the scheme "uses age-based rules that, overall, are effective in meeting the actual needs of the claimants, and in achieving important goals such as ensuring that retiree benefits are meaningful".<sup>485</sup>

Finally, the Court outlined its disagreement with the dissenting opinion in the Court of Appeal which had embraced the notion of mirror comparators. Looking at the group of surviving spouses who received an unreduced death benefit, Rowles J.A. concluded that the provisions did discriminate. This, the Court held, was in error:

In our respectful view, Rowles J.A.'s analysis illustrates how reliance on a mirror comparator group can occlude aspects of the full contextual analysis that s. 15(1) requires. It de-emphasized the operation of the Reduction Provisions on the death benefit in the context of the entire plan and lifetime needs of beneficiaries. The result was a failure to fully appreciate that the package of benefits, viewed as a whole and over time, does not impose or perpetuate discrimination.<sup>486</sup>

(vii) Commentary

*Withler* is a curious decision. It is unanimous, which for an equality decision is an achievement in itself. But, for an attempt to clarify an extremely significant part of section 15 analysis, it is very brief. It is also somewhat unclear in its ultimate prescription. The Court has not eschewed comparison, or even comparator groups. It catalogues criticisms of mirror comparators in an unusually forthright way, but it never questions the earlier cases that cemented the mirror approach, even when on a reasonable reading of those cases the mirror approach led to a loss for the claimants. Indeed, the past decisions are described as having applied a fully contextual analysis. Yet, if none of the earlier cases demonstrate any of the flaws, one may be forgiven for wondering why the Court finds the mirror comparator approach so objectionable.

To be sure, the Court's repeated invocation of substantive equality and the need for a fully contextual inquiry is positive rhetoric. The search

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<sup>484</sup> *Id.*, at para. 77, citing Garson J., at para. 159.

<sup>485</sup> *Id.*, at para. 77.

<sup>486</sup> *Id.*, at para. 81.

for disadvantage, and the recognition that it can exist outside of a strict comparison between “likes”, hearkens back to the early promise of section 15. Peering more closely, though, *Withler* engages in very little analysis of the claimants’ actual situation. What is instead given pride of place is the legislature’s purpose in instituting complex benefits systems, and the likelihood that members of the class have benefited in some way from the system as a whole. To extent that other financial benefits militate against any discrimination flowing from differential treatment, this suggests that “prejudice and disadvantage” rather than “stereotype” is the determinative factor.

The Court also does not provide much of an explanation — in equality terms at least — why the age-based distinction is consistent with substantive equality. The reference to the massive scale of the program and the fact that its benefits are broadly distributed surely are factors going more properly to justification under section 1 than an analysis of whether the *particular differential treatment* counts as discrimination. This analytical framework almost certainly arises because of the Court’s position, hinted at in earlier decisions but baldly stated here, that a *different approach* to discrimination analysis is required when someone challenges a benefits program. Together with the decision in *Cunningham*, this suggests the entrenchment of profound deference to governments when they confront section 15 challenges to the nuts and bolts of many state programs.

(b) *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*

*Cunningham*<sup>487</sup> was the second equality rights decision issued this term. A complex dispute between Aboriginal peoples, it provided the Court with an opportunity to consider some of the questions remaining from its reshaping of section 15(2) — the affirmative action clause — in *Kapp*.

(i) Legislative and Lower Court History

The case arose out of a challenge to the removal of several persons in the same family from the membership list of the Métis settlement of Peavine, Alberta. The de-listing occurred pursuant to the *Métis Settlements Act*,<sup>488</sup> under which Status Indians may not also belong to an

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<sup>487</sup> *Supra*, note 16.

<sup>488</sup> R.S.A. 2000, c. M-14 [hereinafter “MSA”].

official Métis community. The claimants alleged that their exclusion violated their rights under sections 2(a), 7 and 15 of the Charter. The Supreme Court considered only the section 15 claim.

The Métis are descendants of 18th-century unions largely between European men and Aboriginal women in what is now Manitoba, Saskatchewan and Alberta. Within a few generations those peoples developed a distinctive culture and identity that was neither European nor Aboriginal. As the Court acknowledged, they were excluded from Indian treaties and other forms of recognition of Aboriginal sovereignty:

The Crown did not apply to the Métis its policy of treating with the Indians and establishing reservations and other benefits in exchange for lands. In some regions, it adopted a scrip system that accorded allotments of land to individual Métis. However, Métis communities were not given a collective reservation or land base; they did not enjoy the protections of the *Indian Act* or any equivalent. Although widely recognized as a culturally-distinct Aboriginal people living in culturally-distinct communities, the law remained blind to the unique history of the Métis and their unique needs.<sup>489</sup>

Legislation governing the Métis in Alberta was first enacted in 1938. The MSA was a product of the growing realization that the Métis were a distinct peoples (though their distinct nature was portrayed in racist terms, as exemplified by the official references to Métis as “half-breeds”).<sup>490</sup> The Alberta government defined a “Métis” person as:

a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in *The Indian Act*, being chapter 98 of the Revised Statutes of Canada, 1927.<sup>491</sup>

While the first legislative provisions provided some statutory recognition of Métis, they did not provide a land base for Métis settlements or other means to preserve Métis identity and culture. This began to change in 1982 when the *Constitution of Canada* entrenched Aboriginal rights for Métis as a distinct group.<sup>492</sup> Negotiations followed, and in 1989 pursuant to the *Alberta-Métis Settlements Accord* the Alberta government granted the Métis Settlements General Council fee simple title to the lands of the eight Métis communities and passed a suite of legislation to protect Métis rights, including the MSA.

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<sup>489</sup> *Supra*, note 16, at para. 7.

<sup>490</sup> *Id.*, at paras. 8-9.

<sup>491</sup> *Id.*, at para. 10, citing *Metis Population Betterment Act*, S.A. 1938, 2nd Sess., c. 6.

<sup>492</sup> *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.



The MSA defines “Métis” as “a person of aboriginal ancestry who identifies with Métis history and culture”. Section 75 provides that persons registered as Indians or Inuit may not apply for membership in a Métis settlement, unless certain conditions are met and membership is authorized by a settlement by-law.<sup>493</sup>

The *Transitional Membership Regulation*<sup>494</sup> permits those registered on a settlement membership list prior to the coming into force of the MSA to maintain their membership even if they were already registered or were eligible to register as Indians under the *Indian Act*. Otherwise, voluntary registration under the *Indian Act* precludes membership in a Métis settlement unless a General Council Policy provides otherwise. A person who loses membership under these provisions loses any interest in the settlement land, but may continue to reside on a Métis settlement unless expelled.

In 1985, the *Indian Act* was amended to (partially) correct the historic injustice visited against Aboriginal women who were stripped of Indian status for marrying non-Aboriginal men.<sup>495</sup> As a result, many Métis gained the right to be recognized as Indians. The claimants, who were among this group, registered as status Indians but did so outside of the window provided by the transitional regulation cited above. Their membership in the Peavine Settlement subsequently was revoked.

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<sup>493</sup> Section 75 states:

75(1) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement is not eligible to apply for membership or to be recorded as a settlement member unless subsection (2) or (3.1) applies.

(2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if

(a) the person was registered as an Indian or an Inuk when less than 18 years old,  
(b) the person lived a substantial part of his or her childhood in the settlement area,  
(c) one or both parents of the person are, or at their death were, members of the settlement, and  
(d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of that individual as a member of the settlement.

(3) If a person who is registered as an Indian under the *Indian Act* (Canada) is able to apply to have his or her name removed from registration, subsection (2) ceases to be available as a way to apply for or to become a settlement member.

(3.1) In addition to the circumstances under subsection (2), an Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if he or she meets the conditions for membership set out in a General Council Policy.

<sup>494</sup> Alta. Reg. 337/90.

<sup>495</sup> *Act to Amend the Indian Act*, S.C. 1985, c. 27 (Bill C-31).

The Alberta Court of Queen's Bench dismissed the claim.<sup>496</sup> In a decision that pre-dated *Kapp*, Shelley J. found no discrimination on the basis that the impugned provisions created neither stereotyping nor disadvantage. While the claimants were denied the benefits associated with Métis membership, they gained the benefits of Indian status. She also noted that the provisions have an ameliorative purpose and effect: enhancing and preserving Métis culture, identity, land rights and self-governance.<sup>497</sup>

The Court of Appeal allowed the appeal.<sup>498</sup> In its interpretation of *Kapp*, the Court held that in order to count as an ameliorative program, the exclusion of status Indians "must be rationally connected to the enhancement and preservation of Métis culture and self-governance and the securing of a Métis land base".<sup>499</sup> Such a relationship was not established. Characterizing the provisions as "arbitrary", the Court of Appeal found that excluding long-time members of a Métis community on the basis of Indian status neither enhanced Métis identity nor was consistent with the fact that Métis identity is itself based on Aboriginal origins. It found "no evidence that settlements were being overrun by status Indians or that the number of status Indians seeking settlement membership would impair the aims of the *MSA*".<sup>500</sup> Thus, section 15(2) of the Charter did not protect the impugned provisions against a section 15(1) claim. Returning to section 15(1), the Court of Appeal found that the provisions stereotyped the claimants as being "less Métis" because of their Indian status. It exposed them to further vulnerability and disadvantage. Under section 1, in somewhat confusing reasoning the Court found that:

[a]ccepting the government's claimed purpose — promoting the Métis culture, protecting and distinguishing it from Indian culture, furthering self-governance, and preserving a Métis land base — ... there [is] no pressing and substantial objective capable of justifying the infringement of s. 15(1) of the *Charter* caused by the exclusion of the claimants and other status Indians.<sup>501</sup>

It added that had there been a pressing and substantial objective, the exclusion was neither rationally connected to it nor minimally impairing of the claimant's section 15(1) rights.

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<sup>496</sup> [2007] A.J. No. 913, 2007 ABQB 517, 81 Alta. L.R. (4th) 28 (Alta. Q.B.).

<sup>497</sup> Justice Shelley also dismissed the claims arising under ss. 2(d) and 7: *id.*, at paras. 29-30.

<sup>498</sup> [2009] A.J. No. 678, 2009 ABCA 239, [2009] 8 Alta. L.R. (5th) 16 (Alta. C.A.).

<sup>499</sup> *Supra*, note 16, at para. 32.

<sup>500</sup> *Id.*, at para. 32.

<sup>501</sup> *Id.*, at para. 35.

(ii) Section 15(2) — Purpose and Role

The Supreme Court of Canada allowed the appeal, and dismissed the claim. Turning first to the relationship between the two clauses of section 15, the Court noted that they work together to promote substantive equality. While section 15(1) aims at preventing discrimination, section 15(2) recognizes that, because of past discrimination, governments are entitled to take positive measures to improve the condition of disadvantaged groups.<sup>502</sup> Section 15(2) thus provides that “ameliorative programs” are not to be struck down on the basis of claims of “reverse discrimination”.<sup>503</sup> The Charter permits the government “to target subsets of disadvantaged people on the basis of personal characteristics [for the purpose of improving their situation], while excluding others”.<sup>504</sup> The Court continued:

If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.<sup>505</sup>

(iii) Section 15(2) — The Framework and Underlying Rationale

The Court next considered the framework of equality analysis when section 15(2) is potentially in play. The first step is to establish a legal distinction on the basis of an enumerated or analogous ground of discrimination. Once that is done, if the government relies on section 15(2) it must show “that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality”.<sup>506</sup> The ameliorative purpose must be genuine, as demonstrated by “a correlation between the program and the disadvantage suffered by the target group”.<sup>507</sup> If the government can meet this test, section 15(2) will protect all distinctions “necessary” to serve the ameliorative purpose. The Court was quick to point out that the word “necessary” does not connote a high

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<sup>502</sup> *Id.*, at paras. 39-40.

<sup>503</sup> *Id.*, at para. 41.

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*, at para. 44.

<sup>507</sup> *Id.*, citing *Kapp, supra*, note 446, at para. 49.

threshold for the government. The government need not show, for example, that a statutory exclusion is “essential” to the goal at hand. Rather:

What is required is that the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality. A purposive approach to s. 15(2) focussed on substantive equality suggests that distinctions that might otherwise be claimed to be discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program.<sup>508</sup>

In terms of elaborating on the kind of distinction that is permitted under section 15(2), the Court would go no further than to say that “irrational means” are excluded, explaining that further clarification might emerge in subsequent cases.<sup>509</sup> A distinction not permitted under section 15(2) will be interrogated under the remaining steps of section 15(1) to determine whether it is discriminatory, and may ultimately be struck down or upheld under section 1.

Thus, section 15(2) permits the government to assist groups selectively without being “paralyzed” by the need to assist all groups similarly situated. It allows for “tailoring” of benefits without those benefits being subject to the threat of scurrilous equality rights claims. The Court noted that the legislative space guaranteed by section 15(2) was recognized in an earlier case involving Aboriginal persons: *Lovelace v. Ontario*.<sup>510</sup> In that case, some status Indian bands, and other Aboriginal groups, challenged their exclusion from the distribution of profits emanating from an on-reserve Casino. The Ontario Court of Appeal held that the scheme was not discriminatory merely because it provided benefits only to some Aboriginal groups. The program was designed to benefit Aboriginals living on reserves, and that objective was not discriminatory. The government was entitled to enact a scheme targeted at a subset of Aboriginal persons. While departing from the Court of Appeal’s analytical framework (which seemed to set up section 15(2) as an “exemption” to equality rights), the Supreme Court in *Lovelace* accepted that substantive equality is consistent with a decision to confer benefits on a subset of a larger group that suffers discrimination. In the case at bar, the lessons from the previous case law were deemed to be as follows:

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<sup>508</sup> *Cunningham, id.*, at para. 45.

<sup>509</sup> *Id.*, at para. 46.

<sup>510</sup> [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.).

Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality. This is so even where the included and excluded groups are aboriginals who share a similar history of disadvantage and marginalization.<sup>511</sup>

In addition, the Court emphasized not only the nature of affirmative action programs, but the protected status of Aboriginal persons, who are constitutionally recognized as comprising three distinct groups that include Métis.

(iv) Outcome

The Court then applied the above framework to the facts. It first noted that all the parties and lower courts had accepted the existence of a distinction on an analogous ground, namely, registration as a status Indian. While careful not to endorse this finding as a point of law, the Court decided that the lack of a Crown appeal on this point rendered it inappropriate to revisit the issue.

The next step, since the government relied on section 15(2), was to determine the nature of the program, in particular, whether it was genuinely ameliorative and whether there was a correlation between the program and the disadvantage. In order for this step to be satisfied, the program “must be directed at improving the situation of a group that is in need of ameliorative assistance”.<sup>512</sup> Drawing on a combination of history, constitutional recognition and statutory interpretation, the Court found that the MSA was intended “to benefit Métis, as distinct from Indians, by setting up a land base that would strengthen an independent Métis identity, culture and desire for self-governance”.<sup>513</sup> It rejected the appellants’ contention that the program was designed to benefit Alberta Métis generally, noting the perceived importance of establishing a land base to the preservation of a distinct Métis identity and culture. The goal was directed specifically to the land base of Métis peoples *as separate and distinct* from other Aboriginal groups:

The title of the statute, the “*Métis Settlements Act*”, suggests that the focus is not on benefiting the Métis generally, but on establishing land-

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<sup>511</sup> *Supra*, note 16, at para. 53.

<sup>512</sup> *Id.*, at para. 59.

<sup>513</sup> *Id.*, at para. 65.

based settlements. ... The history of the struggle that culminated in the *MSA* supports this view ... The *MSA*, as discussed earlier, is the result of a negotiation process between the Métis of Alberta and the Province and the outcome of an ongoing struggle for self-preservation. The Métis considered themselves as one of three Aboriginal groups in Canada, but this was not recognized until the *Constitution Act, 1982* ... Their aboriginality, in a word, was not legally acknowledged or protected. Viewed in this perspective, the ameliorative program embodied in the *MSA* emerges as an attempt to provide to Alberta's Métis settlements similar protections to those which various Indian bands have enjoyed since early times.<sup>514</sup>

Given the above context, the Court stated, the required correlation was “manifest”:<sup>515</sup>

The history of the Métis is one of struggle for recognition of their unique identity as the mixed race descendants of Europeans and Indians. Caught between two larger identities and cultures, the Métis have struggled for more than two centuries for recognition of their own unique identity, culture and governance. The constitutional amendments of 1982 and, in their wake, the enactment of the *MSA*, signal that the time has finally come for recognition of the Métis as a unique and distinct people.<sup>516</sup>

Under the second requirement of section 15(2), the impugned distinction must serve or advance the purpose of the ameliorative program. The Court found that the distinction here — the exclusion of status Indians from membership in Métis settlements — did. The Court stated, first, that the program recognizes the Métis peoples as a distinct category of Aboriginal peoples and in particular, as *different* from Indians (and Inuit). Second, the distinction protects against the potential “hollowing out” of Métis identity that could result from the addition of status Indians to membership:

To the extent that status Indians are members of Métis settlements, the distinctive Métis identity, with its historic emphasis on being distinct from Indian identity, would be compromised. And to the extent that status Indians are members of Métis settlements, the goal of self-governance is hampered. For example, Indians who already enjoy the right to hunt off-reserve may have little interest in promoting the right of Métis to hunt outside settlement lands. The same may be ventured

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<sup>514</sup> *Id.*, at paras. 65-66.

<sup>515</sup> *Id.*, at para. 70.

<sup>516</sup> *Id.*

for other benefits and privileges. Because the *Indian Act* provides a scheme of benefits to status Indians ... status Indian members of Métis settlements may have less interest in fighting for similar benefits than Métis without Indian status.<sup>517</sup>

Finally, the Court stated, the Métis enjoy a recognized right to define membership in their community, as part of the framework for determining the scope of the Aboriginal rights guaranteed under the Constitution.<sup>518</sup> While this case did not address the parameters of the category of “Métis”, it is nonetheless significant to the section 15(2) analysis that the impugned provisions were developed with the input of the Métis themselves:

The self-organization and standardization of the Métis community in Alberta is precisely what the Alberta legislature and the Alberta Métis have together sought to achieve in developing, agreeing upon and enacting the membership requirements found in the *MSA* and challenged here. The significant role that the Métis must play in defining settlement membership requirements does not mean that this exercise is exempt from *Charter* scrutiny. Nevertheless, it does suggest that the courts must approach the task of reviewing membership requirements with prudence and due regard to the Métis’s own conception of the distinct features of their community.<sup>519</sup>

The Court concluded that there was a sufficient basis for the government to decide that the exclusionary provision served the ameliorative purpose of the program. Importantly, it rejected the Court of Appeal’s reasoning that the government had not provided evidence that the provision *would* protect Métis identity (because, for example, of the very small numbers of status Indians who might actually become members). The Court insisted that in order to qualify under section 15(2), a program need not establish a factual connection supported by “positive proof”.<sup>520</sup> In the case of a genuinely ameliorative program, the state need only have a rational belief that the distinction furthers the ameliorative purpose. Here, the Court found, that was easily the case.

The Court acknowledged that people occupy multiple locations, the example the claimants here who identified as both Indians and Métis. That

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<sup>517</sup> *Id.*, at para. 78.

<sup>518</sup> *R. v. Powley*, [2003] S.C.J. No. 43, 2003 SCC 43, [2003] 2 S.C.R. 207 (S.C.C.).

<sup>519</sup> *Cunningham*, *supra*, note 16, at para. 82.

<sup>520</sup> *Id.*, at para. 74.

reality, though, did not oblige the state to accommodate such identities when designing ameliorative programs permitted under section 15(2):

Mixed identity is a recurrent theme in Canada's ongoing exercise of achieving reconciliation between its Aboriginal peoples and the broader population. It figures, for example, in land claims negotiations between particular Indian groups and the government. Residents of one Indian group frequently also identify themselves with other Indian groups for historical and cultural reasons. Yet lines must be drawn if agreements are to be achieved. The situation of Métis settlements is similar. In order to preserve the unique Métis culture and identity and to assure effective self-governance through a dedicated Métis land base, some line drawing will be required.<sup>521</sup>

In very brief reasons, the Court also dismissed the freedom of association and fundamental justice claims.

(v) Commentary

*Cunningham* raises exceptionally difficult questions concerning the contested and complex relationship between categories of Aboriginal identity. The legacy of Canada's history with its Aboriginal peoples has created inter-group conflict and tension. Questions concerning membership in various Aboriginal communities are surely among the most sensitive that governments and courts will confront. One senses that the Court was particularly alive to this concern. The decision highlighted the history of the Métis community, its initial invisibility in the Aboriginal fabric and its subsequent and slow trajectory to full legal recognition. As a group that is the product of cultural and ethnic merging, the Métis are justifiably concerned with how to define membership in their group. The Court seemed especially persuaded by the argument that the MSA's exclusionary provisions were the product of negotiation, and were logically related to the (important) objective of ensuring the continued recognition of the Métis as a distinct Aboriginal group. *Cunningham* is thus the result of a particular nexus between Charter law and Aboriginal concerns.

Because of the special context of *Cunningham*, exemplified by the fact of numerous intervenor groups strenuously arguing for both sides, it is difficult to judge whether the ultimate outcome of the case is the correct one. It is, though, possible to articulate some broader worries

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<sup>521</sup> *Id.*, at para. 86.



about the direction in which the decision takes equality jurisprudence. Most notably, the Court appears to have entrenched in section 15(2) a very wide latitude for governments to design ameliorative programs without the ordinary constraints of section 15(1) — namely, the constraint that differential distinctions that work “prejudice, disadvantage or stereotype” *on the claimants* are vulnerable to charges of discrimination. This is unfortunate given that most cases involving section 15(2) have not involved claims of *reverse* discrimination (where the claimant group is *advantaged* in society). Instead, section 15(2) cases have featured claims by *equally* or *more* disadvantaged groups who believe that they have been unfairly *excluded*. The claim thus is not against the mere *fact* of an ameliorative program, but its *underinclusive* nature.

By structuring a far more deferential approach to section 15(2), and permitting that framework to be invoked with respect to the *program* without regard for the situation of the *claimants*, the Court seems to have broadened the scope of section 15(2) beyond its historical concern with claims of reverse discrimination. The provision has been rendered a general shield from governments having to defend in any meaningful way the choices that such programs may reflect. The most commonly cited reason for such latitude is to avoid creating a disincentive for governments to enact such programs in the first place. There is, though, no evidence of such a disincentive actually featuring in any government decisions. More to the point, a beneficial government program may *also* be discriminatory, and it is plainly contrary to the spirit of section 15 for a program’s beneficial effect to shelter any discriminatory aspects it may possess. It is possible for the program itself to be a justified limitation on equality rights, but that fact should not function to read any discrimination out of existence. Regrettably, *Cunningham* continues the marginalization of equality rights albeit under the more palatable veneer of protecting ameliorative programs from unfair attacks.

#### IV. CONCLUDING THOUGHTS

Looking back on the 2010-2011 Term, a few points stand out. First, the cases reveal a large measure of consensus on the Court. Six rulings were unanimous. *Ahmad* was issued *per curiam*. Although there were three opinions in each of the aeronautics cases, Deschamps J.’s dissenting opinions were not joined by any other member of the Court. The decisions in *Fraser* and *AHRA* were, admittedly, deeply divided — but of

course these cases also involved some of the most contentious issues confronted this Term. And even *Fraser* featured little outright dissent. Interestingly, the Court was most fractured in cases which turned on the division of powers — not on the interpretation of Charter rights.

Second, the workload in the cases we have discussed was concentrated in the hands of only a few members of the Court. Chief Justice McLachlin wrote or co-wrote an opinion in six cases — the two majority opinions in the aeronautics cases, a plurality opinion in *AHRA*, the majority decision in *Fraser*, and the sole opinions in both section 15 cases. (She also co-authored the concurring opinions in *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto* and *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*.) Justice Deschamps issued two dissenting opinions in the aeronautics cases, co-authored a plurality opinion in *AHRA*, wrote the unanimous opinions in both *C.B.C.* cases, and produced a concurring opinion in *Fraser*. Justice LeBel issued concurring opinions in the aeronautics cases, co-authored (with Deschamps J.) a plurality opinion in *AHRA*, wrote the unanimous opinion in *Globe and Mail*, and co-wrote the majority opinion in *Fraser*. Justice Abella dissented in *Fraser*, and co-wrote (with the Chief Justice) the majority opinion in *Withler*. (She also wrote the majority opinions in *Native Child and Family Services of Toronto* and *NIL/TU,O Child and Family Services Society*.) These four justices dominated the constitutional landscape in 2010-2011.<sup>522</sup>

But behind these numbers, we can see that these four judges are not equally *influential*. In six cases, McLachlin C.J.C. wrote or co-wrote an opinion that commanded the support of four or more judges, and in *no* case attracted the support of fewer than three. This is *her* Court. Justice Deschamps' influence is less certain. Her dissents in the aeronautics cases attracted no straightforward support. If anything, her concurring opinion in *Fraser* was even *less* convincing to her colleagues on the Court. Her co-written opinion in *AHRA* was less isolated, but still unable to secure a majority. It was only in the two *C.B.C.* decisions that the

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<sup>522</sup> For the sake of completeness, we would point out that Fish J. co-wrote the concurring opinions in *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, *supra*, note 17 and *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, *supra*, note 17. Justice Cromwell cast the deciding vote in *AHRA Reference*, *supra*, note 9. Justice Rothstein wrote the *tour de force* concurrence in *Fraser*, *supra*, note 13. We should keep in mind, too, that we have not discussed cases delivered in the area of constitutional criminal procedure.

Court coalesced around her reasoning. One is tempted to describe Deschamps J.'s approach as "stubbornly independent". Justice LeBel, meanwhile, tended to write opinions either in cooperation with another member of the panel (as in *Fraser* and *AHRA*), or that expressed qualified support for another opinion (as in the aeronautics cases). His opinion in *Globe and Mail*, however, attracted support from the entire panel. Finally, though Abella J. wrote a dissent in *Fraser* that drew no straightforward support from the other members of the Court, we have seen that the reasoning she used greatly influenced Rothstein J.'s understanding of *Health Services*, and that no member of the Court rejected it. She also co-wrote the unanimous opinion in *Withler*, and the majority opinions in *Native Child and Family Services of Toronto* and *NIL/TU,O Child and Family Services Society*. As in previous years, the Chief Justice, Abella J., and LeBel J. set the direction of the Court in matters of constitutional law.

