



Dissent from Within at the Supreme Court of Canada 2015 Year in Review

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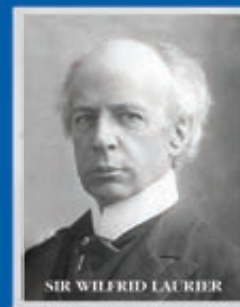


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Executive Summary

The Supreme Court again made major headlines in 2015, with several prominent decisions that will have dramatic implications for Canada. To provide a greater understanding of the trends that underlie the Court's decisions, the Macdonald-Laurier Institute has once again undertaken a detailed analysis of the Court's 10 most important decisions in terms of policy impact, legal significance, and public interest, and has drawn some fascinating conclusions.

Following up on the Institute's survey of the Court in 2014, titled *The Supreme Court of Canada: Policy-Maker of the Year*, the 2015 report reveals that while some trends continued, such as the federal government's poor record before the Court, there have been striking new developments as well, key among them an increasing amount of discord among the justices, and a sharply reduced degree of unanimity. Also worth watching is a growing tendency of the Court to overturn its own precedents in major *Charter* decisions.

The period examined picks up where the 2014 report left off, running from November 1, 2014 to October 31, 2015, which encompasses the Harper government's last 12 months in power and includes such high profile and controversial decisions as *Carter v. Canada* (assisted suicide), *R. v. Nur* (mandatory minimum sentences), and *Saskatchewan Federation of Labour v. Saskatchewan* (the right to strike).

The key findings from the report are:

- the former federal Conservative government's losing record on major cases at the Court continued in 2015, with just two narrow wins among the cases studied, compared to one win in 2014. On average, various levels of government have historically succeeded in 59 percent of *Charter* cases;
- the Court has overturned its own precedents in a growing number of major *Charter* decisions; and
- the remarkably high level of consensus within the Court on major decisions in 2014 (80 percent consensus rate) has not been maintained in the past year's top 10 cases (50 percent), and strong dissenting voices have emerged.

Likely the most high-profile case in terms of media attention and public debate in 2015 was *Carter v. Canada*, in which the Court struck down the prohibition on assisted suicide, thrusting a hot issue onto the federal political agenda that Parliament has repeatedly avoided addressing. The case was also an example of the trend of the Court reversing itself in major cases, as it had upheld the constitutionality of the blanket prohibition on physician-assisted suicide in the 1993 case of *Rodriguez v. British Columbia*.

Another about-face for the court in the past year can be found in the decision in *Mounted Police Association of Ontario v. Canada*. Heralded as "stunning", the decision rendered moot the 1999 *Delisle* case, which held that excluding members of the RCMP from collective bargaining did not infringe their freedom of association under section 2(d) of the *Charter*.

The case of *R. v. Nur* saw dissenting justices strongly cautioning their fellow judges not to intrude upon Parliament's legitimate role in making what amount to policy decisions. The case of two accused convicted of possessing loaded prohibited firearms ended in a 6-3 split decision that found the mandatory minimum sentence amounted to "cruel and unusual" punishment and infringed section 12 of the *Charter*. This was a major loss for the Harper government, which had rapidly increased the number of mandatory minimum sentences as a major feature of its justice agenda. It was also another divisive decision, with the minority justices writing that "it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture". It is noteworthy that the three dissenting judges raising the alarm in this case were all appointed by former Prime Minister Stephen Harper and they have expressed a leaning at various times in subtle and not so subtle ways towards judicial restraint.

Most controversial in 2015 perhaps was the decision in *Saskatchewan Federation of Labour v. Saskatchewan*, which found that the right to strike is protected under Section 2(d) of the *Charter* (freedom of association). It was another case where the court overturned precedent (*Alberta Reference* 1987) and where there was a strong dissenting opinion, with the dissenting judges writing that "the majority is wrong to intrude into the policy development role of elected legislators".

In 2015 the outgoing federal government continued its losing streak from 2014, but the level of dissent was remarkable compared to the high degree of consensus last year. Philosophical fissures were laid bare in the reasons of several judges who cautioned the Court against intruding on Parliament's legitimate role in making tough policy decisions. It is also notable that the Court continues to overrule its own recent *Charter* decisions with the express disapproval of some of its members.

In the coming year, the new federal Liberal government is saddled with countless hard choices on how to proceed with ongoing litigation involving decisions and legislation of the former federal Conservative government. It will need to develop legislation responding to key decisions in 2015. The last two years of the Conservative government and the Supreme Court have been fascinating to watch.

Sommaire

En 2015, la Cour suprême a de nouveau fait les manchettes à la suite de plusieurs jugements de haute importance, dont les répercussions seront critiques pour le Canada. Pour mieux faire comprendre les tendances qui les soutiennent, l'Institut Macdonald-Laurier a encore une fois entrepris d'analyser en profondeur les dix arrêts majeurs de cette Cour sur le plan de leur effet sur la politique publique, de leur portée juridique et de l'intérêt public, et en a tiré certaines conclusions fondamentales.

Dans la continuité de son étude sur le plus haut tribunal du pays réalisée en 2014 et intitulée *The Supreme Court of Canada: Policy maker of the year*, l'Institut révèle dans le rapport de 2015 que si certaines tendances sont demeurées inchangées, notamment en ce qui a trait au piètre bilan du gouvernement fédéral devant la Cour suprême, de nouvelles sont aussi apparues qui ont fait grand bruit. Il cite comme les plus déterminantes la discorde croissante qui divise les juristes et la baisse marquée du degré d'unanimité dans les décisions rendues. Fait également révélateur, la Cour suprême tend de façon croissante à infirmer les précédents qu'elle a elle-même établis en ce qui concerne les décisions majeures relevant de la *Charte*.

La période à l'étude commence là où se termine celle du rapport de 2014 et s'étend donc du 1^{er} novembre 2014 au 31 octobre 2015. Elle englobe ainsi les 12 derniers mois du gouvernement Harper et les décisions très publicisées et fort controversées comme celles rendues dans les causes *Carter c. Canada* (suicide assisté), *R. c. Nur* (peines minimales obligatoires) et *Saskatchewan Federation of Labour c. Saskatchewan* (droit de grève).

Les principales conclusions du rapport de 2015 sont les suivantes :

- l'ancien gouvernement conservateur fédéral a continué de subir des défaites dans les causes majeures présentées devant le plus haut tribunal du pays en 2015. De toutes les causes saisies par cette Cour, il en a gagné seulement deux de justesse, après une victoire en 2014. Dans le passé, les divers ordres de gouvernement gagnaient en moyenne 59 % de leurs causes relevant de la *Charte*;
- la Cour a infirmé ses propres précédents dans un nombre croissant de décisions majeures relevant de la *Charte*; et
- dans les dix principales décisions rendues en 2015, la Cour n'a pas maintenu le degré remarquablement élevé d'unanimité observé l'année précédente (degré d'unanimité de 50 % contre 80 % en 2014), de fortes opinions dissidentes s'étant manifestées.

L'arrêt *Carter c. Canada* a probablement été celui qui a été le plus médiatisé et le plus débattu en 2015. Dans cet arrêt, la Cour a invalidé la prohibition de l'aide médicale à mourir, ce qui a fait de cet élément du programme politique fédéral un sujet brûlant à maintes reprises écarté par la législature. L'affaire a également illustré la mesure dans laquelle la Cour tend à annuler ses propres décisions dans les causes majeures, puisqu'elle avait confirmé la constitutionnalité de l'interdiction générale du suicide assisté dans la cause *Rodriguez c. Colombie-Britannique* en 1993.

La Cour a fait volte-face une fois de plus l'an dernier lorsqu'elle a statué sur *Mounted Police Association of Ontario c. Canada*. Annoncée comme « surprenante », la décision invalidait l'arrêt *Delisle c. Canada* en 1999, qui établissait que l'exclusion des membres de la GRC d'un régime de négociation collective ne porte pas atteinte à la liberté d'association en vertu de l'article 2(d) de la *Charte*.

Dans l'arrêt *R. c. Nur*, les juges dissidents ont sérieusement mis en garde leurs collègues contre les empiétements dans le rôle légitime joué par le Parlement dans l'élaboration de toute politique publique. Dans cette cause où deux accusés ont été reconnus coupables de possession d'armes à feu prohibées avec munitions, la Cour a tranché dans une décision rendue à 6 voix contre 3, concluant que la peine minimale obligatoire constituait un châtement « cruel et inusité » aux termes de l'article 12 de la *Charte*. Il s'agissait d'une importante défaite pour le gouvernement Harper, qui avait fait augmenter rapidement le nombre de peines minimales obligatoires comme élément majeur de son programme en matière de justice. Encore une fois, la décision engendrait des divisions, une minorité de juges ayant écrit qu'« il n'appartient pas à la Cour de contrecarrer les objectifs de politique générale de nos élus sur la foi d'hypothèses discutables ou de vagues conjectures ».

La décision rendue dans la cause *Saskatchewan Federation of Labour c. Saskatchewan* a sans doute été la plus controversée en 2015. La Cour a conclu que le droit de grève est protégé en vertu de l'article 2(d) de la *Charte* (liberté d'association). Là encore, la Cour annulait un précédent (*Alberta Reference*, 1987). En outre, les opinions étaient nettement divisées, les juges dissidents ayant écrit que « les juges majoritaires s'immiscent à tort dans l'élaboration de politiques par les élus ».

Le gouvernement fédéral sortant a prolongé en 2015 la série de défaites subies en 2014, mais l'ampleur de la dissidence tranchait de façon saisissante avec le degré élevé d'unanimité observé antérieurement. Les différences de philosophie sont devenues des plus claires dans les arguments présentés par plusieurs juges ayant mis en garde la Cour contre les empiétements dans le rôle légitime du Parlement en matière de politique compte tenu des choix ardu qu'il doit faire. Il est également remarquable que la Cour ait continué à infirmer ses décisions récentes relatives à la *Charte* dans des jugements explicitement réprouvés par certains de ses membres.

Pendant l'année en cours, le nouveau gouvernement libéral fédéral sera confronté à de nombreux choix difficiles sur la manière de résoudre les litiges existants qui découlent des décisions et des lois adoptées par l'ancien gouvernement conservateur fédéral. Il aura besoin d'élaborer des lois pour donner suite aux principales décisions rendues en 2015. Certes, les deux dernières années du gouvernement conservateur devant la Cour suprême ont été fascinantes à observer.

1. Introduction

Last year, the Macdonald-Laurier Institute for Public Policy recognized the Supreme Court of Canada as its annual Policy-Maker of the Year. The Court's decisions in 2014 spanned Senate reform, prostitution, Aboriginal rights and title, tools for fighting crime and terrorism, and judicial appointments to the Court itself. In analysing these decisions, significant and enduring policy and legal implications were identified. It was also determined that consensus decisions were the norm that year and the federal government suffered an abysmal record of losses.

This report looks at 2015 – the final year of Prime Minister Stephen Harper's Conservative government – to see if these trends have held or not and sets the stage for some of the challenges and opportunities facing the new Liberal government under Prime Minister Justin Trudeau. The issues confronted by the top Court this year included controversial social questions like physician-assisted suicide and medical marijuana derivatives; labour relations issues including collective bargaining for the RCMP and the right to strike; and criminal law issues such as police searches of cell phones and mandatory minimum sentences for gun crimes. It also grappled with the extent to which governments should be liable to pay damages for violations of the *Canadian Charter of Rights and Freedoms (Charter)* and whether it should read-in a duty of good faith into private contracts.

Within this context and while appreciating that the work of the Court is cyclical and outcomes vary from year to year, this paper explores the recent track record of the Supreme Court of Canada and the significance of some of its landmark decisions from the last year, following the same methodology and approach as last year's report to facilitate year-over-year comparisons. Part 2 of this paper introduces the current members of the Court. Part 3 discusses the main findings from this study, focusing on trends across the top 10 most significant judgments from the last year. Part 4 provides an in-depth examination of each of these decisions, including their impact on public policy.¹ The main findings of this study are:

1. the former federal Conservative government's losing record on major cases at the Court continued in 2015;
2. the Court has overturned its own precedents in a growing number of major *Charter* decisions; and
3. the consensus within the Court on major decisions has not been maintained, and there are strong voices within the Court itself raising the alarm that it must not intrude into Parliament's public policy domain.

2. Current Members of the Supreme Court of Canada

The Supreme Court of Canada is comprised of the members listed in table 1, below, organized in order of seniority.

Table 1 – Current members of the Supreme Court of Canada

Name of Justice	Year of Appointment	Appointed by	Mandatory retirement year
1. The Rt. Hon. Beverley McLachlin, Chief Justice	1989 (Justice) 2000 (Chief Justice)	The Rt. Hon. Brian Mulroney (as Justice) The Rt. Hon. Jean Chrétien (as Chief Justice)	2018
2. The Hon. Madam Justice Rosalie Silberman Abella	2004	The Rt. Hon. Paul Martin	2021
3. The Hon. Mr. Justice Thomas Albert Cromwell	2008	The Rt. Hon. Stephen Harper	2027
4. The Hon. Mr. Justice Michael J. Moldaver	2011		2022
5. The Hon. Madam Justice Andromache Karakatsanis	2011		2030
6. The Hon. Mr. Justice Richard Wagner	2012		2032
7. The Hon. Mr. Justice Clément Gascon	2014		2035
8. The Hon. Suzanne Côté	2014		2033
9. The Hon. Russell Brown	2015		2040

Members of the Court are entitled to serve until reaching the mandatory retirement age of 75 years (*Supreme Court Act*, R.S.C., 1985, c. S-26, s. 9(2)). There have been two recent changes to the composition to the Court since last year's report. At the end of 2014, Justice Louis LeBel reached mandatory retirement and was replaced by Justice Suzanne Côté of Quebec, a lawyer in private practice whose appointment was generally well received. Justice Marshall Rothstein reached mandatory retirement this past year and was replaced by Justice Russell Brown of Alberta. However, Justice Brown's appointment faced some criticism from media commentators and opposition politicians for his more conservative judicial outlook and views that he has expressed in the past.

Prime Minister Stephen Harper has appointed 7 of the 9 current judges of the Court. Prime Minister Justin Trudeau will have the opportunity to select the next Chief Justice of Canada during his mandate with the upcoming mandatory retirement of Chief Justice Beverley McLachlin in 2018.

Choosing her replacement will be an important decision of lasting significance. While Prime Minister Trudeau is likely ideolog-

Prime Minister Justin Trudeau will select the next Chief Justice of Canada during his mandate.

ically closest to Justice Rosalie Abella, he is unlikely to select her for the role of Chief Justice given her mandatory retirement date is in 2021, which would only leave her with a few years in the role – not enough time to leave her mark and elevating her would risk having a potential subsequent government being able to appoint a new Chief Justice with a much longer tenure.

There are a number of candidates on the current Court who could be elevated to this role, but it is also possible that an outsider from a provincial appellate court could be tapped as well, although that would be less likely.

3. Discussion & Analysis

As a follow-up to the 2014 study, the one-year period selected for this review was November 1, 2014 to October 31, 2015. This period is also helpful since it roughly coincides with the formal transition of power from the Conservative to Liberal federal government on November 4, 2015. For consistency with last year’s study, all judgments of the Court during this period were considered for inclusion in the analysis that follows. The top 10 cases were selected to provide a manageable, but meaningful number of cases to analyse and compare. These cases were selected based on the importance of their subject matter and broad significance to Canadians. The outcome of the decisions was not a consideration in selecting them. It is observable that the selection criteria led to a large number of public law decisions, across a wide spectrum of areas of law. However, some of these decisions have significant implications for private actors, including individuals and private corporations.

Table 2, below, provides a snapshot of these decisions and their outcomes. Each case is identified by its style of cause and citation with a brief note on its subject matter. The outcome in the case is listed, according to whether it was a unanimous decision, majority decision with concurring reasons, or a case involving majority reasons with dissenting reasons.

The final column of “Government Win or Loss” (which refers to the federal government) requires some explanation, since the federal government is not a party to every case reaching the Court. The determination of whether a case involved a “win” or “loss” for the federal government refers to cases where the Court either agreed with, or rejected, respectively, the position taken by the federal government (which includes the Attorney General of Canada and Director of Public Prosecutions in these cases). In some instances, these federal entities were parties to the proceeding, whereas they were interveners in others (in which case their intervener’s factum was consulted). The decisions are listed in chronological order.

Table 2 – Top 10 Supreme Court of Canada decisions of the last year

Case	Citation	Subject	Unanimous	Majority and Concurring Reasons	Dissenting Reasons	Federal Government Win or Loss
<i>1. Bbasin v. Hrynew</i>	2014 SCC 71	Duty of good faith in contracts	Cromwell J.			N/A
<i>2. R. v. Fearon</i>	2014 SCC 77	Police searches of cell phones incident to arrest		Cromwell J. (4 judges)	Karakatsanis J. (3 judges)	Win
<i>3. Mounted Police Association of Ontario v. Canada (Attorney General)</i> ²	2015 SCC 1	Collective bargaining for RCMP		McLachlin C.J. and LeBel J. (6 judges)	Rothstein J. (1 judge)	Loss
<i>4. Saskatchewan Federation of Labour v. Saskatchewan</i>	2015 SCC 4	Right to strike		Abella J. (5 judges)	Rothstein and Wagner JJ. (2 judges)	Loss
<i>5. Carter v. Canada (Attorney General)</i>	2015 SCC 5	Physician-assisted suicide	The Court			Loss
<i>6. Loyola High School v. Quebec (Attorney General)</i>	2015 SCC 12	Freedom of religion		Abella J. (majority, 4 judges); McLachlin C.J. and Moldaver J. (concurring, 3 judges)		N/A
<i>7. Quebec (Attorney General) v. Canada (Attorney General)</i>	2015 SCC 14	Long-gun registry data from Quebec and “cooperative federalism”		Cromwell and Karakatsanis JJ. (5 judges)	LeBel, Wagner and Gascon JJ. (4 judges)	Win
<i>8. R. v. Nur</i>	2015 SCC 15	Mandatory minimum sentences		McLachlin C.J. (6 judges)	Moldaver J. (3 judges)	Loss
<i>9. Henry v. British Columbia (Attorney General)</i>	2015 SCC 24	Damages for Charter violations		Moldaver J. (majority, 4 judges); McLachlin C.J. and Karakatsanis JJ. (concurring, 2 judges)		Loss
<i>10. R. v. Smith</i>	2015 SCC 34	Derivatives of medical marijuana	The Court			Loss

A number of other notable decisions that were not included in these top 10 decisions bear mentioning, including *Wakeling v. United States of America*, 2014 SCC 72 (foreign law enforcement cooperation); *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21 (minority language education rights); *R. v. Kokopenace*, 2015 SCC 28 (jury representation and Aboriginal offenders); *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 (enforcement of foreign judgments) and *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 (provincial impaired driving laws).

The main findings from the top 10 decisions analysed in this review are as follows:

1. The former federal Conservative government's losing record on major cases at the Court continued in 2015.

In last year's report, the federal government won just one in 10 major cases in which it participated (10 percent) whereas in this year's report, it succeeded in two of eight cases in which it participated (25 percent). The federal government was either a party or intervener in each of these cases. This losing record is still substantially worse than historical trends for *Charter* litigation before the Court: on average, various levels of government have historically succeeded in 59 percent of *Charter* cases (Monahan and Sethi 2012, 2).

It is notable that the two cases that the federal government was victorious in this past year were only won narrowly – in both instances by a margin of a single judge. In *R. v. Fearon*, the Court split 4–3, while in *Quebec (Attorney General) v. Canada (Attorney General)*, the Court split 5–4. The win in *R. v. Fearon* was on an issue – police searches of cell phones incident to arrest – that had not featured as a policy position of the Conservative Party of Canada and it could be unpopular with libertarians in their base, so it would not have been a particularly important win from the perspective of the former federal government. On the other hand, the victory in *Quebec (Attorney General) v. Canada (Attorney General)* – on the destruction of long-gun registry data collected in Quebec – would have been considered a major political success for the former federal government given its longstanding opposition to the registry. Given it only dealt with the data from that registry from Quebec, however, its actual policy impact was negligible, particularly given that Quebec has announced it will launch its own registry.

This losing record is still substantially worse than historical trends for Charter litigation before the Court.

On the other hand, the losses suffered by the former federal government included some major political and policy defeats. Losing *R. v. Nur* was particularly bad for them given that it was the first of a raft of new mandatory minimum penalties of imprisonment brought in by the former Conservative government to be challenged before the Court. The striking down of the mandatory minimums in that case, which involved a firearms violation, using an expanded application of the “reasonable hypothetical” doctrine could prove to be damaging to other recently added mandatory minimum penalties as well as favour *Charter* claimants more generally in other cases.

The former federal government's loss in the highly-publicized physician-assisted suicide case, *Carter v. Canada (Attorney General)*, was taken particularly badly by supporters of its social conservative base. It created a political “hot potato” for the former government which, as discussed below, punted it before the recent federal election to an external group of experts to conduct consultations. The loss in *R. v. Smith* on derivatives of mari-

juana was denounced by the former federal government, which has resisted the extension of medical marijuana and opposed the legalization of marijuana – in sharp contrast with the new Liberal government that has promised to legalize marijuana.

Labour rights case losses by the former federal government stand out as having a major long-term policy impact. In *Mounted Police Association of Ontario v. Canada (Attorney General)*, the Court recognized that RCMP members have a right to collective bargaining and in *Saskatchewan Federation of Labour v. Saskatchewan*, it recognized the right to strike. Both cases are based on freedom of association in the *Charter* so their impact will be longstanding.

Finally, *Henry v. British Columbia (Attorney General)* was a major loss that extends the potential liability of all levels of government to pay damages for *Charter* violations. However, the decision leaves much uncertainty about how, and to what extent, such liability extends to other *Charter* rights beyond the right to disclosure in a criminal prosecution.

2. The Court has overturned its own precedents in a growing number of major *Charter* decisions.

What is particularly remarkable about this year's major decisions by the Court is how many involved the Court overturning its own precedents to arrive at the outcome. These decisions add to a growing number of cases where the Court has reversed itself, often within recent decades.

In *Mounted Police Association of Ontario v. Canada (Attorney General)*, the Court's decision was considered stunning because it overruled its 1999 decision in *Delisle v. Canada (Deputy Attorney General)* finding that the RCMP did *not* have the right to collective bargaining. Likewise, in *Saskatchewan Federation of Labour v. Saskatchewan*, the Court overturned a 1987 decision (*Alberta Reference (Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313)) that had ruled the right to strike was *not* protected under freedom of association in the *Charter*. In this past year, the *Charter* has come to protect both the RCMP's right to collective bargaining and the right to strike.

The Court's decision on physician-assisted suicide in *Carter v. Canada (Attorney General)* reversed its 1993 decision in *Rodriguez v. British Columbia (Attorney General)*, similarly to how its recent decision on prostitution laws in *Canada (Attorney General) v. Bedford* reversed its 1990 decision in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* ("Prostitution Reference").

While the Court professes to not lightly overturn its own precedents, it appears that the ability of *Charter* claimants to re-litigate decided constitutional cases has expanded in recent years. Some of the judges on the Court have expressed discomfort with how ready the majority of the Court has been to turn its back on recent precedents.

In *Mounted Police Association of Ontario v. Canada (Attorney General)*, Justice Rothstein wrote a scathing dissent criticizing the majority for overturning not one, but two recent precedents to achieve the outcome in its decision. He writes: "[f]airness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about."

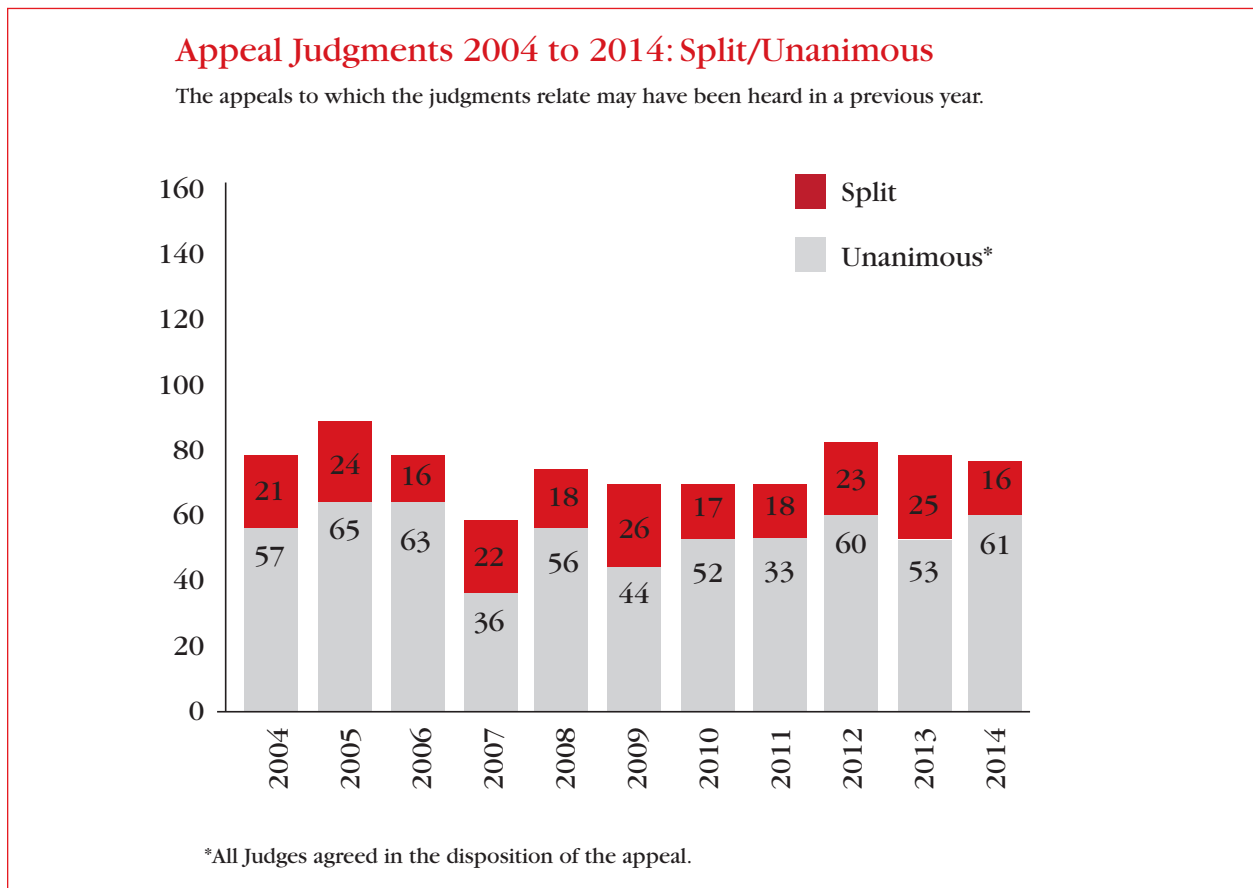
Some of the Court expressed discomfort with how readily the majority has turned its back on recent precedents.

3. The consensus within the Court on major decisions has not been maintained, and there are strong voices within the Court itself raising the alarm that it must not intrude into Parliament’s public policy domain.

Last year’s 2014 report found that the Court’s record showed a remarkably united institution with consensus decisions on significant cases being the norm and dissenting opinions rare. Of the 10 significant decisions reviewed in that previous report, only two had dissenting reasons. In other words, in eight of the 10 decisions, there was consensus on the outcome of the case (an 80 percent consensus rate) in the 2014 report. In this year’s 2015 report, five of 10 decisions achieved consensus (50 percent consensus rate) with the remaining five cases involving dissenting opinions – in some cases with a deeply divided court (a 4–3 split in *R. v. Fearon*; a 5–4 split in *Quebec (Attorney General) v. Canada (Attorney General)*; and a 6–3 split in *R. v. Nur*). This is a major decline in consensus-based decisions by the Court compared with both last year’s report (of top 10 cases) and historical trends (of all cases).

Figure 1 identifies the 10-year trend in consensus decisions at the Court, with “unanimous” referring to consensus decisions where all judges agreed on the outcome, and “split decisions” referring to cases involving at least one dissenting opinion.

Figure 1: Supreme Court of Canada degree of consensus, 2004–2014



Source: Supreme Court of Canada, 2015, “Category 4: Appeal Judgments.”

These statistics provided by the Court reveal that it made consensus decisions in 79 percent of cases in 2014 (which is consistent with the 80 percent consensus rate found in last year's 2014 MLI report for the top 10 major decisions from that year), 68 percent of cases in 2013, 72 percent of cases in 2012, and 75 percent of cases in 2011. With only a 50 percent consensus rate on the top 10 decisions in this 2015 report, the Court has never been so divided in the last decade.

What is even more interesting than the quantitative aspect of the rise of dissenting decisions on major cases in this year's report is that they included at times blistering criticism of majority judges for allegedly intruding on Parliament's policy-making domain. This warning of judicial restraint has been raised in reasons written by several judges appointed by former Prime Minister Stephen Harper.

With only a 50 percent consensus rate in this 2015 report, the Court has never been so divided in the last decade.

In *R. v. Nur*, Justice Moldaver (with Justices Rothstein and Wagner concurring) writes in dissenting reasons that Parliament's objective in adopting mandatory penalties for firearms offences is valid and pressing and "it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture".

In *Saskatchewan Federation of Labour v. Saskatchewan*, Justices Rothstein and Wagner dissented, writing "the majority is wrong to intrude into the policy development role of elected legislators by constitutionalizing the right to strike" (para. 105). They even went so far as to caution the Court against "usurping the responsibilities of the legislative and executive branches" (para. 114).

Finally, in *Quebec (Attorney General) v. Canada (Attorney General)*, it was the majority who warned that the Court must be careful not to overstep its proper role. Justices Cromwell and Karakatsanis characterize the long-gun registry data destruction as a "contentious policy choice" (para. 1) that was for Parliament to make, stating "the courts are not to question the wisdom of legislation but only to rule on its legality" (para. 3).

4. Review of Major Judgments

Each of the major judgments of the Court, identified above, is summarized below along with its subject area, identification of the parties, and the judges who wrote reasons. After providing basic information about each case there is a synopsis of the Court's decision (including concurring and dissenting opinions, as relevant), followed by a discussion of the implications of the decision moving forward in terms of their impact on the law, policy, and (in some cases) political considerations. The cases appear below in the chronological order in which they were decided.

1.1 *Bhasin v. Hrynew* (duty of good faith in contracts)

Citation: *Bhasin v. Hrynew*, 2014 SCC 71

Date: November 13, 2014

Appellant: Harish Bhasin, carrying on business as Bhasin & Associates

Respondent: Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited)

Coram: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis, and Wagner JJ.

Issue: Whether parties to a contract owe a general duty of honesty in contractual performance?

Decision: Yes

Synopsis:

The defendant sold education savings plans to investors through retailer dealers, including the plaintiff and a second defendant. The second defendant wanted to merge his business with the plaintiff but the plaintiff refused. The defendant appointed the second defendant to review the plaintiff's business, but the plaintiff protested having his competitor review his business. The defendant repeatedly misled the plaintiff by telling him that the second defendant had an obligation to treat the information as confidential. When the plaintiff refused to let the second defendant audit his records, the defendant threatened to terminate his contract. When the contract was not renewed, the plaintiff lost his business and most of his clients transferred to the second defendant. At issue was whether the defendant was in breach of an "implied term" of good faith in the contract.

The unanimous reasons of the Court written by Justice Cromwell describe the notion of good faith in Canadian contract law as "piecemeal, unsettled and unclear" (para. 59). As "incremental" steps in the development of contract law, he declares that "good faith contractual performance" is an "organizing principle" of contract law and that there is a general duty to act honestly in performing a contract (para. 33). Beyond the words used in a contract, this requires that parties to a contract have "appropriate regard" (para. 65) to the legitimate contractual interests of the other party. Parties must not lie or mislead one another in performing the contract. Applying this new duty will be a "highly context-specific" exercise to determine what parties are required to do. Justice Cromwell cautions that this should not turn into "a form of *ad hoc* judicial moralism or 'palm tree' justice" (para. 70).

On the facts of the case, the Court found that the defendant was liable and the plaintiff was awarded \$87,000 plus interest.

Implications of the Decision:

Legal commentators have heralded *Bhasin v. Hrynew* as "a landmark decision that dramatically impacts the obligations of all parties to commercial contracts in Canada" (Hanna and Adamson 2014) and

The ruling in Bhasin v. Hrynew sought to enhance commercial certainty, yet it may make contract law less predictable.

"big news in the legal and business worlds" (Taylor 2014). The decision creates a new common law duty applicable to all contracts in all common law jurisdictions in the country. Others, however, have echoed the Court's characterization of the change as "incremental". Prior to this decision, outside of certain specialized areas of contract law (including employment, insurance, and franchise law), the courts have affirmed freedom of contract by being quite reluctant to "read in" unwritten terms into private contracts (Neilson 2015).

In *Bhasin v. Hrynew*, the Court sought to enhance commercial certainty, yet business law firms say it is "likely to have the opposite effect on the predictability of contract law" (Hanna and Adamson 2014), in part, because contractual obligations are no longer confined to the words the parties use in the contract, and because both their conduct and intention will be examined in any litigation.

Some commentators have claimed that lower courts have already been extrapolating the approach in *Bhasin v. Hrynew* to find unwritten duties into other contexts, including with respect to contractual interests owed by employers upon termination (Boshyk and McKechnie 2015).

1.2 *R. v. Fearon* (police searches of cell phones incident to arrest)

Citation: *R. v. Fearon*, 2014 SCC 77

Date: December 11, 2014

Appellant: Kevin Fearon

Respondent: Her Majesty The Queen

Coram: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis, and Wagner JJ.

Issue: Whether the police have the power to search a cell phone incident to arrest without a warrant?

Decision: Yes

Synopsis:

The police arrested the accused for an armed robbery of jewelry. During a pat-down search of him incident to arrest they found a cell phone in his pocket. They searched the phone at that time and then again two hours later. Their search revealed a draft text message referring to jewelry that said “We did it” and a photo of a handgun. The police obtained a warrant to search the “getaway vehicle” and found the handgun used in the robbery and shown in the photo. After several months, the police obtained a warrant to search the accused’s phone but no new evidence was found. The accused argued his right to be secure against unreasonable search and seizure protected by section 8 of the *Charter* had been breached and he sought to exclude the evidence obtained from the search of his cell phone under section 24(2) of the *Charter*. The trial judge found there was no such breach and admitted the evidence, convicting him of robbery with a firearm and related offences. The majority of the Supreme Court of Canada agreed, but three judges dissented.

Writing for the majority, Justice Cromwell found that the common law power the police have to search incident to arrest includes the search of cell phones and “similar devices” found on a suspect. However, the majority developed the law to include some protections given the massive amount of private information contained on cell phones. Searches incident to arrest are considered to be “extraordinary” because they are warrantless and are not based on reasonable and probable grounds that they will locate the thing being searched for. Instead, such searches are acceptable if they pursue a valid law enforcement objective and are truly incident to arrest.

The majority requires that a search of a cell phone incident to arrest meet a four-part test: (1) the arrest must be lawful; (2) the search must be truly incident to the arrest; (3) the nature and extent of the search must be tailored to its purpose (such as protecting the police, the accused, or the public; preserving evidence; and discovering evidence that the police would otherwise be stymied in finding), meaning that generally only searches of recent texts, emails, drafts, photos, or the call log will be justified; and (4) the police must take detailed notes of their search, including applications searched and the extent, time, duration, and purpose of the search. Crimes involving violence or threats of violence, where public safety is at risk, serious property offences, and drug trafficking are the types of offences that are the most likely to justify a search incident to arrest of a cell phone. In other words, cell phone searches incident to arrest for minor crimes would not generally be permissible. On the facts of this case, the majority found that the police failed to adequately document their search such that the accused’s section 8 *Charter* rights were infringed. However, the evidence was not excluded because the evidence was reliable and excluding it would undermine the truth-seeking function of the criminal trial. Accordingly, the convictions stand.

For the dissenting judges, Justice Karakatsanis was alarmed by the majority’s approach, stating “our law must also evolve so that modern mobile devices do not become the telescreens of George Orwell’s *1984*” (para. 102). She found that only judicial pre-authorization could adequately balance the state’s law enforcement objectives with the constitutionally protected privacy of the accused. She emphasized that digital devices are qualitatively and quantitatively different from other items found on a suspect incident to an arrest because of the voluminous personal information they contain. For the dissenting judges, only exigent circumstances could justify a warrantless search of a personal digital device. In a powerful passage, Justice Karakatsanis writes:

In short, the cell phone acts like a key or portal which can allow the user to access the full treasure trove of records and files that the owner has generated or used on any number of devices. It is not just the device itself and the information it has generated, but the gamut of (often intensely) personal data accessible via the device that gives rise to the significant and unique privacy interests in digital devices. The fact that a suspect may be carrying their house key at the time they are arrested does not justify the police using that key to enter the suspect’s home. In the same way, seizing the key to the user’s digital life should not justify a wholesale intrusion into that realm. Indeed, personal digital devices are becoming as ubiquitous as the house key. (para. 132)

On the facts of this case, the dissent would have found a section 8 *Charter* violation and excluded the evidence.

Implications of the Decision:

R. v. Fearon expands police powers in ways that will make it easier for law enforcement to routinely search cell phones, including smart phones, in most serious or violent criminal investigations incident to arrest. It will have a major impact on criminal cases given how ubiquitous cell phones are today. This case contrasts with last year’s decision in *R. v. Spencer* where the Court required a warrant for the police to obtain basic subscriber information for Internet users, absent exigent circumstances. The majority decision in *R. v. Fearon* is also at odds with a recent unanimous decision of the United States Supreme Court (*Riley v. California*, 134 S. Ct. 2473 (2014)) that rejected warrantless searches of cell phones incident to arrest.

The law protects our privacy interest in our homes to a greater extent than our cell phones, even though the latter contains much more private information.

Civil libertarians are concerned with *R. v. Fearon* for many of the reasons set out by the dissenting judges. The majority decision clearly favors robust law enforcement powers at the expense of constitutionally protected privacy. The information searched could be profoundly personal and the invasion of privacy significant. There is a concern that it will allow the police to go on a fishing expedition – yet the framework set by the majority aims to prevent this from occurring, stating “generally, the search of the entire contents of a cell phone or a download of its contents is not permitted as a search incident to arrest” (para. 78).

Several commentators have been critical of *R. v. Fearon* because it doesn’t appreciate how Canadians, especially younger Canadians, use their smart phones. They argue that it is an odd outcome that the law protects our privacy interest in our homes to a greater extent than our cell phones, given that the latter contains much more private information than could be found in our homes (Hassan and Stark 2015). The majority decision is also puzzling in how it treats unsophisticated cell phones in the same way as smart phones, as the latter can be used to access information stored

remotely or through cloud computing technology – making the device more of a portal to access remote information than a thing found at the place of arrest. This extension of the proximity of a search incident to arrest is a major change that the majority does not appear to be sufficiently attuned to or concerned about.

The next case for civil libertarians to watch will be *R. v. Philippon*, involving a man from Quebec who was charged after refusing to give Canadian customs officers his cell phone password after he returned back to Canada from the Dominican Republic (Julian 2015). Will accused persons be obstructing the police if they refuse to divulge their passwords for their cell phones incident to arrest? If so, that would be a further extension of police powers that hitherto have been limited by the constitutionally protected right to remain silent, among other requirements.

1.3 *Mounted Police Association of Ontario v. Canada (Attorney General)* (RCMP collective bargaining)

Citation: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1

Date: January 16, 2015

Appellant: Mounted Police Association of Ontario and British Columbia Mounted Police Professional Association, on their own behalf and on behalf of all members and employees of the Royal Canadian Mounted Police

Respondent: Attorney General of Canada

Coram: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis, and Wagner JJ.

Issue: Whether members and employees of the RCMP have a right to collective bargaining?

Decision: Yes

Synopsis:

Federal legislation prevents members of the RCMP from unionizing or engaging in collective bargaining. Instead, labour issues (other than wages) are raised through the Staff Relations Representative Program (SRRP). It is the only employee representation that is recognized by RCMP management. Two private associations of RCMP officers (in Ontario and BC) challenged this labour relations regime as infringing freedom of association, protected under section 2(d) of the *Charter*.

Chief Justice McLachlin and Justice LeBel, for the majority, found that the regime prohibiting collective bargaining denied RCMP members the opportunity to pursue their collective workplace interests independent from management. They held that collective bargaining is a precondition for freedom of association in the workplace. Consequently, they concluded that the freedom of association of the RCMP members was infringed and could not be justified under section 1 of the *Charter*. The majority suspended the relevant declaration of invalidity for 12 months.

Justice Rothstein wrote a scathing dissent criticizing the majority for overturning not one, but two recent precedents to achieve the outcome in its decision. He writes: “[f]airness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about” (para. 217). In elevating choice and independence to constitutional requirements in collective bargaining, the dissent asserts that the Court has entrenched an adversarial model of labour relations in the *Charter* and stretched freedom of association in section 2(d) well beyond either its plain or generous meaning. Justice Rothstein states that the status quo provides for “a statutory collaborative

labour relations model” (para. 254) that did not infringe section 2(d) because RCMP members democratically elect their representatives to the SRRP and those representatives have a duty to represent their members. Management, in turn, must consider the representations of the SRRP in good faith. The dissent considered the exclusion of the RCMP from adversarial labour relations as pursuing a legitimate concern for a national police force.

Implications of the Decision:

This decision was heralded as “stunning” (MacCharles 2015) in large part because the Court retreated from an earlier precedent. While the majority states that “[o]verturning precedents of this Court is not a step to be lightly taken” (para. 127), its judgment in this case is part of a growing number of recent *Charter* decisions where the Court has reversed itself. In *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, the Court had held that excluding members of the RCMP from collective bargaining did not infringe their freedom of association under section 2(d) of the *Charter*. That decision is now moot.

The RCMP is a labour relations outlier. All police forces in Canada, other than the RCMP, have collective agreements that address workplace conditions of their officers. While the shift to collective bargaining for the RCMP will be significant for members and management – and raises even more questions than answers – it is thus not without precedent.

In terms of the approach going forward, the Court emphasizes that “[s]hould it see fit to do so, Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s. 2 (d) and s. 1 of the *Charter*.” (para. 156) It gave Parliament one year to do so. The previous Conservative government was muted in its reaction to this decision and did not introduce legislation responding to it. However, the new Liberal government has announced that it is drafting a new RCMP labour relations law to respond to the Court’s decision and it may seek an extension of the suspended declaration of invalidity in *Mounted Police Association of Ontario v. Canada (Attorney General)*. The new legislation could be introduced in late February 2016 but would reportedly not give officers the right to strike (Crawford 2015).

1.4 Saskatchewan Federation of Labour v. Saskatchewan (right to strike)

Citation: *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4

Date: January 30, 2015

Appellant: Saskatchewan Federation of Labour et al.

Respondent: Her Majesty The Queen in Right of the Province of Saskatchewan

Coram: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis, and Wagner JJ.

Issue: Whether the right to strike is protected under section 2(d) (freedom of association) of the *Charter*?

Decision: Yes

Synopsis:

Provincial legislation (*The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (*PSESA*), and *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26) adopted in 2008 by the then newly elected Saskatchewan Party prevented public sector “essential service employees” from striking. Instead, these employees continue to work based on the terms and conditions of their last collective agreement

until a new one is in place. The Court noted that there is no “meaningful mechanism” for resolving an impasse during collective bargaining of these workers. “Essential services” are defined in the legislation as follows:

- (i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:
 - (A) danger to life, health or safety;
 - (B) the destruction or serious deterioration of machinery, equipment or premises;
 - (C) serious environmental damage; or
 - (D) disruption of any of the courts of Saskatchewan; and
- (ii) with respect to services provided by the Government of Saskatchewan, services that:
 - (A) meet the criteria set out in subclause (i); and
 - (B) are prescribed; (*PSESA*, s. 2)

Justice Abella, for the majority, finds that “the right to strike is an essential part of a meaningful collective bargaining process” (para. 3). Where collective bargaining breaks down, striking was said to play a “crucial role” (para. 51) in allowing workers to pursue their collective workplace objectives. The majority held that the prohibition on striking by essential service employees in this provincial regime infringed section 2(d) (freedom of association) of the *Charter* and was not justified under section 1. While maintaining essential public services was seen as a pressing and substantial objective, the majority concluded that the provincial legislation designating essential services went beyond what was reasonable to provide essential services during a strike. It was also problematic that the provincial regime did not provide for arbitration (or some other mechanism) to address impasses. The majority gave Saskatchewan one year to enact new legislation, if it desired, before its impugned laws would be struck down.

Justices Rothstein and Wagner strongly dissented, finding that “the majority is wrong to intrude into the policy development role of elected legislators by constitutionalizing the right to strike” (para. 105). They add:

The statutory right to strike, along with other statutory protections for workers, reflects a complex balance struck by legislatures between the interests of employers, employees, and the public. Providing for a constitutional right to strike not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained. (para. 107)

The dissenting judges stressed that the majority decision improperly intruded on the role of the legislature in a complex area of socio-economic policy. They even went so far as to caution against the Court “usurping the responsibilities of the legislative and executive branches” (para. 114). The dissent emphasized that the balance struck by Saskatchewan was reasonable and noted that the *Constitution Act, 1867* actually requires the federal and provincial governments to “provid[e] essential public services of reasonable quality to all Canadians” (para. 119).

Implications of the Decision:

In 1987, the Court held that freedom of association did not protect the right to collective bargaining or to strike (*Alberta Reference (Reference re Public Service Employee Relations Act (Alta.)*, [1987]

1 S.C.R. 313)). However, in 2007 the Court reversed course and held that section 2(d) now protects the right of employees to engage in a meaningful process of collective bargaining (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391). Now with *Saskatchewan Federation of Labour v. Saskatchewan*, the Court has taken another step in overturning its own precedents in expanding *Charter* rights under section 2(d) to encompass the right to strike.

Organized labour was obviously pleased with this decision, while the Government of Saskatchewan promised that it would respond with new legislation. It has recently done so. Under Bill 183: *The Saskatchewan Employment (Essential Services) Amendment Act, 2015*, the parties are to agree on what services are essential, with recourse to a third-party tribunal where consensus is not possible. Arbitration will now be possible in the event of an impasse involving essential services. The provincial government reportedly involved several labour representatives in crafting the new regime and believes that it should pass constitutional muster (CBC News 2015a). Its approach to responding to the Court's decision – striking a small committee for that purpose, including key representatives from labour – has been applauded.

1.5 *Carter v. Canada (Attorney General)* (physician-assisted suicide)

Citation: *Carter v. Canada (Attorney General)*, 2015 SCC 5

Date: February 6, 2015

Appellant: Lee Carter, Hollis Johnson, William Shoichet, British Columbia Civil Liberties Association, and Gloria Taylor

Respondent: Attorney General of Canada and Attorney General of British Columbia

Coram: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, and Gascon JJ.

Issue: Whether the *Criminal Code* provisions prohibiting physician-assisted suicide infringe section 7 (principles of fundamental justice) of the *Charter*? If so, is the infringement justifiable under section 1?

Decision: The prohibition on physician-assisted suicide infringes section 7 of the *Charter* and is not saved by section 1.

Synopsis:

The *Criminal Code* makes it an indictable offence to aid or abet a person in committing suicide and provides that no one may consent to death being inflicted upon him or her. The trial judge held that this prohibition infringes the section 7 *Charter* rights of “competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition” (para. 3) and was not justified under section 1. She issued a suspended constitutional declaration of invalidity for one year and awarded the plaintiffs special costs. On appeal, the majority of the BC Court of Appeal allowed the appeal because it held that the trial judge was bound to follow the Supreme Court of Canada's precedent in *Rodriguez v. British Columbia (Attorney General)*, which had upheld the constitutionality of the blanket prohibition on physician-assisted suicide.

The Supreme Court of Canada unanimously allowed the appeal, finding that the prohibition on physician-assisted suicide creates a “cruel choice” (para. 13) for a grievously and irremediably ill patient who must either “take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes” (para. 1). The Court concludes “that the prohibition on phy-

physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition” (para. 4). It also concludes that “a properly administered regulatory regime is capable of protecting the vulnerable from abuse or error” (para. 3). The Court suspended its constitutional declaration of invalidity for one year and awarded the plaintiffs special costs on a full indemnity basis throughout the litigation.

The Court found the trial judge was entitled to not follow *Rodriguez* because a new legal issue was raised in *Carter* (“the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*”) (para. 46) and there has been a change in circumstances or evidence (“[t]he matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*.”) (para. 47). This test for when a trial judge may effectively ignore a Supreme Court of Canada precedent was set out in *Canada (Attorney General) v. Bedford* – another recent decision that overturned a previous *Charter* decision of the Court (“Prostitution Reference”).

In crafting new legislation, if the federal or provincial governments elect to do so, the Court noted that the rights of both patients and doctors would need to be reconciled. It clarified that its declaration did not compel physicians to provide patients assistance in taking their lives.

Implications of the Decision:

The *Carter* decision is notable for several reasons. First, it has thrust the issue of physician-assisted suicide onto the federal political agenda – an issue that Parliament has repeatedly avoided addressing. It is a “hot potato” political file because supporters and detractors of physician-assisted suicide are vocal and are not evenly split across party lines. It is an issue on which Canadians have deeply-held views and are divided. Second, this is a complex policy challenge for the new Liberal Government to navigate – and on tight timelines. Third, it shifts the costs of significant *Charter* litigation onto governments.

It took several months before the former federal government announced any action to respond to *Carter*. On July 17, 2015, the previous Conservative government appointed a three-member “External Panel on Options for a Legislative Response to *Carter v. Canada*” with a mandate to consult with medical authorities, interveners in the *Carter* case, and Canadians to propose options to respond to the Court’s decision (Government of Canada 2015). Its consultations were put on hold during the lengthy federal election period, resuming on October 20, 2015.³

The new Liberal Government has recently requested a six-month extension from the Court of the one-year suspended constitutional declaration of invalidity in *Carter*. The hearing on that request was heard on January 11, 2016 and included a surprising concession from the lawyer for the new federal Liberal government that its request for an extension did not need to apply in Quebec, which has adopted its own physician-assisted suicide law, discussed below. This position has sent Ontario Premier Kathleen Wynne scrambling, stating that her government has asked the College of Physicians and Surgeons to come up urgently with guidelines in case the extension request is denied. With respect to a federal response, the federal Liberal government received the External Panel’s report on December 15, 2015, after asking the panel for a report on the results of the consultation, rather than legislative options (Justice Canada and Health Canada, 2015). Parliamentary Committees have now been struck to deal with the issue as well. (Justice Canada and Health Canada 2015).

Physician-assisted suicide is a “hot potato” political file because supporters and detractors are vocal and not evenly split across party lines.

Interestingly, however, the Court in *Carter* did not simply refer to the federal Parliament responding to its decision. It also mentioned provincial governments may choose to respond. Indeed, health care is a concurrent area of federal and provincial responsibility, adding a further complication to any federal legislative response to *Carter*. In *Carter*, the Court noted “aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation” (para. 53). Before the decision in *Carter* was released, the Government of Quebec became the first province to enact legislation providing for physician-assisted suicide in the form of Bill 52, *An Act respecting end-of-life care*, in June 2014. The law was slated to take effect December 10, 2015 but litigation in Quebec delayed its implementation until the Quebec Court of Appeal ruled that it could come into force (CBC News 2015b). Prime Minister Trudeau’s Office has recently said that a pending federal bill will draw “inspiration” from Quebec’s Bill 52 (Harris 2015).

As noted above, the decision in *Carter* is also significant because it opens the door to more *Charter* claimants being able to obtain funding through generous costs awards against the government(s) that they are suing. In *Carter*, that meant a special full indemnity costs award of over \$1,000,000 in legal costs to the plaintiffs at the trial level alone, whereas a typical party-and-party cost award would have only come in around \$150,000. This is notable in the context of the former Conservative Government having abolished the Court Challenges Program – something that the new Liberal Government has indicated it will restore. Between the increased possibility of special costs awards in *Carter* and the restoration of the Court Challenges Program, the economic considerations in bringing forward major *Charter* challenges have significantly shifted towards *Charter* claimants and their legal counsel.

1.6 *Loyola High School v. Quebec (Attorney General)* (freedom of religion)

Citation: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12

Date: March 19, 2015

Appellant: Loyola High School and John Zucchi

Respondent: Attorney General of Quebec

Coram: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, and Karakatsanis JJ.

Issue: Whether the Minister of Education’s insistence that a private Catholic school deliver a mandatory ethics and religious cultural program from an entirely secular perspective was reasonable?

Decision: No

Synopsis:

Loyola High School is a private Catholic school, founded in 1840 by the Jesuit Order. In 2008, the Government of Quebec’s mandatory core curriculum required all schools in the province to teach an ethics and religious culture course on different world religions in a “strictly secular”, “neutral and objective” manner. The Minister can approve an alternative equivalent program. Loyola applied for such an exemption, offering to teach the course from a Catholic perspective, but was denied. Loyola applied for judicial review of the Minister’s decision on the basis that the Minister’s refusal to approve the alternative program infringed Loyola’s freedom of religion.

Justice Abella, writing for the majority, found that the Minister’s decision was unreasonable because it limited Loyola’s freedom of religion more than was necessary to achieve the government’s objectives and did not reflect a proportionate balancing. In particular, requiring Loyola to teach Catholicism from a neutral perspective was unreasonable. The matter was sent back to the Minister for reconsideration. Justice Abella states that freedom of religion encompasses both individual aspects and “manifestation through communal institutions and traditions” (para. 60). She articulates the importance of religious freedom in a secular society as follows:

A secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. [...] The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them. (para. 43)

Implications of the Decision:

While *Loyola* was welcomed for supporting religious freedom because of the outcome in the case and its recognition of the importance of such freedoms being exercised in a collective manner, it may turn out to be an unfortunate precedent in the end. First, the majority reasons appear to suggest that there is room for internal limitations to freedom of religion – prior to any balancing or justification analysis – which would be a new and troubling shift if it were to be adopted and applied in future jurisprudence. Second, the test that *Loyola* enshrines for judicial review involving fundamental rights and freedoms represents a potential diminution of such rights.

Loyola is a significant case as it relates to the protection and enforcement of *Charter* rights, including but not limited to freedom of religion, before administrative tribunals and discretionary decision-makers. The majority adopted the framework from *Doré v. Barreau du Québec*, which is deferential to discretionary decision-makers and makes it more difficult to enforce *Charter* rights in the courts in such instances. This is because the test in *Doré* provides that the reviewing court should determine whether such decision-makers have “proportionately balanced” *Charter* protections, rather than whether the infringement of *Charter* rights is demonstrably justified under the traditional section 1 *Charter* analysis from *R. v. Oakes*. While there is significant overlap between the *Doré* and traditional section 1 *Oakes* tests, the majority reasons in *Loyola* represent a step backward from the protection of fundamental rights and freedoms in administrative and discretionary governmental decisions. It is thus a potentially troubling precedent.

The majority reasons in Loyola appear to suggest there is room for internal limitations to freedom of religion.

However, the Court does not appear to be applying *Doré* consistently or very broadly. In its decision in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, which was released less than a month after *Loyola* and also dealt with freedom of religion and judicial review, *Doré* is not even cited, much less applied. The majority reasons in *Saguenay* were written by Justice Gascon (who did not sit in *Loyola*) – only Justice Abella dissented but even she did not cite or apply *Doré*.

The anticipated Supreme Court of Canada litigation involving the accreditation of Trinity Western University’s proposed new law school will be one of the next major freedom of religion cases that the Court will likely decide in the coming years. Given that different administrative decision-makers have arrived at different outcomes on that issue in different provinces, it is not clear whether or how the *Doré* test could actually be helpful in resolving the matter in a principled manner once these cases arrive eventually at the Court.

1.7 *Quebec (Attorney General) v. Canada (Attorney General)* (long-gun registry data from Quebec and “cooperative federalism”)

- Citation:** *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14
- Date:** March 27, 2015
- Appellant:** Attorney General of Quebec
- Respondent:** Attorney General of Canada, Commissioner of Firearms, and Registrar of Firearms
- Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, and Gascon JJ.
- Issue:** Whether Quebec has a right to obtain long-gun registry data from the federal government which federal legislation requires to be destroyed?
- Decision:** No

Synopsis:

The former federal Conservative government passed legislation abolishing the long-gun registry, including a provision requiring the destruction of all registry data. The Government of Quebec announced that it would create its own provincial long-gun registry. The province challenged the constitutionality of the federal data destruction and sought all data related to Quebec to be transferred to the province.

The Superior Court of Quebec declared the long-gun registry data destruction related to data from Quebec unconstitutional and ordered Canada to transfer it to Quebec; however the Quebec Court of Appeal unanimously reversed this decision.

The top court split 5–4, with all three judges from Quebec dissenting. The majority reasons written by Justices Cromwell and Karakatsanis found that the data destruction was constitutional and that Quebec had no right to the data. The majority characterizes the data destruction as a “contentious policy choice” (para. 1) that was for Parliament to make, stating “the courts are not to question the wisdom of legislation but only to rule on its legality” (para. 3). Exclusive federal criminal law jurisdiction was the basis for the abolition of the registry and deletion of its data. It could not be trumped by the principle of cooperative federalism according to the majority:

Quebec is asking us to recognize that the principle of cooperative federalism prevents Canada and the provinces from acting or legislating in a way that would hinder cooperation between both orders of government, especially in spheres of concurrent jurisdiction.

In our respectful view, Quebec’s position has no foundation in our constitutional law and is contrary to the governing authorities from this Court. (paras. 15–16)

The dissenting reasons written by all three judges from Quebec (with Justice Abella concurring) concluded that the destruction of long-gun registry data from Quebec was unconstitutional and invalid. The dissent cites “the Constitution’s unwritten principles” (para. 151) and relies on the concept of cooperative federalism in reaching its outcome:

In our opinion, the dismantling of a partnership like the one established with respect to gun control must be carried out in a manner that is compatible with the principle of federalism that underlies our Constitution. Thus, Parliament or a provincial legislature

cannot adopt legislation to terminate such a partnership without taking into account the reasonably foreseeable consequences of the decision to do so for the other partner. (para. 153)

Nevertheless, the dissent found that there were no legal grounds for Quebec to compel the data to be transferred to it from the federal government, noting “[i]n some cases, the source of the appropriate remedy must lie in the political process rather than in the courts” (para. 199).

Implications of the Decision:

This decision is notable because it is one of the few recent victories that the former Conservative government won at the Court on a major political file. It was not, however, the final chapter for the long-gun registry. Days after the Court’s decision, the Government of Quebec announced that it would go ahead with creating a provincial long-gun registry (Bill 64, the *Firearms Registration Act*) and the Quebec National Assembly unanimously passed a motion asking the federal government to transfer the federal long-gun data from Quebec (Canadian Press 2015; CBC News 2015c).

The nebulous concept of “cooperative federalism” cannot be used to trump the explicit language of the Constitution.

In June 2015, a Federal Court judge ordered a hard drive containing the long-gun registry data from Quebec be handed over to the court, pending litigation involving the Information and Privacy Commissioner (Cheadle 2015). It remains to be seen how the new Liberal Government will proceed in this ongoing litigation. During the recent federal election campaign, the Liberal Party of Canada pledged not to bring back the long-gun registry if elected (Young 2015).

The decision in *Quebec (Attorney General) v. Canada (Attorney General)* is also important because the majority affirms that the nebulous concept of “cooperative federalism” cannot be used to trump the explicit language of the Constitution. It thus favours a clearer and less subjective approach to constitutional interpretation.

1.8 R. v. Nur (mandatory minimum sentences)

Citation: *R. v. Nur*, 2015 SCC 15

Date: April 14, 2015

Appellant: Her Majesty The Queen; Attorney General of Canada

Respondent: Hussein Jama Nur; Sidney Charles

Coram: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, and Gascon JJ.

Issue: Whether new mandatory minimum penalties of imprisonment for possessing a loaded prohibited firearm violate the *Charter*?

Decision: Yes

Synopsis:

The accused were each charged in separate cases under section 95(1) of the *Criminal Code* with possessing a loaded prohibited firearm. The minimum penalty is three years imprisonment for first-time offences and five years imprisonment for second or subsequent offences under section 95(2)(i) and (ii), respectively. In both cases, the accused challenged the mandatory minimum penalties under

section 12 of the *Charter* (cruel and unusual punishment), in addition to several other *Charter* provisions, but were sentenced to a greater term of imprisonment than the prescribed minimums.

In a 6-3 split decision, Chief Justice McLachlin wrote the majority reasons finding that the challenged mandatory minimum penalties infringe section 12 of the *Charter*, are not justified under section 1, and are null and void. The majority held that while in most cases the mandatory penalties would be acceptable, there are reasonable hypothetical circumstances where their application would constitute cruel and unusual punishment. Specifically, the Chief Justice gave as an example a licensed and responsible firearms owner who safely stored his gun unloaded but with ammunition nearby, mistakenly storing it at their cottage instead of their home where it is supposed to be. A three-year sentence in such a case would be cruel and unusual, according to the Chief Justice. Consequently, the mandatory minimum penalty had to be struck down.

The dissenting reasons written by Justice Moldaver (with Justices Rothstein and Wagner concurring) argue that the reasonable hypothetical approach does not justify striking down the mandatory minimum penalties that have been challenged. Justice Moldaver writes that the licensing-type examples relied on by the majority were “speculative and strain the bounds of credulity. They are not grounded in experience or common sense” (para. 146). The dissent pointed out that there is not a single reported case of the type given by the Chief Justice where the Crown proceeded by way of indictment to attract the three-year mandatory minimum penalty. The dissent wrote that Parliament’s objective in adopting mandatory penalties for firearms offences is valid and pressing and “it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture”. (para. 132)

Implications of the Decision:

All criminal offences have maximum prescribed penalties, but only some have mandatory minimum penalties. Under the former federal Conservative government, the number of mandatory minimum penalties of imprisonment grew significantly for serious and violent offences, sexual offences, firearms offences, and illegal drug crimes. Section 12 of the *Charter* has been used in the past to strike down mandatory minimum penalties of imprisonment for certain offences but in other instances such challenges have failed and the minimum penalty has been upheld. *Nur* is the first *Charter* challenge to mandatory minimum sentences that had been imposed by the former federal Conservative government to reach the Court. For that reason, it was closely watched.

Nur is an obvious blow to mandatory minimum penalties as a policy option.

The majority in *Nur* has extended the application of the doctrine of reasonable hypotheticals further than seen in previous cases, as evidenced by the split decision and strong dissent. *Nur* is an obvious blow to mandatory minimum penalties as a policy option, yet such penalties should still pass constitutional muster in other situations.

This is also a notable case because it provides *Charter* claimants in different cases an opportunity to conjure up scenarios that could be technically caught by the law being challenged even if they are a real stretch.

Nur is one of the starkest examples from 2015 of internal voices within the Court itself strongly cautioning their fellow judges not to intrude upon Parliament’s legitimate role in making what amount to policy decisions. It is noteworthy that the three dissenting judges raising the alarm in this case were all appointed by former Prime Minister Stephen Harper and have expressed a leaning at various times in subtle and not so subtle ways towards judicial restraint.

1.9 *Henry v. British Columbia (Attorney General)* (damages for *Charter* violations)

Citation: *Henry v. British Columbia (Attorney General)*, 2015 SCC 24

Date: May 1, 2015

Appellant: Ivan William Mervin Henry

Respondent: Her Majesty The Queen in Right of the Province of British Columbia as Represented by the Attorney General of British Columbia and Attorney General of Canada

Coram: McLachlin C.J. and LeBel,⁴ Abella, Moldaver, Karakatsanis, Wagner, and Gascon JJ.

Issue: Whether section 24(1) of the *Charter* can be invoked to award damages against the Crown for prosecutorial non-disclosure absent malice?

Decision: Yes

Synopsis:

The accused was convicted of 10 sex offences and declared a dangerous offender. After he had served almost 27 years in prison, the BC Court of Appeal found that there were serious errors in the trial so it quashed all of the convictions and substituted acquittals. The Crown allegedly failed to disclose relevant information to the accused, including forensic evidence and 30 statements that showed inconsistencies in the Crown's identification evidence, which was considered shaky already. The accused was also not told that the police had arrested another suspect two times in the area of the attacks.

Among other parties, the accused sued the BC Attorney General for damages from his wrongful conviction and imprisonment, seeking damages under section 24(1) of the *Charter* based on allegations that his rights under sections 7 and 11(d) of the *Charter* were infringed. Section 24(1) reads: "[a]nyone whose rights or freedoms . . . have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." The accused wanted to be able to obtain *Charter* damages as a remedy for non-malicious prosecutorial misconduct, specifically non-disclosure. The trial judge agreed that was possible, but the BC Court of Appeal allowed the appeal.

The majority reasons written by Justice Moldaver found that section 24(1) of the *Charter* could indeed be the basis for awarding damages for prosecutorial misconduct absent any proof of malice. The majority held that "a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by *intentionally* withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence" (para. 31, emphasis added). The majority noted that this standard is more onerous for the plaintiff to prove than negligence or gross negligence. However, the majority was clear that this fault standard would not necessarily apply in other *Charter* damages cases:

. . . it is neither prudent nor necessary to decide whether a similar threshold would apply in circumstances not involving wrongful non-disclosure. Mr. Henry's claim against the AGBC is rooted in allegations that Crown counsel failed to disclose certain relevant information. It would be unwise to speculate about other types of prosecutorial misconduct that might violate the *Charter*, or to fix a blanket threshold that governs all such claims against the Crown. The threshold established in this case may well offer guidance in setting the applicable threshold for other types of misconduct, but the prudent course of action is to address new situations in future cases as they arise, with the benefit of a factual record and submissions. (para. 33)

Chief Justice McLachlin and Justice Karakatsanis wrote concurring reasons that would not require the plaintiff to prove that the prosecutor acted “intentionally” in order to obtain *Charter* damages. Rather, they would award *Charter* damages where the accused proves a *Charter* breach, damages would be “an appropriate and just remedy to advance the purposes of compensation, vindication or deterrence”, and the state is unable to establish sufficient “countervailing factors” (para. 108). However, the majority warned that such an approach “runs the risk of opening the floodgates to scores of marginal claims” (para. 78).

Implications of the Decision:

This case is a significant decision for all levels of government and *Charter* claimants, as evidenced by the fact that nine provinces participated through their Attorneys General (only Prince Edward Island did not), in addition to interveners including the Association in Defence of the Wrongly Convicted, David Asper Centre for Constitutional Rights, British Columbia Civil Liberties Association, Canadian Civil Liberties Association, Criminal Lawyers’ Association, and Canadian Association of Crown Counsel.

The decision in Henry will undoubtedly spur a cottage industry of Charter damages litigation.

In its 2010 landmark decision in *Vancouver (City) v. Ward*, the Court established that section 24(1) of the *Charter* could be used to award damages as a remedy for *Charter* violations, in certain circumstances. A key issue, however, that was unclear was what level of fault must be proven to obtain such damages. In civil lawsuits alleging malicious prosecution, malice must be proven – which is exceedingly difficult and rare. Under *Henry*, however, it is now much easier for *Charter* claimants to seek damages for non-disclosure because the requirement to prove malice is absent (although the accused must establish, *inter alia*, that one or more of their constitutional rights was infringed and the necessary threshold for misconduct, discussed above, can be established). While

the majority in *Henry* was mindful of the potential “chilling effect” that increased liability for Crown prosecutors could have, its decision will undoubtedly have an impact on how cases are prosecuted.

The decision in *Henry* creates considerable uncertainty about the fault level in other *Charter* damages situations and will undoubtedly spur a cottage industry of *Charter* damages litigation. *Charter* damages will also have untold fiscal implications for all levels of government. For his part, Mr. Henry (whose 1983 case pre-dated modern disclosure rules) is now seeking up to \$43 million in damages in proceedings that are now underway in British Columbia (Kane 2015).

1.10 *R. v. Smith* (derivatives of medical marijuana)

Citation: *R. v. Smith*, 2015 SCC 34

Date: June 11, 2015

Appellant: Her Majesty The Queen⁵

Respondent: Owen Edward Smith

Coram: McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner, Gascon, and Côté JJ.

Issue: Whether restricting medical marijuana to dried forms violates the *Charter*?

Decision: Yes

Synopsis:

The accused produced edible and topical marijuana derivatives for sale outside of the federal medical marijuana regulations and was not a medical marijuana user. He was charged with possession of marijuana and possession of marijuana for the purposes of trafficking. At trial, the court found that the restriction of medical marijuana to dried forms infringed the *Charter*, specifically section 7 (principle of fundamental justice). The Supreme Court of Canada unanimously agreed, striking down the limitation of medical marijuana to dried forms, and affirming the accused's acquittal (the Crown surprisingly elected not to adduce any evidence at trial after it lost the constitutional ruling).

The Court found that Parliament's decision to limit medical marijuana to dried form was arbitrary. It found that inhaling marijuana carries health risks from smoking it and is less effective for some conditions than derivative forms of marijuana, which can be administered orally or topically. Accordingly, section 7 of the *Charter* was infringed and the infringement was not reasonably justified under section 1. The Court ordered that the impugned provisions "are of no force and effect, to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes" (para. 31).

Implications of the Decision:

The decision in *Smith* was highly predictable. Given that since 2000 the courts have required marijuana to be available for medical purposes, restricting it to dried forms that must be smoked instead of derivatives that can be ingested or applied topically was clearly not going to be considered reasonable by the Court.

Smith is another case like *Nur*, discussed above, where *Charter* claimants have been successful in challenging laws that go beyond the scope of the facts of their case. In *Smith*, the accused was neither a medical marijuana user nor producer for users of medical marijuana yet was recognized as having standing to challenge the restrictions related to medical marijuana – a regime that really had nothing to do with him (as a dissenting judge at the BC Court of Appeal noted). The Supreme Court of Canada has steadily loosened the standing requirement in *Charter* challenges such that the link may now be quite tenuous.

The former federal Conservative government, speaking through then Health Minister Rona Ambrose (now Interim Leader of the Conservative Party of Canada and Leader of the Official Opposition) expressed its displeasure at the court's decision, noting that marijuana is not approved as a drug by Health Canada. *Smith* is thus another case eroding the Conservative's opposition to the use of marijuana of any kind by anyone for any purpose, despite some public musings late in their mandate that they were considering making personal possession of small amounts of marijuana a ticketing-type offence (Kennedy 2015).

In Smith and Nur, Charter claimants successfully challenged laws that go beyond the scope of the facts of their case.

The legalization of marijuana became a hot button issue in the recent federal election campaign with a promise by the Liberal Party of Canada to legalize and regulate it for recreational use. That policy position spurred attack ads by the Conservative Party of Canada. The recent Speech from the Throne of the new Liberal Government includes a promise to "legalize, regulate and restrict access to marijuana" (Hansard 2015, 1550). Ontario Premier Kathleen Wynne recently mused that marijuana could be sold in LCBO stores as part of such a new regime. The debate surrounding how marijuana legalization will occur will inevitably involve provincial and territorial governments, which may have quite different perspectives on the way forward.

5. Conclusion

The Supreme Court of Canada continues to tackle controversial and important public policy issues. In the final year of the former federal Conservative government, it continued a losing streak observed in last year's report with just two narrow victories in the 10 major cases considered this year. However, unlike in last year's study where the Court had record levels of consensus in reaching its decisions, this recent year found a Court deeply divided with record levels of dissents on major decisions. Even more remarkable were philosophical fissures laid bare in the reasons of several judges at the Court that it must be cautious not to intrude on Parliament's legitimate role in making tough public policy decisions. It is also notable that the Court continues to overrule its own recent *Charter* decisions with the express disapproval of some of its members.

With the upcoming year, the new federal Liberal government is saddled with countless decisions on how to proceed with ongoing litigation involving decisions and legislation of the former federal Conservative government. It is seeking extensions of the Court's suspended declarations of invalidity to give it more time to enact legislation responding to the Court's recent decisions and preparing legislation to respond to them. In other instances, it is abandoning appeals launched by the former Conservative government that it doesn't agree with. It will be several years before law and decisions adopted by the new Liberal government will be judicially challenged and make their way eventually to the Court. Prime Minister Justin Trudeau will also have the opportunity to select the next Chief Justice during his majority mandate, which will be a significant development that could have important and lasting implications for the Court going forward.

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Biography



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Endnotes

- 1 Copies of these decisions can be downloaded via Lexum, *Judgments of the Supreme Court of Canada*, online: <http://scc-csc.lexum.com/scc-csc/en/nav.do>.
- 2 See also *Meredith v. Canada (Attorney General)*, 2015 SCC 2 (wage rollbacks and collective bargaining).
- 3 For more information on the External Panel on Options for a Legislative Response to *Carter v. Canada*, visit the website at <http://www.ep-ce.ca/>.
- 4 LeBel J. took no part in the judgment.
- 5 Represented by the Public Prosecution Service of Canada.

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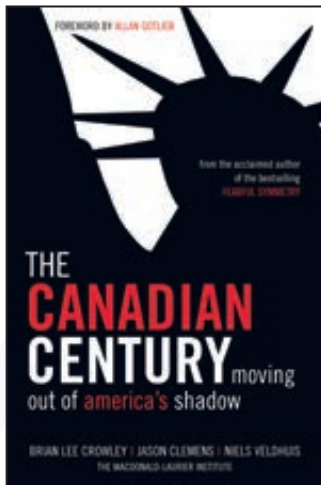
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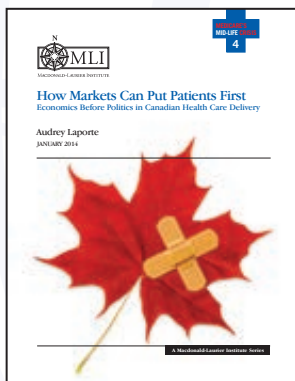
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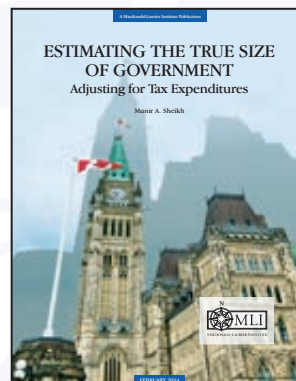
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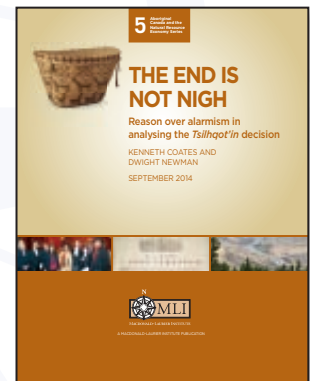
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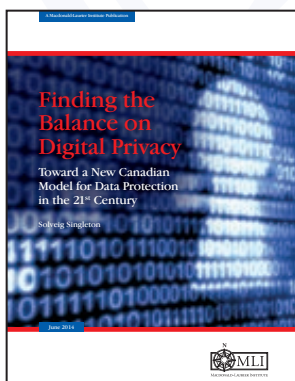
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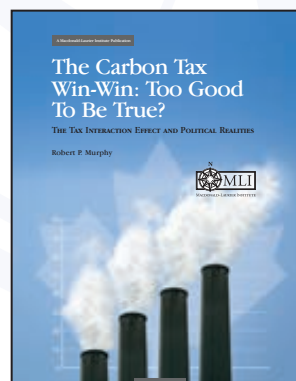
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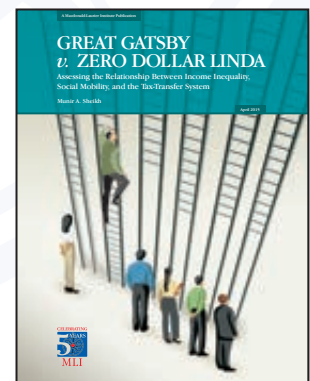
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