The Constitution and Canada's Branches of Government

Introduction

Canada is a "constitutional monarchy," which is a form of government where monarchs act as the political heads of state but their powers are kept within the boundaries of that country's constitution.[1] In Canada, the monarch is the Queen. At the time of Confederation, the *Constitution Act, 1867* (then called the *British North America Act*), as well as other documents and unwritten conventions adopted over time, set out who would be involved in government and how it would work.[2]

As a former colony of Britain, Canada inherited a British style of governance called the Westminster system. Thus, Canada's system of governance has three branches: the executive branch, the legislative branch, and the judicial branch.

The branches of government operate at both the federal and the provincial levels because Canada is a federation. That is, there is a constitutionally recognized federal government and there are constitutionally recognized provincial governments.

Executive Branch

The Monarch

The first branch of Canada's political system is the executive branch. This is the decision-making branch made up of the monarch as the head of state and the Prime Minister, as head of government, and his or her Cabinet.[3] In Canada's early history, the British monarch ruled the area from its Parliament in London until Canada became a country in 1867 and implemented its own constitution. The monarch then became a symbol of unity, authority and allegiance in Canada,[4] a figure who holds significant symbolic power but little political decision making power.

The monarch is represented in Canada by the Governor General at the federal level and by a lieutenant governor in each of the ten provinces. (While the commissioners in each of the three territories perform duties similar to those of the lieutenant governors, they are not considered the monarch's representatives and are therefore the representatives of the Canadian government). The Governor General is appointed by the monarch upon the recommendation of Canada's Prime Minister, and the lieutenant governors in each province are appointed by the Governor General upon the recommendation of the Prime Minister.[5]

The monarch's role is outlined in Part III of the *Constitution Act, 1867*.[6] Section 9 vests authority in the monarch.[7] Sections 38 to 49, also known as the amending formula, instruct that any change to the position of the monarch or his or her representatives in

Canada requires the consent of the Senate, the House of Commons, and the legislative assemblies of all the provinces.[8] The monarch is also symbolically responsible for executive functions such as giving royal assent to bills passed in the House of Commons and Senate or reading the federal government's agenda at the start of each new session of Parliament (called the Speech from the Throne).

The Governor General is also responsible for dissolving Parliament before an election and may even "prorogue" or end a parliamentary session if necessary. A recent example of proroguing occurred in 2008 when Prime Minister Stephen Harper asked then-Governor General Michaëlle Jean to prorogue parliament after the party in opposition, the Liberals, attempted to form a coalition government with the New Democratic Party and the Bloc Quebecois. After careful consideration and consultation with constitutional experts, Jean decided to honour the Prime Minister's request.[9] This is an example of how executive power ultimately resides with the monarch.

The Prime Minister and Cabinet

After a federal election, the leader of the political party with the most seats in the House of Commons becomes the Prime Minister. The Prime Minister advises the Governor General on matters concerning the country's governance and how he or she may proceed symbolically with executive matters. The cabinet is appointed by the Prime Minister from the large body of party Members of Parliament to advise him or her on these matters and help run the government. Section III of the *Constitution Act, 1867* refers to the cabinet as the Queen's Privy Council, although the term cabinet is not used.[10]

The role of the Prime Minister is not discussed in any Canadian constitutional document, and is mentioned only in passing in the *Constitution Act, 1867* and the *Letters Patent* issued in 1947 by King George VI.[11] The role of the Prime Minister is an example of an "unwritten" element of Canada's Constitution. The role is a tradition or convention that, over time and history, has come to be accepted as part of an unquestioned element of Canada's governance. As such, the role of the Prime Minister has come to be constitutionally protected as well.[12]

Legislative Branch

The federal legislative branch of Canada's government makes the laws of the country. This branch is formally known as the Parliament of Canada and includes the monarch, the House of Commons, and the Senate. As in Britain, Canada has a "bicameral," or two-house system, an integral feature in a constitutional government. In Canada, the lower house is known as the House of Commons and the upper house is known as the Senate. When the British colonies were established in North America at the beginning of the 16th century, colonial assemblies were bicameral because there were two interests to be represented: the mother country by the governor in council, and the colonists by their chosen deputies.[13] Early Canadians preferred a bicameral system because they believed it avoided the creation of hasty and harsh legislation, ensured deliberation in government, and was best able to promote the interests of democracy.[14] The bicameral tradition has continued into present

day.

House of Commons

At the federal level, the House of Commons is the first house of legislation in the bicameral system. It is also called the lower house of Parliament. The House of Commons' structure and role are outlined in sections 37 to 52 of the *Constitution Act, 1867*.[15] This House is responsible for introducing, voting on and adopting laws and proposals for taxes and revenues. The members of this house, or Members of Parliament (MPs), belong to different political parties and they are elected by the people of Canada. There are currently 308 MPs, but the number can grow as the population increases.[16] According to section 40, House of Commons seats are distributed according to the proportion of Canada's population residing in the various provinces and territories.[17] And according to section 50, a House may not sit longer than 5 years.[18]

Senate

The Senate is the upper house of Parliament. It was created as a place of "sober second thought" to carefully examine legislation before it becomes law. It is made up of 105 members that are appointed by the Governor General, on advice of the Prime Minister, based on regional representation and other individual requirements.[19] Senators are not elected. The Constitution states that senators are to be appointed based on regional representation and that they must meet specific requirements. Twenty-four senators must be from each of Ontario, Quebec, the Maritimes and the western provinces. Six senators are to be appointed from Newfoundland and one senator is to be appointed from each of the three territories. A senator must be a Canadian citizen and be at least 30 years old, own land worth at least $4,000 and, in the case of Quebec, own land within the province. Senators must have at least $4,000 and live in the province or territory they represent. Senators usually affiliate with a political party although some may choose to sit as independents.[20]

The Constitution defines the scope of the Senate's role and powers in sections 21 to 36. In 2014 the Supreme Court of Canada advised the federal government in *Reference Re Senate Reform*[21] that significant changes to the Senate require constitutional amendments and that these amendments would require the use of the amending formula.[22]

Judicial Branch

The judicial branch of government interprets and applies the law. It includes judges and the courts and operates independently from the other branches of government. Courts operate at both federal and provincial levels. The federal courts include the Supreme Court of Canada, the Federal Court of Canada (Trial Division and Appellate Division), and the Tax Court. The provincial courts include the superior courts or courts of appeal in each province or territory.

The courts deal with all manners of law in Canada including Aboriginal law, administrative

law, contract law, constitutional law, criminal law, property law, and tort law. Judges interpret legislation and have the power to strike it down. A government may also ask the court for advice on a major legal issue. This is known as a reference question. According to the Constitution, appointment of judges to provincial superior courts (trial or appellate) is made by the Governor General.[23] In practice, the Governor General appoints judges based on the advice of the Prime Minister and his or her cabinet. Appointments to provincial courts are made by the Lieutenant Governor of each province on the advice of the provincial government.

Appointments to the federal courts (Federal Court of Appeal and Federal Court Trial Division) that have jurisdiction for all of Canada are made by the Governor General on the advice of the government. Appointments to the Supreme Court of Canada are governed by the *Supreme Court Act*. It explains who may be appointed to the Supreme Court of Canada: "Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province."[24] Section 6 then discusses the qualification of appointees from Quebec: "At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province, [6.1] … if, at any time, they were an advocate of at least 10 years standing at the bar of that Province."[25] The issue of appointment of Supreme Court judges from Quebec was an issue in *Reference Re Supreme Court*.

Conclusion

Each branch of Canada's government serves a specific role. Canada's Constitution outlines the structure of how these branches should operate and how they should work together to serve the country's citizens.

The executive branch is made up of the monarch, represented by the Governor General, as head of state and the Prime Minister as head of government. The Governor General is the Queen's representative in Canada and the Prime Minister is the leader of the political party with the most seats in the House of Commons. Although the Governor General usually acts on the advice of the Prime Minister, the monarch is still a symbol of unity, authority, and allegiance in Canada.

The legislative branch is made up of the House of Commons and the Senate; these are also known as the lower and upper houses of parliament respectively. The legislative branch introduces, votes on, revises, and passes bills that become laws once they are signed by the Governor General.

Finally, the judicial branch includes the courts and judges at both the federal and provincial levels. Although judges are appointed by the Governor General on the advice of the Prime Minister, the judiciary acts independently from the executive branch. The judicial branch interprets and applies the law and sometimes provides an advisory opinion to a government, on a major legal issue, when asked.

Together, Canada's branches of government provide an integral framework that guides the democratic governance of the country.

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[1]"Canada: A Constitutional Monarchy" Parliament of Canada (2 July 2014) online: Senate of Canada <http://www.parl.gc.ca/About/Senate/Monarchy/SenMonarchy_00-e.htm>.

[2]*The Constitution Act, 1867*, .

[3]"The Queen's Role in Canada," The British Monarchy (4 July 2014) online: The Royal Household <http://www.royal.gov.uk/MonarchAndCommonwealth/Canada/TheQueensroleinCanada.aspx>.

[4]*Ibid*.

[5]*Ibid*.

[6]*Constitution Act*, ss 9-16.

[7]*Ibid* at s 9.

[8]*Ibid* at ss 38-49.

[9]Andrew Heard, "The Governor General's Decision to Prorogue Parliament: A Dangerous Precedent," Democratic Governance (18 June 2013) online: The Centre for Constitutional Studies <https://www.constitutionalstudies.ca/ccs/index.php/constitutional-issues/democratic-governance/47-the-governor-general-s-decision-to-prorogue-parliament-a-dangerous-precedent>.

[10]*Constitution Act*, *supra* note 6 at s 11: "There shall be a Council to aid and and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada."

[11]George VI, *Letters Patent Constitution the Office of the Governor General of Canada* (Ottawa: King's Printer for Canada, 1947), online: Library and Archives Canada <http://www.collectionscanada.gc.ca/obj/001060/f2/1940/cgc_p2-0_v081_n012_t002_000_19471001_p00000.pdf>.

[12]Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Scarborough: Thomson, 2007) at 1.2.

[13]"Parliamentary Institutions," House of Commons Procedure and Practice, Robert Marleau and Camille Montpetit, eds, (2000) online: Government of Canada <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?Sec=Ch01&Seq=2&Language=E>.

[14]"Bicameral System," The Encyclopaedia Britannica (28 July 2014) online: The

Encyclopaedia Britannica Inc <http://www.britannica.com/EBchecked/topic/64614/bicameral-system>.

[15]*Constitution Act*, supra note 6 at ss 37-52.

[16]*Ibid* at s 37.

[17]*Ibid* at s 40.

[18]*Ibid* at s 50.

[19]"Senate," Constitutional Keyword (5 August 2014) online: The Centre for Constitutional Studies < https://www.constitutionalstudies.ca/ccs/index.php/sz/766-senate>.

[20]*Constitution Act*, supra note 6 at ss 21-36.

[21]*Reference re Senate Reform* 2014 SCC 32 (CanLII) [Senate]. <https://www.canlii.org/en/ca/scc/doc/2014/2014scc32/2014scc32.html?searchUrlHash=AAAAAQAQc2VuYXRlIHJlZmVyZW5jZQAAAAAB>.

[22]*Ibid* at para 77, 85 and 96.

[23]*Constitution Act*, Supra note 6 at s 96.

[24]*Supreme Court Act*, RSC 1985, c S-26, s 5.

[25]*Ibid* s 6.

Right to counsel includes access to counsel

Introduction

The right to counsel upon arrest is a constitutionally protected right under section 10(b) of the *Canadian Charter of Rights and Freedoms*. On July 18, 2014, the Supreme Court of Canada clarified the importance of this right in the case of *R v Taylor (Taylor)*.[1] In this case, the police did not provide an opportunity for a suspected drunk driver to access counsel and in doing so they denied him his right to counsel. Section 10(b) states that "everyone has the right on arrest or detention…to retain and instruct counsel without delay and to be informed of that right."[2] It ensures that a detained or arrested individual knows

both the nature of the charges and his or her legal options.

In building on the section 10(b) cases before it, *Taylor* clarifies that for Canadians to trust the justice system, police must ensure that they do not simply pay lip service to section 10(b); the *right* to counsel must become *access* to counsel.[3] In other words, an accused's right to seek the advice of a lawyer is an important *Charter* right that cannot be ignored or violated.

Facts

Early on April 13, 2008, Jamie Kenneth Taylor left a party in Cochrane, Alberta, in a vehicle containing four other passengers. Driving at high speeds, he lost control while attempting to turn right. His vehicle hit a street lamp and rolled several times, injuring three of his passengers.[4] Police informed him of his *Charter* rights at the time of arrest. His response was that he wanted to speak to both his father and his lawyer but police did not give him access to a phone at the scene.

Paramedics found Taylor to be in good health but took him to the hospital for a thorough examination as part of their standard procedure.[5] There, a nurse took five vials of blood from Taylor between 3:05 a.m. and 3:12 a.m. The police asked staff when Taylor would be able to leave the hospital to give a breath sample. The staff were unable to provide a definitive answer, and so an officer issued a blood sample demand to Taylor.[6] A doctor withdrew a second set of blood samples from Taylor at 4:53 a.m. and these samples were given to the police. On the following day the police applied for a warrant to seize the first five vials of blood in addition to the second set that they already possessed. The warrant was granted and the police took this blood from the hospital. The analysis of both sets of blood revealed that Taylor's blood alcohol level was above the legal limit at the time of the accident. The police used the samples as evidence against Taylor to charge him with impaired driving.[7]

Procedural History

The Alberta Court of Queen's Bench heard Taylor's trial in 2011.[8] The Crown conceded that the second set of blood samples were inadmissible because the police had failed to provide Taylor with an opportunity to consult counsel prior to demanding the second set of samples.[9] However, the Crown insisted that the first set of vials, taken 30 minutes after Taylor's arrival at the hospital, were admissible. The trial judge agreed, stating that there was no section 10(b) breach when staff took the first set. The judge stated that when an accused "is awaiting or receiving emergency medical treatment, there is no reasonable opportunity to provide private access to the accused to a telephone to implement his right to instruct counsel."[10] The Court admitted the first set of blood samples as evidence and convicted Taylor.

Taylor appealed the decision to the Alberta Court of Appeal. In April 2013, the Alberta Court of Appeal heard Taylor's case, where they set aside his conviction. The majority at the Court of Appeal found that the trial judge erred in concluding that there was no reasonable

opportunity to provide Taylor access to counsel prior to taking the first set of samples.[11] Phones were available at the hospital. Law enforcement admitted to forgetting to assist Taylor in fulfilling his section 10(b) rights, which rendered Taylor unable to "exercise a meaningful and informed choice as to whether he should or should not consent" to having the first samples taken.[12]

The Crown appealed the case to the Supreme Court.

Issue

The issue brought before the Supreme Court was whether Taylor's section 10(b) rights were violated during the detention process, therefore rendering the first set of blood samples inadmissible as evidence. More specifically, did the police comply with Taylor's section 10(b) right to speak with counsel "without delay?"[13]

Decision in Brief

The Supreme Court dismissed the Crown's appeal. It unanimously agreed with the majority of the Court of Appeal's conclusion that the police deprived Taylor of his section 10(b) *Charter* right to counsel throughout the detention process, and that the first set of blood samples were inadmissible as evidence.[14]

Analysis

The Application of Section 10(b)

Madam Justice Abella delivered the Supreme Court's reasons. She cited several previous cases that have helped to clarify the essence of section 10(b), whose purpose is to allow an arrested or detained individual to be informed of his or her rights and obligations under the law and to obtain advice on how to exercise those rights. The Supreme Court in *R v Manninen* reiterated that section 10(b) is "meant to assist detainees [to] regain their liberty, and guard against the risk of involuntary self-incrimination."[15] This ensures that someone who is detained, or "under control of the state" and in possible legal jeopardy, can make a free and knowledgeable choice to cooperate with law enforcement. In *R v Bartle*[16] and *R v Suberu*[17] the Supreme Court stressed that the need for this duty begins *immediately* at the time of arrest, and the police have a constitutional obligation to provide access to counsel "without delay."[18]

The Supreme Court also found that the Crown was unable to prove beyond a reasonable doubt that the police's delay in giving Taylor access to a phone was reasonable. Once at the hospital, 20 tominutes passed before staff took any blood. This was more than enough time for the police to ensure Taylor had access to a phone. At no time was Taylor under emergency care that would have rendered his consent impossible. In fact, one police officer conceded that he made a "mistake" and that he could have given Taylor access to a phone if he had remembered to do so. This indicates that no practical obstacle stood in the way of facilitating Taylor's section 10(b) rights.[19] Madam Justice Abella maintained that someone

who enters a hospital for medical treatment is not in a "*Charter*-free" zone: "Since most hospitals have phones, it is a question simply of whether the individual is in an emergency room. [It] is whether the Crown has demonstrated that…a private phone conversation is not reasonably feasible."[20] Taylor *could* have used a phone at any time during the process. He simply was not given the opportunity.

The Grant Test: A Constitutional Safeguard

In some circumstances, the Court may choose to admit evidence despite a section 10(b) breach. In other words, even if the police have breached an individual's right to counsel, the evidence that was acquired may be used by a court in determining guilt or innocence. Doing so involves determining whether to invoke *Charter* section 24(2), a provision that examines unconstitutionally obtained evidence and determines if excluding it could bring the administration of justice into disrepute. Also known as the *Grant* test, the section 24(2) analysis balances the "seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused…, and society's interest in the adjudication of the case on its merits."[21] The Court agreed that the police's conduct was serious and that it was a significant violation of Taylor's right to counsel.

The Supreme Court noted that the public has an interest in seeing the court admit the blood samples as evidence because drunk driving is a severe crime against the state. However, the Court ruled that police placed Taylor's medical interests in direct tension with his constitutional rights.[22] Taylor was in a legally vulnerable position when hospital staff took blood samples before he had the opportunity to consult with legal counsel. His health was not an emergency, and the police admitted that there were time and resources available to help Taylor realize his section 10(b) rights. They simply forgot to do so. The Supreme Court stressed that it could not accept this type of behaviour from police, therefore, it excluded the evidence:

> [In our] view, the seriousness of the *Charter* breach and the impact of the police conduct on Mr. Taylor's interests are such that the admission of the evidence would so impair public confidence in the administration of justice as to warrant the exclusion of the evidence.[23]

Significance of the Ruling

R v Taylor illustrates that access to counsel is a fundamental principle of Canada's justice system. Paying lip service to *Charter* rights is simply not adequate. Here, the Supreme Court maintained that the police could not assume that barriers to access existed. They were required to prove it. They also had an obligation to ensure that they assisted the accused in fulfilling his or her *Charter* section 10(b) rights, because it is often impossible for the accused to do so alone.

Yet the *Charter* has a built-in safeguard that allows evidence to be gathered and admitted despite a violation of an individual's *Charter* rights if doing so is in the best interests of justice. In some cases, the Supreme Court must admit evidence in order to achieve a just

result. This was not the case in *Taylor*. The Supreme Court believed that maintaining Canadians' confidence in the justice system outweighed the benefit of admitting the evidence and convicting Taylor for impaired driving.

R v Taylor illustrates the importance of upholding Charter values in the criminal justice system and, in the words of Madam Justice Abella, hospitals are not "*Charter*-free zones."[24] Indeed, the *Charter* applies everywhere and at all times for everyone, and the police must respect an accused's right to counsel or risk undermining the public's confidence in our justice system.

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[1] *R v Taylor*, 2014 SCC 50 (CanLII) < https://www.canlii.org/en/ca/Supreme Court/doc/2014/2014Supreme Court50/2014Supreme Court50.html>.

[2] *Supra* note 1 at para 20.

[3] *Ibid* at para 33.

[4] *Ibid* para 3.

[5] *Ibid* at para 6 and 7.

[6] *Ibid* at para 12.

[7] *Ibid* at para 18.

[8] *R v Taylor*, 2011 ABQB 543 (CanLII). < https://www.canlii.org/en/ab/abqb/doc/2011/2011abqb543/2011abqb543.html>.

[9] *Ibid* at para 16.

[10] *Ibid* at para 20.

[11] *R v Taylor*, 2013 ABCA 342 (CanLII), <http://canlii.ca/t/g0zds>.

[12] *Ibid* at para 19.

[13] *Taylor, supra* note 1 at para 20.

[14] *Ibid* at para 39.

[15] *Ibid* at para 21.

[16] *R v Bartle*, [1994] 3 SCR 173 (CanLII). < http://www.canlii.org/en/ca/Supreme Court/doc/1994/1994canlii64/1994canlii64.html>.

[17] *R v Suberu*, [2009] 2 SCR 460 (CanLII). _https://www.canlii.org/en/ca/Supreme Court/doc/2009/2009Supreme Court33/2009Supreme Court33.html.

[18] Taylor, *supra* note 1 at para 20.

[19] *Ibid* at para 29.

[20] *Ibid* at para 34

[21] *R v Grant*, [2009] 2 SCR 353, at para 71 (CanLII). < https://www.canlii.org/en/ca/Supreme Court/doc/2009/2009Supreme Court32/2009Supreme Court32.html>.

[22] *Taylor*, *supra* note 1 at para 40.

[23] *Ibid* at para 42.

[24] *Ibid* at para 34.

The *Charter*'s guarantee of Life, Liberty and Security of Person does not include a right to use Edmonton's Transit System

Introduction

Public transit is a service that a large segment of the population relies upon, particularly the poor, vulnerable or those who face physical or other challenges. It is often their only way to get around large cities like Edmonton, Alberta and to do what is necessary for their health, welfare and personal growth. Does a temporary ban to access transit property that then makes taking public transit impossible violate a person's *Charter*-guaranteed right to life, liberty and security of the person?[1]

This question divided the Alberta Court of Appeal in its 2014 ruling *R v SA*.[2] The Court ruled that SA's *Charter* section 7 right to liberty, or freedom of movement, was not engaged and therefore the ban on using public transit was constitutional. One justice however, dissented and said that the ban did affect SA's rights to liberty, and she would have ruled that the ban could not stand because it was not in accordance with the "principles of fundamental justice."[3]

Facts

SA was a youth at the time of the incident. Neither she nor her father owned a vehicle nor had access to one, so she regularly used the Edmonton Transit System (ETS). She was known to transit authorities because she had been involved in past altercations, assaults and other dangerous behaviors at ETS stations. After SA committed an assault in an ETS station in April 2008, a transit authority officer wrote her a notice under the *Trespass to Premises Act*,[4] banning her from city property for six months. Thus, she was not allowed to enter ETS stations and could not take public transportation. But she violated the ban numerous times, and in July 2008 she was given an offense ticket for trespassing in contravention of the notice banning her from the property.

Procedural History

SA's trial on the trespass charge was heard in Provincial Court in 2011. She contested the ticket, arguing that it violated her section 7 right to liberty and therefore that it and the *Trespass to Premises Act* were unconstitutional. The Provincial Court accepted her defense, ruling the ban restricted her freedom of movement. The Court then invalidated the ticket and acquitted SA of the charges. The Crown appealed the ruling to the Alberta Court of Queen's Bench, which allowed the appeal. The Court compared the ETS ban to a driving restriction and noted both had the same effect on a commuter – they would have to find alternate means to get around. Therefore, ETS had committed no section 7 violation. SA then appealed the decision to the Alberta Court of Appeal.

Issues

In rendering its judgment, the Court of Appeal considered the following:

1. Was the correct law challenged in the courts below?
2. Did the ban to ETS properties engage the appellant's Charter section 7 right to liberty, or have the potential to engage anyone else's?
3. If so, was the ban "in accordance with the principles of fundamental justice" so that it was not a section 7 violation?

Decision

The Court of Appeal's judgment was divided. The majority dismissed the appeal, finding there was no "right" to public transit. They held that the ban did not engage the appellant's section 7 rights. The majority stated that the ban did not unduly infringe SA's basic human dignity and choice. Therefore, there was no section 7 violation.

Justice Bielby dissented. She would have allowed the appeal and restored the Provincial Court's ruling. Since the municipal government ban on ETS restricted SA's movement, it affected her liberty rights. It was also not in accordance with the "principles of fundamental justice" because of the manner in which the ban was issued. Justice Bielby also stated that

the scope of the restriction was overbroad (it covered situations that it was not intended to cover).

Analysis

Correct Law

The majority opinion by Justices Côté and O'Ferrall began with a lengthy criticism of how the case had been litigated to that point. They noted that the legal foundation of the case was incorrect; it was the Edmonton Transit Bylaw not the *Trespass to Premises Act* that was the appropriate law to be considered. Even if the Act was unconstitutional, the bylaw, in combination with common carrier law, supported ETS's actions in banning a dangerous passenger from the premises. Therefore, had the case been litigated on this correct law, a section 7 defense could not have been presented.[5] This is because a carrier has a duty of care to ensure its passengers are safe. The majority rhetorically asked: "if dangerous people had a constitutional right to be on subway premises, how could a fellow-passenger injured or killed by them (or his survivors) have any right to sue the carrier for failure to eject those dangerous people?"[6]

In her dissenting opinion, Justice Bielby did not write on these matters.[7]

Engaging Section 7 rights

The majority found that SA's *Charter* section 7 rights to life, liberty and security of the person were not engaged by the ban to ETS property. The judgment said SA's argument that access to public transit is a right "trivializes" the rigid criteria the Supreme Court of Canada has set for a section 7 right.[8] According to those criteria, the ban did not affect something fundamental like SA's dignity, personal autonomy, health and safety, or privacy; "she was merely told temporarily not to come onto the subway (and buses)."[9] In coming to this decision, the majority disregarded the evidence that led Provincial Court Judge Dalton to determine that the ban restricted SA's fundamental section 7 rights to liberty. Judge Dalton had relied on the testimony of a youth worker about the ban's effect on the liberty of youth, but the majority noted that that person was not a trained social worker and therefore the worker's opinions "have no weight."[10] The majority also rejected the arguments of SA's counsel that poverty allowed her no other alternative than public transit. Instead the Court viewed travel by public transit as a choice, not a fundamental right; there was no evidence submitted as to why she could not purchase and use a second-hand bicycle with the savings of not buying transit tickets, or why she could not do her shopping closer to home.[11]

Justice Bielby dissented and noted that SA's section 7 right to liberty was engaged by the transit ban. The City, as intervener, conceded the point, and the Crown conceded that under section 7 "liberty can include freedom to make choices that are fundamental or inherently personal to the individual."[12] Justice Bielby relied on a Supreme Court of Canada case where it considered restrictions on freedom of movement as triggering a section 7 right. Since Edmonton is a city that is spread out and in a harsh climate, the mode of

transportation is fundamentally connected to the exercise of freedom of movement. Therefore, Justice Bielby wrote that since SA had no other access to transportation to go about her daily life, make fundamental personal decisions, and go to school or meet appointments, the law interfered with her ordinary right of movement. Therefore, she ruled that section 7 was engaged.[13]

Principles of Fundamental Justice

Because Justice Bielby wrote that the Act and trespass ticket impaired SA's liberty rights, she considered whether the restriction was in accordance with the principles of fundamental justice. If so, the law would be valid.

To examine the principles of fundamental justice, a court must examine the purpose of the legislation in question and ensure that it is not overbroad (doesn't cover situations it was not intended to cover) or that any government action taken in accordance with the legislation is in keeping with its purpose. On a plain reading of the *Trespass to Premises Act*, Justice Bielby noted the ban would prohibit entry to any city property like sidewalks and roads, not just transit stations, subways and buses.[14] Therefore she wrote that the Act was overbroad since it would keep SA or anyone else who was issued the ban in virtual house arrest.[15] She also noted the scope of the Act and its related ban to be disproportionate to what its purpose was. If the purpose of the ban was public safety, its purpose was not being served if involvement in criminal activity which did not endanger the public, attracted the ban.[16] As a result, she found that the ban was not in accordance with the principles of fundamental justice and therefore, unconstitutional.

Significance

R v SA outlines some of the limits to the Charter's section 7 guarantee of liberty. Liberty, as interpreted by the Alberta Court of Appeal, does not include the ability to choose one's mode of transportation, regardless of one's circumstances. So long as there is an alternative way to travel about the city in carrying out one's daily life, even if it is not one's preferred mode of transportation, the right to liberty has not been engaged. Therefore, bans to accessing public transit are constitutional.

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[1]*Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[2]*R v SA*, 2014 ABCA 191. <http://www.canlii.org/canlii-dynamic/en/ab/abca/doc/2014/2014abca191/2014abca191.html#_ftn3>

[3]Ibid.

[4]*Trespass to Premises Act*, RSA 2000, c T-7.

[5]*R v SA*, Supra note 2, at para 39-44.

[6]*Ibid*, at para 79.

[7]*Ibid*, at para 305.

[8]*Ibid*, at para 151.

[9]*Ibid*, at para 153.

[10]*Ibid*, at para 160.

[11]*Ibid*, at para 174 – 177.

[12]*Ibid*, at para 308.

[13]*Ibid*, at para 324-327.

[14]*Ibid*, at para 368-369.

[15]*Ibid*, at para 376.

[16]*Ibid*.

Freedom of Association: The Constitutional Limits of Union Rights

Introduction

As part of the fundamental freedoms in the *Canadian Charter of Rights and Freedoms*, section 2(d) guarantees Canadian people the freedom from state interference when they lawfully associate with one another.[1] But what 'associating' actually involves has been a tricky question for the Supreme Court of Canada (SCC) when faced with section 2(d) cases brought by private and public-sector labour unions.[2]

This article will trace the SCC's freedom of association judgments regarding a union's right to associate, to collectively bargain, and to strike since the *Charter* was entrenched in Canada's Constitution.[3] It will demonstrate that the Supreme Court's earliest judgments

interpreted freedom of association very narrowly and only protected the formation and maintenance of the association itself. In the 2000s, the SCC started to recognize that collective activities such as collective bargaining deserved protection from state interference. This recognition has expanded the scope of the freedom of association to include the right to strike.

Overview

Unions and those who support organized labour argue that what is protected in section 2(d) of the *Charter* is not only a right to associate but also the right to collective associational activity like the right to bargain with an employer and to withdraw labour services by striking. Because these activities are already recognized in labour statutes, organized labour supporters believe the Court should draw upon them in interpreting the freedom of association in section 2(d) of the *Charter*.[4]

Early Supreme Court rulings gave unions only narrow protections. In its first rulings in 1987, the SCC denied a collective aspect to section 2(d), finding associational activities, like collective bargaining and striking, were not guaranteed protection from government interference because these were not activities that an individual could do.[5]

Some twenty years after this ruling, the SCC reversed its stand on collective rights as it related to collective bargaining in *BC Health Services*.[6] By considering labour history, international law and *Charter* values, it found that section 2(d) must protect unionized workers' rights to collective bargaining. But it interpreted collective bargaining as only including the ability to bring collective representations to the employer. It did not include a guarantee to a particular bargaining model or outcome, for instance.

In *BC Health Services* the Supreme Court declined to comment on whether or how this new interpretation altered its previous ruling that freedom of association does not protect the right to strike. However, in 2015, the SCC ruled that section 2(d) collective bargaining rights applied to the right to strike.

Historical and Political Context

Foundations of Unionism in Canada

Although the history of unions for skilled workers dates back to the 1790s, unionism really took root in Canada during the turbulent 1910s, 1920s and 1930s. It was legal for workers in the private sector to join a union, but unions themselves had few legal protections.[7] Radical ideology and hard times meant that industrial workers banded together to fight for better working conditions and wages.[8] Often such organizing was with an eye to a coming worker's revolution. Workers found support by joining new national and international unions. Union membership grew during the First World War when employment was high and then declined again during the harsh years of the depression.

Because there was no duty in law for employers to recognize these new unions, hostile

employers refused to meet with union workers. Since workers were frustrated by their unions' lack of recognition and inability to negotiate wages and conditions for them, they often walked off the job to pressure employers to bargain with the unions. Striking threatened employers' productivity and profits and was often the only way to collectively advance workplace goals. However, it only worked well during times of high employment, like the Second World War, when replacement workers were scarce.

Although provincial governments had passed piecemeal and toothless legislation about union recognition, the federal government finally responded to workers' demands for freedom of association and for union recognition during the 1940s when uninterrupted work was most critical for the war effort.[9] At the time 1 in 3 workers were on strike.[10] Following the model of the *Wagner Act* that had been passed in the United States a decade before, PC 1003, part of the *War Measures Act*,[11] finally legislated private-sector employers to recognize and bargain collective agreements with trade unions. PC 1003 also included an arbitration mechanism and a prohibition on strike activity during the life of a collective agreement. When the war ended the federal government dismantled PC 1003. During wartime, the federal government had assumed control over labour relations for peace, order and good government under section 91 of the Constitution even though in normal times, labour relations were part of the province's jurisdiction under 92(13): property and civil rights.[12] Now that the power had been returned to the provinces, the provinces passed similar legislation to PC 1003 mandating union recognition and establishing labour relations regulations and adjudicative bodies.[13]

Public Sector Unions in the Immediate Post-War Era

In the post-war era (1945-1975), often called 'the post-war compromise' by scholars, high employment levels meant unions were able to build on the legal gains of the 1940s in a way that was "consistent with their employer's profitability."[14] With high wages and a stable economy, union leadership largely lost its leftist radicalism and accepted capitalism.[15] Union density in these years grew because of the growth in white-collar public sector jobs that began to be unionized.

Part of the post-war compromise involved large investments in public health, education, and other social programs. This 'social safety net' lessened disparities in wealth and equality. It also meant an increase in the size of governments and an increase in the number of government jobs. When this sector grew in size and power, its workers wanted the same rights to association and bargaining that private-sector workers had. Quebec was the first government to extend broad powers to its workers to collectively bargain and strike in 1965. After postal workers went on a wildcat strike, the federal government responded with the *Public Service Staff Relations Act* in 1967.[16] This Act allowed most federal government workers to unionize, collectively bargain and to strike or arbitrate to resolve workplace disputes. Similar legislation in the other provinces soon followed in the 1970s, allowing civil servants, teachers, nurses, cultural workers and others to turn their professional organizations into full-fledged unions.

Globalization, Neoliberalism and the Assault on Unionized Workers

Beginning in the late 1970s and early 1980s, business and political leaders turned their backs on the idea of large government and its related social safety net. In a new global world of capital, business looked for more profit by either 'reorganizing' the shop floor to reduce the number of workers and drive down wages, or move manufacturing offshore. Both gutted the manufacturing industries in Canada. As a result, private sector union density declined as well as the relative number of those unions. At the same time, neoliberal[17] politicians tried to reduce, or in some cases, eliminate social services to get rid of debt and channel any savings into tax cuts for business. This had a significant impact on public sector workers when federal and provincial governments cut the size of government departments and privatized government services. Labour historian Bryan Palmer describes the period as the public sector being "hammered by the state and drained of its combativeness."[18]

So, just as the *Charter* was being negotiated, the face of unionization changed. The largest unions now represented the public sector, whose members also made up the majority of the unionized workforce. They, like private sector workers, were battling against job cuts and government policy that tried to roll back the many benefits unionization brought.

Rights in Association: Early Interpretations

Because they were fighting to hold onto post-war gains, labour organizations were silent in the public committee phase of the *Charter* negotiations in 1981. Only the British Columbia Federation of Labour provided a submission saying that freedom of association should include protections for the right of trade unions to organize and strike. Silence from certified unions and the Canadian Labour Congress meant that organized labour missed an opportunity to influence the wording and scope of section 2(d).[19] After the *Charter's* adoption, it was left to the courts to interpret the scope of protections in freedom of association. In the first section 2(d) cases, the Supreme Court's rulings gave trade unions very limited protections.

The Labour Trilogy and the Alberta Reference

The Supreme Court was first faced with defining freedom of association in a trilogy of cases that challenged provincial legislation prohibiting striking for public sector workers and mandating compulsory arbitration in cases of bargaining impasses.[20] The SCC's reasoning was discussed most fully in what is known as the *Alberta Reference* case.[21] This particular case resulted from a reference question where the Alberta government sought advice as to whether several pieces of legislation prohibiting striking and imposing arbitration during a negotiation impasse were constitutional. The majority of the Court ruled that section 2(d) did not protect a right to strike because the article was there to protect individual, not collective, interests. While the majority recognized that "freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes,"[22] the right did not exist outside of what rights individuals are guaranteed. Therefore, this case established that:

- There is a protected right for an individual to join, belong to, and maintain

a lawful association, whether it be a trade union or otherwise;
- Only activities that an individual could lawfully do would be protected; and
- Since individuals could not themselves engage in trade union activities like striking and collective bargaining, these were not protected under section 2(d).

The majority had little problem ruling that collective bargaining and striking did not fall under section 2(d)'s protection because it said these activities were created by modern law and were not a long-standing fundamental freedom.

Throughout the 1990s the SCC followed its initial narrow interpretation, refining it in *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* by clarifying that, even if an association exists solely for a particular activity, the activity still will not be protected by section 2(d) because only the *right* not the reason for existence will be protected.[23]

The Dissent in the *Alberta Reference*

The *Alberta Reference* and the decisions that followed it were a blow to organized labour. Unions could find some comfort in the vigorous dissenting opinion in *Alberta Reference*, however, which gained acceptance in succeeding judgments. In contrast to the individualistic interpretation the majority of the Court took, Chief Justice Dickson in dissent, used international law and Canada's international obligations to argue that section 2(d) also protected collective rights.

Chief Justice Dickson listed the number of international agreements that Canada was a party to that explicitly or implicitly protected associational activities. He argued that "the *Charter* should generally be presumed to provide protection at least as great as afforded by similar provisions in international human rights documents that Canada has ratified."[24] As a practical matter, he also found that striking was part and parcel of collective bargaining in the labour relation system in Canada. Workers could not bring the same amount of pressure to employers individually as they could collectively. Striking had no individual parallel, so "it is precisely the individual's interest in joining and acting with others to maximize his or her potential that is protected by s 2(d) of the *Charter*."[25]

Recognition of Collective Bargaining in section 2(d)

In the 2000's, the ideas from Chief Justice Dickson's dissent began to influence the Court's rulings, widening its narrow interpretation of section 2(d).

Dunmore

In *Dunmore v Ontario (Attorney General)*, the United Food and Commercial Workers on behalf of farm workers challenged their exclusion from Ontario's labour legislation, which

made union organization more difficult.[26] The Supreme Court recognized that in certain circumstances government needed to take action to ensure workers could exercise their section 2(d) freedoms to associate. Therefore, it struck down the limiting legislation. In this decision, the Court drew on a similar approach to the dissent in *Alberta Reference* by recognizing it could not mark such a clear division between what actions an individual can lawfully undertake and what the collective can lawfully undertake. For an association to have any meaning, and for individuals to reach their potential through it, "the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level."[27] Therefore the Court had to recognize "certain collective activities" were worthy of protection under section 2(d).

In this way the Court moved away from the restrictive 'individual' interpretation of the freedom of association it had established in the labour trilogy. But it would only go so far. It decided activities like creating and maintaining a union in the face of prohibitive legislation fell under the protection of section 2(d), but, holding firm to its previous decisions, it said not all activities were protected. It explicitly ruled out collective bargaining and the right to strike. In summary the Court decided that:

- Freedom of association has to extend to some activities that are collective because an individual cannot perform them alone;
- It does not protect collective bargaining and striking; and
- Governments must not interfere with groups' abilities to associate.[28]

BC Health Services

Now that the Supreme Court's initial interpretation that association was only defined in light of individual actions had changed, context and labour history became important in its next major decision on section 2(d). In *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia (BC Health Services)* the SCC scrapped the reasoning of the labour trilogy in reference to collective bargaining, finding that it was protected from government interference under section 2(d).[29]

This case concerned legislation passed in British Columbia that stripped healthcare workers' collective agreement of key protections related to job security.[30] The Hospital Employees' Union challenged the law as a violation of freedom of association, and the SCC agreed. On the issue of collective bargaining, the Court went further than it had in *Dunmore* by totally and explicitly overturning its earlier interpretations of section 2(d). Instead, building on Chief Justice Dickson's dissent in the *Alberta Reference*, it interpreted freedom of association according to international law, *Charter* values, and labour history.

Since the collective bargaining activities of unions were protected in the International Labour Organization's convention 87, of which Canada was a signatory, the Court said domestic protections should at least extend that far. The Court also found workers' rights to

bargain collectively and with good faith enhanced their dignity and autonomy as individuals, and allowed them workplace democracy and **rule of law**. These values are inherent in the *Charter*.[31] And for the first time, the Court relied on the work of critical labour historians in rendering its judgment.[32] Using their research, the Court found workers' rights to associate for the purposes of collective bargaining were fundamental and longstanding. Collective bargaining existed long before modern statutes that recognized these activities and it existed long before the *Charter*. Rather, the *Charter* should be seen as "the culmination of a historical movement towards the recognition of a procedural right to collective bargaining."[33] Since the reasoning in the labour trilogy disregarded this history, the Court felt justified in overturning the basis for those decisions. It specifically did not say what impact this reversal would have on the right to strike.

For the Hospital Employees' Union, the SCC's decision to strike down part of the law as unconstitutional was a "huge victory."[34] But, what the Court recognized was still a limited right to collective bargaining. It recognized:

- Freedom of association included a right to a good faith procedure or process of collective bargaining, and protections against *substantial government interference* to this right;
- But this protection does not extend to a particular model of labour relations, nor a specific bargaining method or even an outcome to bargaining.[35]

It would be up to a court to determine what substantial government interference entailed based on the context and facts of the case. It therefore would be possible for a union's freedom of association right to be interfered with, so long as it was considered a moderate or minor interference. This may include a shortened negotiating timeline or an imposed mandate. Or if a government attempted a good faith negotiation and it went nowhere, a government would likely not be in breach of section 2(d) if it resorted to legislating collective agreement terms to conclude bargaining.[36]

A Step back in Collective Bargaining recognition?

Fraser

Despite the Supreme Court of Canada's recognition of collective bargaining as protected under section 2(d) in *BC Health Services*, it left unresolved what a duty to good faith bargaining entailed. In 2011 the SCC released its decision in *Attorney General of Ontario v Fraser (Fraser)*.[37] Many felt this ruling represented a retreat from the SCC's landmark decision in *BC Health Services* since it created "ambiguity in respect of the nature and scope of protection for collective bargaining."[38]

This case resulted from the fall-out of *Dunmore* where Ontario's labour legislation was struck down. Ontario brought in new labour legislation, geared towards providing farm workers their own labour relations regime. The farm workers were still excluded from

Ontario's *Labour Relations Code*, so the new legislation did not give them the same protections for their associational and collective bargaining aspirations as other workers received.[39] The United Food and Commercial Workers challenged the constitutionality of this new legislation, arguing that it did not adequately protect farm worker's section 2(d) rights. The trial court ruled in favour of the government, finding that its legislation was constitutional because it complied with the ruling in *Dunmore*. The Court of Appeal, taking guidance from the just-released *BC Health Services*, ruled in favour of the union since the legislation did not allow for meaningful good faith collective bargaining, a constitutionally guaranteed freedom.[40] The SCC overturned the Court of Appeal's decision when the Ontario government appealed it.

At the Supreme Court, the respondent farm workers and the UFCW argued that the *BC Health Services* ruling meant the government must provide statutory duties for employers to recognize bargaining agents and to bargain in good faith. The government, they argued, was constitutionally required to provide a statutory mechanism to resolve bargaining impasse and to interpret collective agreements.[41] The Court then had to answer whether section 2(d) required Ontario to provide a particular form of bargaining rights to farm workers in order to secure their associational rights.

In four separate decisions, the Court ruled 8-1 that the contested legislation was constitutional.[42] But, the reasoning of those concurring in the result varied. Justices Rothstein and Charron wrote a forceful attack on *BC Health Services*, arguing that case was wrongly decided, because section 2(d) protects *individual* freedom to come together and advance a common cause. It does not create positive obligations on others. Because they believed it appropriate to overrule *BC Health Services*, the arguments of the respondents, which were based on that case, would have no basis.[43]

Labour law scholars note that this dissent was so vigorous it forced the majority opinion of Chief Justice McLachlin, and Justices LeBel, Binnie, Fish and Cromwell into a defensive position.[44] While the majority stood by the reasoning in *BC Health Services*, the Court narrowed its interpretation regarding when the process of collective bargaining warranted *Charter* protection, making it more restrictive. The Court determined that, if a law or government action has the effect of making it *impossible* for workers to act collectively in making collective bargaining representations to an employer, only then would the section 2(d) protections be engaged because without the "derivative right" to collective bargain, freedom of association would be meaningless.[45]

In this case, because the legislation did not make it impossible for workers to collectively engage in good faith negotiations with the employer, the SCC found it to be constitutional. Legal scholars, labour lawyers and organized labour were left puzzling about what to make of these divided judgments just a few years after the SCC reached unanimity in *BC Health Services*.[46] This is particularly so because of Justices Rothstein and Charron's apparent desire to return to the interpretation of the labour trilogy. Even the majority opinion appears to have slowed or even stopped the direction the SCC was going in recognizing the importance collective bargaining and striking has to freedom of association and its

connection to other *Charter* values. These scholars hope the Court will reaffirm its contextual *BC Health Services* reasoning at the next opportunity

The Right to Strike: *Saskatchewan Federation of Labour*

Unions resort to striking when collective bargaining breaks down. Striking and collective bargaining are intertwined processes aimed at pushing for workplace gains. Like collective bargaining, Canadian labour history shows that the right to strike has had longevity in labour relations. The interpretive framework set by *BC Health Services* also highlights the importance of international law. The recognition of collective bargaining in that case came about partly because the International Labour Organization's convention 87 gave protection to the activity.

The Supreme Court previously rejected the argument that striking should be given constitutional protection. However, in 2015, the SCC recognized the constitutional right to strike in *Saskatchewan Federation of Labour v Saskatchewan*. The case considered legislation like Saskatchewan's *Public Service Essential Services Act* that restricted strike activity for public sector workers whom the government deemed to be essential.[47] But the legislation included no independent dispute resolution mechanism to interpret what positions were essential or to settle a negotiation impasse. The Saskatchewan Federation of Labour challenged the law's effect in denying union members the freedom to collectively withdraw their labour.

In the lower court, Saskatchewan Queen's Bench Justice Denis Ball took a cue from *BC Health Services* and interpreted section 2(d) according to labour history and international obligations. He ruled that the right to strike was part of a union's associational activity 'interdependent' to organizing and collective bargaining that are protected under section 2(d).[48] The "reality of a potential work stoppage," whether through strike or employer lock-out, is what drives both parties to come to the bargaining table in good faith.[49] Therefore, the right to strike is a protected associational activity. His interpretation of international law supported this decision since interpretations of ILO convention 87 have included the right to strike as a protected associational activity.

Without any clear guidance on the issue from the SCC, his decision was in keeping with the SCC's retreat from the labour trilogy and its rulings since then. He had to address the decision in *Fraser* but found it is not "in any way incompatible with recognition of a right to strike as a fundamental freedom under section 2(d)."[50]

The province appealed the decision to the Saskatchewan Court of Appeal where the Court overturned Justice Ball's ruling.[51] The Saskatchewan Court of Appeal decided it had to follow the precedent on striking set in the labour trilogy, even if the Supreme Court's more recent decisions on section 2(d) appeared to upset the logic of that decision.[52] Therefore, the Court of Appeal ruled that there is no *Charter*-protected guarantee of a right to strike. Perhaps anticipating an appeal by the Saskatchewan Federation of Labour to the SCC, the court laid out two opposing interpretations. It contemplated that "strike activity might be seen as being, in effect, an aspect or a dimension of collective bargaining and, more

particularly, as being a mechanism for giving employees the economic muscle necessary to make collective bargaining meaningful."[53] On the other hand, striking could also be "seen as conceptually independent of collective bargaining" and therefore should be analyzed on its own terms.[54] The Saskatchewan Federation of Labour appealed the decision to the SCC.

Conclusion: The Constitutional Right to Strike

Abella J, writing for the SCC majority, agreed with the trial judge and overturned the Court of Appeal's judgment. Through an analysis of labour history, evolving SCC jurisprudence, and Canada's international human rights obligations, the Court found striking to be "an indispensable component" of collective bargaining that deserves "constitutional benediction."[55] The Saskatchewan legislation denied the right to strike for a number of public employees, and because it provided no alternatives, was deemed to breach s 2(d) of the *Charter*. For collective bargaining to be "meaningful," the Court reasoned, there must be a right to strike.[56]

The legal test for determining if curbing the right to strike breaches the Charter is the same as other collective bargaining rights: "whether the interference with the right to strike… amounts to a substantial interference with collective bargaining."[57] The Court found that the *Public Service Essential Services Act* substantially interfered with collective bargaining rights by denying the right to strike and that it could not be justified under s 1 of the *Charter*. However, it is important to note that in dissent Rothstein and Wagner JJ disagreed that s 2(d) protected the right to strike.

With the SCC establishing the constitutional right to strike, s 2(d) jurisprudence has clearly evolved since the adoption of the *Charter.* From the Labour Trilogy and the *Alberta Reference,* where unions were granted only minor s 2(d) rights, the Court has expanded collective bargaining rights. According to Abella J, "the arc bends increasingly towards workplace justice."[58] Thus, the judicial interpretation of s 2(d) has changed considerably in the lifetime of the *Charter*; this jurisprudence will continue to evolve as the nature of work and labour changes.

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[1] *Canadian Charter of Rights and Freedoms*. Part I of the Constitution Act, 1982, being Schedule B of the Canadian Act 1982 (UK), 1982, c 11, s 33.

[2] Because the *Charter*, as set out in section 32, only applies to government action or government legislation, public sector unions whose employers are government bring the most 2(d) challenges. Private sector unions can only bring challenges when government legislation limits their 2(d) rights. Although every Canadian is guaranteed the freedom to associate, there is little case law from other types of associations.

[3] Many of the cases discussed in this article also include section 15, equality arguments. This aspect will not be addressed, as it goes beyond the scope of this article.

[4] Paul JJ Cavalluzzo & Adrienne Telford, “Freedom of Association: How Fundamental is the Freedom? Section 2(d)” in Ryder Gilliland, ed, *The Charter at Thirty* (Toronto: Thomson Reuters, 2012) 33 at 72.

[5] *Reference re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 (SCC) (Alberta Reference) ; *PSAC v Canada*, 1987 CanLII 89 (SCC); *RWDSU v Saskatchewan*, 1987 CanLII 90.

[6] Health Service*s and Support: Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 [BC Health Services].

[7] *The Trade Union Act*, SC 1872, c 30.

[8] See eg Craig Heron, *The Canadian Labour Movement: A Short History* (Toronto: James Lorimer, 1996); Bryan Palmer, *Working Class Experience: The Rise and Reconstitution of Canadian Labour, 1800-1980* (Toronto: Butterworths, 1983).

[9] Donald D Carter, Geoffrey England, Brian Etherington & Giles Trudeau, *Labour Law in Canada*, 5th ed (Devinter: Kluwer; Markham: Butterworths, 2002) at 54.

[10] *Ibid*.

[11] *Wartime Labour Relations Regulations*, PC 1003, (1944) C Gaz II.

[12] *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

[13] *Supra* note 9 at 54.

[14] Donald Swartz and Rosemary Warskett, “Canadian Labour and the Crisis of Solidarity” in Stephanie Ross & Larry Savage, eds, *Rethinking the Politics of Labour in Canada* (Halifax & Winnipeg: Fernwood Publishing, 2012) 18 at 24.

[15] Thom Workman, *If You’re in My Way, I’m Walking: The Assault on Working People Since 1970*. (Halifax & Winnipeg: Fernwood Publishing, 2009) at 14.

[16] *Public Service Staff Relations Act*, SC 2003, c 22 s 2.

[17] Neoliberalism can be defined as a wish to return to classic liberal economic ideas of the nineteenth century where the free market reigned unrestrained by state social services. Supra note 15 at 21. This would necessarily involve a rebalance of class interests. Some scholars understand it as class warfare. Tim Fowler, "From Crisis to Austerity: An Introduction” in Tim Fowler, ed, *From Crisis to Austerity: Neoliberalism, Organized Labour, and the Canadian State*. (Ottawa: Red Quill Books, 2013) 7 at 13.

[18] Bryan Palmer, “Canadian Labour: Past, Present, Future.” (2014) 48 Canadian Dimensions.

[19] Stephanie Lee Hudson, *Freedom of Association in Canada: The Dilemma for Trade*

Unions in a Liberal Society (MA Thesis, University of British Columbia Political Science, 1988) at 7 [unpublished].

[20] *Supra* note 5.

[21] *Reference re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 (SCC) (Alberta Reference).

[22] *Ibid* at para 22.

[23] *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* 1990 CanLII 72 (SCC).

[24] *Supra* note 21 at para 59.

[25] *Ibid* at para 98.

[26] *Dunmore v Ontario (Attorney General)*, 2001 SCC 94.

[27] *Ibid* at para 1.

[28] *Ibid* at para 29.

[29] *BC Health Services, supra* note 6.

[30] *Health and Social Services Delivery Improvement Act*, SBC 2002, c 2.

[31] *BC Health Services, supra* note 6 at para 81.

[32] Eric Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008) 61 Labour/Le Travail 151 at 151.

[33] *BC Health Services, supra* note 6 at para 68. Emphasis added.

[34] "Big Win for Unions as Ruling says Bargaining Protected" CBC News (June 8, 2007) online.

[35] *BC Health Services, supra* note 6 at para 91.

[36] Tucker, *supra* note 31 at 173.

[37] *Ontario (Attorney General) v Fraser,* 2011 SCC 20 [Fraser].

[38] Cavalluzo & Telford supra note 4 at 72.

[39] *Agricultural Employees Protection Act*, SO 2002, c 16.

[40] *Fraser v Ontario (AG)*, 2008 ONCA 760 <http://www.canlii.org/en/on/onca/doc/2008/2008onca760/2008onca760.html?searchUrlHash=AAAAAAAAAAEAFzIwMDYgQ2FuTElJIDEyMSAoT04gU0MpAAAAAQA1L2VuL29uL29uc2

MvZG9jLzIwMDYvMjAwNmNhbmxpaTEyMS8yMDA2Y2FubGlpMTIxLmh0bWwB>

[41] *Ibid* at para 7.

[42] Three separate decisions concur in the result: the majority decision was written by Chief Justice McLachlin and Justice LeBel (with Justices Binnie, Fish and Cromwell concurring), one was written by Justice Deschamps, and one was written by Justice Rothstein (with Justice Charron concurring). The dissenting opinion was written by Justice Abella who, on the precedent of BC Health Services, would have found the Ontario legislation unconstitutional in its violation of the farm workers' section 2(d) rights.

[43] *Supra* note 40 at para 128.

[44] Cavalluzzo & Telford supra note 4 at 72.

[45] *Ibid* at para 46.

[46] See eg, Fay Faraday, Judy Fudge & Eric Tucker, eds. *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012).

[47] *Public Service Essential Services Act*, SS 2008, c P-42.2.

[48] *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62 at para 60.

[49] *Ibid* para 92.

[50] *Ibid* para 91.

[51] *Supra* note 44.

[52] *Ibid* at para 51.

[53] *Ibid* at para 52.

[54] *Ibid* at para 53.

[55] *Saskatchewan Federation of Labour v Saskatchewan,* 2015 SCC 4 at para 3.

[56] *Ibid* at para 71.

[57] *Ibid* at para 78.

Ibid at para 1.

Reference re *Supreme Court Act*: Defining Appointments to Canada's Highest Court

Introduction

On March 21, 2014, the Supreme Court of Canada (SCC) released *Reference Re Supreme Court* (*Supreme Court Reference*),[1] a decision about who is eligible to be appointed to the three Supreme Court seats reserved for Quebec judges or lawyers. The question arose when the federal government's appointment of Justice Marc Nadon to a vacant seat at the Supreme Court was constitutionally challenged. At the time of his appointment, Justice Nadon was not practicing law in Quebec as a lawyer or judge. Rather, he was a justice of the Federal Court of Appeal which is a Federal court and therefore, he was not considered a member of the Quebec bar. To determine if his appointment was constitutional, the Supreme Court examined the wording of sections 5 and 6 of the *Supreme Court Act* that sets out the qualifications for Supreme Court judges.

But the *Supreme Court Reference* accomplished more than providing an answer to the constitutionality of a particular appointment of one judicial candidate. It helped define how changes to the composition of the Supreme Court can be made. The answers provided by the Supreme Court to the questions posed clarified its constitutional status and reaffirmed that its composition, including the eligibility of justices for appointment, can only be achieved through the amending formula.

Facts

Justice Marc Nadon served as a justice in the Federal Courts for over twenty years. Admitted to the Barreau de Quebec (Quebec Bar) in 1974, he practiced law in both Quebec and England until his appointment to the Canadian Federal Court Trial Division in 1993. When Justice Morris Fish retired from the Supreme Court in August 2013, the Conservative government chose Justice Nadon to replace him, and he assumed his new position on October 7, 2013.[2]

That day, constitutional lawyer Rocco Galati officially challenged Justice Nadon's appointment at the Federal Court.[3] He argued that Nadon was neither a member of one of the superior courts of Quebec nor a current member of the Bar of Quebec as required by the *Supreme Court Act* and that his appointment was therefore unconstitutional. The Government of Quebec took a similar position.[4] In response to the controversy, Justice Nadon stated that he would not hear cases until the Supreme Court decided on the constitutionality of his appointment.[5]

To remedy the situation, Parliament amended the *Supreme Court Act* in the *Economic Action Plan 2013 Act No. 2* so that the requirement that those eligible for appointment be existing members of the Bar was expanded to include former members of the Bar as well as current ones.[6] Justice Nadon's appointment could then be considered constitutional. The government argued that this was the "most expeditious and most efficient way … to guarantee that federal court judges can be considered in the process of filling upcoming Supreme Court vacancies."[7] Challengers Galati and the Quebec government, however, opposed the amendments, stating that the Supreme Court is part of Canada's constitutional framework and eligibility requirements cannot be amended by the government acting alone.[8]The federal government then referred the case to the Supreme Court as a reference question for clarification of both the Nadon appointment and Supreme Court appointments in general.

Issues

The issues examined by the Supreme Court were as follows:

1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?

2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2*?[9]

The Decision in Brief

Six of the seven members of the Supreme Court responded in the negative to question 1: The *Supreme Court Act* requires that the three Quebec judges chosen must either be currently sitting on the Court of Appeal or Superior Court of Quebec, or have been members of the Barreau du Québec (Quebec Bar) for at least 10 years. The seventh member, Justice Moldaver, dissented.

The Court answered Question 2 in the affirmative, but only in part. It ruled that the government can make changes pertaining to the maintenance of the Courts, but it cannot enact legislation that would fundamentally change the Supreme Court or its structure, as it did in clause 472 of the *Economic Action Plan 2013 Act*.

Overall, the majority of the Court ruled that to be eligible for appointment to the Supreme Court, an individual *must* be a current member of the Quebec bar. The only way this eligibility criterion can be changed is through constitutional amendment.

Analysis

Who from Quebec is Eligible for Supreme Court Appointment?

Six of the seven members of the Supreme Court agreed that Nadon, a justice of the Federal Court, was not eligible for appointment to the Supreme Court even though he had been a past member of the Quebec bar. Section 6 of the *Supreme Court Act* states that "[a]t least three of the judges [of the Supreme Court of Canada] shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province."[10]

The Court examined the plain, textual meaning of section 6, that judges be selected "from among" members of the Quebec bar (implying "current" members). They believed this interpretation was consistent with the intention of the drafters of section 6 which was to preserve and protect Quebec's civil law code.[11]Having civil law experts on the Supreme Court ensures that Quebec's legal traditions will be preserved and, in turn, enhances Quebecers' confidence in the Supreme Court.[12]

The Court also examined the wording of section 5 of the *Supreme Court Act*. It explains who among all of Canada's judges may be appointed to the Supreme Court: "Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province."[13] Section 6 discusses the qualification of appointees from Quebec. "At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province if, at any time, they were an advocate of at least 10 years standing at the bar of that Province."[14] The Court concluded that while sections 5 and 6 are linked and should be read together, the wording of section 6, limiting the appointments of Quebec judges, is more important to consider than the wording in section 5. Those eligible for appointment therefore must be current members of the Bar.[15]

Justice Moldaver, however, disagreed, ruling that judges are eligible for appointment if they were a member of the Quebec bar for 10 years at *any* time in their legal career. He also argued that sections 5 and 6 are inextricably linked, which affects the way in which they are read. He stated that reading section 6 without section 5 –which is the general appointment process - is absurd.[16] Choosing to consider section 6 (the Quebec qualifications) over section 5 could result in a "newly-minted member of one day's standing at the Quebec bar [being] eligible for a Quebec seat on this Court," an undesirable result.[17] In Justice Moldaver's opinion, Justice Nadon's appointment could stand because both current *and former* members of the Quebec bar of at least 10 years standing, and current *and former* judges of the Quebec superior courts, are eligible for appointment to a Supreme Court seat reserved for Quebec.[18]

Can Parliament Enact Legislation that Modifies the Supreme Court of Canada?

The majority of the Supreme Court ruled that Parliament cannot unilaterally change the

Court's composition or essential features. By legislating changes to the Supreme Court Act via clauses 471 and 472 in the *Economic Action Plan 2013 Act, No. 2*, the Court ruled that Parliament had indeed changed the Court's composition or essential features:

1. Clause 471 stated that a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province;[19] and

2. Clause 472 modified the *Supreme Court Act* so that a candidate does not need to be an active 10-year member of the Quebec bar to be considered for a SCC appointment.[20]

Clause 472 was problematic for the Court. At issue was whether the *Supreme Court Act* was constitutionally protected. The government argued that the Act is not part of section 52 of the *Constitution Act, 1982*, a clause outlining which documents are constitutionally protected. Therefore, the Act is not "entrenched," or protected, by the Constitution and Parliament can make changes to the Court outside of the amending formula unless or until the Act becomes entrenched.[21]

The Court disagreed with the government's interpretation stating that any substantive change to the Supreme Court's eligibility requirements as stated in the *Supreme Court Act* amends the Constitution and therefore triggers the Constitution's amending formula. In other words, any changes to be made to the eligibility requirements to the Supreme Court require use of the amending formula because eligibility is constitutional. Therefore, the new substantive addition to the *Supreme Court Act*, section 6.1 (originally clause 472 of the *Economic Action Plan 2013 Act, No. 2*) is unconstitutional – it was a change made unilaterally by Parliament and did not include consent of the provinces as is required for constitutional change. In this decision, the Court declared for the first time that, at a minimum, sections 5 and 6 of the *Supreme Court Act* are part of the Constitution.[22]

Notably, Justice Moldaver did not answer question 2 because he ruled that no change to the *Supreme Court Act* was necessary to appoint Nadon, and so the question was moot: in his opinion, the second question did nothing more than restate the law as it exists.[23]

Significance of the Ruling

The Court's opinion in the *Supreme Court Reference* denied Justice Marc Nadon's candidacy for the vacant Supreme Court seat. He returned to his former position atthe Federal Court of Appeal. But what does the ruling mean in the broader constitutional context? The *Supreme Court Reference* clarifies the constitutionally-protected interests of two entities, the Supreme Court of Canada and the provinces and territories.

First, it confirmed that substantial changes to the structure of the Supreme Court are constitutionally protected and can only be changed using the Constitution's amending formula. This means the independence of the Supreme Court is protected from a federal government that may try to change the Court to suit its political interests, and that the majority of Canada's provinces must consent to any substantive changes.

Second, the decision upholds an important component of federalism by protecting the fundamental role of the provinces and territories in changing aspects of the Constitution such as eligibility for appointment to the Supreme Court. Legal scholar Ian Peach suggests that the *Supreme Court Reference* will come to be known as "much more than a simple decision about the validity of a particular judicial appointment… [It is an] important milestone in the evolution of our constitutional jurisprudence."[24]

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[1] *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] SCJ No 21 (CanLII) . <https://www.canlii.org/en/ca/scc/doc/2014/2014scc21/2014scc21.html?searchUrlHash=AAAAAQAXc3VwcmVtZSBjb3VydCByZWZlcmVuY2UAAAAAAQ>.

[2] Aaron Wherry, "The Hot Mess of the Nadon Appointment" *Macleans* (21 March 2014), online: Rogers Digital Media.

[3] *Ibid*.

[4] *Ibid*.

[5] *Ibid*.

[6] *Supreme Court Reference*, *supra* note 1 at para 11.

[7] *House of Commons Debates (Hansard)*, 41st Parl, 2nd Sess, No 6 (21 November 2013) at 0850 (Peter McKay).

[8] "The Nadon Reference: 16 Possible Outcomes," Administrative Law Matters (17 March 2014), online: < http://administrativelawmatters.blogspot.ca/2014/03/the-nadon-reference-16-possible-outcomes.html.>.

[9] *Supreme Court Reference*, *supra* note 1 at para 7.

[10] *Supreme Court Act*, RSC 1985, c S-26, ss 5-6 (CanLII) . <https://www.canlii.org/en/ca/scc/doc/2014/2014scc21/2014scc21.html?searchUrlHash=AAAAAQAXc3VwcmVtZSBjb3VydCByZWZlcmVuY2UAAAAAAQ>.

[11]Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Scarborough: Thomson, 2007) at 2.3. Quebec's civil law is different from the common law practiced in the other provinces and territories in that it is mainly written down, or "codified," whereas the common law uses past rulings to determine the direction the law will take.

[12] *Supreme Court Reference*, *supra* note 1 at para 18.

[13] *SCA*, *supra* note 10, s 5.

[14] *Ibid*, s 6.

[15] *Supreme Court Reference*, *supra* note 1 at para 56.

[16] *Ibid* at para 123.

[17] *Ibid*.

[18] Ian Peach, "*Reference re Supreme Court Act, ss 5 and 6* - Expanding the Constitution of Canada,"Const Forum Const, vol 23.3 (12 July 2014), online: *Centre for Constitutional Studies*.

[19] *SCA*, *supra* note 10, s 5.1

[20] *Ibid*, s 6.1

[21] Peach, *supra* note 18.

[22] *Ibid*.

[23] *Supreme Court Reference*, *supra* note 1 at para 111.

[24] *Ibid*.

Constitutional Challenges: Public Interest Standing

Introduction

Canada's Constitution is a document that both exists for and has relevance to all Canadians. This article will explain public interest standing and how it allows concerned Canadians to have constitutional challenges heard in court even if the contested government law or action does not affect them personally. But because the issues are of broad public interest, such challenges are important to others, particularly the economically and socially marginalized. Public interest standing is one way to ensure governments abide by the Constitution.

Constitutional issues can be raised in court through reference questions submitted by governments, through private litigation and criminal prosecution, or by private interest standing when a law or government action has or will have an impact on the litigant(s). Issues can also be raised by public interest standing.

In public interest standing, courts have the discretion to hear constitutional challenges of government action brought forward by interested individuals, groups or corporations who may not have a personal stake in the issue. Generally, courts will grant standing when the challenged government action has broad social effect.[1]

Examples of Public Interest Standing Cases

There have been several high profile Supreme Court of Canada cases where the Court granted public interest standing. One was *Nova Scotia Board of Censors v McNeil*,[2] where a film buff was granted public interest standing to challenge the province's ban on a particular racy film. He argued that the ban, based on public morality, was a federal jurisdiction and was unconstitutional. He lost because the majority of the court found it constitutional that a province reject a film based on its own local standards of morality.

In *Chaoulli v Quebec (Attorney General)*[3] a doctor and patient of Quebec's public healthcare system were given public interest standing to challenge provincial legislation that forbid access to private healthcare and insurance. Since there was no alternative to waiting lists in the public healthcare system, they argued the legislation violated their constitutional rights to security of the person. The Supreme Court of Canada agreed, ruling that Quebec's monopoly on healthcare was unconstitutional.

More recently, Rocco Galati, a Toronto lawyer, used public interest standing to launch a challenge in the Federal Court to Hon. Marc Nadon's appointment to the Supreme Court of Canada. The challenge prompted the federal government to ask advice about the appointment of justices from Quebec to the Supreme Court in the Supreme Court Reference. The Supreme Court found that the appointment was unconstitutional. Vindication in the approach has led Galati to file for public interest standing in two more cases to be heard.[4] When asked about his successful challenge, he said it was his duty as a citizen to do it since no one else did; "As Canadians we prefer not to engage, and pretend that everything is OK, and it's not."[5]

Origins of Public Interest Standing

Traditionally, only those individuals who had a direct investment in the effects of legislation could get what was known as private interest standing in court outside of a regular civil or criminal case.

This changed with a series of Supreme Court rulings in the 1970s and 1980s. In *Thorson v Canada*[6] the Suprme Court decided to grant standing to Joseph Thorson to bring a constitutional challenge to the *Official Languages Act*.[7] The government argued he did not have standing as the law did not personally affect him, but the Court found Thorson's case sound enough to be granted a hearing. It reasoned that the result would be "alarming, if there was no way in which a question of alleged excess of executive power"[8] could be heard. Since there was no other way for the case to be heard, and since he argued as a taxpayer he had a genuine interest, the Supreme Court had the discretion to allow it to be heard. In two cases that followed, *Minister of Justice Canada v Borowski*[9] and *Canadian*

Council of Churches v Canada,[10] the Supreme Court set out a test as to who is entitled to public interest standing and in what circumstances. It became known as the *Borowski* test:

(1) Is the issue raised a serious one?;

(2) Does the party bringing the case have a personal stake in the matter, or have a genuine interest in the validity of the legislation?; and

(3) Is there no other reasonable or effective way to bring the issue before the court?

This three-step test ensures that the case deserves a hearing, that it weeds out frivolous challenges by requiring a genuine interest, and it ensures that the busy and expensive judicial system is not overburdened with such cases.[11]

A Development in Public Interest Standing: *SWUAV* and Access to Justice

In *Thorson v Canada* and the cases that followed, the Supreme Court was concerned with the rule of law. Granting individuals, groups or corporations public interest standing allowed courts to scrutinize government action or law when no one else could, or would, challenge it. This rationale lay behind the three-part Borowski test and the court's discretion to hear public interest standing cases.

In 2012, in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society (SWUAV)*,[12] the Supreme Court recognized another important reason for providing public interest standing: access to justice.

SWUAV, a society of Downtown Eastside sex worker advocates in Vancouver, felt Canada's prostitution laws endangered sex workers and thus violated their constitutionally guaranteed rights. When SWUAV applied to have its case heard based on public interest standing, the government argued they did not have that standing. The chambers judge agreed with the government. Justice Ehrcke determined that the first two requirements of the test to grant public interest standing were met, but SWUAV's application failed on the third requirement that there is no other reasonable or effective way to have the issue brought before the court. He determined there was another way the issue could be brought to trial since the Bedford case, a private interest standing case about the same matter, was about to be heard in Ontario. Also a sex worker charged with a prostitution offense could challenge the law's constitutionality in the course of a criminal case.[13]

For the third part of the test, SWUAV had argued that the current sex workers in its society were too vulnerable to mount a private interest standing challenge. If they did so, they would face reprisal from clients, the police, family members and acquaintances. SWUAV also argued that sex workers who could raise a constitutional challenge during criminal prosecution would be prevented from doing so because of the prohibitive costs associated with it.[14] Without the Society receiving public interest standing, their clients would not have access to justice.

SWUAV appealed the decision to the British Columbia Court of Appeal. There, the Court overturned the previous decision. The majority opinion reviewed previous rulings on public interest standing where the Supreme Court of Canada said that discretion to grant it "must not be exercised mechanistically." Rather, public interest standing should be exercised "in a broad and liberal manner."[15] In considering the whole case, the Court determined it was deserving of standing. On the third step of the test, the Court ruled that waiting for a criminal case or private interest standing was not a more effective way to bring the broad and multi-faceted issue before the Court, and unless Bedford was appealed to the Supreme Court it would not be binding in British Columbia.[16]

When the government appealed SWUAV, the Supreme Court stood by the Court of Appeal's ruling and clarified the interpretation of the test for public interest standing. The Supreme Court stated that the test is not considered a "checklist."[17] Rather, the three factors are to be weighed together "in light of their purposes."[18]

Therefore, the Supreme Court recast the third part of the test to be more flexible:

> (3) Whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court?[19]

In considering this question, several factors related to access to justice must be canvassed. A court must ask if the applicant for public interest standing has sufficient resources and expertise to bring the suit. The court must also be practical when a number of litigants may bring the issue to court. One party may have a particularly useful perspective. A court must also ask if the case transcends the interests of those most directly affected by the challenged legislation. In assessing this, "courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected."[20]

The Supreme Court found that SWUAV met the requirements of the third part of the test when this flexible approach was applied. It found the Society to be well organized with the legal resources and expertise about sex workers necessary to challenge the laws. Granting them standing would "prevent a multiplicity of individual challenges in the context of criminal prosecutions."[21] And since its vulnerable clients would not apply for private interest standing for fear of losing privacy and security, SWUAV's challenge would allow them access to justice.[22]

Conclusion

Public interest standing is a tool that reminds us that the Constitution exists for all Canadians. It is an excellent example of democracy in action since it allows concerned individuals, groups or corporations to have courts review government laws and actions for their constitutionality. As SWUAV has shown, it can also be an effective way of reviewing laws that affect the marginalized for their constitutionality. Since those in a vulnerable financial, health or social position may be unable or unwilling to mount a challenge based on private interest standing, public interest standing is vital to access to justice.

[1] Dana Phillips, "Public Interest Standing, Access to Justice and Democracy under the *Charter*: Canada (AG) v Downtown Eastside Sex Workers United Against Violence." (2013) 22 Const Forum Const 21 at 22.

[2]*Nova Scotia Board of Censors v McNeil*, 1978 CanLII 6 (SCC).

[3]*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35.

[4] One challenges a federal appointment of a Quebec Court of Appeal Justice from the Federal Court of Appeal. The Justice was not a current member of the Quebec Bar when section 98 of the *Constitution Acts* indicates they are to be current. The other challenges the recently passed changes to the *Citizenship Act*, arguing that section 91 of the *Constitution Acts* only gives jurisdiction to the federal government over "aliens and naturalization" but does not give jurisdiction to the federal government to strip citizens of citizenship. Alison Crawford, "Rocco Galati challenge to Mainville appointment seen as unlikely to proceed," *CBC News* (19 June 2014) online: CBC News < http://www.cbc.ca/news/politics/rocco-galati-challenge-to-mainville-appointment-seen-as-unlikely-to-succeed-1.2679944> and Susana Mas, "Rocco Galati launches lawsuit over Citizenship Act changes," *CBC News* (25 June 2014) online: CBC News.

[5] Alyshah Hasham, "Rocco Galati: the lawyer who lives to take on government," *The Star* (19 October 2013) online:

[6] *Thorson v Attorney General of Canada*, 1974 CanLII 6 (SCC).

[7] *Official Languages Act*, RSC 1985, c 31.

[8] *Supra* note 6 at page 145.

[9] *Minister of Justice Canada v Borowski*, 1981 CanLII 34 (SCC).

[10] *Canadian Council of Churches v Canada*, 1992 CanLII 116 (SCC).

[11] Phillips, *supra* note 1 at 22.

[12] *Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society*, 2012 SCC 45. < http://www.canlii.org/en/ca/scc/doc/2012/2012scc45/2012scc45.html?searchUrlHash=AAAAAAAAAAEAFzIwMDggQkNTQyAxNzI2IChDYW5MSUkpAAAAAQAzL2VuL2JjL2Jjc2MvZG9jLzIwMDgvMjAwOGJjc2MxNzI2LzIwMDhiY3NjMTcyNi5odG1sAQ>

[13] *Downtown Eastside Sex Workers United Against Violence Society v Attorney General (Canada)*, 2008 BCSC 1726 at paras 74-78.

[14] *Ibid*.

[15] *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2010 BCCA 439 at para 41. < http://www.canlii.org/en/bc/bcca/doc/2010/2010bcca439/2010bcca439.html?searchUrlHash=AAAAAAAAAAEAFzIwMDggQkNTQyAxNzI2IChDYW5MSUkpAAAAAQAzL2VuL2JjL2Jjc2MvZG9jLzIwMDgvMjAwOGJjc2MxNzI2LzIwMDhiY3NjMTcyNi5odG1sAQ.

[16] *Ibid* at paras 66 - 68.

[17] *Supra* note 12 at para 36.

[18] *Ibid* at para 36.

[19] *Ibid* at para 52. Emphasis added.

[20] *Ibid* at para 51.

[21] *Ibid* at para 73.

[22] *Ibid* at para 71.

Guest Post by Professor Lori Thorlakson: After the Scottish No vote: the politics of constitutional reform in the UK

Last week's No vote in the Scottish referendum may have settled the question of Scottish independence for a generation. Alex Salmond has announced that he will step down as first minister of Scotland, and the 307-year-old union will remain intact for the time being. Devolution and constitutional change in the UK is not off the agenda. Instead, the agenda is set for an intense year of political battles over constitutional reform

The campaign

After a race in the few weeks leading up to the referendum became too close to call, the No side won the vote by a fairly comfortable ten-point margin—55.3 per cent to 44.7 per cent, with a remarkable voter turnout of 85 per cent.

The No victory was far from certain in the days leading up to the poll, with the early lead

that the No campaign had established a year earlier all but eroded by early September when the race started to become too close to call, especially due to the undecided voters whose vote cannot be easily predicted. While the Yes campaign, led by Alex Salmond, mobilized a strong grassroots movement modeled after Barack Obama's campaign, the Better Together campaign, led by Alasdair Darling, was plagued by organizational difficulties and infighting. After a strong performance in the first televised debate, in which Darling successfully played on uncertainties surrounding the future of the currency and pensions in an independent Scotland, the momentum shifted back toward the Yes campaign. Salmond won the second televised debate handily and Better Together had difficulty matching the optimism, confidence and emotional appeal of the Yes campaign.

Some of the strongest arguments for the Better Together campaign had included the enormous economic risks and potential costs of separation, the uncertainties surrounding the continued use of Sterling as a currency and uncertainty about future EU membership. The prospect of a Yes vote was enough to trigger some of these consequences: the week before the vote saw nearly one billion pounds in capital outflows from UK equity funds. In the end, two eleventh hour interventions contributed to a shift in campaign momentum: a cross-party pledge to devolve further welfare, spending and taxation powers to Scotland, and an emotional appeal from UK Prime Minister Gordon Brown on the possibility of being part of both a strong Scottish nation and a strong unified state—the United Kingdom.

Consequences of the No vote

A Yes vote would have caused an enduring change to the British party system in the rest of the UK. Without Scottish Labour seats, the chances of a future Labour government in Westminster would be made remote for possibly decades to come.

(Labour currently has 41 MPs from Scotland while the Conservatives have only one). In a different way, the No vote will also likely lead to a shift in political weight in England, as the Tories have sought to link further devolution in Scotland to reforms of English powers.

The British government will proceed with plans—hastily promised by all three pro-Unionist parties during the final days of the campaign—to devolve further powers over welfare policy, spending and taxation to Scotland. According to a timetable signed by David Cameron, Nick Clegg, Ed Miliband and Gordon Brown, draft legislation could be prepared as early as November, following a command paper and Commons debate scheduled for October. A committee on devolution, chaired by Lord Kelvin, will also discuss further devolution of powers to Wales, as well as how to ensure the effective functioning of institutions in Northern Ireland.

For the Tories, the quid pro quo for further Scottish devolution, however, is a clear call for an answer to the so-called 'West Lothian question'. In a speech delivered on September 19, the morning after the referendum, David Cameron called for further reform that would create 'a balanced settlement—fair to people in Scotland and importantly to everyone in England, Wales and Northern Ireland as well'.

‘We have heard the voice of Scotland—and now the millions of voices of England must also be heard. The question of English votes for English laws—the so-called West Lothian question—requires a decisive answer’.

The ‘West Lothian question’ refers to the paradox that while issues such as education and health care have been devolved to Scotland, to be decided by the Scottish Parliament, legislation in these policies affecting English voters are currently decided by the entire parliament in Westminster, including Scottish and Welsh MPs. Prime Minister David Cameron, supported by the Liberal Democrats, has announced a plan for ‘English votes for English laws’. This will have a dramatic impact on the balance of political power due to the Conservative party’s dominance in England.

The Conservative party’s plan to link the timetable of addressing the West Lothian question to that of settlement of the Scottish question is highly divisive, as the Labour Party stands to lose politically from constitutional reform for England. The issue is made no less contentious by Cameron’s choice of William Hague to lead a cross-party Cabinet Committee to examine ways of reforming the scrutiny of England-only legislation. It is not yet clear how the government intends to go about reform for England. We are unlikely to see regional assemblies emerge and Hague has already warned of the dangers in completely excluding non-English MPs from entire areas of legislation.

Even without the details ironed out, what is clear is that one of the losers in this scenario is the Labour Party, which stands to see its influence over English domestic legislation diminished. In the event that the Labour Party should win a majority in Westminister in the future, it would be unlikely to be able to command a majority over legislation in areas of domestic policy in England. In response, the Labour Party has called for a separate timetable for the English question, with a Constitutional Convention in autumn 2015—well after the May 2015 general election in the UK.

Broader impacts of the referendum

Another impact of the Scottish no vote can be found beyond the borders of the UK.

Despite the Scots’ rejection of independence, the referendum campaign has added fuel to secessionist campaigns elsewhere. The day after Scotland’s No vote, the Catalan parliament passed a law calling for a non-binding referendum to be held on November 9, 2014. Catalan President Artur Mas has yet to sign a decree that will formally call for the referendum. When he does, it will likely be challenged in court by the Spanish government. The Spanish Prime Minister Mariano Rajoy has vowed to put a stop to the non-binding referendum, declaring that such an act would be illegal due to provisions in the Spanish constitution that assert the ‘indissoluble unity’ of the country. Spain is one of a number of EU member states that face their own internal territorial challenges and so are careful not to even indirectly support secessionist movements in other member states. Had Scotland voted Yes, Rajoy was prepared to use Spanish veto power to ensure that an independent Scotland’s path to EU membership would be long and full of roadblocks.

The referendum as a ‘triumph for the democratic process’

The United Kingdom has some important work ahead to develop a settlement for all of its constituent countries and address the divisions raised by the campaign. The Yes side may be bitterly disappointed by the outcome, but if there is a positive outcome for those on the losing side of this referendum, it is perhaps found in Alex Salmond’s assessment that the referendum was a ‘triumph for the democratic process’.

The Scottish independence referendum was, arguably, a great success as a democratic exercise. Referendums on independence and secession can be fraught with difficult issues, such as how the clarity of the question, the requirement for a simple or supermajority or the territorial concentration of oppositions can affect the legitimacy of the outcome. The nationalism issue in Scotland is not complicated by uneven distributions of ethnic minorities—Welsh or English enclaves dotted in Scottish territory—but it does have geographically distributed preferences that could have led to some complications in the event of a Yes vote. In the Shetland Islands, more than 1000 Shetland, Orkney and Western Islanders signed a petition calling for a separate referendum on their own independence from Scotland (in the event of a Scottish yes vote). This was rejected by the Scottish government. The UK Scotland secretary then suggested before the vote that oil-rich Shetland might become a self-governing territory rather than part of an independent Scotland, should Shetland vote clearly against independence.

The No result has dodged these thorny democratic issues and instead the referendum is likely to be best remembered as a triumph of democracy and democratic innovation. Alex Salmond called the turnout of 86 per cent the ‘highest in the democratic world for any election or any referendum in history,’ adding ‘this has been a triumph for the democratic process and for participation in politics’. In Glasgow, Scotland’s largest city and one of the few areas that returned a majority for the Yes side, the turnout was nearly double that of the last election for the Scottish Parliament.

One of the innovations in this referendum was the Scottish government’s decision to lower the voting age to 16 from 18. This is the first jurisdiction in the UK to adopt this reform, which has been championed by the ‘Votes at 16’ campaign for several years. The decision to lower the voting age was a contentious one. Across the UK, this campaign has been supported by Labour and the Liberal Democrats, but opposed by the Conservatives. In Scotland, the decision resulted in a surprisingly high youth turnout and likely benefitted the Yes side. While we don’t yet have figures of actual turnout among the 16 to 18 year old age group, we know that approximately 80 per cent of 16 to 18 year olds registered to vote. This is a remarkable achievement, given the low and declining levels of turnout among the youngest voters, not only in the UK, but across western democracies more generally. A poll commissioned on the referendum day found that the 16 to 18 year old age group was more likely than older cohorts to vote yes. (This was not a foregone conclusion—results from earlier survey research suggested that these young voters would be slightly less likely than 18 to 24 year olds to support independence). This youth turnout will be an attractive argument in favour of lowering the voting age elsewhere in the UK. The Welsh first minister

has already called for lowering the voting age to 16.

As the dust settles after the Scottish vote, the pressures for constitutional reform that lay ahead for the UK in matters of devolution and electoral reform are emerging, and political battle lines are being drawn.

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Guest Post: Professor Joanna Harrington on Canadian Legal Values, Extradition, and Life Imprisonment Without Parole

Introduction

How do we determine the Canadian legal values that animate and guide the application of Canadian law and the making of Canadian legal decisions? That is the question raised upon reading this week's decision by the Alberta Court of Appeal, concerning the extradition of an Iraqi-Canadian citizen, and Edmonton resident, from Canada to the United States to stand trial for the alleged facilitation of acts of terrorism. If convicted, the possible sentence to be served is one of life imprisonment without parole, a matter taken as fact by the Alberta Court of Appeal (see *United States v Muhammad 'Isa*, 2014 ABCA 256 at paras 67-74). But a "life-without-parole" or "life means life" sentence with no opportunity to make application has no counterpart in Canadian law, raising the question of whether Canadian legal values should require Canada to seek an assurance to address this risk. The judgment also raises the question of how we determine what those Canadian legal values are, as compared with and in contrast to American legal values, or the legal values of others.

The 'Isa Case

Known by several names, Edmonton resident Faruq Khalil Muhammad 'Isa is wanted for trial before the United States District Court for the Eastern District of New York on charges of conspiracy to murder American nationals abroad and the provision of material support to terrorist conduct. These are the two charges laid out by the United States in its diplomatic

note to Canada in March 2011, with a supplementary note of January 2012 adding a further five counts of aiding and abetting the murder of Americans abroad. 'Isa is alleged to have served as a member of a terrorist network that facilitated and procured supplies for two suicide bomb attacks in Iraq that killed several American soldiers (with persons of other nationalities, including Iraqi, also harmed or killed). 'Isa's alleged involvement has not taken place on US soil, but from Canada, by phone and computer.

Last summer, Canada's Minister of Justice authorized 'Isa's surrender to the United States, after having obtained an assurance (or solemn promise) from the United States that 'Isa, if extradited, would not face the death penalty. Such death penalty assurances are now commonplace, with Canada following a trend established long ago by European and Latin American states whereby their embrace of certain fundamental legal values compel the receipt of these assurances to pave the way for surrender (see *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283). Canada would later receive a further assurance from the United States in April 2014 that 'Isa would not be detained in military custody of any kind.

'Isa, however, remains in Canada, with his surrender on hold while his counsel appealed the decision of the extradition judge to issue a committal order and sought judicial review of the minister's decision to surrender. Both efforts were dismissed by the Alberta Court of Appeal this week, with the judgment likely to generate comment on a number of fronts, including the curative aspect with respect to the use of evidence obtained by torture as well the Court's embrace of a high standard of deference. There is also the matter of an accused's extradition from Canada to face an acknowledged risk of life imprisonment without parole.

The Use of Evidence Obtained By Torture

Much of the case against 'Isa appears to rest on his own words, obtained through wiretap recordings and the data-mines from his computer, and through post-arrest interviews with the RCMP, and with a US Justice Department Investigator. These words were considered to establish a sufficient case in support of extradition before the extradition judge as well as the Alberta Court of Appeal, with the Court of Appeal rejecting arguments that 'Isa's post-arrest statements were made involuntarily and in breach of his right to counsel.

'Isa has also alleged that there is a risk that evidence will be used against him that was obtained by torture, but the extradition judge found that these allegations failed to raise the required "air of reality" that information obtained by torture would be relevant to issues properly raised in the extradition hearing (*United States of America v Muhammad 'Isa*, 2012 ABQB 344). On appeal, 'Isa's lawyers successfully challenged the standard that had been applied by the extradition judge, prompting the Alberta Court of Appeal to write with emphasis that "evidence obtained by torture is unreliable, offensive to the rule of law and the product of an abhorrent practice …" (see para 29, with fans of the late Tom Bingham being pleased to see a supporting citation to the former Senior Law Lord's book on *The Rule of Law*). But while the allegations of torture were now found to have an air of reality, the Court found no miscarriage of justice or a substantial wrong that would bar the exercise of its curative power to address this aspect of the proceedings before the court below.

The Life Imprisonment Challenge

As for the application for judicial review, it too was unsuccessful, with Alberta's highest court embracing an approach that accords a high degree of judicial deference to a ministerial decision to extradite, citing in support the Supreme Court of Canada's decision in *Sriskandarajah v United States of America*, 2012 SCC 70, [2012] 3 SCR 609. An argument that the minister had started from a pro-surrender standpoint was readily dismissed, as was an argument concerning the minister's determination as to the offences for which his extradition is sought, which leaves the life imprisonment argument for further comment.

It was argued by 'Isa's counsel that the minister's decision to surrender 'Isa to the United States would violate both Canadian extradition law and the *Canadian Charter of Rights and Freedoms* by reason of the possibility that 'Isa might receive a sentence of life imprisonment without parole. As noted above, and as acknowledged by the Alberta Court of Appeal, such sentences have no counterpart in Canadian law, with Canada's elected lawmakers having enacted a provision within our Criminal Code that provides for parole eligibility after the passage of a period of time. That is Parliament's will, and presumably an indication of Canadian views with respect to "life should mean life" sentences, albeit that there are cases of extremely heinous crimes where, in practice, one can readily predict that no application for parole will ever be successful. But knowing you don't have a strong case for parole is a different matter from not having any possibility or option to apply for parole.

The Alberta Court of Appeal clearly disagrees, portraying the matter as one of prison sentence differentiation, with the potential for a more severe prison sentence in one state, as compared to another, not being a bar to extradition. But there's more afoot in 'Isa's case than sentence length differentiation. Indeed, even when two prison sentences are the same in length, there would still be a qualitative difference if one of those sentences is say served in shackles, or in solitary confinement, or without access to medical care. And that's why courts in Canada, as guardians of the Constitution and the rule of law, are obliged to inquire into the nature of the punishment or treatment to be meted out in the requesting state, with 'Isa's case raising concern given the lack of process for a form of early release or parole.

Moreover, the very fact that there is differentiation between states is precisely why extradition law makes use of assurances, with the requirement for an assurance enabling the requested state to add conditions to a surrender that are reflective of the legal values of the requested state. The Court makes no mention of the United States having any objection to providing such an assurance, with the American authorities clearly capable of securing assurances when asked, having already provided two in 'Isa's case.

The Alberta Court of Appeal has held that 'Isa's circumstances do not bring him within the scope of what the Supreme Court of Canada had described in *Burns* as a "particular treatment or punishment [which] may sufficiently violate our sense of fundamental justice as to the tilt the balance against extradition." To seal this argument, the Court refers to the examples of "stoning adulterers or amputating the hands of thieves", harking back to examples provided in 2001 by the Supreme Court of Canada in *Burns*. But the more cogent comparator for a life sentence without parole is surely a sentence of death, with countries

such as the United Kingdom having brought in what are termed "whole life" sentences as a replacement when capital punishment was abolished. (Another well-respected British judge, Lord Justice Laws, has opined that "a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death": *R (Wellington) v Secretary of State for the Home Department*, [2007] EWHC 1109 (Admin) at para 39.) Sentences of death were also the very focus of the *Burns* decision, with the end result being that capital punishment so violates our *Canadian* sense of fundamental justice that an assurance is required to secure the extradition of an accused from Canada to a death penalty state. Indeed, many countries in Europe and Latin America have long taken the view that sending an accused to face a life sentence without parole is either akin to, or worse than, an extradition to face a judicially-imposed sentence of death, with these countries viewing both as violations of the fundamental prohibition on unjust, cruel, inhuman or degrading treatment or punishment.

The Evolving Extradition Practice of Other States

The Alberta Court of Appeal does not mention the views of other countries, with Canada having a number of extradition partners, in addition to the United States. Extradition law and practice changes over time, with several states now refusing to extradite an accused to face life imprisonment without the possibility of release or parole, absent an assurance. One of the earliest states to adopt such a practice is Portugal, which has long refused to extradite persons who face what it has termed "life-long" sentences, lodging a formal reservation to this effect back in 1990 to the European Convention on Extradition (an extradition arrangement now attracting 50 states). Some states accepted this reservation with their silence, but Germany, unsure as to the meaning, lodged an official response, stating that: "It takes the reservation to mean that the only circumstance in which extradition will not be granted is where there is no possibility under the law of the requesting state for the person sentenced to life imprisonment, having completed a certain proportion of the sentence or period of detention, to obtain a judicial review of his case with a view to having the remainder of the sentence commuted to probation." Austria followed suit, by expressing agreement with Germany, with the texts of the Portuguese, German and Austrian statements to be found in the documentation submitted to the UK Parliament when it joined the European Convention on Extradition in early 1991: UKTS No 97 (1991). Soon thereafter, Switzerland expressed its agreement with Germany and Austria, as would Russia in 1999, with Belgium in 1997 making a second attempt at clarification by referring to the situation when "the person sentenced to life imprisonment cannot be released after a certain time, following a legal or administrative procedure." The Treaty Office of the Council of Europe duly records each state's official declaration here**.**

But what about the context of terrorism? Does that provide an exception or an overriding reason to extradite even with the risk of life imprisonment without parole? A review of the record suggests no, with many European states continuing to maintain an objection to extradition to face life imprisonment without the possibility of parole or early release, as illustrated by reference to the 2003 Protocol to update the 1977 European Convention on the Suppression of Terrorism. Motivated by the devastation of the September 2001 attacks, the clear goal of the Protocol's drafters was to expand the list of offences considered

terroristic for the purposes of extradition. But the Protocol also makes clear that nothing in the revised treaty is to be interpreted so as to impose an obligation to extradite where there is a risk of torture, the death penalty, or life imprisonment without the possibility of parole (Article 4). Admittedly, the 2003 Protocol is not yet in force, being an amending treaty that requires the consent of all, but it has, to date, attracted 31 states parties.

There is also the 2005 Council of Europe Convention on the Prevention of Terrorism, a treaty which is in force, and which despite its generic title, aims to criminalize, and make extraditable, the offences of public provocation to commit terrorism, recruitment for terrorism, and training for terrorism (Articles 5-7). This convention also aims to enhance international cooperation by modifying existing extradition arrangements as between contracting states so to ensure that the above offences are recognized as extraditable crimes (Article 19). Nevertheless, we also see a balance arising between criminal law cooperation and enforcement and safeguards for an accused, with Article 21 of the 2005 Convention expressly providing that nothing in the convention shall impose an obligation to extradite where there is a risk of torture, inhuman or degrading treatment, the death penalty, or life imprisonment without the possibility of parole. The convention's Explanatory Report explains that the Article 21 safeguards are provided "to make clear that this Convention does not derogate from important traditional grounds for refusal of cooperation under applicable treaties and laws." An extradition request refused on such grounds is then submitted for prosecution in the requested (not requesting) state.

Much like Portugal and Spain, a number of Latin American states with a Catholic tradition view a life sentence to be as cruel and inhumane as a death sentence, and contrary to goals of prisoner rehabilitation. As a result, a prohibition on extradition to face life imprisonment can also be found within the inter-American extradition regime, with article 9 of the 1981 Inter-American Convention on Extradition stating clearly that: "The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced."

As a result, in light of evolving extradition practice, the Americans would surely not be surprised if Canada also required an assurance, as a precondition for extradition, removing the risk that a surrendered accused would face life imprisonment without parole. We know that other states have received such assurances from the United States, including France, which secured such an assurance in relation to murder charges (see *Nivette v France*, App No 44190/98, Judgment of the European Court of Human Rights of 3 July 2001).

The Views of Courts

Lastly, there are the views of courts. To its credit, the Alberta Court of Appeal does acknowledge that the Quebec Court of Appeal has come to a different conclusion, viewing the prospect of a life sentence without the possibility of parole for a youth wanted for extradition to face charges of second-degree murder in the United States as extreme and in

violation of Canadians' sense of fundamental justice (see Doyle Fowler c Canada (Ministre de la Justice), 2011 QCCA 1076; see also Doyle Fowler c Canada (Ministre de la Justice), 2013 QCCA 1001; leave to appeal to the Supreme Court of Canada denied September 19, 2013). For the Alberta Court of Appeal, the fugitive's youth is the distinguishing factor.

But court challenges to "life means life" prison terms are taking place elsewhere, with the German Federal Constitutional Court, on January 16, 2010, having refused an extradition to Turkey where the accused faced "aggravated life imprisonment until death" (the aggravation aspect meaning that it was a fixed-term life sentence). In that case, the German government had sought assurances that the accused would be considered for release, but the Turkish government in reply merely noted that the Turkish President had the power to remit sentences on grounds of chronic illness, disability, or old age. The German court refused to allow the extradition, finding the President's power to be insufficient, and holding that a prison sentence with no practical prospect of release is cruel and degrading.

Arguments against extradition to the United States to face a sentence of life imprisonment without parole have also come before Britain's highest court, with the Law Lords finding that the imposition of such a sentence does not constitute inhuman and degrading treatment per se unless it was grossly or clearly disproportionate (see *R (Wellington) v Secretary of State for the Home Department*, [2008] UKHL 72). The Law Lords have also embraced the desirability of extradition, suggesting that a punishment that might be regarded as inhuman or degrading within the domestic context may not bar extradition when a choice has to be made between either extraditing or allowing a fugitive offender to evade justice altogether. No mention is made, however, of the use of assurances as a means to avoid this stark choice, nor is guidance provided with respect to the alternative of submitting the case for prosecution within the requested state. There is also the case of *Babar Ahmed and Others v United Kingdom*, decided in 2012, where the Fourth Section of the European Court of Human upheld a British decision to extradite alleged terrorists to the United States to face a risk of life imprisonment without parole.

But the *Wellington* judgment, as well as that in *Babar Ahmed*, must now be reevaluated in light of the release in July 2013 of a Grand Chamber decision from the European Court of Human Rights in *Vinter and Others v United Kingdom*, a point that has been made by leading expert on imprisonment law, Professor Dirk van Zyl Smit, writing with others in "Whole Life Sentences and the Tide of European Jurisprudence: What is to be Done?" (2014) 14:1 *Human Rights Law Review* 59-84. By definition, Grand Chamber decisions are for cases of importance and they serve to address competing interpretations of fundamental rights (with the earlier 2012 decision in *Vinter* having been decided by a vote of 4 to 3).

The *Vinter* case was brought by three prisoners, all serving mandatory sentences of life imprisonment, and all three having been given what are termed "whole life" orders. Ordinarily, mandatory life sentences in England and Wales, as in Canada, have a minimum period that must be served before a prisoner can have a review of the continuing relevance of his imprisonment. But British law, as enacted by its Parliament, provides for the issuance of a whole life order for offences considered so heinous, with only the Justice Minister

permitted by statute to release a whole life prisoner and only on compassionate grounds. Whole life orders are thus an exceptional measure and indeed, the UK government's own figures, as presented to the court, indicate that of 4,900 prisoners serving mandatory life sentences for murder in England and Wales in 2011, only 41 were subject to whole life orders (including those held in secure hospitals). Moreover, since 2000, no prisoner serving a whole life term in England and Wales has been released on compassionate grounds.

By a vote of 16 to 1, the Grand Chamber of the European Court of Human Rights has now made it clear that a life sentence is only compatible with the fundamental prohibition on inhuman and degrading treatment when there is some prospect of release and some possibility of review. The Court engaged in an extensive review of European, comparative and international law materials on life sentences, finding an emphasis in European penal policy on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence. The Court has also indicated its support for the institution of a mechanism that provides for a review no later than 25 years after the imposition of a life sentence for murder – a time period that is consistent with the Canadian Parliament's position.

Final Thoughts

To be clear, the Grand Chamber's decision in *Vinter* does not ban whole life sentences, but it does make an argument for considering the fundamental nature and value of a process for review and possible release. The Alberta Court of Appeal makes no mention of the *Vinter* decision, nor for that matter, the decisions in *Babar Ahmed* or *Wellington* (which mention the key Canadian cases, including *Burns*). There is, of course, no obligation on a Canadian court to consider foreign law, but extradition is inherently international in nature and looking outwards to examine recent trends within both extradition law and human rights law provides insights into the questions to ask, not least the question of whether a requirement for an assurance would secure the desired balance between criminal law enforcement and the safeguarding of Canadian legal values. There is also the question of relativities as between Canada and the United States (and elsewhere), and whether Canadian legal values, with due regard to the position taken by Parliament (rather than the executive branch), should guide a Canadian assessment of what is unjust or oppressive, or inhuman or degrading, so as to bar an extradition without an assurance.

Traditionalists in international law, given their strong embrace of a state's sovereign right to its own views and laws, might well suggest that a Canadian minister, making a Canadian decision to extradite, under Canadian law, about a person in Canada, conducting alleged activities in Canada, should not hesitate to attach a precondition to an order of surrender that is reflective of Canadian legal values. Canadian law provides an opportunity for all those given life sentences to apply for parole after the passage of a period of time. Such applications can be denied, especially in cases of heinous crimes, but Parliament's decision to ensure there is an opportunity to apply highlights a fundamental due-process difference in legal values between Canada and the United States (and the United Kingdom). Many other countries also agree, developing over time a practice to bar extradition to face a life imprisonment without parole on the grounds that such a sentence is as unjust or oppressive,

or as cruel or inhumane, as being sent to face a sentence of death.

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Alberta v UFCW 401 (2013): Highest Court Upholds Union's Constitutional Freedom of Expression at Picket Line

Introduction

When union members are on strike they engage in all sorts of activities at a picket line, including taking pictures and recordings of all those present. Can unions take pictures of people crossing a picket line without their permission? As decided by the Supreme Court of Canada (SCC) in its November 15, 2013 ruling *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401 (UFCW 401)*,[1] they can because unions are guaranteed freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.[2]

In its first case dealing with the *Charter* right to freedom of expression in 1989, the SCC interpreted freedom of expression broadly; an activity was covered so long as it was non-violent and "attempts to convey meaning."[3] In *UFCW 401* the SCC found capturing images to be a meaningful activity since it was a vital tool for the union to express its position during the strike. Therefore, the law forbidding the collection and use of such images without permission, the Alberta *Personal Information Protection Act* (*PIPA*),[4] is unconstitutional because it is an unreasonable limit to the Union's freedom of expression. But to give the government time to amend the law and not leave Albertans without a personal information protection law, the Court allowed the law to remain in force for up to one year.

Facts

Employees of Edmonton's Palace Casino, members of the United Food and Commercial Workers local 401 (UFCW 401), picketed on site during a 305-day lawful strike. The Union took film footage and photographs of patrons, managers and replacement workers crossing

the picket line, as well as any individuals in the camera's line of sight. To pressure those who crossed or were about to cross to respect the picket line, a nearby sign informed those individuals that their images may be placed on a website (www.casinoscabs.ca). One manager's image was used, in a way intended to be humorous, on a poster and in internal union communication to keep up the strikers' morale.

A few of the individuals who were photographed were unhappy and complained to the Alberta Information and Privacy Commissioner (AIPC), claiming that the Union violated *PIPA* by collecting their personal information without their consent.

Procedural History

The case went first to an adjudicator appointed by the AIPC. Because there was no exemption in *PIPA* that allowed a union to collect, use or disclose personal information without consent, the adjudicator ordered UFCW 401 to stop collecting images and to destroy the ones it already had. The adjudicator agreed that the Union collected the images for an expressive purpose which fell under the protection of section 2(b) of the Charter (freedom of expression), but she was prevented from deciding questions of constitutional law by the *Administrative Procedures and Jurisdiction Act*.[5]

UFCW 401 then challenged the law at Alberta's Court of Queen's Bench. There, the Court ruled that the Union's activity was for an expressive purpose, and that *PIPA's* efforts to limit this activity violated the Union's right to freedom of expression.[6] The Court also determined that this limitation was not reasonable.

The Alberta government appealed this decision to the Alberta Court of Appeal; that Court ruled likewise. It found that *PIPA's* limitations violated UFCW 401's right to expression in order to support its labour relations and collective bargaining.[7] The government then appealed to the SCC.

Issues

The issues examined by the SCC were as follows:

(1) Is the Union's use of film and photography during the lawful strike considered an expressive activity that deserves protection under section 2(b)?;

(2) If so, does *PIPA* violate section 2(b) by restricting the Union's ability to collect, use or disclose personal information without consent during that strike?; and

(3) If there is a violation under *PIPA*, is it a reasonable limit to the Union's right that can "be demonstrably justified in a free and democratic society" as stated in section 1 of the Charter?

Decision

In a unanimous decision, the SCC concluded that *PIPA's* total ban on UFCW's freedom of expression in recording picket line images is unconstitutional. Since the Act's restriction of

this activity is disproportionate to the benefits it seeks to promote in protecting personal information, it also could not be saved by section 1 of the *Charter*. Therefore, the Court declared the legislation invalid, but allowed a period of one year for the legislature to change it.

Analysis

Expressive Activity

The Court affirmed that filming and photographing at a picket line during a lawful strike is part of a union's freedom of expression. To record people crossing a picket line has meaning. It is done to try to persuade people to support the strike, or at least discourage people from doing business with the employer. Film and photographic images can also be used to inform the public about the strike, bring the labour dispute into the public realm, ensure the safety of union members, and boost morale and solidarity.

***PIPA's* Restrictions**

The Court found that *PIPA's* purpose was to give people greater control over their personal information. "Personal information" is information about an identifiable person, even if it is widely known and not private.[8] While exemptions in the legislation exist for artistic or journalistic purposes, as a general rule organizations (including unions) cannot collect, use or disclose personal information without consent.[9] Since no exemptions applied for UCFW 401 to advance its interests in a labour dispute by capturing picket line images, the legislation violates its 2(b) freedom.

Section 1

If the government could show that section 7(1) of *PIPA* is a 'reasonable limit' to UCFW 401's 2(b) freedoms under section 1 of the *Charter*, the legislation could stand. Under the Oakes Test, the SCC found that *PIPA* had a pressing and substantial objective to allow individuals control over who had their personal information and how widely it could be used. The SCC also found that *PIPA's* procedures were rationally connected to its objective of protecting personal information connected to individual autonomy and dignity.

However, the Court determined that the beneficial effect of the legislation comes at the cost of the Union's constitutional right to freedom of expression. It noted that, "*PIPA* deems virtually all personal information to be protected regardless of context."[10] While not all union activity that is expressive would prevail over such legislation, the SCC emphasized that in the *context of labour relations* the freedom of expression is of fundamental importance.

Freedom of expression in a labour dispute is directly related to workers' associational freedoms to promote common interests and influence their working conditions. In legitimate labour relations contexts, the protections given by both 2(b) and the freedom of association in 2(d) contribute to an individual worker's self-identity, worth, and ability to withstand an employer's economic power in relation to their vulnerability.[11] In addition, the SCC

recognized that unions and their rights to associate and bargain collectively have a role to play in the Canadian economy and society.

Therefore, the SCC decided that the law was unconstitutional because it disproportionately "imposes restrictions on a union's ability to communicate and persuade the public of its cause, impairing its ability to use one of its most effective bargaining strategies in the course of a lawful strike."[12]

Significance of the Ruling

Alberta's government must now draft new constitutionally compliant legislation. It must weigh the interests of individuals who want to protect their personal information with a union's freedom of expression in a labour relations context.

The SCC's ruling was a victory for both the UFCW 401 and the labour movement. It recognizes the historical and contemporary importance of unions for individual workers in labour relations, and it accordingly protects unions' freedom of expression from legislation that seeks to limit it.

The decision impacts groups other than unions that have the right to associate. The Union's lawyer noted "it is a very important decision for not just trade unions, but any kind of public organization or people's organization."[13] When a group's freedom of expression is limited by similar legislation, the courts will look at the context of the communication in weighing the benefit of it against the disadvantages of it for the group. She hopes that the new legislation will not restrict any group's ability to freely communicate its views about public events or politics.

[1] *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 .

[2] *Canadian Charter of Rights and Freedoms*. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canadian Act 1982* (UK), 1982, c 11, s 33.

[3] *Irwin Toy v Quebec*, 1 SCR 927.

[4] *Personal Information Protection Act*, SA 2003, c P-6.5 [PIPA]

[5] *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3. Section 11 of the *Act* specifies that unless a regulation has been made, an administrative body does not have jurisdiction to rule on constitutional matters. The province of Alberta had not delegated jurisdiction to the AIPC to determine questions of constitutional law.

[6] *United Food and Commercial Workers, Local 401 v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 414. https://www.canlii.org/en/ab/abqb/doc/2011/2011abqb415/2011abqb415.html

[7] *United Food and Commercial Workers, Local 401 v Alberta (Attorney General)*, 2012 ABCA 130.

[8] *PIPA*, *supra* note 4 s 1(1)k.

[9] *Ibid*, s 7(1).

[10] *UFCW 401*, *supra* note 1 at para 25.

[11] *Ibid* at para 32.

[12] *Ibid* at para 37.

[13] Alberta's Personal Information Protection Act Struck Down by Supreme Court of Canada" *Canadian Press* (15 November 2013) online: *Huffington Post*

Canada (AG) v Bedford: Canada's Prostitution Laws Found Unconstitutional

This article was written by a law student for the general public.

Introduction

In the landmark decision of *Canada (Attorney General) v Bedford*[1] on December 20, 2013, the Supreme Court of Canada ruled that some of Canada's prostitution laws are unconstitutional. The Court found that the laws violated sex workers' rights to the security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*.[2] The Court gave the government time to change the laws by allowing them to stay in place for up to one year. If there is no change, the unconstitutional prostitution laws will be struck down. This one-year delay gives Canadians a unique opportunity to think about, debate, and tell Members of Parliament what kind of prostitution laws they want. It is possible, however, that any new laws may be challenged in court again.

Reports showed sharply contrasting views of the decision on the day it was released. In particular, plaintiff Valerie Scott stated, "[p]eople said that when women got the right to vote, equal pay, equal rights, and same sex marriage — all of those things, every single one, people said the sky would fall in. It did not. Society is the better for it and society will be the better for sex workers having proper civil and occupational rights."[3] A contrasting view came from Kim Pate of the Association of Elizabeth Fry Societies: "It's a sad day that we've now had confirmed that it's OK to buy and sell women and girls in this country. I think generations to come — our daughters, their granddaughters and on — will look back and

say, 'What were they thinking?'"[4]

Prostitution is currently legal in Canada, but many actions associated with prostitution are considered crimes. Three of these crimes were found to be unconstitutional by the Court:

1) Communicating in public for the purpose of prostitution;[5]

2) Living in, owning, leasing, occupying or being inside of a 'common bawdy house';[6] and

3) 'Living off the avails of' prostitution.[7]

A common bawdy house is a place that is used for prostitution.[8] 'Living off the avails of' prostitution means someone who makes a living from or lives off the money that prostitutes earn.

The following Featured Court Ruling explains why the Supreme Court found these three prostitution laws unconstitutional. The Supreme Court also commented in detail about how section 7 of the *Charter*[9] should be interpreted by the courts.

Facts

Background

Terri Jean Bedford, Amy Lebovitch, and Valerie Scott are either current or former sex workers. They applied to the Ontario Superior Court of Justice for an order declaring that the above laws were unconstitutional. They argued that these laws created unsafe working conditions for prostitutes, and thus violated their rights to the security of the person under section 7.

Procedural History

At trial, and after considering 25,000 pages of evidence, the judge found the laws against keeping a common bawdy house, living on the avails, and communicating in public for the purposes of prostitution laws to be unconstitutional. The judge decided that all three of those laws violated sex worker's rights to security of the person.

The government appealed the decision to the Ontario Court of Appeal, where it found that the 'bawdy house' and 'avails' laws were unconstitutional. However, they found the law about 'communicating' to be constitutional. One of the justices on the appeal court dissented in part and would have found the 'communicating' law unconstitutional as well.

The majority of the Court also found that the trial judge had overstepped her authority since she disagreed with an earlier Supreme Court decision in the *Prostitution Reference* case.[10] The Supreme Court also decided that appeal courts did not have to show deference to trial judges on facts about society and legislation. Usually, appeal courts must be deferential to the facts found at trial.

Both sides appealed the Court of Appeal decision to the Supreme Court.

Issues

The Supreme Court considered the following issues:

1. Can a trial judge consider Charter arguments not raised in a previous case about the same law?
2. Must appeal courts defer to facts found at trial about society and legislation?
3. How should courts determine whether laws cause violations of section 7 rights?
4. Is the 'common bawdy house' law constitutional?
5. Is the 'living off the avails' law constitutional?
6. Is the 'communicating in public for the purposes of prostitution' law constitutional?

Decision

The Supreme Court ruled that a trial judge may consider *Charter* arguments not raised in a previous case about the same issues. It also found that facts about society and legislation determined at trial court must be given deference by higher courts. Finally, the Court found all three of the prostitution laws – common bawdy house, living of the avails, and communicating in public for the purposes of prostitution - to be unconstitutional.

Court's Analysis

Issue 1: Can a trial judge consider *Charter* arguments not raised in a previous case about the same law?

The Supreme Court decided that, in some situations, a trial judge may consider *Charter* arguments not raised in a previous case about the same law.

If a higher court has already made a decision about a legal issue, then a lower court generally must decide that legal issue in the same way. This is the principle of *stare decisis*.[11] The lower court is 'bound' by that decision. This is true of all cases, including reference cases. Here, the Supreme Court ruled that new arguments about a subject already decided by higher courts are new issues. Because they are new issues, the trial court can make a different decision than the higher court about the same subject. In addition, significantly new circumstances or evidence may render the same argument about the same subject a new issue. In those circumstances, a lower court is also not bound by a higher court. In other words, the constitutionality of a law is more important than the principle of *stare decisis*. A lower court does not need to follow the decision of a higher court, even the Supreme Court of Canada, if the result would be unconstitutional.

In this case, the Supreme Court found that the trial judge was allowed to make a different

decision about Canada's prostitution laws than the Supreme Court did in the *Prostitution Reference* case. New arguments about the laws and section 7 of the *Charter* meant that there was a new legal issue for the judge to decide.

Issue 2: Must appeal courts defer to facts found at trial about society and legislation?

The Supreme Court decided that appeal courts must defer to facts found at trial about society and legislation.

Generally, appeal courts do not change facts found at trial unless the trial judge finds a fact that had no supporting evidence, and that finding affects the outcome. This is because the trial court can examine and test the evidence at length. If appeal courts did the same fact finding, there would be a lot of time wasted on repeating work already completed at trial. Likewise, if appeal courts had one standard for facts about society and legislation and another for other facts, then appeal courts would have an impossible task. Facts about society and legislation are usually linked with other facts. Appeal courts could not untangle the two types of facts, nor verify them. They must rely on the trial court's judgment because the facts have been presented directly there.

Issue 3: How should courts determine whether laws cause violations of section 7 rights?

The Court clarified two important points about determining whether, and how, laws cause violations of section 7 rights. The first point was about causation, or how the court determines whether the law caused the violation of someone's section 7 rights. The second was about the principles of fundamental justice, or how courts must classify different ways in which laws can violate rights.

Sub Issue 3.1: Causation

The Attorney General in this case argued that the laws against living off the avails, keeping a common bawdy house and communicating for the purposes of prostitution cannot cause violations of section 7 rights because Parliament is free to make laws as they see fit. Therefore, anyone who sells sex accepts the risks of breaking those laws.

The Supreme Court rejected these arguments. The court reasoned that some people may have no real choice other than selling sex because of desperate financial circumstances, addiction, or force. Even if all prostitutes had freely chosen their work, the laws in question create the possibility of harm that violates their right to security of the person. For example, the prohibition against communicating in public for the purposes of prostitution prohibited prostitutes from screening clients in public before getting in a car or meeting in a private area. Screening clients before going into a private area is a way for prostitutes to help check if their potential client is drunk or possibly dangerous. Prohibiting this practice violated their section 7 rights because sex workers must choose between an important safety measure and obeying the law.

Sub Issue 3.2 Principles of fundamental justice

Section 7 of the *Charter* states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[12] The Court stated that the purpose of section 7 is to ensure that laws that impact the rights to life, liberty and security of the person do not conflict with our basic values. The 'principles of fundamental justice' are a way to understand these basic values about justice.

The Court noted that one of these principles is a principle against arbitrariness, overbreadth and gross disproportionality. A law is arbitrary when there is no real connection between the effect of the law and its goal. A law is overbroad when the effect of the law goes too far and interferes with activities that are not part of its goal. A law is grossly disproportionate when the effect of the law is much harsher than the benefits of achieving its goal.

Issue 4: Is the 'common bawdy house' law unconstitutional?

The Supreme Court found the common bawdy house law unconstitutional. Unlike the Ontario Court of Appeal, the Supreme Court supported the trial court's decision about the facts involving bawdy houses. The trial court found that the goal of this law was to address some of the effects of prostitution on communities rather than to address prostitution itself. The finding was that while the law did help keep brothels out of communities, it also prevented sex workers from working safely. It noted that the safest method of prostitution is "in-call" prostitution, where sex work occurs in a place controlled by sex workers. The Court concluded that the 'common bawdy house' law prevents sex workers from hiring security and receptionists, resorting to safe houses, and taking other safety measures. Therefore, the law puts sex workers at risk and violates their section 7 rights. As such, it was declared unconstitutional.

Issue 5: Is the 'avails' law unconstitutional?

The law against living off the avails of prostitution was likewise found to be unconstitutional. The Supreme Court accepted the facts about this law found at trial. It was found at trial that this law's purpose was to protect sex workers against exploitative relationships. The Supreme Court found that this law was overbroad. It noted that while the law satisfied this purpose, it also stopped sex workers from hiring people that would make their work safer, such as security guards. It did this because any person that sex workers might hire to keep them safe would be breaking the law against living off the avails of prostitution.

Issue 6: Is the 'communication' law unconstitutional?

Again, the Supreme Court accepted the facts found at trial where the objective was found to be preventing a public nuisance, namely public displays of the negotiation about sex work. While the law does prevent that nuisance, the court also found it to prevent safety measures such as screening of clients and negotiating condom use.

The Supreme Court found that the effect of the law was grossly disproportionate because the law had grave consequences to sex workers compared to the benefits of the goal of avoiding nuisance in communities.

The Supreme Court also ruled that the majority of the Court of Appeal erred in their decision on this point, misunderstanding the objective of the law as noted in the *Prostitution Reference* case. The Court of Appeal also wrongly substituted its own judgment on the evidence for the trial court's judgment. The Supreme Court also found that the Court of Appeal erred by ignoring some important facts found at trial and substituting these facts with speculation.

The court gave Parliament time to write new laws by allowing all three laws to stay in place for up to one year.

Significance of the Ruling

It is hard to overstate the impact of this decision. Not only were three of Canada's prostitution laws declared invalid, the Supreme Court gave new direction on how courts should deal with prior decisions and section 7 rights claims.

On June 4, 2014, Minister of Justice Peter McKay introduced a bill in response to this decision.[13] He stated that the bill would make prostitution illegal in Canada for the first time by criminalizing the purchase of sex.[14] For example, selling sex would still be legal under the proposed law, but buying it would now be illegal. Reactions were polarized. The Pivot Legal Society argued that the new prostitution laws would both be unconstitutional and make sex work more dangerous.[15] They argued that it would be unconstitutional because the proposed law would make a legal activity dangerous in the same way the old laws did. In contrast, professor Michael Plaxton of the University of Saskatchewan College of Law suggested that the law may be constitutional and more carefully written than the laws struck down in *Bedford*.[16]

This decision gives Canadians a unique opportunity to think about, debate, and tell Members of Parliament what kind of prostitution laws they want. Prostitution is the so-called oldest profession, and Canada has an opportunity to take a new approach. The Minister of Justice has stated that the proposed bill is a new "Canadian Model" dealing with sex work.[17] This has led to a lot of debate in society and in Parliament. Regardless of what law, if any, Parliament passes, any new laws may be challenged in court again.

[1] *Canada (Attorney General) v Bedford*, 2013 SCC 72, 2013 SCC 72 (Canlii).

[2] *Canadian Charter of Rights and Freedoms*, *s 7*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11.

[3] "Supreme Court strikes down Canada's prostitution laws", *CBC News* (20 December 2013) online: CBC News < http://www.cbc.ca/news/politics/supreme-court-strikes-down-canada-s-prostitution-laws-1.2471572>.

[4] *Ibid*.

[5] *Criminal Code*, RSC 1985, c C-46, s 213(1)(c).

[6] *Ibid*, s 210.

[7] *Ibid*, s 212(1)(j).

[8] *Ibid*, s 197 "common bawdy-house".

[9] *Charter*, s 7.

[10] *Reference re ss 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 SCR 1123, 1990 CanLII (SCC).

[11] *Black's Law Dictionary*, 9th ed, sub verbo "stare decisis".

[12] *Charter*, s 7.

[13] "Prostitution bill would make it illegal to buy, sell sex in public", *CBC News* (4 June 2014) online: CBC News < http://www.cbc.ca/news/politics/prostitution-bill-would-make-it-illegal-to-buy-sell-sex-in-public-1.2664683>. [Prostition Bill – CBC News].

[14] *Ibid*.

[15] Peter Wrinch, "*The new sex work legislation explained*", Pivot Legal Society (4 June 2014) online: Pivot Legal Society < http://www.pivotlegal.org/the_new_sex_work_legislation_explained>

[16] Michael Plaxton, "First Impressions of Bill C-36 in Light of Bedford", University of Saskatchewan (6 June 2014) online: Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447006>

[17] Prostitution Bill - *CBC News*, see note 13.