True North in
Canadian public policy

THE SUPREME COURT *VS.* PARLIAMENT

Supreme Court of Canada 2016 Year in Review

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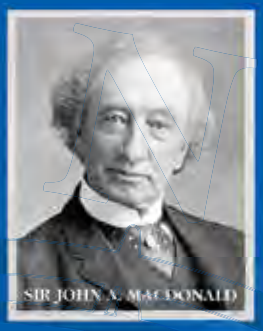

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Executive Summary

The Supreme Court vs. Parliament emerged as the top theme of this third annual review of the Supreme Court of Canada's major decisions. In a series of dissenting and concurring reasons, five of the nine judges on the Court voiced harsh criticism at various times of the majority judges for inappropriately intruding on Parliament's policy-making role. This is a serious critique that goes to the heart of the relative responsibilities of the Court versus Parliament.

Picking up where last year's report left off, this report examines the legal significance and policy impact of the Supreme Court of Canada's top-10 decisions from the last year (November 1, 2015 to October 31, 2016). These cases were selected based on the importance of their subject matter and broad significance to Canadians. While the start of the period covered by this report coincides with the commencement of the new Liberal government, decisions released during this period include litigation undertaken by both the former Conservative government as well as the new Liberal government.

There were landmark rulings on federalism (*Alberta (Attorney General) v. Moloney*), Métis and non-status Indians (*Daniels v. Canada (Indian Affairs and Northern Development)*), non-unionized federal employees (*Wilson v. Atomic Energy of Canada Ltd.*), and the constitutionality of Canada's migrant smuggling offence (*R. v. Appulonappa*). The Court's significant criminal law decisions dealt with mandatory minimum penalties for repeat drug traffickers (*R. v. Lloyd*), the *Truth in Sentencing Act* (*R. v. Safarzadeh-Markhali*), search and seizure incident to arrest (*R. v. Saeed*), unreasonable delays in criminal prosecutions (*R. v. Jordan*), the constitutionality of retrospective prohibitions on child sex offenders (*R. v. K.R.J.*), and the test for when a judge can disregard a plea bargain (*R. v. Anthony-Cook*).

The main findings of this year's study are:

1. A significant number of judges on the Supreme Court of Canada have been highly critical of their colleagues for intruding on Parliament's policy-making role;

2. of the top-10 decisions in the last year, the federal government had zero wins, six losses, two mixed result outcomes, and two cases where it did not participate; and

3. major criminal justice reforms have been initiated by the Court to deal with significant concerns about delays and inefficiencies.

In *R. v. Lloyd*, 2016 SCC 13 (dealing with mandatory minimum penalties for repeat drug traffickers), dissenting Justices Wagner, Gascon, and Brown challenged the majority, arguing that if Chief Justice McLachlin's approach were followed, "one must question what role is left for Parliament's legitimate policy choices in setting punishment" (para. 107). They added that enacting "judicial safety valves" for mandatory minimum penalties "are questions of policy that are within the exclusive domain of Parliament" (para. 109).

Similarly, in *R. v. K.R.J.*, 2016 SCC 31 (dealing with retrospective prohibitions on child sex offenders), Justice Brown wrote in dissenting reasons that the majority "holds Parliament to an

exacting standard of proof, thereby denying Parliament the room necessary to perform its legislative policy-development role when addressing a chronic social problem" (para. 135).

In concurring reasons in *R. v. Saeed,* 2016 SCC 24, Justice Karakatsanis criticized the majority's attempt to set out rules for particular types of searches incident to arrest, indicating that such work is best left to Parliament. Justice Cromwell made the same point in concurring reasons in *R. v. Jordan*, 2016 SCC 27, regarding setting timelines for criminal trials.

This is a serious critique that goes to the heart of the relative responsibilities of the Court versus Parliament.

Conversely, *R. v. Appulonappa,* 2015 SCC 59, provides an example of the Court developing a remedy to a constitutional infringement that shows some deference to Parliament's policy-making role. Rather than striking down the migrant smuggling offence in the *Immigration and Refugee Protection Act* in its entirety, the Court simply "read down" the provision to exclude the categories of persons that it found were not properly encompassed (such as genuine humanitarian aid workers, family members of undocumented migrants, and mutual assistance provided by asylum seekers).

Several observations can be made when stepping back to look at the last several years. First, the Supreme Court of Canada is a trailblazing institution in Canadian public life that continues to move significant and controversial issues forward. Second, it is remarkable to observe the dismal record of the federal government at the Court in major litigation in recent years: a mere three clear victories in the top-30 cases between 2014 and 2016 is a staggeringly poor result.

Third, the philosophical outlook of the Supreme Court of Canada has evolved through the many judicial appointments made by former Prime Minister Stephen Harper to include several judges that are now vocally reflecting an approach of judicial restraint, recognizing that while the Court has a duty to review governmental action and legislation, it must also respect the policy-making role of Parliament.

Moving forward, the Supreme Court of Canada is slated to hear a number of important and controversial cases. It will be interesting to see how the new Liberal government fares before the Court in the upcoming year as it prepares for the appointment of a new Chief Justice in 2018.

Sommaire

La Cour suprême c. le Parlement se révèle être le thème dominant de ce troisième examen annuel des arrêts décisifs de la Cour suprême du Canada. Dans une série de motifs dissidents et concordants, cinq des neuf juges de la Cour ont exprimé de vives critiques à l'endroit de la majorité des juges dans diverses affaires, leur reprochant d'avoir empiété indûment sur le rôle joué par le Parlement dans l'élaboration des politiques. Il s'agit là d'une critique sérieuse qui concerne directement les responsabilités relatives de la Cour et du Parlement.

Dans la continuité du rapport publié l'année dernière, le présent rapport examine l'importance juridique et les répercussions sur les politiques des dix grandes décisions rendues par la Cour suprême du Canada au cours de l'année écoulée (entre le 1er novembre 2015 et le 31 octobre 2016). Ces cas ont été choisis en fonction de leur portée juridique et de leurs conséquences pour les Canadiens. La période à l'étude débute au moment où le nouveau gouvernement libéral est entré en fonction, mais les décisions rendues concernent les litiges dont la Cour a été saisie pendant la période au pouvoir de l'un ou l'autre de l'ancien gouvernement conservateur ou du nouveau gouvernement libéral.

Certaines décisions historiques portent sur le fédéralisme [*Alberta (Procureur général) c. Moloney*], les Métis et les Indiens non inscrits [*Daniels c. Canada (Affaires indiennes et du Nord canadien)*], les employés fédéraux non syndiqués [*Wilson c. Énergie atomique du Canada Ltée*] et la constitutionnalité de la disposition qui criminalise le passage de clandestins au Canada [*R. c. Appulonappa*]. Les décisions importantes de la Cour en droit pénal portent sur les peines minimales obligatoires infligées aux trafiquants de drogue récidivistes [*R. c. Lloyd*], la *Loi sur l'adéquation de la peine et du crime* [*R. c. Safarzadeh-Markhali*], les fouilles et les saisies accessoires à une arrestation [*R. c. Saeed*], les délais déraisonnables lors de poursuites criminelles [*R. c. Jordan*], la constitutionnalité de l'application rétrospective d'interdictions dans le cas des agresseurs sexuels d'enfants [*R. c. K.R.J.*] et le critère en fonction duquel un juge n'est pas tenu d'accepter une négociation de plaidoyer [*R. c. Anthony-Cook*].

Les principales conclusions de la présente étude sont les suivantes :

1. Les juges de la Cour suprême du Canada ont été nombreux à exprimer de vives critiques à l'endroit de leurs collègues, leur reprochant d'avoir empiété indûment sur le rôle joué par le Parlement dans l'élaboration des politiques.

2. Le gouvernement fédéral n'a eu aucun gain de cause parmi les dix arrêts majeurs à l'étude. Il a subi six défaites, a obtenu des résultats mitigés dans deux décisions et s'est abstenu de participer aux deux autres.

3. La Cour a lancé d'importantes réformes en matière de justice pénale en vue de répondre aux sérieuses préoccupations concernant les délais et les inefficacités.

Dans l'arrêt *R. c. Lloyd*, 2016 CSC 13 (traitant des peines minimales obligatoires pour les trafiquants de drogue récidivistes), les juges dissidents Wagner, Gascon et Brown se sont dissociés des juges majoritaires, faisant valoir que si l'approche de la juge en chef McLachlin était suivie, « il faut se demander de quel pouvoir jouit encore le législateur pour l'adoption de politiques générales légitimes en matière de peines » (par. 107). Ils ont ajouté que « La question de savoir si le législateur devrait

ou non prévoir un mécanisme permettant d'écarter l'infliction d'une peine minimale obligatoire [...] relève de la politique générale et du pouvoir exclusif du Parlement » (par. 109).

De même, dans l'arrêt *R. c. K.R.J.*, 2016 CSC 31 (traitant de l'application rétrospective d'interdictions dans le cas des agresseurs sexuels d'enfants), le juge Brown a écrit dans ses motifs dissidents que les juges majoritaires « soumettent le législateur à une norme de preuve très stricte et lui refusent ainsi la marge de manœuvre dont il a besoin pour s'acquitter de sa fonction de mise en œuvre de politiques en matière législative lorsqu'il s'agit de s'attaquer à un problème social chronique. » (par. 135).

Dans les motifs concordants exposés dans l'arrêt *R. c. Saeed,* 2016 CSC 24, la juge Karakatsanis a adressé des reproches aux juges majoritaires pour avoir tenter d'établir des règles pour certains types de fouilles accessoires à une arrestation, ajoutant que le Parlement accomplirait mieux cette tâche. Le juge Cromwell a fait le même constat dans les motifs concordants exposés dans l'arrêt *R. c. Jordan*, 2016 CSC 27, concernant la détermination des délais pour les procès criminels.

Il s'agit là d'une critique sérieuse qui concerne directement les responsabilités relatives de la Cour et du Parlement.

A l'inverse, l'arrêt *R. c. Appulonappa,* 2015 CSC 59, présente un cas où la Cour élabore une solution à une violation constitutionnelle qui démontre un certain respect à l'égard du rôle joué par le Parlement dans l'élaboration des politiques. Plutôt que d'invalider dans son intégralité la criminalisation du passage de clandestins au Canada dans la *Loi sur l'immigration et la protection des* réfugiés, la Cour a simplement « adopté une interprétation atténuée » de la disposition de manière à exclure les catégories de personnes qui, à son avis, n'étaient pas dûment visées (comme les travailleurs humanitaires confirmés, les proches des migrants sans-papiers et les demandeurs d'asile se portant assistance mutuellement).

Il est possible de faire plusieurs observations en considérant les dernières années dans leur ensemble. Premièrement, la Cour suprême du Canada est une institution pionnière dans la vie publique canadienne qui continue de faire avancer d'importantes questions controversées. Deuxièmement, on s'étonne du bilan peu reluisant du gouvernement fédéral dans les litiges importants entendus par la Cour au cours des dernières années : seulement trois franches victoires parmi les 30 décisions majeures rendues entre 2014 et 2016, un résultat excessivement mauvais.

Troisièmement, la philosophie de la Cour suprême du Canada a évolué au fil des nombreuses nominations confirmées par le gouvernement de Stephen Harper, puisqu'à présent, plusieurs des juges nommés font clairement valoir une approche axée sur la « retenue judiciaire », tout en reconnaissant que si la Cour a le devoir de contrôler les actions et les lois du gouvernement, elle se doit aussi de respecter le rôle joué par le Parlement dans l'élaboration des politiques.

Poursuivant son mandat, la Cour suprême du Canada devrait bientôt entendre un certain nombre de causes importantes et controversées. Il sera intéressant de voir les résultats qu'obtiendra le nouveau gouvernement libéral devant la Cour au cours de l'année à venir, année pendant laquelle il procédera aux préparatifs menant à la nomination du nouveau juge en chef en 2018.

1. Introduction

During the last year, the Supreme Court of Canada made landmark rulings on federalism, Métis and non-status Indians, non-unionized federal employees, and the constitutionality of Canada's migrant smuggling offence. Yet it was within the Court's heavy criminal law docket that a philosophical rift within the Court about its proper role vis-à-vis Parliament, which was first identified in last year's report, deepened even further. This could be seen in decisions dealing with mandatory minimum penalties for repeat drug traffickers, search and seizure incident to arrest, unreasonable delays in criminal prosecutions, and the constitutionality of retrospective prohibitions on child sex offenders.

In 2014, the Macdonald-Laurier Institute named the Supreme Court of Canada the "policy-maker of the year" after a string of noteworthy decisions on prostitution laws, Aboriginal title and land claims, police powers, sentencing reform, Senate reform, and appointments to the Court itself (Perrin 2014). Soon afterwards, in his retirement interview with the *Toronto Star*, Justice Louis LeBel pushed back against the characterization, saying that cases simply came before the Court that "had to be decided" (MacCharles 2014).

A philosophical rift within the Court about its proper role vis-à-vis Parliament deepened even further in 2016.

However, in 2015, strong voices within the Court itself raised the alarm that the Court is intruding on Parliament's public-policy domain (Perrin 2016). In *R. v. Nur*, 2015 SCC 15, Justice Moldaver (with Justices Rothstein and Wagner concurring) wrote in dissenting reasons that Parliament's objective in adopting mandatory penalties for firearms offences is valid and pressing and "it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture" (para. 132).

Likewise, in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, Justices Rothstein and Wagner dissented, writing "the majority is wrong to intrude into the policy development role of elected legislators by constitutionalizing the right to strike" (para. 105). They even went so far as to caution against the Court "usurping the responsibilities of the legislative and executive branches" (para. 114). This is striking language from judges on the Court itself – it is not coming from right-wing political scientists, eager politicians, or dissatisfied litigants.

In *Quebec (Attorney General) v. Canada (Attorney General),* 2015 SCC 14, it was the majority who warned that the Court must be careful not to overstep its proper role. Justices Cromwell and Karakatsanis characterized the destruction of long-gun registry data as a "contentious policy choice" (para. 1) that was for Parliament to make, stating, "the courts are not to question the wisdom of legislation but only to rule on its legality" (para. 3).

This year, the clash between Parliament's policy-making role and the Court's overseeing judicial function is even more striking. In various decisions in 2016, Justices Cromwell (recently retired), Karakatsanis, Wagner, Gascon, and Brown have authored stinging rebukes of their fellow judges for making decisions they say are more appropriately left to Parliament in a wide range of criminal justice matters.

This paper explores the recent track record of the Supreme Court of Canada and the significance of some of its landmark decisions from the last year, following the same methodology and approach as previous reports to facilitate year-over-year comparisons. This encompasses litigation by both the former Conservative government and the new Liberal government. Part 2 of this paper introduces the current members of the Court. Part 3 discusses the main findings from this study, focusing on trends across the top-10 most significant judgments from the last year. Part 4 provides an in-depth examination of each of these decisions, including their impact on law and public policy. The main findings of this study are:

1. A significant number of judges on the Supreme Court of Canada have been highly critical of their colleagues for intruding on Parliament's policy-making role;
2. of the top-10 decisions in the last year, the federal government had zero wins, six losses, two mixed result outcomes, and two cases where it did not participate; and
3. major criminal justice reforms have been initiated by the Court to deal with significant concerns about delays and inefficiencies.

2. Current Members of the Supreme Court of Canada

During the last year, Justice Thomas Cromwell retired on September 1, 2016 and was subsequently replaced by Justice Malcolm Rowe of the Newfoundland & Labrador Court of Appeal, who was appointed by Prime Minister Justin Trudeau following a new open nomination process overseen by an independent advisory group. It was made clear by the government that only a functionally bilingual candidate would be appointed. There was significant public debate regarding whether Justice Cromwell's successor should be appointed from Atlantic Canada as he was, in order to respect a convention on regional representation. There were also calls for the appointment of an Indigenous justice. Justice Rowe was questioned by Parliamentarians in a public hearing and then sworn in as a justice of the Court on October 28, 2016 (see table 1 for a complete list of the current members of the Supreme Court of Canada).

TABLE 1 — CURRENT MEMBERS OF THE SUPREME COURT OF CANADA

Name of Justice	Year of Appointment	Appointed by	Mandatory retirement year
The Rt. Hon. Beverley McLachlin, Chief Justice	1989 (Justice) 2000 (Chief Justice)	The Rt. Hon. Brian Mulroney (as Justice) The Rt. Hon. Jean Chrétien (as Chief Justice)	2018
The Hon. Madam Justice Rosalie Silberman Abella	2004	The Rt. Hon. Paul Martin	2021
The Hon. Mr. Justice Michael J. Moldaver	2011	The Rt. Hon. Stephen Harper	2022
The Hon. Madam Justice Andromache Karakatsanis	2011		2030
The Hon. Mr. Justice Richard Wagner	2012		2032
The Hon. Mr. Justice Clément Gascon	2014		2035
The Hon. Madam Justice Suzanne Côté	2014		2033
The Hon. Mr. Justice Russell Brown	2015		2040
The Hon. Mr. Justice Malcolm Rowe	2016	The Rt. Hon. Justin Trudeau	2028

On the horizon, Chief Justice Beverley McLachlin is set for mandatory retirement in 2018 at which point the Prime Minister will have an important decision to make about her successor.

3. Discussion & Analysis

This period coincides with the formal transition of power to the new federal Liberal government.

As a follow-up to the 2014 and 2015 studies, this review covers decisions released by the Supreme Court of Canada between November 1, 2015 and October 31, 2016. This period is also helpful since it coincides with the formal transition of power to the new federal Liberal government. For consistency with previous studies, all judgments of the Court during this period were considered for inclusion in the analysis that follows. The top-10 cases were selected to provide a manageable but meaningful number of cases to analyse and compare. These cases were selected based on the importance of their subject matter and broad significance to Canadians. The outcome of the decisions was not a consideration in selecting them. It is observable that the selection criteria led to a large number of public law decisions, across a wide spectrum of areas of law. Table 2, below, provides a snapshot of these decisions and their outcomes. Each case is identified by its style of cause and citation with a brief note on its subject matter. The out-

come in the case is listed, according to whether it was a unanimous decision, majority decision with concurring reasons, or a case involving majority reasons with dissenting reasons. The final column of "Government win or loss" (which refers to the federal government) requires some explanation, since the federal government is not a party to every case reaching the Court. The determination of whether a case involved a "win" or "loss" for the federal government refers to cases where the Court either agreed with, or rejected, respectively, the position taken by the federal government or federal entities. In some instances, these federal entities were parties to the proceeding, whereas they were interveners in others (in which case their intervener's factum was consulted). The decisions are listed in chronological order.

TABLE 2 — TOP-10 SUPREME COURT OF CANADA DECISIONS OF THE LAST YEAR

Case	Citation	Subject	Unanimous	Majority and concurring reasons	Dissenting reasons	Federal government win or loss
Alberta (Attorney General) v. Moloney[1]	2015 SCC 51	Federalism		Majority: Gascon J. (7 judges); concurring: Côté J. (2 judges)		N/A
R. v. Appulonappa[2]	2015 SCC 59	Migrant smuggling	McLachlin C.J.			Mixed
Daniels v. Canada (Indian Affairs and Northern Development)	2016 SCC 12	Métis and non-status Indians	Abella J.			Loss
R. v. Safarzadeh-Markhali	2016 SCC 14	*Truth in Sentencing Act*	McLachlin C.J.			Loss
R. v. Lloyd	2016 SCC 13	Mandatory minimum penalties		McLachlin C.J. (6 judges)	Wagner, Gascon and Brown JJ. (3 judges)	Loss
R. v. Saeed	2016 SCC 24	Search and seizure		Majority: Moldaver J. (7 judges); concurring: Karakatsanis J.	Abella J.	N/A
R. v. Jordan[3]	2016 SCC 27	Unreasonable delays in criminal justice system		Majority: Moldaver, Karakatsanis and Brown JJ. (5 judges); concurring: Cromwell J. (4 judges)		Loss
R. v. K.R.J.	2016 SCC 31	Retrospective punishment		Karakatsanis J. (7 judges)	Abella J.; Brown J.	Mixed
Wilson v. Atomic Energy of Canada Ltd.	2016 SCC 29	Dismissal of non-unionized federal employees		Abella J.; joint concurring: McLachlin C.J. and Karakatsanis, Wagner and Gascon JJ.; concurring: Cromwell J.	Côté and Brown JJ. (3 judges)	Loss
R. v. Anthony-Cook	2016 SCC 43	Plea bargains	Moldaver J.			Loss

Notes

[1] Companion decisions: *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 S.C.R. 397; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419.

[2] Companion decision: *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58.

[3] Companion decision: *R. v. Williamson*, 2016 SCC 28.

Some of the other notable cases during this period are: *Canada (National Revenue) v. Thompson*, 2016 SCC 21 (solicitor-client privilege); *Caron v. Alberta*, 2015 SCC 56 (language of laws); *R. v. Borowiec*, 2016 SCC 11 (infanticide); *World Bank Group v. Wallace*, 2016 SCC 15 (immunities); *Endean v. British Columbia*, 2016 SCC 42 (pan-Canadian class actions); *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39 (judicial reform and independence); and *Morasse v. Nadeau-Dubois*, 2016 SCC 44 (Quebec student protests and contempt of court).

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

1. A significant number of judges on the Supreme Court of Canada have been highly critical of their colleagues for intruding on Parliament's policy-making role

Last year's report highlighted several decisions where judges on the Supreme Court of Canada itself raised the alarm that the Court was intruding on Parliament's policy-making domain. While this tension can be seen in some earlier decisions of the Court (particularly in the post-*Charter* era), it has become more pronounced.

As Justice La Forest wrote in dissenting reasons in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199:

> courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. (para. 68)

However, Justice La Forest was more willing to "subject criminal justice legislation to careful scrutiny" (para. 68).

Former Prime Minister Stephen Harper appointed each of these justices.

The fundamental philosophical rift concerning the institutional role of the Supreme Court of Canada versus Parliament deepened in 2016. Justices Cromwell (recently retired), Karakatsanis, Wagner, Gascon, and Brown each authored stinging rebukes of their fellow judges for making decisions they say are more appropriately left to Parliament. Former Prime Minister Stephen Harper appointed each of these justices. However, these justices do not form a cohesive voting block on the Court. Instead, they have typically raised these concerns in dissents and concurring reasons at different times during the last year. It is also notable that all of these cases in the last year involved criminal law matters.

In *R. v. Lloyd*, Chief Justice McLachlin wrote majority reasons striking down a one-year mandatory minimum penalty of imprisonment for repeat drug traffickers, and suggested that Parliament should create exceptions to mandatory minimum penalties or narrow their application

in order to ensure their constitutionality. However, dissenting Justices Wagner, Gascon, and Brown challenged the majority, arguing that if the Chief Justice's approach were followed, "one must question what role is left for Parliament's legitimate policy choices in setting punishment" (para. 107). They added that Parliament is not obliged to adopt exceptions to mandatory minimum penalties and that is within its exclusive domain to determine:

> Whether Parliament should enact judicial safety valves to mandatory minimum sentences, and if so, what form they should take, *are questions of policy that are within the exclusive domain of Parliament*. The only limits on Parliament's discretion are provided by the Constitution, and in particular, the *Charter* right not to be subjected to cruel and unusual punishment. (emphasis added; para. 109)

In *R. v. K.R.J.*, Justice Brown's dissenting reasons challenged the approach taken by the majority to assessing whether retrospective prohibitions on child sex offenders that infringed section 11(i) of the *Canadian Charter of Rights and Freedoms ("Charter")* were demonstrably justified under section 1,[1] writing:

> It [the majority] holds Parliament to an exacting standard of proof, thereby *denying Parliament the room necessary to perform its legislative policy-development role* when addressing a chronic social problem. And it also insists on direct evidence of anticipated benefits which, given that chronic nature of the harm, is likely impossible to obtain. (emphasis added; para. 135)

Justice Brown found both retrospective prohibitions were saved by section 1 of the *Charter*. In contrast, Justice Abella (the other dissenting judge in *K.R.J.*) would have found neither retrospective prohibition was saved by section 1 of the *Charter*. Reading these competing sets of reasons, we see a microcosm that arguably reflects the right and left spectrums of the current members of the Court, respectively. Justice Brown (who was appointed by former Conservative Prime Minister Stephen Harper) is recognized for his judicial restraint and more deferential approach towards Parliament, whereas Justice Abella (who was appointed by former Liberal Prime Minister Paul Martin) has been criticized for judicial activism – a label that she has publicly rejected.

We see a microcosm that arguably reflects the right and left spectrums of the current members of the Court.

In concurring reasons in *R. v. Saeed,* Justice Karakatsanis criticized the majority's attempt to set out specific rules for particular types of searches incident to arrest, indicating that such work is best left to Parliament: "A second problem with judicially imposed threshold requirements for specific types of searches incident to arrest is that defining these requirements is a nuanced exercise which may be best left to Parliament" (para. 120).

Likewise, in concurring reasons in *R. v. Jordan,* Justice Cromwell (with McLachlin C.J. and Wagner and Gascon JJ. concurring) was highly critical of the majority for setting specific

timeframes for whether the time that it takes from an accused being charged to the conclusion of their trial constitutes unreasonable delay under section 11(b) of the *Charter*. He assailed the majority's approach as "inconsistent with the judicial role" (para. 273), stating that "creating these types of ceilings is a task better left to legislation" (para. 147) – "[i]f such ceilings are to be created, Parliament should do so" (para. 267). Justice Cromwell quoted the Law Reform Commission of Canada in this regard:

> The courts have been given a greatly expanded role with the *Charter*, but their essential function has not changed. They do not function as legislating bodies; their principal task is adjudicating conflicts brought before them. Rather, it is the role of Parliament to advance and enhance constitutional rights through legislative standards which the *Charter*, by its very nature, can provide only in general terms. (para. 269)

Conversely, *R. v. Appulonappa* provides an example of the Court ordering a remedy to a constitutional infringement that shows some deference to Parliament's policy-making role. In this decision, a unanimous Court decided that rather than strike down the migrant smuggling offence in section 117 of the *Immigration and Refugee Protection Act* for being overly broad in violation of section 7 of the *Charter*, the Court "read it down" to carve out the problematic aspects of it. This had the effect of preserving the core offence that Parliament had enacted to deal with migrant smuggling by criminal organizations, while exempting situations that were not really meant to be criminalized, such as assistance provided by genuine humanitarian aid workers, family members of undocumented migrants, and mutual assistance provided by asylum seekers. In short, the Court decided not to throw the baby out with the bathwater. Had the Court struck down the offence in its entirety, the captain and key crew of the *Ocean Lady* would not have faced charges for their role in allegedly organizing an international for-profit migrant smuggling operation.

While reading down was a less intrusive remedy in *R. v. Appulonappa*, there are situations where reading down can be more intrusive such that striking down a provision that has constitutional frailties may actually be more respectful of Parliament's policy-making role. This decision provides governments with a current precedent to employ when they would prefer a provision that has been found to infringe the *Charter* be read down, rather than struck down.

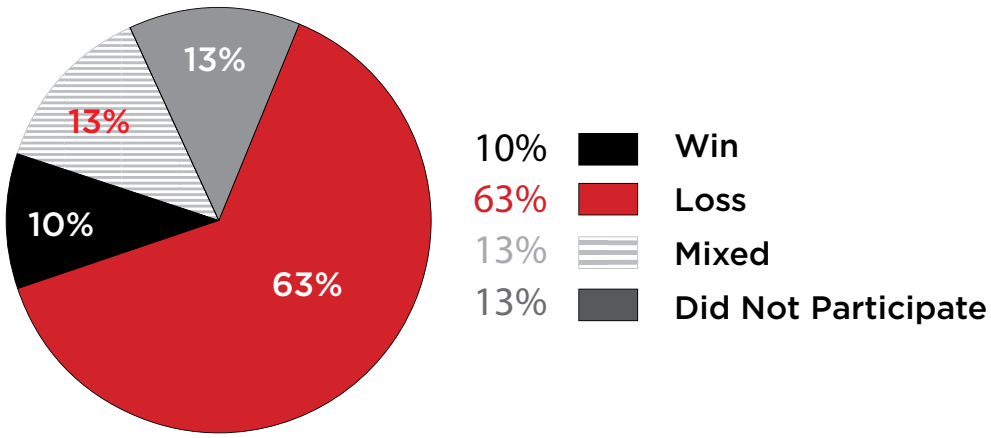
"Reasonable hypotheticals" are factual situations that are not actually before the court but may be used in assessing certain constitutional standards such as overbreadth. *R. v. Appulonappa* provides an example of a more reasonable approach to "reasonable hypotheticals" than in recent decisions such as *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, which included a sharp rebuke from the dissenting judges about the majority's use of "reasonable hypotheticals" being nothing more than "questionable assumptions or loose conjecture" (para. 132). Likewise, the dissenting judges in *R. v. Lloyd* dismissed a key hypothetical advanced by the majority as "far-fetched" (para. 91) and cautioned that in considering reasonable hypotheticals, the courts are not to "artificially concoct 'the most innocent and sympathetic case imaginable'" (para. 102). Instead, a unanimous Court in *R. v. Appulonappa* used reasonable hypotheticals based on reported judicial decisions and historical occurrences (paras. 29–30).

2. Of the top-10 decisions in the last year, the federal government had zero wins, six losses, two mixed result outcomes, and two cases where it did not participate

This year was the worst record of federal government losses on major cases before the Supreme Court of Canada of any of the last three years since this annual review began. In the 2014 report, the federal government had one win, seven losses, and two mixed result outcomes in the top-10 decisions. In the 2015 report, the federal government had two wins, six losses, and two cases where it did not participate in the top-10 decisions. In this 2016 report, the federal government had zero wins, six losses, two mixed result outcomes and two cases where it did not participate in the top-10 decisions. This most recent year includes cases that were litigated by both the former Conservative government and the new Liberal government.

Overall, as shown in chart 1, looking at the outcomes in the top-10 decisions for each of the last three years covered by these annual reports (30 cases in total), the federal government had just three wins (10.0 percent), 19 losses (63.3 percent), four mixed result outcomes (13.3 percent), and four cases where it did not participate (13.3 percent).

CHART 1 — FEDERAL GOVERNMENT RECORD AT SUPREME COURT OF CANADA IN MAJOR CASES, 2014–2016



This is a dismal recent litigation record for the federal government on major decisions that raises serious questions about the efficacy and approach to government litigation, warranting a thorough internal review by the Department of Justice. By comparison, as a historical average, 41 percent of *Charter* claimants have historically been successful at the Court – meaning that the various levels of government succeeded in 59 percent of cases (Monahan and Chanakya 2012, 2).

3. Major criminal justice reforms have been initiated by the Court to deal with significant concerns about delays and inefficiencies

The Supreme Court of Canada has highlighted delays and inefficiencies in the criminal justice system as a major concern this year, taking concrete steps to attempt to incent judges and lawyers to address these systematic and chronic challenges.

In *R. v. Jordan*, the majority of the Court found "a culture of complacency towards delay has emerged in the criminal justice system" and that "[u]nnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay" (para. 40). The majority overturned the longstanding (and highly problematic) framework for assessing the reasonableness of delays in the criminal justice system under section 11(b) of the *Charter* that was set down in *R. v. Morin*, [1992] 1 S.C.R. 771. In its place, the majority in *Jordan* adopted a new test for unreasonable delay, which results in a stay of proceedings, based around presumptive ceilings from the time charges are laid to the expected or actual conclusion of trial: after 18 months in cases before the provincial court or 30 months in cases at superior court, the accused's right to be tried without unreasonable delay is presumed to be breached and a stay of proceedings will result unless the Crown can show that there were exceptional circumstances or defence waived or caused delay. There is no need for the accused to prove prejudice occurred, and the seriousness of the charges are not a factor in this assessment.

There are thousands of cases likely under review presently based on this new test in *Jordan*.

There are thousands of cases likely under review presently based on this new test in *Jordan* and already charges are being stayed. For example, in Alberta, Crown prosecutors are reviewing approximately 400 cases that are at risk of being stayed for unreasonable delay because of the new test in *Jordan*. Already murder charges in the province have been stayed in the wake of this new test (Grant 2016).

In *R. v. Anthony-Cook*, for a unanimous Court, Justice Moldaver set out a new test for whether trial judges can depart from joint submissions (known colloquially as plea bargains), which resolve the vast majority (up to 90 percent) of criminal cases. He held that a trial judge can only depart from a joint submission where it would bring the administration of justice into disrepute or otherwise be contrary to the interests of justice. This stringent test means that there is a high degree of certainty in most cases that judges will adopt joint submissions. The case was largely motivated by concerns about the criminal justice system being unable to function without joint submissions. Justice Moldaver went so far as to say that without joint submissions "our justice system would be brought to its knees, and eventually collapse under its own weight" (para. 40).

4. Review of Major Judgments

Each of the top-10 major judgments of the Court from the last year, identified above, is summarized below along with its subject area, identification of the parties, and the judges who participated. After providing basic information about each case there is a synopsis of the Court's decision (including concurring and dissenting opinions, as relevant), followed by a discussion of the implications of the decision moving forward in terms of their impact on the law and policy. The cases appear below in the chronological order in which they were decided.

4.1 *Alberta (Attorney General) v. Moloney* (federalism)

Citation: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327

Date: November 13, 2015

Appellant: Attorney General of Alberta

Respondent: Joseph William Moloney

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

Issue: How is a conflict between otherwise valid federal and provincial laws determined and resolved?

Decision: Federal law prevails over provincial law where (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

Synopsis:

While the facts of this case are unremarkable (involving whether a person who is a discharged bankrupt under federal law must pay compensation previously awarded under provincial traffic laws), the constitutional doctrine developed to decide it is fundamental to the relationship between federal and provincial laws and jurisdiction. The *Constitution Act, 1867* sets out the respective spheres of jurisdiction of the federal and provincial governments. Even when acting within their own jurisdiction, the effects of one level of government's legislation can overlap with the other level of government's jurisdiction. The doctrine of federal paramountcy provides that federal law prevails where there is a conflict between federal and provincial laws.

Justice Gascon wrote majority reasons setting out how courts should determine whether a conflict exists between federal and provincial legislation and, if so, how to resolve the conflict. The first step is to ensure that the relevant federal and provincial laws are independently valid. If they are, the court must determine whether a conflict exists. Justice Gascon explained two situations where a conflict exists: "(1) there is an operational conflict because it is impossible

to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment" (para. 18). If either situation exists, the provincial law will be declared inoperative. However, Justice Gascon described this doctrine of federal paramountcy as one that should be applied with restraint because of "co-operative federalism" and the assumption that "Parliament intends its laws to co-exist with provincial laws" (para. 27).

Justice Côté wrote concurring reasons (which Chief Justice McLachlin agreed with) disputing how Justice Gascon formulated the federal paramountcy test. She would frame the first situation where a conflict arises as "impossibility of dual compliance as a result of an express conflict" (para. 93). Justice Côté claims that her test is more respectful of co-operative federalism, noting that the majority's test "increases the number of situations in which a federal law might be found to pre-empt a provincial law without an in-depth analysis of Parliament's intent" (para. 93).

Implications of the Decision:

The decision in *Moloney* clarifies a foundational test in Canadian constitutional law. Determining whether there is conflict between provincial and federal laws and how to resolve it is a central issue in federalism. Where there is a conflict in either of the situations set out by the majority, then the doctrine of federal paramountcy will render the provincial law inoperative.

In *Moloney* and its companion decision *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, certain provisions in Ontario and Alberta's driver and vehicle licensing laws were declared inoperative where they seek to enforce debts that have been discharged under federal bankruptcy laws. Counsel in *407 ETR* has said that these decisions will have a "significant impact on future constitutional cases" (Schmitz 2015) because the majority's federal paramountcy test in *Moloney* makes it easier for federal laws to prevail over provincial legislation.

The decision in *Moloney* clarifies a foundational test in Canadian constitutional law.

On the other hand, a third decision (*Saskatchewan (A.G) v. Lemare Lake Logging Ltd.*, 2015 SCC 53) released on the same date as *Moloney* and *407 ETR* applied the federal paramountcy test to set aside a ruling declaring part of *The Saskatchewan Farm Security Act* inoperative because of an alleged conflict with federal bankruptcy laws. Counsel in that case claims that it demonstrates strong support for co-operative federalism (Schmitz 2015). Indeed, *Moloney* gives the concept of cooperative federalism some new life. In *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 (destruction of long-gun registry data from Quebec), the majority had rejected the application of the principle of cooperative federalism as argued in that case. However, the dissenting judges (including all three judges from Quebec) relied heavily on the principle of cooperative federalism. It is notable that judges appointed from Quebec wrote both the majority and concurring reasons in *Moloney*. Consequently, *Moloney* may give with one hand while taking with the other with respect to the balance between federal versus provincial jurisdiction.

4.2 *R. v. Appulonappa* (migrant smuggling)

Citation: *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754

Date: November 27, 2015

Appellant: Francis Anthonimuthu Appulonappa et al.

Respondent: Her Majesty The Queen

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

Issue: Whether section 117 of the *Immigration and Refugee Protection Act* ("IRPA") (organizing entry into Canada) infringes section 7 (principles of fundamental justice) of the *Charter*? If yes, is it saved under section 1 of the *Charter*? If not, what is the appropriate remedy?

Decision: Section 117 of IRPA is read down such that it does not apply to humanitarian aid to undocumented entrants, mutual assistance provided by fellow asylum seekers, or assistance to family members.

Synopsis:

The *Ocean Lady* was apprehended on October 17, 2009 off the coast of Vancouver Island, British Columbia with 76 undocumented migrants aboard – all Sri Lankan Tamils who had boarded the vessel in various Southeast Asian countries. They all sought refugee status claiming their lives were endangered due to the aftermath of a lengthy civil war in Sri Lanka. The Crown alleged the undocumented migrants had paid or were obliged to pay between $30,000 and $40,000 each for passage to Canada on the vessel.

The appellants (the captain and chief crew of the *Ocean Lady* who the Crown alleged were part of an international illicit migrant smuggling operation) were charged under section 117 of IRPA, which then provided: "No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act." The penalty for contravening this provision where 10 or more people are involved in coming into Canada is presently a fine of up to $1,000,000, up to life imprisonment or both (IRPA, s. 117(3)). It also renders persons convicted of this offence inadmissible to Canada. The appellants brought a challenge before trial claiming that section 117 of IRPA infringes section 7 of the *Charter*, not because it was unconstitutional with respect to them but because the offence could be used to prosecute genuine humanitarian aid workers and family members.

The trial judge found that section 117 of IRPA infringed section 7 of the *Charter* because it was overbroad and not saved under section 1. It included the possibility that genuine humanitarian workers or family members could be convicted even though the Crown conceded that was not its purpose. The trial judge rejected the Crown's argument that since the Attorney General of Canada is required to authorize prosecutions under this offence, these problematic cases

would never actually occur in practice. With respect to a remedy, the trial judge held that section 117 of IRPA could not be read down or interpreted to make it *Charter* compliant, so the provision was struck down in its entirety. As a result, the trial judge ordered the indictments against the appellants to be quashed. The B.C. Court of Appeal allowed the appeal, set aside the declaration of invalidity and acquittals, and ordered a new trial.

Chief Justice McLachlin wrote the unanimous reasons for judgment in this decision, noting that since the Court's decision in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, the *Charter* has applied to undocumented foreign nationals entering Canada. She found that section 117 of IRPA infringes section 7 of the *Charter* because it is overbroad – it goes too far in pursuing its objectives. As noted earlier, "reasonable hypotheticals" are factual situations that are not actually before the court but may be used in assessing certain constitutional standards. This doctrine was arguably expanded in last year's decision in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 (a mandatory minimum penalty case that sharply divided the Court and was discussed in last year's annual report). The Chief Justice identified three categories of conduct that make section 117 of IRPA overbroad because she found Parliament intended to combat organized crime and did not intend to criminalize (1) humanitarian aid to undocumented entrants (such as church groups); (2) mutual aid provided by fellow asylum seekers; and (3) assistance provided by family members. The infringement was not saved under section 1 of the *Charter*.

With respect to a remedy, Chief Justice McLachlin refused to strike down section 117 of IRPA in its entirety but instead read it down to exclude the three problematic scenarios, noted above, from its application. The offence thus continues to apply in all other scenarios, including to the appellants, who must now stand trial. The reasons on the remedy issue are unfortunately quite brief:

> The appellants ask the Court to strike s. 117 down in its entirety. Section 117, as it was at the time of the alleged offences, has been replaced. In the particular circumstances of this case, I conclude that the preferable remedy is to read down s. 117 as not applicable to persons who give humanitarian, mutual or family assistance. This remedy reconciles the former s. 117 with the requirements of the *Charter* while leaving the prohibition on human smuggling for the relevant period in place. This remedy is consistent with the guidance this Court gave in *Schachter v. Canada*, [1992] 2 S.C.R. 679. (para. 85)

Consequently, the outcome in this decision for the federal government is mixed: part of the provision was read down, but the core offence was maintained such that the prosecution could resume.

Implications of the Decision:

The arrival of the *Ocean Lady* was followed by the much larger arrival of 492 Sri Lankan Tamils in August 2010 aboard the *MV Sun Sea*. It spurred public reaction and debate about how Canada should deal with migrant smuggling. Ultimately, the federal government adopted legislation to deal with mass smuggling events such as these (Bill C-31, *Protecting Canada's Immigration System Act*)[2] and developed a strategy to address the issue through prevention of such incidents. There have not been any subsequent mass irregular entries by sea to date in Canada.

The remedy in *R. v. Appulonappa* is an example of a measured and appropriate response to a finding of unconstitutionality that is limited to certain specific situations. Rather than striking down section 117 of IRPA in its entirety, the Court simply read it down, carving out the problematic aspects from its scope of liability. This approach shows respect for Parliament's policy-making role, conserves legislative resources, and prevents a gap in the law from arising. Unfortunately, however, the reasons of the Court offer no analysis and simply cite an earlier decision of the Court on constitutional remedies without any elaboration. It would have been helpful had the Court elaborated on why this was an appropriate case for reading down. Nevertheless, it is a useful example for future constitutional remedy decisions.

4.3 *Daniels v. Canada (Indian Affairs and Northern Development)* (Métis and non-status Indians)

Citation: *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12

Date: April 14, 2016

Appellant: Harry Daniels, Gabriel Daniels, Leah Gardner, Terry Joudrey, and Congress of Aboriginal Peoples

Respondent: Her Majesty the Queen as represented by the Minister of Indian Affairs and Northern Development and Attorney General of Canada

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

Issue: Whether to issue declarations: (1) that Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*; (2) that the federal Crown owes a fiduciary duty to Métis and non-status Indians; and (3) that Métis and non-status Indians have the right to be consulted and negotiated with?

Decision: The first declaration sought was issued, namely, that Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867,* meaning that they are under federal jurisdiction. The second and third declarations were not issued because they are already settled law.

Synopsis:

Section 91(24) of the *Constitution Act, 1867* states that the federal Parliament has exclusive jurisdiction over "Indians, and Lands reserved for the Indians". However, neither the federal nor provincial governments have formally accepted jurisdiction or responsibility for Métis and non-status Indians, leaving them in a "jurisdictional wasteland" (para. 14), resulting in fewer benefits and a lack of accountability towards these Indigenous communities.

The plaintiffs in this case sought the following declarations:

> 1. That Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*;
>
> 2. That the federal Crown owes a fiduciary duty to Métis and non-status Indians; and
>
> 3. That Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples. (para. 2)

Justice Abella, writing for a unanimous Court, states that "[d]elineating and assigning constitutional authority between the federal and provincial governments will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution" (para. 12). She found that before and after Confederation, the federal government has acted when it suited its purposes to exercise jurisdiction over Métis and non-status Indians, including by sending them to residential schools. It is also notable that section 35 of the *Constitution Act, 1982* acknowledges that Indian, Inuit, and Métis peoples are "Aboriginal peoples" when it recognizes and affirms existing Aboriginal and treaty rights.

While Justice Abella found that the federal Parliament has exclusive jurisdiction over Métis and non-status Indians, she held that it does not have a duty to legislate under section 91(24) of the *Constitution Act, 1867*. Nevertheless, the Court acknowledged that by declaring federal jurisdictional authority, there would now be certainty and accountability.

The Court noted that the definition of who is Métis or a non-status Indian is ambiguous, yet Justice Abella held that a broad understanding of "Indians" under section 91(24) of the *Constitution Act, 1867* resolves this challenge since "there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians" (para. 46). She adds: "[d]etermining whether particular individuals or communities are non-status Indians or Métis and therefore 'Indians' under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future" (para. 47).

Justice Abella agreed with the lower courts that the second (fiduciary duty) and third (right to be consulted) declarations sought in the case should not be granted. She held that these declarations were unnecessary because they are already settled law.

Implications of the Decision:

Daniels is a watershed for Métis and non-status Indians – the culmination of litigation beginning in 1999 but having its roots dating back to before Confederation. Prime Minister Justin Trudeau called *Daniels* "a landmark ruling that will have broad consequences and impacts" (Fontaine 2016). While *Daniels* is largely symbolic at this stage, since it is merely a declaration of Parliament's authority, it will nevertheless be the starting point for claims by Métis

and non-status Indians to various rights, land claims, government services, entitlements, and benefits from the federal government. Some of these future claims will likely assert that section 15 of the *Charter* requires non-discriminatory treatment between status Indians versus Métis and non-status Indians in a bid to extend benefits to the approximately 600,000 Métis and non-status Indians in Canada.[3]

Several commentators have been critical of the *Daniels* decision, describing it as "a roadmap to nowhere" (Andersen 2016) that offers "simple answers with significant consequences" (Madden 2016). Major concerns relate to the approach taken by the Court to defining who is Métis or a non-status Indian. Indeed, the Court left open the very challenging issue of how to determine whether particular individuals or communities are Métis or non-status Indians. This threshold issue is complicated and controversial. Justice Abella, writing for the majority, indicated that a broader definition should be used for the purpose of section 91(24) of the *Constitution Act, 1867* than was adopted by the Court in *R. v. Powley*, [2003] 2 S.C.R. 207 for the purposes of section 35 of the *Constitution Act, 1982*. Accordingly, a major preoccupation of the litigants and the diverse group of Métis or non-status Indians not included in this litigation will be negotiating with the federal government on this definitional question and potentially going back to the courts to resolve it.

Several commentators have been critical of the *Daniels* decision, describing it as "a roadmap to nowhere".

4.4 *R. v. Safarzadeh-Markhali* (*Truth in Sentencing Act*)

Citation: *R. v. Safarzadeh-Markhali*, 2016 SCC 14

Date: April 15, 2016

Appellant: Her Majesty the Queen

Respondent: Hamidreza Safarzadeh-Markhali

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

Issue: Whether denying enhanced credit for pre-trial custody based on an offender's criminal record infringes section 7 of the *Charter*? If yes, is this infringement justified under section 1?

Decision: Section 719(3.1) of the *Criminal Code* infringes section 7 of the *Charter* and is not saved by section 1, to the extent that it denies enhanced credit for pre-trial custody based on an offender's criminal record.

Synopsis:

Where a person is held in custody prior to their trial and found guilty, they will be given credit for their pre-trial custody at sentencing. Traditionally, sentencing judges have provided "enhanced" credit for pre-trial custody (typically 2:1, but in some cases 3:1 or more credit for each day spent in pre-trial custody) because pre-trial custody is considered more "onerous" due to "overcrowding, inmate turnover, and labour disputes" (para. 8). Another reason given is that "the time spent in pre-sentence custody does not count for purposes of parole eligibility, earned remission and statutory release" (para. 1). This means that an offender who is denied bail and spends time in pre-trial custody is not on an "equal footing" as an offender who is granted bail when both are found guilty and sentenced in otherwise identical circumstances (para. 1).

In 2009, Parliament enacted the *Truth in Sentencing Act*, which provides that a sentencing judge should generally provide one day of credit for every day spent in pre-trial custody, but if the circumstances justify it the sentencing judge can award a maximum credit of 1.5 days for each day spent in pre-trial custody. However, such enhanced credit is not permitted where an offender was denied bail based primarily on their criminal record – at sentencing, such offenders are limited to receiving one day of credit for each day spent in pre-trial custody.

The trial judge in this case found that the purposes of the *Truth in Sentencing Act* are to "repress manipulation of pre-sentence custody to achieve a lower sentence than would otherwise be served, and to provide transparency in this aspect of the sentencing process" (para. 15). In other words, a chief concern was that defence counsel were attempting through a range of tactics to extend the pre-trial custody period of an accused who was likely to be convicted, so that their effective sentence would be less due to receiving enhanced pre-trial custody credit.

The accused claimed that part of section 719(3.1) of the *Criminal Code*, which denies enhanced credit for pre-trial custody where bail was denied primarily because of the offender's criminal record, infringed the *Charter*. For a unanimous Court, Chief Justice McLachlin agreed, holding that this part of the provision infringes section 7 of the *Charter* because it is over broad and is not saved by section 1.

In considering the impugned part of section 719(3.1) of the *Criminal Code*, Chief Justice McLachlin held that its "animating social value" is "enhancing public confidence in the justice system" (para. 46) and its "legislative purpose" is "to enhance public safety and security by increasing violent and chronic offenders' access to rehabilitation programs" (para. 47, emphasis removed). The Chief Justice concluded that denying enhanced credit for pre-trial custody due to bail denied for a criminal record is overbroad in pursuing this purpose because it would include offenders who are not violent or chronic offenders, such as someone who was denied bail because they missed "two or three" court appearances (para. 53). She also found the impugned provision problematic because the endorsement of a bail judge that bail was denied due to a criminal record lacks a possibility of review. This could mean that someone who successfully appealed a conviction that was the subject of their record, or people who "erroneously" received the endorsement, would be without recourse (para. 54). Accordingly, she found that section 7 of the *Charter* was infringed and not saved under section 1 because it fails to minimally impair this right in pursuing its objective. The impugned part of section 719(3.1) of the *Criminal Code* was declared of no force and effect.

Implications of the Decision:

This decision is another loss for the former Conservative government's *Truth in Sentencing Act*. In *R. v. Summers*, 2014 SCC 267, [2014] 1 S.C.R. 575 (discussed in the 2014 annual review), the Court's decision meant that enhanced 1:1.5 credit for pre-trial custody in this legislation will not be particularly rare, but should be given if failing to do so would negatively impact early release (even if the pre-sentence detention was not harsh and the offender was unlikely to be granted parole). However, "a lower rate may be appropriate when detention was a result of the offender's bad conduct, or the offender is likely to obtain neither early release nor parole" (para. 71).

Despite *R. v. Summers* and *R. v. Safarzadeh-Markhali*, the *Truth in Sentencing Act* continues to cap enhanced credit that may be awarded for pre-trial custody at 1:1.5, so it generally remains effective in limiting greater pre-trial custody enhanced credits that were routine prior to its enactment (such as 2:1, 3:1, or greater credit). However, it has now been seriously eroded through *Charter* litigation.

There are also broader legal developments for *Charter* cases evident in *R. v. Safarzadeh-Markhali*. The Court cites its recent decision in *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485 for how courts should determine the purpose of provisions for *Charter* analysis, including the concept of an "animating social value" in addition to the "legislative purpose", "means", and "effects" of the impugned provision. Beyond the importance of these developments for *Charter* litigation in general, these decisions have implications for how the federal Parliament and provincial legislatures craft legislation and how ministers characterize and present such legislation since this is evidence that can be used in deriving its purpose. However, as seen in *R. v. Safarzadeh-Markhali* this is not definitive evidence. Indeed, it is somewhat surprising that the Court found the purpose of the former Conservative government in denying enhanced pre-trial custody credit for persons denied bail based primarily on their criminal record was to enhance their access to rehabilitation programs (para. 47).

4.5 *R. v. Lloyd* (mandatory minimum penalties)

Citation: *R. v. Lloyd*, 2016 SCC 13

Date: April 15, 2016

Appellant: Joseph Ryan Lloyd

Respondent: Her Majesty the Queen

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

Issue: Whether a one-year mandatory minimum penalty of imprisonment for drug trafficking by a repeat offender infringes section 12 (cruel and unusual punishment) of the *Charter*? If yes, is it saved under section 1?

Decision: The one-year mandatory minimum penalty infringes section 12 of the *Charter* and is not saved by section 1.

Synopsis:

The Controlled Drugs and Substances Act includes a one-year mandatory minimum penalty of imprisonment for anyone who traffics, or possesses for the purposes of trafficking, any quantity of a Schedule I substance (such as cocaine, heroin, methamphetamine) or three kilograms of a Schedule II substance (such as marijuana) where that person has been convicted within the last 10 years of a designated substance offence (which excludes simple possession). There is an exception: if the offender successfully completes a drug treatment court program or other court-approved program prior to sentencing, then the one-year mandatory minimum penalty does not apply.

The accused was a drug addict and convicted drug dealer in Vancouver's Downtown Eastside with 21 prior convictions. He was convicted of possessing methamphetamine for the purposes of trafficking and a month after his release he was arrested and subsequently convicted for possessing crack cocaine, methamphetamine, and heroin for the purposes of trafficking. At sentencing, he challenged the one-year mandatory minimum penalty that he would be exposed to for these offences. The sentencing judge found that a one-year sentence of imprisonment was appropriate in this case, yet nevertheless considered the accused's *Charter* argument.

Chief Justice McLachlin wrote the majority reasons (with Abella, Cromwell, Moldaver, Karakatsanis, and Côté JJ. concurring) applying the recent decision in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 (where a sharply divided Court ruled that a mandatory minimum penalty for possessing a loaded prohibited firearm was unconstitutional). So-called "reasonable hypothetical" scenarios that would be caught by the offence may be used to demonstrate that the application of a given mandatory minimum penalty infringes section 12 of the *Charter*. The Chief Justice cited prior jurisprudence, which holds that for a mandatory minimum penalty to infringe section 12 of the *Charter*, it must be "grossly disproportionate", "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society.

Chief Justice McLachlin's majority reasons in *R. v. Lloyd* represent the harshest criticism to date of mandatory minimum sentences as a general approach to sentencing: "mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence" (para. 3). She proposes two solutions to this situation: (1) Parliament could narrow the reach of such offences so that only conduct that merits the mandatory minimum penalty is encompassed; or (2) Parliament could provide for residual judicial discretion in "exceptional circumstances" to depart from the mandatory minimum penalty.

With respect to the impugned mandatory minimum penalty in this case, the Chief Justice noted that, on its face, it may not appear to be excessive. She identified three aspects of the offence that make its application broad: (1) it applies to any quantity of a Schedule I offence; (2) the definition of "traffic" includes people giving a small quantity of drugs to a friend or a

drug addict who is "only trafficking to support his own habit" (para. 30); and (3) prior convictions may include trafficking a small quantity of marijuana. In other words, the mandatory minimum penalty can apply to professional drug dealers as well as "the addict who is charged for sharing a small amount of a Schedule I drug with a friend or spouse, and finds herself sentenced to a year in prison because of a single conviction for sharing marihuana in a social occasion nine years before" (para. 32). The majority found that the latter scenario would infringe section 12 of the *Charter* and would not be saved under section 1. Chief Justice McLachlin called the exception, noted above, where the accused completes a court-approved treatment to be a "step in the right direction" (para. 34) but is "too narrow".

Justices Wagner, Gascon, and Brown wrote joint dissenting reasons in this case, stating that "Parliament is owed substantial deference in crafting mandatory minimum sentences" (para. 60), noting that the Court has previously held that it will only be in "rare and unique occasions" that a mandatory minimum penalty will infringe section 12 of the *Charter*. The dissenting judges highlighted that the Court has only twice found a mandatory minimum penalty infringed section 12 of the *Charter*, one of which was the 2015 split-decision in *R. v. Nur*. They disagreed that the majority's hypothetical scenarios would result in a grossly disproportionate sentence in this case because drug-sharing scenarios are treated as joint possession – not trafficking – and would therefore not attract the mandatory minimum penalty. The dissenting judges rejected the hypothetical of a "two-time" sharing trafficking conviction as "far-fetched" (para. 91). In considering *reasonable* hypotheticals, the courts are not to "artificially concoct 'the most innocent and sympathetic case imaginable'" (para. 102).

The dissenting judges highlighted that the Court has only twice found a mandatory minimum penalty infringed section 12 of the *Charter*.

The dissenting judges found that Parliament was essentially codifying existing sentencing practice across Canada: offenders with at least one prior, related conviction would face at least one year imprisonment for trafficking in even small quantities of Schedule I substances. Given the exception for offenders who complete a court-approved treatment program, the dissenting judges found the mandatory minimum penalty was actually a "very narrow and tailored mandatory minimum sentence" (para. 79). Accordingly, the dissenting judges found that the impugned mandatory minimum penalty did not infringe section 12 of the *Charter*. They also objected to the *obiter dicta* of the Chief Justice regarding the constitutionality of mandatory minimum penalties in general, given her comments were inconsistent with the longstanding jurisprudence of the Court, according to the dissenting judges.

Justices Wagner, Gascon, and Brown challenged the majority reasons of Chief Justice McLachlin, arguing that if her approach to applying section 12 of the *Charter* is followed, "one must question what role is left for Parliament's legitimate policy choices in setting punishment" (para. 107). They added that Parliament is not obliged to adopt exemptions to mandatory minimum penalties, which was an alternative suggested by the Chief Justice:

> Whether Parliament should enact judicial safety valves to mandatory minimum sentences, and if so, what form they should take, *are questions of policy that are within the exclusive domain of Parliament*. The only limits on Parliament's discretion are provided by the Constitution, and in particular, the *Charter* right not to be subjected to cruel and unusual punishment. (para. 109; emphasis added)

Implications of the Decision:

This case has significant implications for mandatory minimum penalties in general, such that *Charter* challenges should be expected for any offence that includes such a penalty. Indeed, the Court may have opened the floodgates for such litigation given the Chief Justice's *obiter dicta* in *R. v. Lloyd*. However, given the strong dissenting reasons in this case and a body of previous case law upholding mandatory minimum penalties, it should not be expected that all, or even most, of these *Charter* challenges would be successful.

Parliament has not responded to this decision to date. However, the federal Liberal government is considering one of the approaches suggested by Chief Justice McLachlin in *R. v. Lloyd* for ensuring the constitutionality of mandatory minimum penalties – specifically providing for exceptions in certain circumstances such as when the accused makes an early guilty plea (Bronskill 2016). However, it is not at all clear how such an exception would actually have any bearing on whether a given mandatory minimum penalty infringes section 12 of the *Charter* or not. If an offence is framed so broadly that it encompasses behaviour that would result in cruel and unusual punishment if the mandatory minimum penalty applied, how does exempting an accused from the penalty if they plead guilty address this concern? Such a situation creates strong incentives for an accused to plead guilty to avoid a harsher mandatory penalty, raising the risk that innocent people will plead guilty based on a pragmatic risk-based assessment of wanting to avoid the higher mandatory minimum penalty that would apply if they contest the charges against them. Those who do not plead guilty but are found guilty at trial would still be exposed to the mandatory minimum penalty. The fact they *could* have pled guilty but chose not to cannot justify imposing what is otherwise a cruel and usual punishment on them – this would deeply offend the presumption of innocence protected in section 11(d) of the *Charter*. Indeed, in *R. v. Lloyd* itself, Chief Justice McLachlin stated that avoiding a mandatory minimum penalty by accessing a program requiring a guilty plea does not cure the constitutional problems with the penalty (para. 34).

Charter challenges should be expected for any offence that includes such a penalty.

The better way to deal with the constitutionality of mandatory minimum penalties is for the court to adopt a more reasonable approach to "reasonable hypotheticals" that can be used to establish that a mandatory minimum penalty for a given offence would constitute cruel and unusual punishment under section 12 of the *Charter* (for instance, by using real historical examples and actual cases as in *R. v. Appulonappa*).

4.6 *R. v. Saeed* (search and seizure)

Citation: *R. v. Saeed*, 2016 SCC 24

Date: June 23, 2016

Appellant: Ali Hassan Saeed

Respondent: Her Majesty the Queen

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

Issue: Whether a warrantless penile swab of the accused incident to arrest in a sexual assault causing bodily harm case infringes section 8 (unreasonable search and seizure) of the *Charter*? If yes, should the evidence be excluded?

Decision: No.

Synopsis:

The accused was convicted of sexual assault causing bodily harm and unlawful touching for a sexual purpose. The Crown had provided evidence at trial showing that the complainant's DNA was on the accused's penis, which was obtained by a warrantless penile swab at the police station following his arrest, a few hours after the assault. The accused argued that this evidence was obtained in violation of his right to be free from unreasonable search and seizure under section 8 of the *Charter* because it was done without his consent or a warrant.

A key issue at trial was the identification of the accused since the complainant recanted her identification of him under cross-examination and an eyewitness witness's identification evidence was weak. The accused did not testify at trial. The penile swab evidence was thus important to the Crown's case. Expert evidence at trial stated that such a swab must be taken as soon as possible due to degradation of transferred DNA with the passage of time and because the accused could urinate, wash, or wipe the evidence away.

Justice Moldaver wrote the majority reasons with Chief Justice McLachlin and Justices Cromwell, Wagner, Gascon, Côté, and Brown concurring. He held that determining the reasonableness of this warrantless search incident to arrest (a common law power of the police) under the *Charter* involved balancing the accused's privacy interests with valid law enforcement objectives. Justice Moldaver held for the majority that "while a penile swab constitutes a significant intrusion on the privacy interests of the accused, the police may nonetheless take a swab incident to arrest if they have reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested, and the swab is conducted in a reasonable manner" (para. 6). Under the majority's approach, while evidence of the complainant's DNA that was obtained by such a warrantless penile swab would be admissible, evidence of the accused's DNA from such a procedure cannot be used for any purpose.

On the facts of the case, the majority held that the penile swab was a reasonable search incident to arrest that did not infringe section 8 of the *Charter* because the police had reasonable grounds to conduct it and took steps to protect the privacy of the accused (it was conducted in a cell with only two male officers present, the small window on the cell door was covered by one of the officers, and the swab was conducted by the accused himself). The evidence was, thus, properly admitted and the convictions stood.

Justice Karakatsanis wrote concurring reasons finding that the penile swab in this case infringed section 8 of the *Charter* but the evidence of the complainant's DNA should nevertheless be admissible under section 24(2) of the *Charter*. She held that genital swabs are a "significant interference with individual dignity and privacy" (para. 100) – more so than mouth swabs, dental impressions, or hair samples from the accused that the Court has previously ruled could not be obtained under police common law powers. A genital swab seeking the complainant's DNA also puts the accused's DNA "in the hands of the state" (para. 104). Even though the penile swab evidence infringed section 8 of the *Charter*, Justice Karakatsanis would nevertheless admit it under section 24(2) of the *Charter* because the police did not act in bad faith (the law was unsettled at the time), the DNA evidence was reliable and probative, the evidence was important to the Crown's case, and the case involved a "brutal public assault of an adolescent girl [that] was particularly heinous" (para. 128). However, going forward, should such a case arise again she suggested that she would not allow such evidence since the law would be clear.

Justice Karakatsanis also criticized the majority's attempt to set out rules for particular new types of searches, indicating that such work is best left to Parliament:

> A second problem with judicially imposed threshold requirements for specific types of searches incident to arrest is that *defining these requirements is a nuanced exercise which may be best left to Parliament*. Not only must the right balance be found between the competing privacy and law enforcement interests; the framework must be workable for the police. The common law power of search incident to arrest is a blunt tool, but this makes it relatively straightforward for the police to use. Rather than complicating matters with various add-ons intended to perform different functions, *it should be left to Parliament to equip the police with additional tools tailor-made for specific functions*. (para. 120; emphasis added)

Justice Abella wrote dissenting reasons finding that the accused's right to be free from unreasonable search and seizure under section 8 of the *Charter* was infringed and the evidence should be excluded under section 24(2) of the *Charter*.

Implications of the Decision:

The *Criminal Code* does not appear to provide for warrants for penile swab searches, so the decision in *R. v. Saeed* provides common law recognition of a new police power to conduct them incident to arrest, subject to the rules set out by the majority. This is a new tool for police given that sexual assaults are extremely under-reported and notoriously difficult to prove, including often with respect to the identity of the perpetrator.

However, *R. v. Saeed* raises concerns about the protection of the privacy interests of Canadians and is a surprising result given the Court's decision in *R. v. Stillman*, [1997] 1 S.C.R. 607 which held that obtaining mouth swabs, dental impressions, or hair samples from the accused could not be obtained using police common law powers (Parliament subsequently amended the *Criminal Code* to provide warrants for such searches). In separate reasons, Justices Karakatsanis and Abella both found that the accused's rights under section 8 of the *Charter* were infringed. Justice Karakatsanis' reasons are most compelling in this regard, particularly her criticism of the majority reasons of Justice Moldaver for minimizing the impact on a person's privacy and dignity of a genital swab and his attempts to jurisprudentially segregate the DNA of a complainant versus the DNA of an accused. It would have been better for the Court to have decided this case similarly to *R. v. Stillman* (a murder case) such that Parliament would be compelled to enact legislation providing for judicial warrants, including telewarrants available on a rapid basis, for intimate bodily samples. This would better protect the privacy and dignity of Canadians while providing the police with the ability to legally obtain genital swabs in serious sexual offence investigations.

4.7 *R. v. Jordan* (unreasonable delays in the criminal justice system)

Citation: *R. v. Jordan*, 2016 SCC 27

Date: July 8, 2016

Appellant: Barrett Richard Jordan

Respondent: Her Majesty the Queen

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

Issue: Whether a four-year delay in drug trafficking charges being tried infringes section 11(b) of the *Charter*, which guarantees the right of accused persons to be "tried within a reasonable time"?

Decision: Yes. The convictions are overturned and the charges are stayed.

Synopsis:

Section 11(b) of the *Charter* guarantees the right of accused persons to be "tried within a reasonable time". When justice is delayed, it not only costs the accused who remains in a state of uncertainty, stress, anxiety, stigma, and potentially pre-trial custody but also victims who remain in limbo, prolonging their suffering. Society can also lose confidence in the criminal justice system. The quality of evidence may also deteriorate over time. At the same time, some accused may seek to delay their trial in the hopes that the charges against them will be stayed (para. 21).

In this case, the accused was charged with drug trafficking and possession charges but the case took over four years to reach trial in British Columbia. Both the trial judge and appellate court found that there was no infringement of his right to a trial within a reasonable time under section 11(b) of the *Charter*. The Supreme Court of Canada disagreed, setting aside the convictions and staying the charges against the accused.

Justices Moldaver, Karakatsanis, and Brown wrote joint reasons for the majority finding that "a culture of complacency towards delay has emerged in the criminal justice system" and that "[u]nnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay" (para. 40).

The majority set out a new framework for assessing delays under section 11(b) of the *Charter*, including benchmarks for when the time from charge to the actual or expected end of trial (minus defence waived or caused delay) will presumptively constitute an unreasonable delay: "18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry)" (para. 46). The Crown must show "exceptional circumstances" (such as medical or family emergencies of the Crown prosecutor or judge, extradition proceedings, unexpected events at trial, or particularly complex cases) to rebut this presumption, or the charges will be stayed (para. 47). If the total delay is less than these ceilings (accounting for defence delays and exceptional circumstances), the burden is on the defence to show the delay is unreasonable. Stays beneath the ceilings are expected to be "rare" (para. 48). The majority reasons also include transitional provisions with the aim of preventing *en masse* stays of proceedings for cases already in the system. The majority concluded with a call to action: "Real change will require the efforts and coordination of all participants in the criminal justice system" (para. 137).

Justice Cromwell wrote concurring reasons (agreed to by McLachlin C.J. and Wagner and Gascon JJ.) setting out modest adjustments to the existing framework for section 11(b) of the *Charter*. The concurring judges rejected the majority's approach of setting ceilings for the presumptive unreasonableness of a delay, writing that they are "inconsistent with the judicial role" (para. 273) and that "creating these types of ceilings is a task better left to legislation" (para. 147) – "[i]f such ceilings are to be created, Parliament should do so" (para. 267). Justice Cromwell quoted the Law Reform Commission of Canada in this regard:

> The courts have been given a greatly expanded role with the *Charter*, but their essential function has not changed. They do not function as legislating bodies; their principal task is adjudicating conflicts brought before them. Rather, it is the role of Parliament to advance and enhance constitutional rights through legislative standards which the *Charter*, by its very nature, can provide only in general terms. (para. 269)

Justice Cromwell lambasted the majority for overturning the Court's section 11(b) *Charter* jurisprudence absent an adequate evidentiary record, expert evidence, or giving the parties an opportunity to make submissions on the majority's new framework and the ceilings that it sets. Alberta's Attorney General was the only attorney general to intervene in the case, which was prosecuted by the Public Prosecution Service of Canada.

Implications of the Decision:

The Supreme Court of Canada's decision in *R. v. Jordan* is a watershed for the criminal justice system. It "casts aside three decades of the Court's jurisprudence" (para. 302), notably overturning its decision in *R. v. Morin*, [1992] 1 S.C.R. 771, which the majority compared to a "dice roll" that "led to the proliferation of lengthy and often complex s. 11 (b) applications, thereby further burdening the system" (para. 32). The *Morin* test in practice generally required the accused to prove they suffered prejudice when they experienced even very lengthy delays. Instead, *R. v. Jordan* adopts a new framework for assessing the reasonableness of delays under section 11(b) of the *Charter* and sets presumptive ceilings for what will constitute unreasonable delays resulting in the staying of criminal charges.

Is *R. v. Jordan* a powerful wake up call for a sleepy system that has come to accept delays as the norm? Will it cause mass stays of proceedings? Or, are the ceilings that it sets too high to have any meaningful impact? Of immediate impact, the Court's decision stayed two sets of serious criminal charges – drug trafficking charges in *Jordan* and child sexual offences in the companion case in *R. v. Williamson*, 2016 SCC 28 (due to an almost three year delay between the charges and end of trial). The Court diverged on whether the new approach will result in *en masse* stays of proceedings in practice. There may also be unintended consequences of *Jordan*. It could encourage the police and Crown prosecutors to delay charges until cases are virtually ready for trial in jurisdictions that have lengthy institutional delays. At its worst, this could present a risk to public safety and public confidence in the criminal justice system. Already *Jordan* has resulted in charges as serious as murder being stayed. A number of provinces have disclosed that they are reviewing large numbers of cases which are similarly at risk of being stayed due to unreasonable delay. To date, only a handful of provinces have announced measures to begin to address these challenges.

The Supreme Court of Canada's decision in *R. v. Jordan* is a watershed for the criminal justice system.

Justice efficiency is a major problem that is threatening the ability of our criminal justice system to do its job. Our recently released *Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit* (Perrin and Audas 2016) assessed the criminal justice system of each province and territory based on Statistics Canada data and statistical methods. We evaluated each jurisdiction based on its performance on metrics related to its performance in protecting public safety, supporting victims, cost and resources, access to justice, and fairness and efficiency. Our findings revealed serious problems in each of these core objectives in various provinces and territories. The report card spurred a public reaction from several jurisdictions, including Manitoba's government agreeing with our call for a top-to-bottom review of its criminal justice system and Alberta's government promising major reforms. We found that delays in time to trial vary widely across the country.

The majority in *Jordan* essentially invites Parliament to streamline the *Criminal Code* to enhance the efficiency of criminal procedure. Fortuitously, in his mandate letter to the Hon. Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, Prime Minister Justin Trudeau (2016) directed the Minister to "[u]ndertake modernization efforts to improve the efficiency and effectiveness of the criminal justice system, in cooperation with provinces and territories."

4.8 *R. v. K.R.J.* (retrospective punishment)

Citation: *R. v. K.R.J.*, 2016 SCC 31

Date: July 21, 2016

Appellant: K.R.J.

Respondent: Her Majesty the Queen

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

Issue: Whether retrospective restrictions on child sex offenders upon their release into the community infringes section 11(i) of the *Charter*? If yes, are they saved by section 1?

Decision: While retrospective restrictions on contact with persons under 16 years of age and Internet usage both infringe section 11(i) of the *Charter*, the former is not saved by section 1, while the latter is saved by section 1.

Synopsis:

Section 11(i) of the *Charter* states that anyone charged with an offence has the right "if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment." In 2012, the former Conservative government amended sections 161(c) and (d) of the *Criminal Code* to allow sentencing judges to prohibit certain child sex offenders from having contact with anyone under 16 years of age or from using the Internet upon their release into the community, subject to exceptions ordered by the judge. This case involves a constitutional challenge under section 11(i) of the *Charter* to the retrospective application of these changes to persons who committed their offences prior to these provisions coming into force (for instance, offenders who committed their offence prior to 2012, but were sentenced after 2012). This required the Court to determine if these restrictions constitute "punishment" for the purposes of section 11(i) of the *Charter* and, if so, whether they are reasonably justified under section 1 of the *Charter*.

Justice Karakatsanis wrote majority reasons finding that section 11(i) of the *Charter* "constitutionally enshrines the fundamental notion that criminal laws should generally not operate retrospectively" (para. 22). The purpose of this protection is safeguarding the rule of law and fairness. She expanded the previous test for what constitutes "punishment" under section 11(i) of the *Charter* as follows: "a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests" (para. 41). Applying this test to the impugned provisions in this case, she found that both prohibitions infringe section 11(i) of the *Charter* when applied retrospectively.

In considering whether these infringements were reasonably justified under section 1 of the *Charter*, Justice Karakatsanis found that their purpose was to enhance the protection of children from sexual offences and that the prohibitions were rationally connected to this objective and minimally impaired section 11(i) of the *Charter* in doing so. In considering the final branch of the section 1 test, however, she held that the *retrospective* prohibition on contacting persons under 16 years of age lacked evidence of its benefits despite having significant deleterious effects, such that it failed a section 1 justification. Conversely, the retrospective prohibition on Internet usage was saved by section 1. Justice Karakatsanis found that "[t]he rate of technological change over the past decade has fundamentally altered the social context in which sexual crimes can occur . . . sexual offenders have been given unprecedented access to potential victims and avenues to facilitate sexual offending" (para. 102). She noted the advent of social media occurred after 2002, which was the last time that section 161 of the *Criminal Code* was amended. She found that there are grave emerging harms affecting both the nature and degree of risk of sexual violence facing children because of this technology. These considerations justified the retrospective prohibition on Internet usage by child sex offenders when ordered by a sentencing judge.

Justice Karakatsanis found that the Internet and social media has given sexual offenders unprecedented access to potential victims and avenues for offending.

In dissenting reasons, Justice Abella wrote that neither of the impugned prohibitions should be applied retrospectively because they are not saved under section 1 of the *Charter*. She found the Crown's evidence lacking.

Conversely, in separate dissenting reasons, Justice Brown found that both prohibitions were saved under section 1 of the *Charter*. He attacked the approach taken by the majority to the section 1 justification as intruding on Parliament's policy-making domain:

> It [the majority] holds Parliament to an exacting standard of proof, *thereby denying Parliament the room necessary to perform its legislative policy-development role when addressing a chronic social problem*. And it also insists on direct evidence of anticipated benefits which, given that chronic nature of the harm, is likely impossible to obtain. (emphasis added; para. 135)

Justice Brown found the evidence before Parliament in adopting these provisions to be compelling and sufficient to justify their retrospective application.

Implications of the Decision:

Similar to the decision in *Canada (Attorney General) v. Whaling*, 2014 SCC 20, the majority decision in *K.R.J.* demonstrates the significant concerns with the retrospective application of criminal law with respect to the rule of law and fairness. However, *K.R.J.* demonstrates that it can pass constitutional muster in certain circumstances where there are compelling temporal reasons for such action.

K.R.J. is also significant because of the strong language used by the Court to recognize the significant issue of child sexual offences in the context of the proliferation of social media and the Internet. While the Court has demonstrated that these major societal concerns will justify greater action by Parliament, it is still exercising significant *Charter* oversight in evaluating the means adopted by Parliament to enhance the protection of children from sexual offences.

As noted earlier, the dissenting judgments in *K.R.J.* demonstrate an interesting split within the Court. Justice Abella (who found neither retrospective prohibition was saved by section 1 of the *Charter*) and Justice Brown (who found both retrospective prohibitions were saved by section 1 of the *Charter*) arguably reflect the left and right spectrums of the current members of the Court, respectively.

4.9 *Wilson v. Atomic Energy of Canada Ltd.* (dismissal of non-unionized federal employees)

Citation: *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29

Date: July 14, 2016

Appellant: Joseph Wilson

Respondent: Atomic Energy of Canada Limited

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

Issue: Whether federally regulated non-unionized employees can be dismissed without cause?

Decision: No.

Synopsis:

Mr. Wilson worked as a procurement supervisor at Atomic Energy of Canada (a federal Crown corporation) with a clean disciplinary record. He was dismissed after working four and a half years and filed an unjust dismissal complaint under the *Canada Labour Code*. Mr. Wilson claimed he was fired as a reprisal for complaining about improper procurement practices. The employer said he was dismissed without cause but was given "a generous dismissal package that well exceeded the statutory requirements" (para. 9). A labour adjudicator found that Mr. Wilson was unjustly dismissed because "an employer could not resort to severance payments, however generous, to avoid a determination under the *Code* about whether the dismissal was unjust" (para. 13).

Justice Abella wrote majority reasons on the central issue of whether federally regulated non-unionized employees could be dismissed without cause. She noted that at common law, a non-unionized employee could be dismissed without any reason being given so long as they were given reasonable notice or pay in lieu of such notice. However, she found that the *Canada Labour Code* was created to ensure that non-unionized employees received similar protections to unionized employees covered by a collective agreement. Under this legislation, a non-unionized employee who has worked for more than 12 months can complain if they believe they have been unjustly dismissed. If an adjudicator finds the termination was unjust, they can order the employer to pay the person compensation, reinstate the person's employment, and make other orders to counteract consequences of the dismissal. Justice Abella upheld the adjudicator's decision, finding that the purpose of the applicable provisions of the *Canada Labour Code* are to protect non-unionized employees from being dismissed without cause, adding "[t]he rights of employees should be based on what Parliament intended, not on the idiosyncratic view of the individual employer or adjudicator" (para. 39).

In dissenting reasons, Justices Côté and Brown JJ. (whom Justice Moldaver agreed with) held that a dismissal without cause is not *per se* prohibited under the *Canada Labour Code* so long as adequate notice is given to the non-unionized employee. However, such an employee can still avail themselves of the unjust dismissal provisions of the *Code*.

Implications of the Decision:

Wilson is a significant decision in federal labor law because it means that non-unionized employees have similar protections as unionized employees under a collective agreement from being dismissed without cause, even if they are provided a generous severance package. The landmark decision affects an estimated half a million non-unionized federally regulated employees working in sectors such as banking, telecommunications, airlines, and other federal entities (Brown 2016). Law firms are now recommending that when thinking about dismissing such an employee, reasons will be required from the employer such as "misconduct, incompetence, or conflict of interest. This may mean that the employer will have to first undertake progressive disciplinary steps in order to create an evidentiary record illustrating just cause for termination" (Talbot, Hiscocks, and Stevenson 2016). However, it bears noting that the unjust dismissal complaint process in the *Code* does not apply where the employee was laid off due to "lack of work or the discontinuance of a function" (para. 7).

Lawyers for Atomic Energy of Canada Ltd., which lost the case, have cautioned that *Wilson* will have "very significant consequences" for all federally regulated entities. Conversely, counsel for the intervener Canadian Association for Non-Organized Employees claimed that the majority decision merely affirms what "we thought [the law] was prior to the Federal Court of Appeal decision", and characterized the three dissenting judges as "ideologically driven" (Brown 2016).

4.10 *R. v. Anthony-Cook (plea bargains)*

Citation: *R. v. Anthony-Cook*, 2016 SCC 43

Date: October 21, 2016

Appellant: Matthew John Anthony-Cook

Respondent: Her Majesty the Queen

Coram: Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, and Brown JJ.

Issue: When is it appropriate for a sentencing judge to depart from a joint submission by Crown and defence counsel?

Decision: Trial judges should accept joint submissions unless they would bring the administration of justice into disrepute or are otherwise contrary to the public interest.

Synopsis:

The facts of this case involve a guilty plea by the accused to manslaughter. The accused had mental health and addiction issues and sought help from a drop-in centre. An altercation occurred between him and another person at the centre (the deceased) that led to blows. The deceased fell backwards and hit his head on the pavement, killing him. The accused was then detained in a mental health facility and subsequently charged with manslaughter. The Crown and defence counsel made a joint submission that the accused would plead guilty and serve an additional 18 months in custody (on top of the one-year of pre-trial custody already served). The trial judge expressed serious reservations and asked for further submissions. He invited the accused to withdraw his plea, which the accused declined to do. Ultimately, the judge rejected the joint submission and instead sentenced the accused to two years less a day in custody followed by a three-year probation order, which he described as necessary for a "fit sentence" (para. 21) and to protect the public.

A joint submission on sentence is when the Crown prosecutor and defence counsel agree to recommend a certain sentence to the judge in exchange for the accused pleading guilty. Justice Moldaver wrote unanimous reasons for the Court describing joint submissions (colloquially known as plea bargains) as common, acceptable, and essential for the efficiency of the criminal justice system. Sentencing judges are not required to accept joint submissions, but generally do. Where a judge considers a joint submission to be unduly lenient or harsh, they may depart from it. In his decision, Justice Moldaver set out the test for when a trial judge may do so.

Justice Moldaver adopted the "public interest" test such that "a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest" (para. 32). This is more stringent than the "fitness" test where "trial judges should give joint submissions serious consideration, but may depart from them if, having regard to the circumstances of the case and the applicable sentencing principles, they conclude that the proposed sentence is not 'fit'" (para. 27).

The public interest test means a high degree of certainty that trial judges will generally accept joint submissions, foregoing the need for a trial, which has potential benefits for the Crown, accused as well as victims and witnesses. It also means scarce resources can be devoted to other cases. Justice Moldaver went so far as to say that without joint submissions "our justice system would be brought to its knees, and eventually collapse under its own weight" (para. 40).

In applying this test to the facts in the case, Justice Moldaver found that the trial judge treated the joint submission as if it were a regular sentencing hearing, failing to recognize the "important systemic benefits" of joint submissions (para. 61). Justice Moldaver reasoned that the joint submission should have been adopted because while the custodial term was low, it was not so low as to bring the administration of justice into disrepute since it was close to the range for such cases and the accused gave up the ability to argue self-defence at trial.

Implications of the Decision:

Anthony-Cook is a significant decision given that the "vast majority" of criminal charges are resolving through joint submissions before going to trial (para. 2). Indeed, up to 90 percent of criminal charges are resolved through guilty pleas (Department of Justice 2015). This means that sentencing determinations for most criminal cases are being effectively outsourced to private negotiations between Crown and defence counsel. While sentencing judges retain jurisdiction to depart from unduly lenient or harsh joint submissions, the public interest test means that it will be rare for them to do so. While there are undoubtedly critical benefits to justice efficiency to this approach, it runs the risk that the public and victims come to view judges as mere rubber stamps of the outcome of private plea-bargaining between lawyers.

Justice Moldaver wrote that our justice system would eventually collapse under its own weight without joint submissions.

Given the high degree of certainty that most joint submissions will be accepted, it is critical for the proper administration of justice that victims be given notice by Crown counsel of proposed joint submissions and the ability to provide their views as part of this process. Otherwise, there is a real risk that victims will feel railroaded by the criminal justice system as their rights and interests are effectively ignored. On the other hand, victims may benefit from plea deals by avoiding having to testify and be subjected to cross-examination, which can be very difficult particularly for vulnerable victims.

The recently adopted federal *Victims Bill of Rights Act* now requires Crown prosecutors to give victims of serious offences notice of proposed plea agreements and the court must ask the Crown prosecutor if "reasonable steps were taken to inform the victims of the agreement" (*Criminal Code*, s. 606(4.1)). For plea agreements involving indictable offences with a maximum penalty of five years or more imprisonment, after accepting the plea the court must ask the Crown prosecutor "whether any of the victims had advised the prosecutor of their desire to be informed if such an agreement were entered into, and, if so, whether reasonable steps were taken to inform that victim of the agreement" (s. 606(4.2)). Crown prosecutors have a "duty to inform" victims of the agreement and acceptance of the plea "as soon as feasible" (s. 606(4.3)).

However, these provisions fall short of requiring victims to be consulted on proposed joint submissions and the validity of the plea is not affected if these provisions are not followed (s. 606(4.4)). Some provincial Crown policy manuals go further and encourage Crown prosecutors to give victims information about proposed plea agreements prior to their agreement in serious cases.[4] This practice should be uniformly adopted throughout Canada to maintain the confidence of victims and the public in the administration of justice, given that the decision in *Anthony-Cook* will affect the vast majority of criminal prosecutions.

5. Conclusion

Typically, most Supreme Court of Canada decisions are considered in isolation. The value of an annual report over several years is that it allows for a look at the bigger picture to see broader potential trends emerging. Given that this is now the third annual review of the Court's major decisions, several general observations can be made.

First, the Supreme Court of Canada is a trailblazing institution in Canadian public life that continues to move significant and controversial issues forward. In the last year, the Court has pushed the federal government to take on greater responsibility for federal subjects as in the landmark decision in *Daniels v. Canada (Indian Affairs and Northern Development)* recognizing federal jurisdiction over the approximately 600,000 Métis and non-status Indians. In *Wilson v. Atomic Energy of Canada Ltd.,* the Court granted federally regulated non-unionized employees working in sectors such as banking, telecommunications, airlines, and other federal entities protections similar to unionized employees covered by a collective agreement. In *R. v. Jordan* and *R. v. Anthony-Cook*, the Court sent a strong message that chronic delays and inefficiencies in the criminal justice system are unacceptable and must be remediated. In *R. v. Lloyd, R. v. K.R.J.,* and *R. v. Safarzadeh-Markhali,* the Court continued to dismantle "tough-on-crime" measures of the former Conservative government, bringing mandatory minimum penalties in general and retrospective criminal law measures under a dark cloud of constitutional suspicion, and further eroding the *Truth in Sentencing Act*.

Second, it is remarkable to observe the dismal record of the federal government at the Supreme Court of Canada in major litigation in recent years. A mere three clear victories in the top-30 cases between 2014 and 2016 is a staggeringly poor result. In this year's report, there was not a single clear win by the federal government and this period includes litigation conducted by both the former Conservative government as well as the new Liberal government.

Third, the philosophical outlook of the Supreme Court of Canada has evolved through the many judicial appointments made by former Prime Minister Stephen Harper to include several judges who are now vocally reflecting an approach of judicial restraint, recognizing that while the Court has a duty to review governmental action and legislation, it must also respect the policy-making role of Parliament. There are now regular calls for judicial restraint made by various judges, including currently serving Justices Brown, Wagner, Gascon, and Karakatsanis. However, as noted above, they do not form a cohesive voting block on the Court and do not consistently or always jointly raise concerns about the Court intruding on Parliament's policy-making domain. As a result, concerns about the conflict between the Court and Parliament remain largely at the levels of dissenting voices.

A mere three clear victories in the top-30 cases between 2014 and 2016 is a staggeringly poor result.

During the next year, the Supreme Court of Canada is slated to hear a number of important and controversial cases. It will be interesting to see how the new Liberal government fares before the Court in the upcoming year as it prepares for the appointment of a new Chief Justice in 2018.

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Endnotes

1 Section 1 of the *Charter* states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

2 See Benjamin Perrin, 2013, "Migrant Smuggling: Canada's response to a global criminal enterprise," *International Journal of Social Science Studies*.

3 Estimate from the Congress of Aboriginal Peoples cited in Tim Fontaine, 14 April 2016, "Unanimous Ruling Says Ottawa Has Jurisdiction Over All Indigenous People", *CBC News*.

4 See, e.g., British Columbia Ministry of Justice, 23 July 2015, "Crown Counsel Policy Manual: Resolution Discussions and Stays of Proceedings, RES1."

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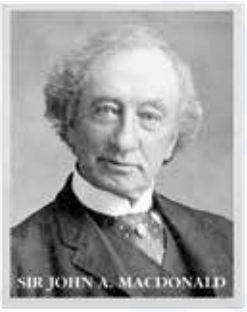
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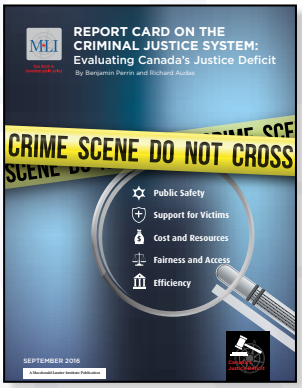

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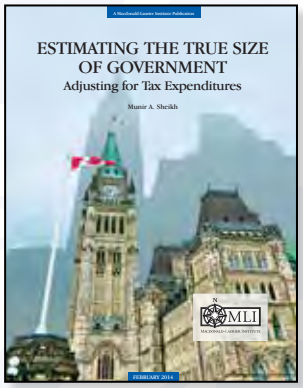

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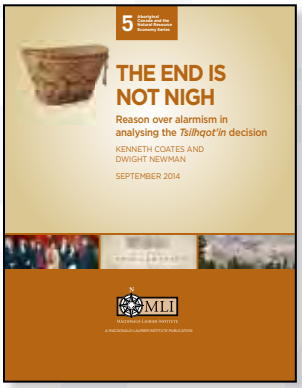

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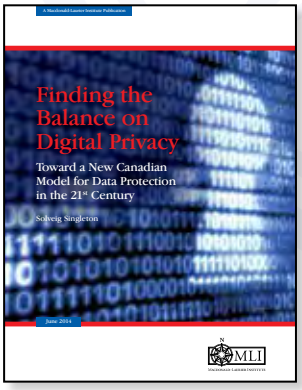

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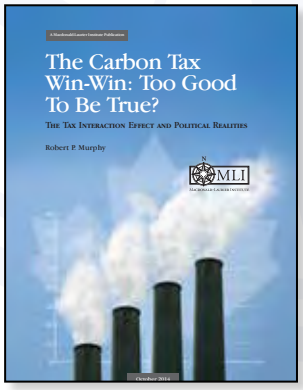

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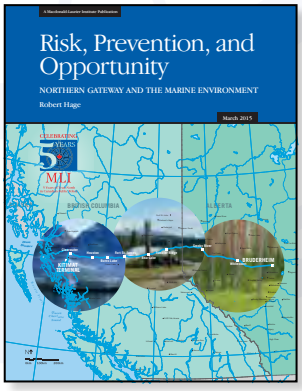

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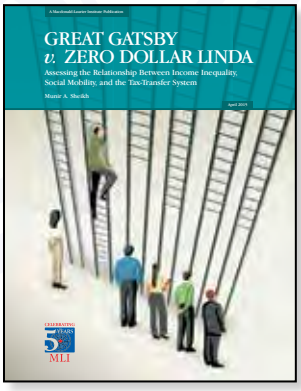

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