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The Supreme Court of Canada: Policy-Maker of the Year

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The Supreme Court of Canada: Policy-Maker of the Year

Benjamin Perrin

A Macdonald-Laurier Institute Publication

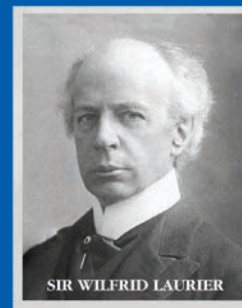
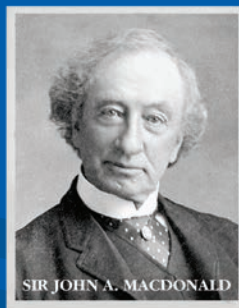


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Executive Summary

Each year, the Macdonald-Laurier Institute for Public Policy recognizes a “Policy-Maker of the Year”. Past recipients have included former Bank of Canada Governor Mark Carney and Foreign Minister John Baird, who have had a tremendous impact on our country’s economic stability and international stature, respectively.

One could argue that, while people in such positions are undoubtedly influential, there is another entity that is rarely acknowledged for its influence on policy, but in the last year has changed Canadian public policy in wide-reaching and long-lasting ways – the Supreme Court of Canada (SCC). This paper examines the Court’s 10 most significant judgments of the last 12 months in terms of their importance and policy implications, on issues ranging from the Senate reform reference to the *Bedford* case challenging Canada’s prostitution laws to the Tsilhqot’in Aboriginal land claim in BC.

This analysis comes at a time when media commentators have characterized recent high court decisions as a string of “losses” for the federal government. So what does the evidence show?

- The policy and legal impact of the Supreme Court of Canada’s decisions of the last year are significant and likely enduring;
- the Supreme Court of Canada was a remarkably united institution with consensus decisions on these significant cases being the norm, and dissenting opinions rare; and
- the federal government indeed has an abysmal record of losses on significant cases, with a clear win in just one in 10 of them.

In the last year, the Court has effectively taken Senate reform off the federal agenda for the foreseeable future, torpedoing both the governing Conservatives’ reform program and the Opposition New Democrats’ policy to abolish the Senate. The Court has struck down much of Canada’s prostitution legislation, resulting in a dramatic rewriting of the law by the current government. It has changed the landscape in parts of Canada for Aboriginal rights, affected tools available for fighting crime and terrorism, and cast into question how future appointments to the Court from Quebec will be managed. One would be hard-pressed to find another actor in Canada who has had a greater impact on such a wide range of issues than the Court has in the last year, such that the moniker Policy-Maker of the Year is appropriate. The Court, no doubt, would resist such a label on the view that it simply applies the law as part of its constitutional mandate. But the policy impact of its recent decisions is clear.

Sommaire

Chaque année, l'Institut de politiques publiques Macdonald-Laurier désigne le « Décideur de l'année ». Parmi les précédents élus figurent le précédent gouverneur de la Banque du Canada, Mark Carney, et le ministre des Affaires étrangères, John Baird, qui ont tous deux joué un rôle exceptionnel, le premier sur le maintien de la stabilité économique au pays et le deuxième sur notre renommée internationale.

Si les personnes occupant de telles positions exercent un pouvoir incontestable, on peut néanmoins avancer qu'une entité rarement reconnue pour son influence sur la politique publique canadienne a réellement influé sur elle de façon étendue et durable l'an dernier : il s'agit de la Cour suprême du Canada. Cette étude examine la portée et les conséquences sur la politique publique des dix arrêts les plus importants de la Cour suprême depuis 12 mois sur des questions allant de la réforme du Sénat à la contestation des lois canadiennes sur la prostitution dans l'affaire *Bedford*, en passant par la reconnaissance du titre ancestral revendiqué par la Première Nation *Tsilhqot'in* en Colombie-Britannique.

Cette analyse arrive à un moment où les chroniqueurs caractérisent les décisions de la Haute Cour comme une série ininterrompue d'« échecs » pour le gouvernement fédéral. Que démontrent les faits en réalité?

- Les incidences dans les domaines politique et juridique des décisions de la Cour suprême l'an dernier sont importantes et vraisemblablement durables;
- La Cour suprême du Canada est une institution remarquablement unie au sein de laquelle les décisions prises de manière consensuelle sur des dossiers importants sont la norme et les opinions dissidentes sont rares; et
- Le gouvernement fédéral présente en effet un bilan catastrophique, ayant subi un revers dans pratiquement toutes les causes importantes et n'ayant remporté une victoire sûre que pour seulement l'une des dix.

Au cours de la dernière année, la Cour a effectivement reporté *sine die* la réforme du Sénat qui était à l'ordre du jour et torpillé avec une grande efficacité à la fois le programme de réforme du Sénat du gouvernement conservateur et l'engagement de l'opposition néo-démocrate visant à l'abolir. La Cour a invalidé une grande partie de la législation sur la prostitution au Canada, ce qui oblige le gouvernement actuel à réécrire la loi. Elle a changé complètement la donne en ce qui concerne les droits des Autochtones dans certaines régions du Canada, s'est prononcée sur les méthodes utilisées pour combattre le crime et le terrorisme et a remis en question la façon dont les futures nominations à la Cour du Québec seront effectuées. On aurait bien du mal à trouver un autre acteur au Canada qui a eu un impact plus important sur un tel éventail de questions cette dernière année. Notre « Décideur de l'année » est donc bien choisi. La Cour suprême, sans doute, résisterait à porter une telle étiquette en faisant valoir qu'elle ne fait qu'appliquer la loi dans le cadre de son mandat constitutionnel. Mais l'impact sur la politique de ses décisions récentes est indiscutable.

1. Introduction

Are the Supreme Court of Canada and Prime Minister Stephen Harper's government on a collision course? During the last year, the Supreme Court of Canada has made a series of landmark decisions in areas including Senate reform, Aboriginal title and treaty rights, prostitution laws, the appointment of justices to the Court from Quebec, security certificates and protection of Canadian Security Intelligence Service (CSIS) human sources, undercover police operations, and sentencing. During this period, numerous commentators have characterized the decisions of the Court as reflecting a string of "losses" for Prime Minister Stephen Harper's government. Some have gone so far as to say that Canada has entered a "legal cold war" and that these "[l]egal conflicts reveal a clash of beliefs about how Canada should work" (Ling 7 August 2014).

Within this context and while appreciating that the work of the Court is cyclical and outcomes vary from year to year, this paper explores the recent track record of the Supreme Court of Canada and the significance of some of its landmark decisions from the last year. 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 public law judgments from the last year. Part 4 provides an in-depth examination of each of these decisions, including their impact on public policy.¹ The main findings of this study are:

Numerous commentators have characterized the decisions of the Court as a string of "losses" for the government.

1. The policy and legal impact of the Supreme Court of Canada's decisions of the last year are significant and likely enduring;
2. the Supreme Court of Canada was a remarkably united institution with consensus decisions on these significant cases being the norm, and dissenting opinions rare; and
3. the federal government has an abysmal record of losses on significant cases, with a clear win in just one in 10 of them.

2. Current Members of the Supreme Court of Canada

The Supreme Court of Canada is comprised of the members listed in table 1, organized in order of seniority. Members of the Court are entitled to serve until reaching the mandatory retirement age of 75 years (*Supreme Court Act*).

To date, Prime Minister Stephen Harper has appointed six of the nine judges of the Court and will be able to appoint a seventh judge after November 30, 2014 when Justice Louis LeBel reaches the age of mandatory retirement. Several of the judges appointed by Prime Minister Harper could serve until at least 2030, based on their mandatory retirement age.

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. Mr. Justice Louis LeBel	2000	The Rt. Hon. Jean Chrétien	2014
The Hon. Madam Justice Rosalie Silberman Abella	2004	The Rt. Hon. Paul Martin	2021
The Hon. Mr. Justice Marshall Rothstein	2006	The Rt. Hon. Stephen Harper	2015
The Hon. Mr. Justice Thomas Albert Cromwell	2008	The Rt. Hon. Stephen Harper	2027
The Hon. Mr. Justice Michael J. Moldaver	2011	The Rt. Hon. Stephen Harper	2022
The Hon. Madam Justice Andromache Karakatsanis	2011	The Rt. Hon. Stephen Harper	2030
The Hon. Mr. Justice Richard Wagner	2012	The Rt. Hon. Stephen Harper	2032
The Hon. Mr. Justice Clément Gascon	2014	The Rt. Hon. Stephen Harper	2035

3. Discussion & Analysis

This project originated with the idea of providing a “year-in-review” of the Supreme Court of Canada’s decisions, spurred by media commentary related to a number of high-profile and controversial cases that began with the Court’s decision in *Canada (Attorney General) v. Bedford*, related to the constitutionality of Canada’s prostitution laws. The one-year period selected for review was November 1, 2013 to October 31, 2014. The goal of the study was to determine whether it has indeed been an extraordinary 12-month period for the Court, recognizing that its work and outcomes are likely cyclical over the long-term.

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. In the end, there were few additional cases that were of the same magnitude of importance as these decisions, so the contest around which to select as the top 10 was not particularly difficult. It is observable that the selection criteria led to a focus on public law cases, across a wide spectrum of areas of law, including constitutional law, Aboriginal law, criminal law (encompassing substantive criminal law, criminal procedure and evidence, and sentencing), and immigration/national security law. However, some of these decisions have significant implications for private actors, including individuals and private corporations.

Table 2, below, provides a snapshot of these decisions and their outcomes. Each case is identified by its style of cause and citation with a brief note on its subject matter. The outcome in the case is listed, according to whether it was a unanimous decision, majority decision with concurring reasons, or a case involving majority reasons with dissenting reasons. The final column of “Government Win or Loss” (which refers to the federal government) requires some explanation, since the federal government is not a party to every case reaching the Court. The determination of whether a case involved a “win” or “loss” for the federal government refers to cases where the Court either agreed with, or rejected, respectively, the position taken by the federal government (which includes the Attorney General of Canada, Minister of Citizenship and Immigration, and Director of Public Prosecutions in these cases). In some instances, these federal entities were parties to the proceeding, whereas they were interveners in others. They are listed generally in terms of greatest to least significance in terms of long-term public policy impact for illustrative purposes only – such a ranking is not the aim of this study and reasonable people will undoubtedly rank some cases higher or lower than others. It appears, however, to be more meaningful than a mere chronological listing of cases.

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

Case	Citation	Subject	Unanimous	Majority and Concurring Reasons	Dissenting Reasons	Government Win or Loss
<i>Reference re Senate Reform</i>	2014 SCC 32	Senate reform	The Court			Loss
<i>Tsilhqot'in Nation v. British Columbia</i>	2014 SCC 44	Aboriginal title and land claims	McLachlin C.J.			Loss
<i>Grassy Narrows First Nation v. Ontario (Natural Resources)</i>	2014 SCC 48	Aboriginal treaty rights	McLachlin C.J.			Win
<i>Canada (Attorney General) v. Bedford</i>	2013 SCC 72	Prostitution	McLachlin C.J.			Loss
<i>Reference re Supreme Court Act, ss. 5 and 6</i>	2014 SCC 21	Appointment of Supreme Court of Canada Justices from Quebec		McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis, and Wagner JJ.	Moldaver J.	Loss
<i>Canada (Citizenship and Immigration) v. Harkat</i>	2014 SCC 37	Terrorism – security certificates and CSIS human sources		McLachlin C.J.	Abella and Cromwell JJ.	Mixed
<i>R. v. Hart</i>	2014 SCC 52	“Mr. Big” police operations		Moldaver J. (majority); Cromwell, Karakatsanis JJ. (concur)		Mixed ²
<i>R. v. Spencer</i>	2014 SCC 43	Cybercrime – request by police for basic subscriber information from ISPs	Cromwell J.			Loss
<i>R. v. Summers</i>	2014 SCC 26	<i>Truth in Sentencing Act</i>	Karakatsanis J.			Loss
<i>Canada (Attorney General) v. Whaling</i>	2014 SCC 20	Retrospective repeal of accelerated parole review	Wagner J.			Loss

Based on the analysis in Part 4 of this paper, which examines each of these decisions in-depth, three primary findings were made.

3.1 The policy and legal impact of the Supreme Court of Canada's decisions of the last year are significant and likely enduring

In its decisions on significant constitutional matters in the last year, the Supreme Court of Canada has made bold decisions that fundamentally affect the way that Canadian democracy functions, the relationship between the Crown and First Nations (including involving resource development), limits on police investigative tactics, and decisions on controversial criminal law issues. It appears that the last year has likely had a disproportionate number of landmark cases of broad significance and interest to Canadians.

The most significant and enduring impact of the Supreme Court of Canada in the last year will be its interpretation of the amending procedures in the *Constitution Act, 1982* in its reference decisions related to Senate reform and the appointment of judges to the high court from Quebec. Taken together, these decisions entrench the Senate and Supreme Court of Canada as institutions that are virtually untouchable. Changing the composition of either institution has been determined to require the unanimous approval of the House of Commons and the Senate as well as every provincial legislature.

The Aboriginal law decisions of the Court in *Tsilhqot'in Nation v. British Columbia* and *Grassy Narrows First Nation v. Ontario (Natural Resources)* are landmark decisions that, together, demonstrate that the constitutional authority that the provinces have over resource development generally applies even in dealings with First Nations. In particular, “provinces may now clearly regulate and make decisions relating to natural resources, even when Aboriginal rights and title questions are involved” (Coates and Newman 2014, 20). However, provincial governments are obliged to respect Aboriginal title and treaty rights, as the case may be, in these interactions with First Nations. These recent authorities from the Court will undoubtedly be at the top-of-mind of provincial governments and private corporations that are seeking approval and implementation of large-scale natural resource projects now and in the decades to come.

Criminal law has always been a major part of the Court's docket. The decision in *Bedford* is notable, not only on the issue of how prostitution may be addressed through the criminal law, but also because of the broader principles established in the decision with respect to the scope of section 7 of the *Charter* and its relationship with section 1 of the *Charter*. Specifically, the Court held that section 7 is breached if the law is grossly disproportionate, overbroad, or has arbitrary effects “on one person” (*Bedford* (SCC), para. 123). As I have noted in a previous MLI *Commentary*,³ this leaves no room for any balancing of broader societal interests or even broader individual interests. It puts section 7 arguably on a hairpin trigger in the criminal law context. I think it is not coincidental then, that *Bedford* appears to suggest that the conventional wisdom that a section 7 infringement will almost never be justified under section 1 is perhaps not so ironclad. The Chief Justice noted that there are “crucial differences between the two sections” (*Bedford* (SCC), para. 124), that they “ask different questions” (*Bedford* (SCC), para. 125), “work in different ways” (*Bedford* (SCC), para. 126), and are “analytically distinct” (*Bedford* (SCC), para. 128). However, she added that it will be “unlikely” that a law that violates section 7 will be justified under section 1 (*Bedford* (SCC), para. 129). *Bedford* shifts the ground more broadly on when criminal laws will be found to infringe section 7, and creates a possibility of a successful section 1 justification argument by the government

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in appropriate cases. The next chapter of this saga will undoubtedly be a new *Charter* challenge to Bill C-36 (the legislative response to *Bedford*) that advocates for legalized/decriminalized prostitution have threatened.

The Court has upheld the availability of some national security and policing tools, including the security certificate regime and the Mr. Big technique, while imposing safeguards to ensure their constitutionality and appropriate use, respectively, but has ruled against others such as protecting the identity of CSIS human sources and enabling police to obtain ISP subscriber information voluntarily from telecom companies. In *Canada (Citizenship and Immigration) v. Harkat*, while the security certificate regime was upheld, the majority failed to protect CSIS human sources through class privilege that applies to police informants. This troubling aspect of its decision was roundly criticized by the dissenting judges in that case and will likely be overruled through legislation, which the majority recognized would be open to Parliament to do. In the cases of *R. v. Hart* and *R. v. Mack*, taken together, the Court developed the common law to maintain the availability of what can be a critical investigative technique (“Mr. Big”), but with adequate safeguards to prevent wrongful convictions. The application by the Court of its new framework to evaluate the admissibility of statements by accused persons in Mr. Big operations is coherent, reasonable, and provides necessary guidance to the police on whether and how to conduct such operations. In *R. v. Spencer*, we see the Court reining in the voluntary provision of basic subscriber information by ISPs to the police. The requirement for a legal basis to obtain such information will change police practices and increase their workloads, but ultimately protect the privacy of Canadians generally in the process. A potential showdown at the Court over certain provisions of Bill C-13, which is before Parliament is very likely, given the outcome in *Spencer*.

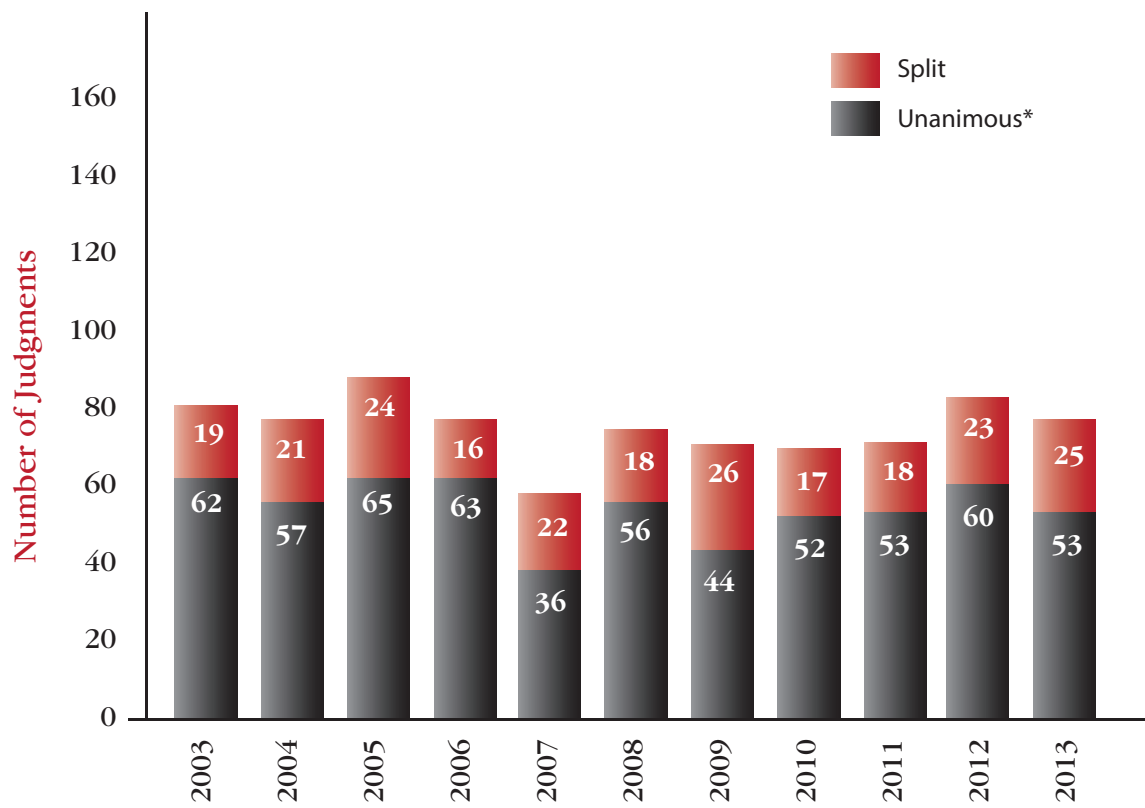
The Court also made modest decisions related to recent sentencing law reforms introduced by Prime Minister Harper’s government. The much more significant challenges to his criminal justice reforms have yet to be decided by the Court, in particular the constitutionality of a raft of new mandatory minimum penalties of imprisonment. In its decisions in *R. v. Summers*, the Court demonstrated that it will require clear proof of legislative intent to change traditional sentencing practices when interpreting restrictive reforms. In *Canada (Attorney General) v. Whaling*, the Court also sent a clear message that retrospective sentencing reforms will not be tolerated as they run afoul of the *Charter*.

3.2 The Supreme Court of Canada was a remarkably united institution with consensus decisions on these significant cases being the norm, and dissenting opinions rare

The Court’s record on significant cases in the last year reveals a remarkably united institution, with unanimous decisions on most controversial cases that have come before it. Of the 10 significant decisions reviewed, only two had dissenting reasons. In other words, in eight of the 10 decisions, there was consensus on the outcome of the case (an 80 percent consensus rate). This rate of consensus stands out from recent years and is especially interesting given that it relates to the most significant decisions from the period under review.

Chart 1 identifies the 10-year trend in consensus decisions at the Supreme Court of Canada, with “unanimous” referring to consensus decisions where all judges agreed on the outcome, and “split decisions” referring to cases involving at least one dissenting opinion. These statistics provided by the Court reveal that it made consensus decisions in 68 percent of cases in 2013, 72 percent of cases in 2012, and 75 percent of cases in 2011. This compares with an 80 percent consensus rate in the top 10 most significant cases under review in this report. The Court has only achieved such a high rate of consensus in one previous year during the 2003 to 2013 period: in 2006, it also had an 80 percent consensus figure.

Chart 1: Supreme Court of Canada degree of consensus, 2003–2013



*All Judges agreed in the disposition of the appeal.

The appeals to which the judgments relate may have been heard in a previous year.

Source: Supreme Court of Canada, 2014, “Statistics 2003 to 2013 – Category 4: Appeal Judgments.”

This study also found that Chief Justice McLachlin is showing leadership on major cases. Of these 10 decisions, the Chief Justice was the sole author of reasons in four of the 10 cases and was a joint author of two additional decisions. In all of these decisions, she was writing for either a unanimous Court or a majority of the judges. She did not dissent in a single significant case under review. The Chief Justice’s departure from the Court in 2018 due to mandatory retirement, and the selection of a new Chief Justice at that time, will be a major transition for the Court as they lose this influential and highly productive Chief Justice who has a reputation in the legal community for favouring consensus on major issues facing the Court.

In contrast to previous decades, there is no evidence of fissures within the Court along ideological lines.

Due to the substantial unanimity of the Court’s major decisions, there is no evidence whatsoever of any deep fissures within the Court along ideological lines. This is in stark contrast to previous decades at the Court and has often been the case at the US Supreme Court. Related to this observation, there is no evidence whatsoever of any observable split in the Court’s decisions on significant issues between the six judges appointed by Prime Minister Harper and the three judges appointed by previous prime ministers (see tables 1 and 2 above). While judges are required to be independent and impartial, it is

nonetheless quite interesting that no observable ideological or philosophical trend is detectable between judges appointed by the current prime minister versus those appointed under previous prime ministers. In other words, the Court is certainly not “Harper’s Court” as some had speculated it could become after so many appointments.

3.3 The federal government has an abysmal record of losses on significant cases in the last year, with a clear win in just one in 10 of them

Media commentary on the Court’s decisions raising the spectre of a string of losses for the federal government at the Supreme Court of Canada was validated by this study. Of the 10 significant decisions, the federal government won just a single case, while achieving mixed results in two cases. By way of providing some context, on average, 41 percent of *Charter* claimants have historically been successful in the Court – meaning that the various levels of government succeeded in 59 percent of such cases on average (Monahan and Sethi 2012, 2).

However, it bears mention that the abysmal record of recent losses for the federal government does not mean that all of these losses are attributable to legislation or recent action of the current federal government led by Prime Minister Harper. For example, some cases relate to government action originating decades ago, by other levels of government (for instance in *Tsilhqot’in Nation v. British Columbia*, the case was triggered by a commercial logging licence issued by BC in 1983 – nevertheless, the current federal government sided with BC and it lost). As noted above, while the Court’s record is likely to be cyclical over a longer period of time, it is nevertheless noteworthy that this past year saw the federal government off-side many unanimous decisions of the Court.

What should the federal government do going forward? A post-mortem of these cases, as a whole, should be conducted within the federal government to determine the factors that may have contributed to the losses. In particular, was the legal advice received by the government reasonable or did it turn out to be significantly off the mark in terms of the actual outcome in the case? Did the instructions provided by the relevant decision-maker related to the positions to take in the case differ significantly from the legal advice received by officials? For example, in a given case, did the legal advice indicate that a given position was strong, and this advice was followed – or did the legal advice say the position was weak, yet the instructions were to proceed anyway? Additionally, could the federal government have been more proactive in these cases, within the bounds of what is appropriate? For instance, could they have done a better job of marshalling evidence, conducting outreach to potentially friendly interveners in the case, and engaging with them in discussions related to it? Should some cases have included eminent external counsel, either as advisers or advocates? Should the federal government have intervened earlier in certain cases on issues that are central to its agenda, including at the trial level, to ensure a strong record for the inevitable appeals? In short, while there are a range of factors that contribute to a record of the type that the federal government has recently endured, a detailed internal review could expose systematic weaknesses with the federal government’s litigation strategy that could be addressed for future cases. Until this is exhaustively done, it would be premature, as some commentators have suggested, to conclude that there is a fundamental rift in values between the federal government and the Court.

4. Review of Major Judgments

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

4.1 *Reference re Senate Reform* (Senate reform)

Citation: *Reference re Senate Reform*, 2014 SCC 32

Date: April 25, 2014

Appellant: N/A (Reference by the Governor in Council)

Respondent: N/A

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

Issue: The Government of Canada referred a series of questions to the Court on the constitutional authority of the federal government to reform or abolish the Senate (para. 5).

Decision: Unanimous decision by the Court: acting on its own, the federal government cannot meaningfully reform or abolish the Senate.

Background:

Since 2006, Prime Minister Harper's government has introduced several proposed laws related to Senate reform, but none of them was adopted by Parliament. Issues related to their constitutionality were regularly raised during debates and in the media. On February 1, 2013, the federal Cabinet decided to refer a broad set of questions to the Court about the authority of Parliament, acting on its own, to reform the Senate. It also asked about abolition, which the Official Opposition, the New Democratic Party, favoured.

Synopsis:

The Court began this reference decision by noting the historically significant, but contested role of the Senate, stating: "The Senate is one of Canada's foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation. Yet from its first sittings, voices have called for reform of the Senate and even, on occasion, for its outright abolition" (*Reference re Senate Reform*, para. 1).

The Court found that most of the contemplated changes to the Senate require "substantial federal-provincial consensus" (*Reference re Senate Reform*, para. 111) and could not be undertaken unilaterally by the federal government. Consultative elections for senators and imposing term-limits on them require the general amending formula be satisfied (at least seven provinces representing half of the population of all provinces must assent). Full repeal of the property requirement for senators requires the consent of Quebec due to special rules related to that province's historical electoral divisions. Abolition of the Senate requires unanimous consent of the Senate, House of Commons, and all provinces.

Implications of the Decision:

The Court's reference decision means that meaningful Senate reform cannot be achieved by Parliament alone and that proposed legislation such as Bill C-7, the *Senate Reform Act*; Bill S-4, *Constitution Act, 2006 (Senate tenure)*; and Bill C-20, the *Senate Appointment Consultations Act* cannot create consultative elections for senators or limit their terms without provincial consent. Politically, the reference decision was thus a major embarrassment for the government, on the one hand, but it was fortunate that it was made prior to the adoption and implementation of any of this legislation.

In effect, *Reference re Senate Reform* has taken Senate reform off of the federal legislative agenda. It has guaranteed that Senate reform or abolition can now only take place as part of a future round of constitutional amendment negotiations involving the federal and provincial governments (as with the ill-fated 1987 Meech Lake Accord and 1992 Charlottetown Accord).

Despite the significance of its decision, the Court attempted to strike a deferential tone going forward, in stating: "Our role is not to speculate on the full range of possible changes to the Senate. Rather, the proper role of this Court in the ongoing debate regarding the future of the Senate is to determine the legal framework for implementing the specific changes contemplated in the questions put to us. The desirability of these changes is not a question for the Court; it is an issue for Canadians and their legislatures" (*Reference re Senate Reform*, para. 4).

The future of the Senate has become a political quagmire for all of the major political parties, such that Senate reform is unlikely to feature in the platforms of any of the major parties in 2015 and, instead, the appointment of senators and their party affiliations will become an increasingly complex and sensitive challenge to manage. Prime Minister Harper has to decide how to go about appointing senators without consultative elections, which his proposed legislation favoured. His declining to appoint new senators can last for a time – indeed his game-plan may very well be to “run out the clock” by not appointing any new senators during his term in office – even if that extends to another mandate in 2015. However, it would be better to develop policy options on how to appoint senators going forward and there should be a public debate about the merits of different models.

The NDP Official Opposition is in the unenviable position of having its main Senate abolition policy declared by the Court as requiring the unanimous approval of the House of Commons, Senate, and all provinces – which is clearly unattainable today or in the foreseeable future, making the policy quixotic. There's the more pressing issue for the NDP that if they form government one day, they will begin their mandate with zero senators. This would inevitably affect their ability to effectively govern and implement their agenda, despite an electoral mandate to do so.

Reference re Senate Reform has taken Senate reform off of the federal legislative agenda.

Liberal Party leader Justin Trudeau's decision to jettison his party's senators from party affairs, fund-raising, and their Parliamentary caucus was also a significant – but not irreversible – decision. If it stands and his party forms government, then he would no doubt face some pressure to bring these senators back into the fold. However, even if he did not, it is highly likely the ousted Liberal Senators would simply shadow the party line in any event on most matters.

4.2 *Tsilhqot'in Nation v. British Columbia* (Aboriginal title and land claims)

Citation: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44

Date: June 26, 2014

Appellant: Roger William, on his own behalf, on behalf of all other members of the Xeni Gwet'in First Nations Government, and on behalf of all other members of the Tsilhqot'in Nation

Respondent: Her Majesty The Queen in Right of the Province of British Columbia, Regional Manager of the Cariboo Forest Region and Attorney General of Canada

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

Issue: Whether the Tsilhqot'in Nation has Aboriginal title over an area where British Columbia granted a commercial logging licence. If so, did British Columbia breach its duty to consult?

Decision: Unanimous decision by McLachlin C.J.: A declaration of Aboriginal title over the area was granted as well as a declaration that British Columbia breached its duty to consult the Tsilhqot'in Nation.

Synopsis:

The Tsilhqot'in Nation was a “semi-nomadic” group of six bands that historically lived in a remote valley in central British Columbia, and has an unresolved land claim. In 1983, the province granted a commercial logging licence in an area that the Tsilhqot'in Nation considered part of their traditional territory. The Tsilhqot'in Nation objected and amended their land claim to assert Aboriginal title in the area where logging had been approved. The claim was opposed by the federal and provincial governments.

Aboriginal title encompasses “the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land” (*Tsilhqot'in Nation v. British Columbia*, para. 73). The Court held that the Tsilhqot'in Nation had established Aboriginal title in the disputed area. Chief Justice McLachlin stated for a unanimous Court that occupation is not limited to settlement sites, but also includes tracts of land regularly used for hunting, fishing, or other resource exploitation at the time of assertion of European sovereignty, so long as the group exercised effective control.

Once Aboriginal title is established, the Court held that “the Crown must seek the *consent* of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*” (*Tsilhqot'in Nation v. British Columbia*, para. 90, emphasis added). For an intrusion justification, the government must have a compelling and substantial objective, and the action must be consistent with the fiduciary obligations owed by the Crown. Chief Justice McLachlin emphasized that through this approach Aboriginal interests can be “reconciled” with broader societal interests (*Tsilhqot'in Nation v. British Columbia*, para. 82).

Implications of the Decision:

The *Tsilhqot'in Nation* decision is the first time that the Court has made a judicial declaration of Aboriginal title in Canada (Coates and Newman 2014, 5). However, while initial media coverage of the *Tsilhqot'in Nation* decision was quite dramatic, more sober analysis of the decision by Aboriginal law experts suggests that its impact is not as significant as some had initially suggested.⁴ The case relied heavily on the seminal Aboriginal title decision of *Delgamuukw v. British Columbia* and related jurisprudence. Additionally, the facts in this case are quite particular in that it dealt with a claim of Aboriginal title in a remote area where there were no competing land claims. Finally, while the Court affirmed the obligations of the Crown when Aboriginal title has been established, it also emphasized that it remains open to the Crown to make a case for justifiable intrusion. In other words, Aboriginal title is not absolute.

There are media and anecdotal reports that a host of First Nations will now seek judicial declarations of Aboriginal title, along the lines of the *Tsilhqot'in Nation* decision. Indeed, it would be surprising if that were not the case (Coates and Newman 2014, 6). However, the fact that many Aboriginal land claims are overlapping and that this case took five years to conclude at the trial level suggests that litigation may ultimately prove unattractive for many First Nations with outstanding land claims. The provincial and federal governments instead favour negotiated settlements of outstanding claims.

The provincial and federal governments favour negotiated settlements of outstanding claims over litigation.

The development of natural resources enterprises in provinces such as British Columbia that have a significant number of unresolved Aboriginal land claims is a complex issue. As the Court affirms in *Tsilhqot'in Nation* “[r]esource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group. Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands” (para. 18). In situations of established Aboriginal title, consent is required – otherwise the Crown must discharge its duty to consult and be able to establish an intrusion justification, as discussed above. Some commentators have cautioned that this decision increases uncertainty for natural resource development projects in British Columbia, including existing enterprises (Bains 2014, 5–6).

4.3 *Grassy Narrows First Nation v. Ontario (Natural Resources)* (Aboriginal treaty rights)

Citation: *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48

Date: July 11, 2014

Appellant: Andrew Keewatin Jr. and Joseph William Fobister, on their own behalf and on behalf of all other members of Grassy Narrows First Nation

Respondent: Minister of Natural Resources, Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.), Attorney General of Canada and Goldcorp Inc.

And Between

Appellant: Leslie Cameron, on his own behalf and on behalf of all other members of Wabauskang First Nation

Respondent: Minister of Natural Resources, Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.), Attorney General of Canada and Goldcorp Inc.

- Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, and Wagner JJ.
- Issue:** Whether Ontario has the power to “take up” lands in the Treaty 3 Keewatin area so as to limit harvesting rights, or whether Canada must approve.
- Decision:** Unanimous decision by McLachlin C.J.: Ontario has the power to “take up” lands under Treaty 3. There is no requirement that Canada approve of such action.

Synopsis:

Unlike in *Tsilhqot'in Nation v. British Columbia*, discussed above, which dealt with an Aboriginal land claim, *Grassy Narrows First Nation v. Ontario (Natural Resources)* involves the interpretation of an Aboriginal treaty. Treaty 3 was signed in 1873 and involved the Ojibway Chiefs (from whom the Grassy Narrows First Nation are descendants) yielding ownership of territory, except for reserved lands. Part of the agreement involved the Ojibway having the right to harvest non-reserve lands until they were “taken up” for settlement or resource extraction. In 1912, these lands were annexed to Ontario, which began issuing development licences with respect to them. This case began in 2005 when the Grassy Narrows First Nation sought to challenge a commercial logging licence issued by Ontario to a private company. The First Nation claimed that Canada would have to approve of such action.

Writing for a unanimous Court, Chief Justice McLachlin rejected the First Nation’s argument. She held that a proper interpretation of Treaty 3, the constitution, and relevant legislation found that Ontario, and only Ontario, had authority over whether non-reserve lands could be taken-up. However, she noted that Ontario owed obligations that are well recognized in existing jurisprudence to the First Nation. In particular, Ontario “must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests” (para. 50).

Implications of the Decision:

Aboriginal law experts have said that this decision “is significant in the context of provincial ownership and jurisdiction over most natural resources” because it “strongly reaffirms the power of the provinces to operate within their spheres of constitutional jurisdiction, even when their activity must interact with Aboriginal communities (and as against claims to federal jurisdiction traditionally applying in that context)” (Coates and Newman 2014, 20).

The case also provides clearer guidance to provincial governments on when they can authorize development on non-reserve treaty lands, and how they must respect treaty rights in doing so. As Chief Justice McLachlin stated:

Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns. [...] Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise. (para. 52)

4.4 *Canada (Attorney General) v. Bedford* (prostitution)

Citation: *Canada (Attorney General) v. Bedford*, 2013 SCC 72

Date: December 20, 2013

Appellant: Attorney General of Canada/Attorney General of Ontario

Respondent: Terri Jean Bedford, Amy Lebovitch, and Valerie Scott

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

Issue: Whether three prostitution-related offences in the *Criminal Code* (section 210: the bawdy-house prohibition; section 212(1)(j): living on the avails of prostitution; and section 213(1)(c): communicating in public for the purposes of prostitution) infringe the *Charter* and, if so, are they saved under section 1 of the *Charter*?

Decision: Unanimous decision by McLachlin C.J.: each of the offences infringes section 7 of the *Charter* (principles of fundamental justice) and none are saved under section 1. The remedy was a one-year suspended declaration of invalidity, meaning that one year from the date of the decision, these offences would be of no force and effect.

Synopsis:⁵

Chief Justice McLachlin, writing for a unanimous Court, found that the impugned offences engaged section 7 of the *Charter* (principles of fundamental justice) because “[t]he prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks” (para. 60). Specifically, the Court found that the offences increased the risk to prostitutes because they prevent prostitutes from moving indoors, hiring bodyguards, and screening clients.

The Court made the following specific findings:

- The bawdy-house prohibition in section 210 of the *Criminal Code*: the Court held that the harms to street prostitutes were grossly disproportionate to the goal of deterring community disruption that the bawdy house prohibition pursues.
- Living off the avails of prostitution in section 212(1)(j) of the *Criminal Code*: this offence was found to be overbroad because it criminalized some non-exploitative relationships (such as secretaries and body guards) that are not connected to the purpose of the law, which is to target pimps who engage in “parasitic, exploitative conduct” (para. 137).
- Communicating in public for the purposes of prostitution in section 213(1)(c) of the *Criminal Code*: this offence was found to be grossly disproportionate because “[t]he provision’s negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution” (para. 159).

None of these offences were found to have been justified under section 1 of the *Charter*. The Court ordered a suspended declaration of invalidity for one year, meaning that by December 20, 2014, they would be struck down.

Implications of the Decision:

The *Bedford* decision means that unless Parliament responds with new legislation, Canada would have *de facto* legalized/decriminalized prostitution by December 20, 2014. Instead, the Government of Canada responded to the *Bedford* decision by introducing Bill C-36 (*Protection of Communities and Exploited Persons Act*), which would adopt a new approach to prostitution. Under this new approach, prostitution is recognized as inherently exploitative and the objective is to discourage prostitution and help prostitutes exit. While “johns”, “pimps,” and human traffickers are criminally liable under this legislation, prostitutes generally are not. Proponents of legalized/decriminalized prostitution have said they will raise a new *Charter* challenge against Bill C-36.⁶

The Chief Justice notes that “Parliament is not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes” (para. 5). She added:

I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the Charter. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure – for example, permitting prostitutes to obtain the assistance of security personnel – might impact on the constitutionality of another measure – for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. (para. 165)

Advocates of legalized/decriminalized prostitution were quick to denounce Bill C-36 and have threatened a *Charter* challenge to it. For a further discussion and analysis of *Bedford* and the anticipated *Charter* challenge, see Benjamin Perrin, 2014, *How to Make Canada’s New Prostitution Laws Work*.

Prostitution is recognized as inherently exploitative and the objective is to discourage prostitution and help prostitutes exit.

4.5 Reference re Supreme Court Act, ss. 5 and 6 (appointment of Supreme Court of Canada Justices from Quebec)

Citation: *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21

Date: March 21, 2014

Appellant: N/A (Reference by the Governor in Council)

Respondent: N/A

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

Issue: The Government of Canada referred two questions to the Court about the eligibility of appointing judges to fill positions at the Court from Quebec. At issue was whether Justice Marc Nadon of the Federal Court of Appeal, formerly a lawyer in Quebec, met the eligibility requirements for elevation as a judge from Quebec to the Supreme Court of Canada and, if not, whether federal legislation could be amended to provide for his eligibility.

Decision: Majority decision by McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis, and Wagner JJ.: Federal Court of Appeal judges are ineligible for appointment to the Supreme Court of Canada to fill any of the three positions reserved for Quebec.

Dissenting reasons by Moldaver J.: Current and former members of the Quebec Bar may be eligible for appointment to the Supreme Court of Canada.

Synopsis:

The majority decision found that only current members of the Quebec Bar, the Quebec Court of Appeal, or the Superior Court of Quebec could be appointed to fill any of the three positions reserved for Quebec on the Supreme Court of Canada. Former members of the Quebec Bar who were appointed to the Federal Court of Appeal are ineligible for elevation. The reasons given by the majority included a “plain meaning” of the relevant provisions of the *Supreme Court Act*, which was said to be consistent with the purpose of these provisions, namely to ensure that the bijuridical nature of Canada is reflected on the Court, as part of a historic compromise with Quebec.

The majority decision also held that “Parliament cannot unilaterally change the composition of the Supreme Court of Canada” (para. 74). Such changes would require the unanimous consent of Parliament and all of the provinces.

The dissenting opinion argued that “[t]o suggest that Quebec wanted to render ineligible former advocates of at least 10 years standing at the Quebec bar is to rewrite history” (para. 147). Justice Moldaver suggested that the majority reasons could result in absurd situations:

A former Quebec superior court judge or advocate of 10 years standing at the Quebec bar could rejoin that bar for a day and thereby regain his or her eligibility for appointment to this Court. In my view, this exposes the hollowness of the currency requirement. Surely nothing is accomplished by what is essentially an administrative act. Any interpretation of s. 6 [of the *Supreme Court Act*] that requires a former advocate of at least 10 years standing at the Quebec bar, or a former judge of the Quebec Court of Appeal or Superior Court, to rejoin the Quebec bar for a day in order to be eligible

for appointment to this Court makes no practical sense. Respectfully, I find it difficult to believe that the people of Quebec would somehow have more confidence in this candidate on Friday than they had on Thursday. (para. 153)

Implications of the Decision:

The majority reasons succinctly describe the immediate impact of their decision: “The practical effect is that the appointment of Justice Nadon and his swearing-in as a judge of the Court were void *ab initio*. He remains a supernumerary judge of the Federal Court of Appeal” (para. 6). Moving forward, only persons who are current members of the Quebec Bar for at least 10 years, judges on the Quebec Court of Appeal, or judges on the Superior Court of Quebec are eligible to fill the positions on the Supreme Court of Canada reserved for Quebec.

The reference decision was portrayed in the media and by the federal Opposition parties as a major embarrassment to the Harper government who nominated Justice Nadon for elevation to the Supreme Court of Canada. The government released legal opinions that it had received prior to appointing Justice Nadon from two former Supreme Court of Canada judges that concluded he was eligible. The Court’s decision also led to an unprecedented public dispute involving Chief Justice McLachlin and the Prime Minister’s Office related to the circumstances of Justice Nadon’s appointment.

Parliament cannot unilaterally change the composition of the Supreme Court of Canada.

The position left vacant after Justice Nadon was declared ineligible was subsequently filled by Justice Clément Gascon of the Quebec Court of Appeal after consultations between the federal and Quebec governments. Notably, Justice Gascon did not go through a Parliamentary committee process as have recent appointments.

There are now questions about how future Supreme Court of Canada appointments will be managed. Minister Peter MacKay, Minister of Justice and Attorney General of Canada, has recently stated: “these appointments have always been a matter for the executive and continue to be. We will respect the confidentiality of the consultation process and will not comment on specific recommendations” (Fine 24 September 2014).

A new controversy has also arisen with respect to Justice Robert Mainville who was sitting on the Federal Court of Appeal and was moved this summer to the Quebec Court of Appeal. There is speculation that this is a preliminary step to ensure that he would be eligible for appointment to one of the next openings on the Supreme Court of Canada for Quebec judges (on December 1, 2014) (Fine 24 September 2014). Justice Mainville’s appointment to the Quebec Court of Appeal has been challenged by Toronto-lawyer Rocco Galati – the same lawyer who initially challenged Justice Nadon’s appointment to the Supreme Court of Canada. However, constitutional experts consider this latest challenge unlikely to succeed (Crawford 19 June 2014). If that is the case and Justice Mainville is appointed to the Supreme Court of Canada as a judge for Quebec, his move from the Federal Court of Appeal to the Quebec Court of Appeal would have technically made him eligible under the terms of the majority reasons in the *Reference re Supreme Court Act, ss. 5 and 6*. It could thus be one of the “end-runs” around the majority reasons of the type, although far less obvious, that Justice Moldaver alluded to in his dissenting reasons.

4.6 Canada (Citizenship and Immigration) v. Harkat (security certificates and CSIS human sources)

Citation: *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37

Date: May 15, 2014

Appellant: Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness

Respondent: Mohamed Harkat

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

Issue: Whether the security certificate regime is constitutional. Whether the identities of CSIS human sources are protected by class privilege, and can they be cross-examined?

Decision: Majority decision by McLachlin C.J. (LeBel, Rothstein, Moldaver, Karakatsanis, and Wagner JJ. concurring): the security certificate regime is constitutional and the security certificate in this case is reasonable and upheld. While CSIS human sources are not protected by class privilege, there was no basis in this case to authorize the exceptional interviewing or cross-examining of them.

Joint reasons dissenting in part by Abella and Cromwell JJ.: CSIS human sources are protected by class privilege and should not be cross-examined.

Synopsis:

The security certificate regime in the *Immigration and Refugee Protection Act* that provides for the detention of foreign nationals who are inadmissible to Canada because of allegedly engaging in terrorism was found to be constitutionally deficient in a previous decision of the Court in *Charkaoui v. Canada (Citizenship and Immigration)*. In response, Parliament amended the security certificate regime and it was challenged again in this decision in *Harkat*. The Court held that the amended security certificate regime was constitutional because it does not infringe *Charter* rights related to knowing and meeting the case against the named person, or the right to a decision based on facts and law. Special advocates in closed hearings can participate on behalf of the named person.

However, the majority opinion held that CSIS human sources are not protected by class privilege. The majority refused to apply police-informer privilege to CSIS human sources, partly on the basis of the differences between the policing and intelligence environments and the uses to which the information is put. However, the majority notes: “If Parliament deems it desirable that CSIS human sources’ identities and related information be privileged, whether to facilitate coordination between police forces and CSIS or to encourage sources to come forward to CSIS . . . it can enact the appropriate protections” (para. 87). While CSIS human sources are not subject to class privilege, special advocates do not have unlimited access to interview or cross-examine them – this should only occur as a “last resort” in the discretion of the designated judge.

The partly dissenting decision in *Harkat* differed from the majority in that Justices Abella and Cromwell would recognize that the identity of CSIS human sources should be protected by class privilege. A limited exception would apply in the security certificate context in very narrow circumstances and then only with disclosure to the special advocate. In such an instance, there should be no cross-ex-

amination of the human source because “[r]equiring a human source to testify will have a profound chilling effect on the willingness of other sources to come forward, and will undoubtedly damage the relationship between CSIS and the source compelled to testify” (para. 138).

Implications of the Decision:

In upholding the amended security certificate regime that provides for the detention of foreign terrorists, the Court has recognized that Parliamentary responses to its decisions will be given respect. This decision upholds an important national security tool and provides further guidance to designated judges in reviewing security certificate cases in future cases.

For Harkat, the Court’s decision means the next stage (proceedings related to his removal from Canada) will begin. No doubt, his case will be back at the Court as his counsel argues that he should not be sent back to his native Algeria due to concerns he could be tortured. In the meantime, he will remain in custody under the security certificate that has been upheld by the Court.

However, the division on the Court in *Harkat* with respect to protecting the identity of CSIS human sources is stark and the majority decision denying such protection is concerning. As the dissenting judges recognize, such informants provide information to CSIS at great risk to themselves. Such information may save many lives. It is difficult to understand why someone who anonymously calls Crimestoppers to report graffiti on a bus stop would be afforded greater legal protection than someone who tells CSIS confidentially about an impending terrorist attack. As the dissenting judges also point out, national security informants were protected prior to the creation of CSIS when the now defunct RCMP Security Service dealt with such matters. The transfer of those functions to CSIS should not be seen to erase that protection for intelligence sources, in their view.

This decision upholds an important national security tool and provides further guidance to judges reviewing security certificate cases in future cases.

On October 27, 2014, the Minister of Public Safety and Emergency Preparedness introduced Bill C-44 (*Protection of Canada from Terrorists Act*) in the House of Commons. Included in the amendments proposed in Bill C-44 are provisions that would protect CSIS human sources with class privilege, subject to review by a Federal Court judge, with disclosure possible in certain instances. This would effectively overrule the majority decision in *Harkat* with respect to the confidentiality of CSIS human sources.

4.7 *R. v. Hart*; *R. v. Mack* (“Mr. Big” police operations)

Citation: *R. v. Hart*, 2014 SCC 52; *R. v. Mack*, 2014 SCC 58

Date: July 31, 2014 (*Hart*); September 26, 2014 (*Mack*)

Appellant: Her Majesty the Queen (in *Hart*); Dax Richard Mack (in *Mack*)

Respondent: Nelson Lloyd Hart (in *Hart*); Her Majesty the Queen (in *Mack*);

Coram: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis, and Wagner JJ. (in both cases)

Issue: Whether statements by accused persons obtained through a “Mr. Big” undercover police operation are admissible as evidence.

Decision: *Hart*: Majority decision by Moldaver J. (McLachlin C.J. and LeBel, Abella, and Wagner JJ. concurring): statements by accused persons obtained by the Mr. Big technique are presumptively inadmissible, unless the Crown can show on a balance of probabilities that the probative value outweighs the prejudicial effects. Such statements may also be excluded based on the abuse of process doctrine. On the facts, the majority would exclude the statements by the accused and leave it to the Crown prosecutor to decide how to proceed.

Concurring reasons (separate): Cromwell J. agreed with the framework set out by the majority but would have ordered a new trial where it could be applied.

Concurring reasons (separate): Karakatsanis J. agreed that the statements by the accused should be excluded, but based on the principle against self-incrimination in the *Charter*.

Mack: Unanimous decision by Moldaver J.: the framework set out in *Hart* was applied to find that the Mr. Big statements were admissible on the facts of this case, such that the first-degree murder conviction was upheld.

Synopsis:

The “Mr. Big” technique involves undercover police officers posing as criminals to cultivate trust and a relationship with a target, who they suspect is involved in serious criminality. Over a period of time, the target may participate in a range of “scenarios” where they are led to believe they are participating in criminal conduct with the undercover officers (such as smuggling contraband goods). An aura of violence is often created, including simulated acts of violence involving the undercover officers. The operation culminates in a meeting with Mr. Big – the fictitious head of the criminal organization made up by the undercover officers. During that meeting the target is encouraged to admit to the criminal conduct that originally caused the police to be interested in the target. Statements made by the target are then used as evidence at trial against the accused. In some cases, there is corroborating evidence obtained as a result of the statements, such as accused persons leading the undercover police to the previously undiscovered body of the victim.

The majority in *Hart* established a new common law rule of evidence to address concerns about reliability, prejudice, and police misconduct that may arise from statements obtained through the Mr. Big technique. Such statements are presumptively inadmissible, unless the Crown prosecutor can show on a balance of probabilities that the statement’s probative value outweighs its prejudicial effects. Additionally, such statements may be excluded based on abuse of process.

On the facts in *Hart*, the majority held that the Mr. Big statements should be excluded based on this new common law rule. They found that the accused was unemployed and socially isolated at the time the operation began and that he was given financial incentives and friendship by the undercover officers to participate in the Mr. Big scenarios. These provided an overwhelming incentive to confess to murdering his twin daughters, whether that was true or not. The confession was unreliable because it was inconsistent and there was no confirming evidence. The risk of prejudice in admitting them was also high (the jury would have disdained for the accused because he willingly participated in 63 “scenarios” of a criminal nature). Accordingly, the probative value was outweighed by the prejudicial effects so the statements by the accused were excluded.

In *Mack*, a unanimous Court applied the framework established in *Hart* with the opposite outcome: Mack’s statements to the undercover officers in a Mr. Big operation were admissible and his first-degree murder conviction was upheld. The evidence showed that the probative value of the statements

outweighed their prejudicial effects, there was no abuse of process, and the jury was adequately instructed on how to assess this evidence. Specifically, the accused in *Mack* had made confessions to two acquaintances prior to the Mr. Big operation commencing, and immediately after making a confession to an undercover officer in a Mr. Big operation the accused led them to a firepit where the victim's remains were found. Additionally, shell casings from a gun found in the accused's apartment matched shell casings found at the firepit. The operation did not involve the accused in any acts of violence or show him as being unsavory. There was no improper conduct by the police officers.

Implications of the Decision:

Interestingly, the Mr. Big technique is considered to be a Canadian invention. The modern use of the Mr. Big technique began in the 1990s and it had been used more than 350 times as of 2008 (*R. v. Hart*, para. 56). Despite concerns about the potential for wrongful convictions, the majority in *Hart* found that no such cases could be attributed to the Mr. Big technique (although the Kyle Unger prosecution involved a Mr. Big confession) (para. 62).

After the decision in *Hart*, the Crown prosecutors announced that they would not proceed with a further prosecution due to lack of evidence, since his statements under the Mr. Big technique were inadmissible. On the other hand, as mentioned above, in *Mack*, the Court upheld the first-degree murder conviction.

Hart and Mack reflect a balanced and appropriate approach to the admissibility of statements obtained during a Mr. Big operation.

Taken together, *Hart* and *Mack* reflect a balanced and appropriate approach to the admissibility of statements by the accused obtained during a Mr. Big operation. The test set out by the Court for assessing these statements is coherent and relies on well-established evidentiary concepts such as probative value and prejudicial effects, helpfully particularized to this new situation.

There was some concern after the release of *Hart* that it would be difficult, if not impossible, for Crown prosecutors to use Mr. Big operations in certain cases where they are vital to obtaining evidence of serious criminality. However, the subsequent release of *Mack* shows that the technique remains available in appropriate cases, and the Court has given some helpful guidance to investigators as to how they can design their Mr. Big operations in a way that addresses legitimate concerns about reliability, prejudice, and the potential for police misconduct.

4.8 *R. v. Spencer* (request by police for basic subscriber information from ISP)

Citation: *R. v. Spencer*, 2014 SCC 43

Date: June 13, 2014

Appellant: Matthew David Spencer

Respondent: Her Majesty The Queen

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

Issue: Whether the police can ask an Internet service provider (ISP) to voluntarily provide the name and address of a subscriber assigned to an Internet protocol (IP) address that was used to access and store child pornography, and use that information to obtain a search warrant.

Decision: Unanimous decision by Cromwell J.: the police request for basic subscriber information from the ISP was a search that infringed section 8 of the *Charter*. However, on the facts, the evidence was not excluded under section 24(2) of the *Charter*.

Synopsis:

The Court held that there is a reasonable expectation of privacy in linking the identity of a person to their Internet usage, such that the request by the police for information from the ISP amounted to a search under section 8 of the *Charter*. The request by police for the subscriber's information had no lawful authority, meaning that the police could not compel the ISP to provide this information. Without the subscriber information, no warrant could have been obtained, so there was an unreasonable search that violated the *Charter*. However, the Court found that the evidence obtained from the warrant should nevertheless be admissible on the facts of this case because its admission would not bring the administration of justice into disrepute under section 24(2) of the *Charter* because the police thought they were acting reasonably and lawfully and the offences were serious. Accordingly, the accused's conviction for possession of child pornography was upheld and a new trial ordered on whether the accused was also guilty of making it available.

Implications of the Decision:

This is the first decision of the Supreme Court of Canada holding that if the police obtain basic subscriber information (name, address and telephone number) linked to an IP address, that this constitutes a search within the meaning of section 8 of the *Charter*. This represents a major development in how privacy on the Internet is considered in criminal matters, with privacy amounting to anonymity, and it departs from appellate decisions in several provinces (*R. v. Spencer*, para. 72). The police will be required to have a warrant to obtain such information in the future, absent exigent circumstances.

The Director of Public Prosecution intervened in *R. v. Spencer*, arguing that “recognizing a right to online anonymity would carve out a crime-friendly Internet landscape by impeding the effective investigation and prosecution of online crime” (para. 49). Justice Cromwell responded to this concern by stating:

However, in my view, recognizing that there may be a privacy interest in anonymity depending on the circumstances falls short of recognizing any ‘right’ to anonymity and does not threaten the effectiveness of law enforcement in relation to offences committed on the Internet. In this case, for example, it seems clear that the police had ample information to obtain a production order requiring Shaw to release the subscriber information corresponding to the IP address they had obtained. (para. 49, emphasis in original)

Accordingly, this decision will increase the workload of police investigating all manner of online criminal activity because they can generally no longer simply request voluntary disclosure of basic subscriber information from an ISP. However, the section 8 *Charter* jurisprudence includes some general exceptions to warrantless searches based on exigent circumstances.

The police will be required to have a warrant to obtain subscriber information in the future, absent exigent circumstances.

The jurisprudence of the Court has long held that a warrantless search is presumptively unreasonable and, in such an event, the Crown has the burden of demonstrating that “(a) it was authorized by law; (b) the law itself was reasonable; and (c) the search was carried out in a reasonable manner” (*R. v. Spencer*, para. 68 relying on *R. v. Collins*, [1987] 1 S.C.R. 265 at 278).

The decision in *R. v. Spencer* was released after the tabling of Bill C-13 (*Protecting Canadians from Online Crime Act*) in the House of Commons on November 20, 2013, related to “cyber-bullying” and other online criminal law issues. Some commentators have argued that Bill C-13 (clause 20) needs to be examined and potentially amended in light of the decision in *R. v. Spencer* as it includes a provision related to voluntary requests by law enforcement authorities for data. However, Minister MacKay has indicated there is no intention to do so.

4.9 *R. v. Summers (Truth in Sentencing Act)*

Citation: *R. v. Summers*, 2014 SCC 26⁷

Date: April 11, 2014

Appellant: Her Majesty The Queen

Respondent: Sean Summers

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

Issue: Whether ineligibility for early release and parole while on remand is a “circumstance” that can justify granting enhanced credit for pre-sentence custody under the *Truth in Sentencing Act*.

Decision: Unanimous decision by Karakatsanis J.: The loss of access to parole and early release justifies enhanced pre-sentence credit at a ratio of 1.5 to 1

Synopsis:

This case interpreted changes made by the *Truth in Sentencing Act* (2009) to the rules related to credit for pre-sentence detention. Prior to these changes, courts typically awarded 2 for 1 credit (or 3 for 1 in some cases) for pre-sentence custody because the rules for parole eligibility and early release fail to account for pre-sentence detention, such that an offender would have a different statutory release date depending on whether he or she was denied bail or not. Additionally, conditions in pre-trial detention are often harsher than in corrections facilities (*R. v. Summers*, paras. 2–3).

Under the new rules in the *Truth in Sentencing Act*, section 719(3) of the *Criminal Code* provides for “a maximum of one day [credit] for each day spent in custody”. However, section 719(3.1) states that “if the circumstances justify it, the maximum is one and one-half days for each day spent in custody”. In *Summers*, the Court noted that the aim of the *Truth in Sentencing Act* was “to remove any incentive for an accused to drag out time in remand custody, and to provide transparency so that the public would know what the fit sentence was, how much credit had been given, and why” (para. 4).

Justice Karakatsanis found that under these new rules, credit for pre-sentence custody is capped at a maximum ratio of 1.5 to 1. Her reasons interpret when this “enhanced credit” (rather than the default 1 to 1 credit) should be awarded. For a unanimous Court, she concluded that enhanced credit should be given if failing to do so would negatively affect early release (even if the pre-sentence detention was not harsh, and the offender was unlikely to be granted parole). However, she stated that “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).

Justice Karakatsanis also raised particular concerns about Aboriginal offenders, who are statistically more likely to be denied bail, stating "[a] system that results in consistently longer, harsher sentences for vulnerable members of society, not based on the wrongfulness of their conduct but because of their isolation and inability to pay, can hardly be said to be assigning sentences in line with the principles of parity and proportionality" (para. 67).

Implications of the Decision:

The decision in *Summers* found that the *Truth in Sentencing Act* capped credit for pre-sentence custody at a ratio of 1.5 to 1, citing clear evidence of Parliamentary intention on that point. It did not find such a clear intention, however, with respect to when this enhanced credit should be awarded, and it interpreted such circumstances broadly to include most cases. The outcome is a loss for the government, although it was successful in reducing the typical pre-sentence credit down from 2:1 to 1.5:1 in most cases.

4.10 Canada (Attorney General) v. Whaling (retrospective repeal of accelerated parole review)

Citation: *Canada (Attorney General) v. Whaling*, 2014 SCC 20

Date: March 20, 2014

Appellant: Attorney General of Canada

Respondents: Christopher John Whaling; Judith Lynn Slobbe; Cesar Maidana

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

Issue: Whether section 10(1) of the *Abolition of Early Parole Act*, which made the abolition of accelerated parole review apply retrospectively to offenders already serving their sentences, infringed section 11(h) of the *Charter* (double jeopardy). If yes, is it saved by section 1 of the *Charter*?

Decision: Unanimous decision by Wagner J.: section 10(1) of the *Abolition of Early Parole Act* infringed section 11(h) of the *Charter* and is not saved by section 1 of the *Charter*. Accordingly, section 10(1) was declared invalid.

Synopsis:

The *Abolition of Early Parole Act* ended the ability of first-time, non-violent offenders to be granted accelerated parole review (APR). In *Whaling*, Justice Wagner for a unanimous Court noted that there had been criticism of APR since its inception in 1992 (paras. 3–6). By 1997, APR allowed for day parole to be granted after six months, or one-sixth, of the offender's sentence had been served (whichever was longer), instead of the offender having to wait to apply for day parole six months before their eligibility for full parole. The Correctional Service of Canada Review Panel reported in 2007 that APRs "undermined discretionary release and generally have not proved as effective as discretionary release in mitigating violent reoffending" (*Whaling*, para. 6). In 2011, the *Abolition of Early Parole Act* ended APR. However, section 10(1) of this legislation purported to make this apply retrospectively to offenders already serving their sentences.

Section 11(h) of the *Charter* establishes a right not to be punished twice for the same offence. Justice Wagner concluded that section 10(1) of the *Abolition of Early Parole Act* violated this right and could not be justified under section 1 of the *Charter*, so he declared it invalid. He held:

Parliament based its decision to abolish APR on considerable evidence, presented by the Crown in this case, that the system was not working effectively. It was within Parliament's prerogative to pass legislation it thought necessary to improve the system. . . . Uniformity of parole administration may be a worthy objective, but the Crown has failed to provide compelling evidence that that uniformity would be impaired if the APR system continued to apply to offenders who were sentenced under it. . . . In my view, having the repeal apply only prospectively was an alternative means available to Parliament that would have enabled it to attain the objectives of reforming parole administration and maintaining confidence in the justice system without violating the s. 11 (h) rights of offenders who had already been sentenced. (paras. 78-80)

Implications of the Decision:

The decision in *Whaling* represents an important caution to Parliament about adopting retrospective sentencing-related measures. The Court rightly identified section 10(1) of the *Abolition of Early Parole Act* as problematic because it significantly changed the rules for eligibility for day parole after an offender had already been sentenced – the legislation was not merely administrative in nature, but had real consequences for offenders already serving terms of imprisonment. However, the practical impact of *Whaling* on the *Abolition of Early Parole Act* moving forward is nil because APR is abolished for all offenders sentenced after this legislation came into force.

5. Conclusion

This study has found that during the last year, the Supreme Court of Canada has made landmark decisions having significant implications for law and policy across many areas. It has done so usually based on consensus, as just two cases among the top 10 most significant decisions have dissenting reasons. The Court has also ruled almost entirely against the federal government, with a single clear win among these most significant decisions.

One would be hard pressed to find another actor in Canada who has had a greater impact on such a wide range of issues than the Court has in the last year, such that the moniker “Policy-Maker of the Year” is appropriate. The Court, no doubt, would resist such a label on the view that it simply applies the law. The Court has a constitutionally vital role both in interpreting and applying the law as well as providing constitutional scrutiny to laws and governmental action. However, as this study has shown, it would be naïve and simplistic to say that the Court’s decisions do not have a significant legal and policy impact. Indeed, the outcomes and implications of the Court’s decisions of the last year are notable across a number of areas and will likely be of enduring significance.

If the norm becomes a united Court handing down losses to the federal government, there is a risk of increasing tensions and frustrations by the federal government where the Supreme Court of Canada is viewed as an impediment to legal and policy reforms – this would not be healthy for our democracy or the proper functioning of either body. Notably, not all of the decisions where the federal government has suffered losses are attributable to constitutional considerations. Several, in fact, reflect losses based on judicial interpretations of federal legislation – areas that are amenable to legislative reform.

Given that the Government of Canada has proposed legislation to respond to several of the decisions that it has lost (notably in *Bedford* and *Harkat*), subsequent litigation related to this new legislation, if adopted, would be a very telling test for whether Parliament and the Court are able to reach a degree of reconciliation, as they have on other controversial issues in the past, or not. More high-profile controversial issues such as euthanasia, polygamy, the “right to strike”, the fate of long-gun registry data from Quebec, and the constitutionality of a raft of new justice and immigration laws are also destined for decision by the Court in the coming months and years. In other words, time will tell whether Canada has entered a “legal cold war” (Ling 7 August 2014) or if this has merely been a long, cold winter for the federal government.

Author’s Note

I am grateful to David Watson and two anonymous reviewers for their helpful feedback and suggestions.

Biography



Benjamin Perrin is an Associate Professor at the University of British Columbia, Faculty of Law and a Senior Fellow at the Macdonald-Laurier Institute. He previously served as Special Adviser, Legal Affairs & Policy in the Office of the Prime Minister and was a Law Clerk at the Supreme Court of Canada. Professor Perrin is a member of the Law Society of Upper Canada and Law Society of British Columbia. He is also the author/editor of several books, law review articles, and book chapters, and regularly provides commentary in the media.

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R. v. Hart, 2014 SCC 52.

R. v. Mack, 2014 SCC 58.

R. v. Spencer, 2014 SCC 43.

R. v. Summers, 2014 SCC 26.

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Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.

Endnotes

- 1 Copies of these decisions can be downloaded via Lexum, *Judgments of the Supreme Court of Canada*: <http://scc-csc.lexum.com/scc-csc/en/nav.do>.
- 2 The result is listed as mixed because the Court ruled that statements obtained by accused persons in Mr. Big operations may be admissible, depending on the facts. In *R. v. Hart*, 2014 SCC 52, the statements were inadmissible, whereas in *R. v. Mack*, 2014 SCC 58 they were admissible.
- 3 Bill C-36, see Benjamin Perrin, 2014, *How to Make Canada's New Prostitution Laws Work* at 6-7.
- 4 See Ken Coates and Dwight Newman, 2014, *The End is Not Nigh: Reason over Alarmism in Analysing the Tsilhqot'in Decision*.
- 5 This synopsis is taken from Benjamin Perrin, 2014, *How to Make Canada's New Prostitution Laws Work*.
- 6 For further discussion of Bill C-36, see Benjamin Perrin, 2014, *How to Make Canada's New Prostitution Laws Work*.
- 7 See also *R. v. Carvery*, 2014 SCC 27; *R. v. Clarke*, 2014 SCC 28.



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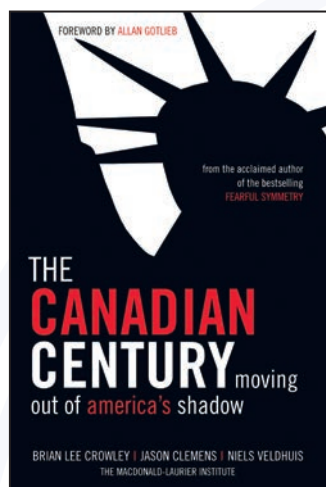
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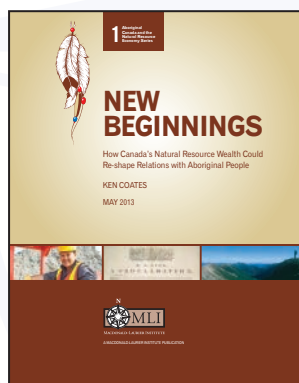
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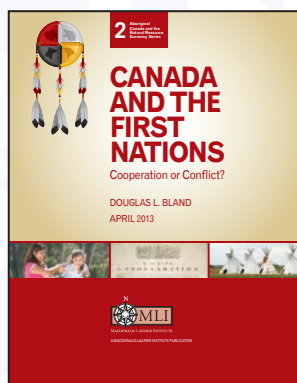
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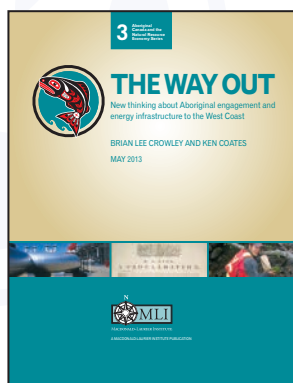
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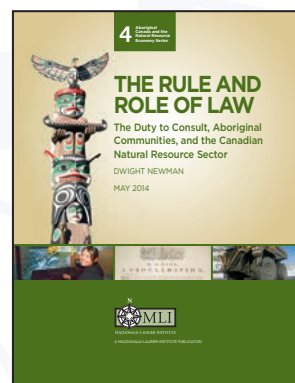
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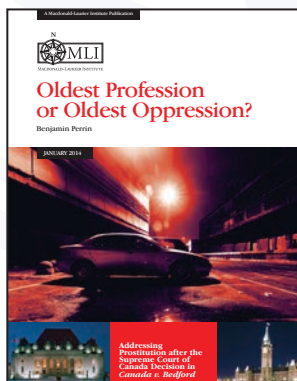
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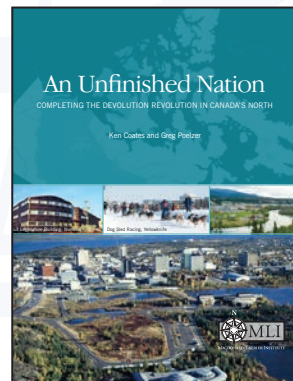
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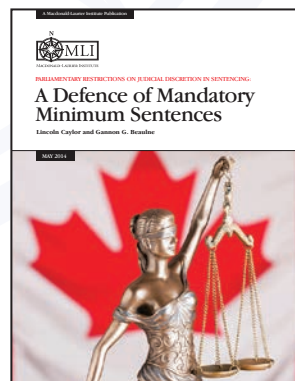
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