The Five Most Significant Decisions of the Courts in 2004-2005[1]

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Introduction

In the age of mediation and arbitration and Legal Aid cutbacks, one might think that Canadian Courts would have fewer to cases to decide; that the importance of the jurisprudence would diminish; or that the cost of litigating would make it prohibitive to bring disputes to a final conclusion.

Undeniably, an overwhelming number of disputes settle before they reach the trial

1 and a few others which deserve "honorable mention"

2 We express our sincere thanks to our colleague, Jacqueline I. Dickison, also of Ellyn-Barristers, Toronto for editing the manuscript and for her helpful suggestions.

door. More litigants than ever cannot afford counsel and go to Court unrepresented. However, these developments have not prevented important societal issues from reaching Courts at all levels; nor have they prevented our judges from making decisions which have the potential to significantly impact the lives of Canadians.

Our barometer of judicial "significance" is those cases which are likely to have the greatest impact on Canadians. This is obviously difficult to predict with accuracy and it is daunting to limit the list to five cases. With all of these caveats in mind, our nominees for the five most important cases deal with these seminal subjects:

1) the right to purchase private insurance for medical services[3];

2) the right of same sex couples to marry and the right of religious institutions to refuse to perform same sex marriages[4];

3) the right of government to sue tobacco companies for the health care costs arising from tobacco-related diseases[5];

4) the financial limits on the right to pay equity;[6] and

5) the scope of directors' and officers' fiduciary duties to creditors.[7]

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3 *Chaoulli v. Quebec – SCC* June 9, 2005 [2005] S.C.J. No. 33 (McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ. *and* same case: Motion for suspension of judgment for 12 months granted: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ August 4, 2005)

4 *Reference re Same-Sex Marriage- SCC - December 9, 2004 [2004] 3 S.C.R. 698; [2004] S.C.J. No. 75* (McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.)

5 *British Columbia v. Imperial Tobacco Canada Ltd.* - Supreme Court of Canada - Sept. 29, 2005 [2005] SCC 49; McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

6 *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)* - SCC - October 28, 2004 [2004] 3 S.C.R. 381; [2004] S.C.J. No. 61 (McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

7 *Peoples Department Stores v. Wise* – SCC - October 29, 2004 [2004] 3 S.C.R. 461; [2004] S.C.J. No. 64

The decisions we have selected, all from the Supreme Court of Canada, reflect how in tune the issues decided by our Courts are with "hot button" issues in Canadian society.[8] This was a year when civil and public law dominated our selections. We found no criminal case which trumped these cases in importance.

Is there a right to buy private medical insurance for medical services?

Long waiting times for medical services under Canada's mandatory government-sponsored public health care system was the central issue of the 2004 federal election. The *Chaoulli* case raises the issue of whether the denial of a patient's right to seek private medical services constitutes a deprivation of the rights to life and security of the person as protected by s. 7 the *Canadian Charter of Rights and Freedoms* and the right to personal inviolability as protected by s. 1 of the *Quebec Charter of Rights and Freedoms*.[9]

Is same-sex marriage constitutional?

The constitutionality of the federal government's *Civil Marriage Act Bill C-38*, which addressed the right of same sex couples to marry and the right of clergy and religious

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(Iacobucci, (who took no part in the judgment) Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

8 Until September 29, 2005, when the Supreme Court of Canada released its decision in the Imperial Tobacco case, one of our cases significant cases was Tierney-Hynes v. Hynes, a decision of the Ontario Court of Appeal (June 28, 2005 - [2005] O.J. No. 2661 (Goudge, Borins, Feldman, Lang and Juriansz JJ.A.), which deals with the important issue of the right of former spouse to renewed spousal support. This case is now an "honourable mention" not because it is any less important but because it will also be dealt with by John Legge in his family law presentation later in Operation Update 2005

9 R.S.Q., c. C-12, ss. 1, 9.1

institutions to refuse to perform same sex marriages has been a focal point of debate not only among Canadians but in many other places in the world. In the *Reference re Same Sex Marriage*, the federal government asked the Supreme Court of Canada to address the constitutionality of the proposed Bill C-38, the *Civil Marriage Act* from two perspectives, namely, the protection of the rights of same sex couples to marry and the protection of the right of religious groups, including institutions and clergy, to refuse to perform same sex marriages.

Can governments sue tobacco companies for health care costs?

As a result of the Supreme Court's decision in *British Columbia v. Imperial Tobacco Canada Ltd.,*[10] the *Tobacco Damages and Health Care Costs Recovery Act,*[11] *("the Act")* is constitutional and the B.C. government can sue tobacco manufacturers for health care costs incurred by smokers. The Act, enacted by the B.C. legislature in 2000, gives the government the right to sue tobacco companies for both past, present and future tobacco-related wrongs.

The Court's ruling is similar to a decision of the Florida Supreme Court, which led to most American states enacting such legislation. In the United States, the cigarette manufactures eventually agreed to a settlement with the state governments for US $368.5 billion to be spent over 25 years for the treatment of patients suffering from

10 2005 SCC 49 (McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

11 S.B.C. 2000, c. 30.

smoking-related cancer, emphysema and other diseases.[12]

In Canada, it is anticipated that other provinces will pass similar legislation. Some legislation is already pending. The result is expected to be a settlement with tobacco manufacturers in the hundreds of billions of dollars.[13]

When does lack of funding justify government's denial of pay equity rights?

The Canadian Charter of Rights and Freedoms has influenced Canadian society for 20 years. Judges resort to the shelter of Section 1 ("reasonable limit in a free and democratic society") much less than they did in the early days of the *Charter*. Among the equality rights that have come to be protected is pay equity, namely, the right of women to receive equal pay for work of equal value as their male counterparts do.

However, the value of pay equity and other equality rights are greatly diminished if governments are able to provide economic justifications for failing to implement equality rights intended to protect disadvantaged groups in Canadian society. Here is where reality sets in: pay equity has significant economic consequences.

From a human rights perspective, it is clear that protection of rights and equality

12 The settlement was made on June 20, 1997 between the Attorneys-General of 40 state of the United States and five tobacco manufacturers for a payment of $368.5 million over 25 years. Further information about the settlement is available online at www.cbpp.org/tobacco-2.htm#N_1_. For more information about U.S. court decisions, see www.tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=865. On Oct. 30, 2002, the European Community filed a lawsuit in the U.S. District Court for the Eastern Dist. of New York against R.J. Reynolds Tobacco Co. See ww.tobaccofreekids.org/pressoffice/rjrlawsuit.pdf. This case is still pending.

13 See www.theglobeandmail.com/servlet/story/RTGAM.20050929.wtobac0929/BNStory/National

transcends economic considerations. A just society has to find the money to do what is just and fair. From an economic perspective, governments have to find resources in the public purse for each program. These two perspectives clashed in the Newfoundland public employees case and the Supreme Court of Canada was called upon to balance the equities, with surprising and perhaps, troublesome results.

Do corporate officers and directors have a fiduciary duty to creditors?

Judicial attention to human rights and Charter issues may distract our attention from what drives our economy: business. The subject of business leaders' fiduciary duties to their corporate stakeholders has attracted judicial attention in recent years. In the United States, we have seen the fall of Enron and Worldcom, where shareholders and employees lost millions of dollars as a result of corporate greed. High profile business people have been convicted of corporate fraud. In Canada, we are witnessing the dismantling of Conrad Black's Hollinger publishing empire as a result of alleged breaches of fiduciary duty.

However, shareholders are not the only stakeholders in corporations. Many business people base their economic success on their relationships with their customers. Millions of dollars of products are advanced on credit upon the assumption that the customer's credit disclosure information is accurate and that its business is conducted on the basis of generally accepted accounting principles.

The important question is: what obligation of disclosure and fair dealing do officers

and directors of a corporation have to creditors of the corporation? A corollary question is whether these obligations are affected differently if the corporation is close to insolvency? The Supreme Court of Canada provides guidance on these issues in the *Peoples' Department Store v. Wise*.

ANALYSIS OF THE FIVE MOST SIGNIFICANT CASES

Chaoulli v. Quebec - Supreme Court of Canada - June 9, 2005 and August 4, 2005

This is a difficult case which could have very important consequences for public health care in Canada --- or, depending on political winds, it may turn out to be completely irrelevant. As we point out, it is a decision which spawned great differences of opinion among the judges of the Supreme Court as well as among the judges and among the parties represented on the appeal, which included numerous intervenors.[14]

In this case, George Zeliotis and his doctor, Jacques Chaoulli, are residents of the province of Quebec who challenged the prohibition against private health care services under Quebec's single-tier health care system. Underlying their challenge

14 Apart from the parties themselves, representations were made in the S.C.C. orally or in writing by: the Attorneys General of Quebec, Canada, Ontario, New Brunswick and Saskatchewan; and by Augustin Roy, Senators Michael Kirby, Marjory Lebreton, Catherine Callbeck, Joan Cook, Jane Cordy, Joyce Fairbairn, Wilbert Keon, Lucie Pépin, Brenda Robertson and Douglas Roche; the Canadian Medical Association and the Canadian Orthopaedic Association; the Canadian Labour Congress; the Charter Committee on Poverty Issues and the Canadian Health Coalition; and by Cambie Surgeries Corp., False Creek Surgical Centre Inc., Delbrook Surgical Centre Inc., Okanagan Plastic Surgery Centre Inc., Specialty MRI Clinics Inc., Fraser Valley MRI Ltd., Image One MRI Clinic Inc., McCallum Surgical Centre Ltd., 4111044 Canada Inc., South Fraser Surgical Centre Inc., Victoria Surgery Ltd., Kamloops Surgery Centre Ltd., Valley Cosmetic Surgery Associates Inc., Surgical Centres Inc., British Columbia Orthopaedic Association and British Columbia Anesthesiologists Society.

was that long waiting lists for essential medical services in a single tier public health system violated Mr. Zeliotis' rights under the *Canadian Charter of Rights and Freedoms*[15] and under the *Quebec Charter of Rights and Freedoms*.[16]

In a 4-3 decision, the majority of the Supreme Court of Canada (Deschamps J., writing for herself and for McLachlin CJC and Major, Bastarache JJ.) held that the prohibition on private health insurance provided for in s.15 of the Quebec *Health Insurance Act* ("HEIA") and s. 11 of the Quebec *Hospital Insurance Act* ("HOIA") are inconsistent with s. 9.1 of the Quebec Charter and are not reasonably justified by s. 1 of the Canadian Charter. Binnie, LeBel and Fish JJ. Dissented. More is said about their dissent below.

Justice Deschamps encapsulated the issue before the Court in these words:[17]

> ¶2 As we enter the 21st century, health care is a constant concern. The public health care system, once a source of national pride, has become the subject of frequent and sometimes bitter criticism. This appeal does not question the appropriateness of the state making health care available to all Quebeckers. On the contrary, all the parties stated that they support this kind of role for the government. Only the state can make available to all Quebeckers the social safety net consisting of universal and accessible health care. The demand for health care is constantly increasing, and one of the tools used by governments to control this increase has been the management of waiting lists. The choice of waiting lists as a management tool falls within the authority of the state and not of the courts. The appellants do not claim to have a solution that will eliminate waiting lists. Rather, they submit that the delays resulting from waiting lists violate their rights under the Charter of human rights and freedoms, R.S.Q., c. C-12 ("Quebec Charter"), and the Canadian Charter of Rights and Freedoms ("Canadian Charter"). They contest the validity of the prohibition in Quebec, as provided for in s. 15 of the Health Insurance Act, R.S.Q., c. A-29 ("HEIA"), and s. 11 of the Hospital Insurance Act, R.S.Q., c. A-28 ("HOIA"), on private insurance for health care services that are available in the public system. The

15 Canadian Charter of Rights and Freedoms, ss. 1, 7, 12, 15, 24.

16 Charter of human rights and freedoms, R.S.Q., c. C-12 ("Quebec Charter")

17 [2005] S.C.J. No. 33 para. 2, QL

> appellants contend that the prohibition deprives them of access to health care services that do not come with the wait they face in the public system.
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> ¶ 4 In essence, the question is whether Quebeckers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state. For the reasons that follow, I find that the prohibition infringes the right to personal inviolability and that it is not justified by a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.

Mr. Zeliotis and Dr. Chaoulli were well-suited litigants for this challenge. Mr. Zeliotis had experienced numerous health problems and required both heart surgery and hip surgery. The prohibition against private health care insurance required that he wait longer than he considered reasonable for health care services. Dr. Chaoulli is a physician who tried unsuccessfully to have his home-delivered medical activities recognized and to obtain a licence to operate an independent private hospital.

Dr. Chaoulli and Mr. Zeliotis argued that the prohibition against private insurance under s. 15 the Quebec Health Insurance Act and s.11 of the Hospital Insurance Act infringed their rights under s. 7 the Charter and under s. 1 of the Quebec Charter. The evidence at the trial showed that for some medical procedures, particularly in the case of heart and other life-saving surgery, delays caused by waiting times "increase the patient's risk of mortality or the risk that his or her injuries will become irreparable." The evidence also showed that "many patients on non-urgent waiting lists are in pain and cannot fully enjoy any real quality of life. The right to life and to personal inviolability is therefore affected by the waiting times."

Deschamps J. embarks on a detailed analysis of the public health care systems of the Canadian provinces as well as those of other OECD[18] countries and concludes that the rights sought by Dr. Chaoulli and Mr. Zeliotis would not undermine the public system as argued by the Attorney General of Quebec. At para. 74 of her judgment, Deschamps J. makes the following observation:

> Even if it were assumed that the prohibition on private insurance could contribute to preserving the integrity of the system, the variety of measures implemented by different provinces shows that prohibiting insurance contracts is by no means the only measure a state can adopt to protect the system's integrity. In fact, because there is no indication that the public plans of the three provinces that are open to the private sector suffer from deficiencies that are not present in the plans of the other provinces, it must be deduced that the effectiveness of the measure in protecting the integrity of the system has not been proved. The example illustrated by a number of other Canadian provinces casts doubt on the argument that the integrity of the public plan depends on the prohibition against private insurance. Obviously, since Quebec's public plan is in a quasi-monopoly position, its predominance is assured. Also, the regimes of the provinces where a private system is authorized demonstrate that public health services are not threatened by private insurance. It can therefore be concluded that the prohibition is not necessary to guarantee the integrity of the public plan.

As a result, Deschamps J. held that the rights claimed by the appellants were in fact violated. The public system's undue waiting times did amount to deprivations under the health care statutes, which are inconsistent with Mr. Zeliotis' right to life and security of the person as protected by s. 7 of the *Canadian Charter* and his right to life and to personal inviolability protected by s. 1 of the *Quebec Charter*.

To provide a remedy to Mr. Zeliotis and Dr. Chaoulli, the Court had to overcome two additional legal hurdles. Section 1 of the Canadian Charter and s. 9.1 of the Quebec Charter provide that an infringement is not contrary law if it can be said to be "a

18 Organization of Economic Co-operation and Development

reasonable limit prescribed by law as can demonstrably justified in a free and democratic society." Further, the Court had to address the level of deference the court must show to the government in assessing the political choices to be made on a matter of government policy.

As to the burden of proof, Deschamps J. held that the Attorney-General of Quebec, not the appellants, had the burden to show that the statutory prohibition against privately-insured health care services was a necessary limit in a free and democratic society under s. 1 of the *Canadian Charter* and under s. 9.1 of the *Quebec Charter* and that the evidence did not support the government.

The majority accepted that the general objective of the HOIA and the HEIA is to promote health care of the highest possible quality for all Quebeckers regardless of their ability to pay. The Court was further satisfied that the purpose of the prohibition on private insurance in s. 11 HOIA and s. 15 HEIA is to preserve the integrity of the public health care system. While the Court recognized that preservation of the public health services plan is a pressing and substantial objective, the Court found "[a lack of] proportionality[19] between the measure adopted to attain

19 The concepts of proportionality, rational connection and minimal impairment relate to the applicability of the reasonable limit test in s.1 of the *Canadian Charter*. The test flows from analytical approach adopted by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, and referred by Deschamps J. para. 45: "First, the court must determine whether the objective of the legislation is pressing and substantial. Next, it must determine whether the means chosen to attain this legislative end are reasonable and demonstrably justifiable in a free and democratic society. For this second part of the analysis, three tests must be met: (1) the existence of a rational connection between the measure and the aim of the legislation; (2) minimal impairment of the protected right by the measure; and (3) proportionality between the effect of the measure and its objective (*Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 182). It is the minimal impairment analysis that has proven to be the most delicate stage in the instant case. The other stages cannot, however, be bypassed." The applicability of s. 9.1 of the *Quebec Charter* is

the objective and the objective itself." While an absolute prohibition on private insurance does have a rational connection[20] with the objective of preserving the public health plan, the Attorney General of Quebec failed to prove that this measure meets the "minimal impairment test"[21].

On the issue of deference to policy choices made by the democratically elected government of the province of Quebec, Deschamps J. concludes that deference was not an impediment in making the decision in favour of the appellants, in these words, para. 95:

> In short, a court must show deference where the evidence establishes that the government has assigned proper weight to each of the competing interests. Certain factors favour greater deference, such as the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state. This list is certainly not exhaustive. It serves primarily to highlight the facts that it is up to the government to choose the measure, that the decision is often complex and difficult, and that the government must have the necessary time and resources to respond. However, as McLachlin J. (as she then was) said in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136, "... care must be taken not to extend the notion of deference too far."

In the result, Deschamps J. found that the Quebec hospital and health legislation provisions were inconsistent with the *Quebec Charter*. However, for reasons which are not clear, Deschamps J.'s judgment is silent on whether the impugned provisions of the HOIA and HEIA are also infringements of the Canadian Charter.

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determined by the same test: see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712) and para. 47 of Deschamps J.'s reasons.

20 See f.n. 14

21 See f.n. 14

The result reached by Deschamps J. was concurred in by Chief Justice McLachlin and Justices Major and Bastarache, in which they also found an infringement of s. 7 of the *Canadian Charte*r, which was not demonstrably justified by s. 1 thereof. At paras. 154-159, McLachlin CJ and Major J. stated:

> 154 Having concluded that the prohibition on private health insurance constitutes a breach of s. 7, we must now consider whether that breach can be justified under s. 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society. The evidence called in this case falls short of demonstrating such justification.
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> 155 The government undeniably has an interest in protecting the public health regime. However, given the absence of evidence that the prohibition on the purchase and sale of private health insurance protects the health care system, the rational connection between the prohibition and the objective is not made out. Indeed, we question whether an arbitrary provision, which by reason of its arbitrariness cannot further its stated objective, will ever meet the rational connection test under *R. v. Oakes*, [1986] 1 S.C.R. 103.
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> 156 In addition, the resulting denial of access to timely and effective medical care to those who need it is not proportionate to the beneficial effects of the prohibition on private insurance to the health system as a whole. On the evidence here and for the reasons discussed above, the prohibition goes further than necessary to protect the public system: it is not minimally impairing.
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> 157 Finally, the benefits of the prohibition do not outweigh the deleterious effects. Prohibiting citizens from obtaining private health care insurance may, as discussed, leave people no choice but to accept excessive delays in the public health system. The physical and psychological suffering and risk of death that may result outweigh whatever benefit (and none has been demonstrated to us here) there may be to the system as a whole.
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> 158 In sum, the prohibition on obtaining private health insurance, while it might be constitutional in circumstances where health care services are reasonable as to both quality and timeliness, is not constitutional where the public system fails to deliver reasonable services. Life, liberty and security of the person must prevail. To paraphrase Dickson C.J. in *Morgentaler*, at p. 73, if the government chooses to act, it must do so properly.
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> 159 We agree with Deschamps J.'s conclusion that the prohibition against contracting for private health insurance violates s. 1 of the Quebec *Charter of Human Rights and Freedoms* and is not justifiable under s. 9.1 . We also conclude that this prohibition violates s. 7 of the *Canadian Charter of Rights and Freedoms* and cannot be saved under s. 1.

The dissenting judgment of Binnie, LeBel and Fish JJ. concluded that waiting times for medical services are a relative matter and while applicable to individual cases, did not change the valid legislative goal of a public health care system as set out in the HOIA and HEIA. The dissenting judges strongly objected to the Court entering the public debate on health care. These judges considered that health was a matter of government policy and not for the court to resolve, even if the implementation of the policy did not achieve perfect results.

On August 5, 2005, the Supreme Court granted a motion by the Attorney-General of Quebec to suspend the application of its decision for 12 months. The government of the province of Quebec requested this time to bring its legislation in line with the Court's decision.

But for the suspension motion, the potential impact of this decision on health care in Canada could have been great. The decision has the effect of sanctioning private health care insurance at least in the province of Quebec. An overwhelming change in the delivery of health care services in Canada was possible. In light of the suspension of the judgment for 12 months, we must hold our collective breath.

The critical element of this decision was the trial evidence of long waiting lists for life-threatening and other publicly-provided medical services. In a future case, evidence of whether the waiting list is too long could well produce a distinguishable

result. What appears to be "too long" to one set of experts might be reasonable to another. If Ontario, Quebec and other provinces improve health care delivery systems to reduce waiting times by 10 or 20%, will that be enough to protect the "sacred cow" of public health care in Canada?[22]

How will the Supreme Court of Canada deal with this issue if it were to arise again in a claim from another province? In the year ahead, a nine-judge court, on which there will have been 33% turnover[23] would hear the case. The result is unpredictable. For now, the decision in *Chaoulli* invites all Canadian governments and, indeed, all Canadians, to take notice that some judges of the Supreme Court are ready to make decisions which break down political "sacred cows". We leave to others to debate whether this is too activist a role for the Court.

Reference re Same-Sex Marriage - Supreme Court of Canada - December 9, 2004

Political debate about same sex marriage has occupied national attention for several years. When Igor Ellyn and Clement Wai wrote this presentation in 2002-2003, one of the most significant decisions was the Ontario Court of Appeal's judgment in *Halpern*

22 Some commentators have wondered whether the decision is applicable outside of Quebec at all in light of the Court's even split on the applicability of the Canadian Charter, i.e. Deschamps J. did not express a view on the Canadian Charter, and also suggested that the Quebec Charter may have a broader application. Maclachlin, CJ, Major and Bastarache JJ. held that it applied and the dissent held that it did not. See L. Wakulowksy and G. Moysa, "The Chaoulli decision and its implications for Ontarians", *OBA Briefly Speaking*, Vol. 31, No. 4, August 2005, p.8-9.

23 Justice Louise Arbour and Frank Iacobucci did not participate in the Chaoulli case. Each of the left the Supreme Court of Canada before the Chaoulli decision was delivered. Justices Louise Charron and Rosalie Silberman Abella were appointed after the Chaoulli case was heard. Justice Jack Major, who concurred with Deschamps J. in the result, is retiring from the Court on December 25, 2005.

v. Canada (Attorney General),[24] which held that the opposite-sex requirement for civil marriage violates the equality guarantee enshrined in s. 15(1) of the Canadian Charter of Rights and Freedoms. Around the same time, courts in British Columbia and Quebec handed down similar judgments.[25]

As a legislative response to these decisions, the federal government proposed the *Civil Marriage Act*[26] ("the *Proposed Act*") and called upon the Supreme Court of Canada to exercise its advisory role about the constitutionality of the legislation under s. 53(1)(d) of the Supreme *Court Act*.[27]

The operative sections of the *Proposed Act* read as follows:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

The Federal Government posed the following questions for the Supreme Court's opinion:[28]

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24 (2003) 65 O.R. (3d) 161 (C.A.)(McMurtry CJO, MacPherson and Gillese JJ.)

25 see EGALE Canada Inc. v. Canada (Attorney General) (2003), 225 D.L.R. (4th) 472, 2003 BCCA 251; and Hendricks v. Québec (Procureur général), [2002] R.J.Q. 2506 (Sup. Ct.).

26 *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*

27 R.S.C. 1985, c. S-26

28 The Same-sex Marriage Reference to the Supreme Court was initiated by the government of Prime Minister Jean Chrétien on July 16, 2003. At that time, only the first three questions were posed. On

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

3. Does the freedom of religion guaranteed by paragraph 2(*a*) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law--Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

The first issue the Court had to determine was whether to answer the questions at all.

In its unanimous decision, the Court dealt with this issue as follows at paras. 10-11:

> 10 The Court has recognized that it possesses a residual discretion not to answer reference questions where it would be inappropriate to do so because, for example, the question lacks sufficient legal content, or where the nature of the question or the information provided does not permit the Court to give a complete or accurate answer: see, e.g., *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545; *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806; and *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 ("Secession Reference"), at paras. 26-30.
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> 11 We conclude that none of the questions posed here lack the requisite legal content for consideration on a reference. The political underpinnings of the instant reference are indisputable. However, much as in the Secession Reference, these political considerations provide the context for, rather than the substance of, the questions before the Court. Moreover, any lack of precision with respect to the Proposed Act's purpose can be addressed in the course of answering the questions.

The full Supreme Court delivered a unanimous decision on December 9, 2004 in which

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December 12, 2003, the government of Prime Minister Paul Martin came into office. The fourth question was added on January 26, 2004.

the four questions were dealt with as follows:

- Question 1: Yes as to s. 1 and No as to s.2;
- Question 2: Yes
- Question 3: Yes.
- Question 4: The Court declined to answer.

The Court heard submissions from governments and other stakeholders, including human rights commissions, NGOs, religious groups and individuals.[29] Intellectuals and politicians on every side of the political and philosophical spectrum around the world have opined on the subject. In the United States, for example, President George W. Bush said he would propose an amendment to the U.S. Constitution to prohibit same sex marriage. However, some states have already passed legislation permitting it.[30]

29 Attorneys General of Canada, Quebec and Alberta; Human Rights Commissions of Canada, Ontario and Manitoba; Canadian Civil Liberties Association; British Columbia Civil Liberties Association; Canadian Bar Association; the Canadian Conference of Catholic Bishops and the Ontario Conference of Catholic Bishops; the Seventh-Day Adventist Church in Canada; the United Church of Canada; the Canadian Unitarian Council; the Church of Jesus Christ of Latter-Day Saints; the Metropolitan Community Church of Toronto; Egale Canada Inc; Egale Couples and B;C; Couples; the Ontario Couples, and the Quebec; the Working Group on Civil Unions; the Association for Marriage and the Family in Ontario; the Canadian Coalition of Liberal Rabbis for same-sex marriage and Rabbi Debra Landsberg, as its nominee; the Foundation for Equal Families; Mouvement laïque québécois; Coalition pour le mariage civil des couples de même sexe; the Islamic Society of North America, the Catholic Civil Rights League and the Evangelical Fellowship of Canada, collectively known as the Interfaith Coalition on Marriage and Family; the Honourable Anne Cools, Member of the Senate, and Roger Gallaway, Member of the House of Commons; Written submissions only by Martin Dion.

30 ww.whitehouse.gov/news/releases/2004/02/20040224-2.html referring to "the *Defense of Marriage Act*, [passed by the U.S. Congress in 1996], which defined marriage for purposes of federal law as the legal union between one man and one woman as husband and wife. The Act passed the House of Representatives by a vote of 342 to 67, and the Senate by a vote of 85 to 14. Those congressional votes and the passage of similar defensive marriage laws in 38 states express an overwhelming consensus in our country for protecting the institution of marriage." In Massachusetts, the state Supreme Court held in 2003 that under State Constitution, same sex couples have a right to marry. Attempts to amend the State Constitution were defeated in the Massachusetts Legislature. Editorial writers, including the New York Times, Friday, September 16, 2005, have written that the opposition to same sex marriage results from fear, bigotry and hysteria.

In some other countries, a more liberal approach has been adopted. Gay marriage has already been approved in some form in the Netherlands, Belgium and Spain. Same same-sex unions are also sanctioned, but not called "marriage in Denmark, Iceland, Norway, Sweden and Finland and New Zealand. Germany, France and Luxembourg have accorded some financial rights to same-sex unions.[31]

The Canadian approach, following the court decisions in Ontario, British Columbia and Quebec, which allowed same sex marriage was to codify same sex marriage and to pre-empt constitutional challenges by seeking an advisory opinion from the Supreme Court before passage of the legislation.

What follows is a brief explanation of the Court's analysis of each of the questions:

Question 1: Is the proposed Act constitutional?

Under s. 91(26) of the *Constitution Act, 1867*, legislation concerning marriage is within the jurisdiction of Parliament. The Court held that the fundamental concept that the Canadian Constitution is a "living tree" means that the nothing in s.91(26) entrenched a "frozen concept" of marriage, i.e., the definition of marriage which was applicable at the time of Confederation. Therefore, interpreting "marriage" progressively, there is no prohibition of same sex marriage in the Constitution.

The Court also held that while "federal recognition of same-sex marriage would have an impact in the provincial sphere, the effects are incidental and do not relate to the

31 http://news.bbc.co.uk/2/hi/americas/4081999.stm

core of the power in respect of "solemnization of marriage" under s.92(12) of the *Constitution Act,* or that in respect of "property and civil rights" under s. 92(13)."

Section 2 of the proposed Act deals with the freedom of religious officials to refuse to perform marriages. The solemnization of marriage is exclusively within the jurisdiction of the provinces under s.92(12). Accordingly, the Court held that this section is unconstitutional.

Question 2: Is the proposed Act consistent with the Charter?

Far from violating equality rights under s. 15 of the Charter, the Court found s.1 the proposed Act consistent with it. The following quote at paras. 42-43 is especially relevant:

> 42 The preamble to the *Proposed Act* is also instructive. The Act's stated purpose is to ensure that civil [page718] marriage as a legal institution is consistent with the *Charter*:
>
> ...
>
> WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended to couples of the same sex;
>
> AND WHEREAS everyone has the freedom of conscience and religion under the *Canadian Charter of Rights and Freedoms* and officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs;
>
> 43 Turning to the substance of the provision itself, we note that s. 1 embodies the government's policy stance in relation to the s. 15(1) equality concerns of same-sex couples. This, combined with the circumstances giving rise to the *Proposed Act* and with the preamble thereto, points unequivocally to a purpose which, far from violating the *Charter*, flows from it.

In response to those who argued that the religious equality rights of opponents of same sex marriage would be infringed by the proposed Act, the Court responded as follows at paras. 45-46:

> 45 Some interveners submit that the mere legislative recognition of the right of same-sex couples to marry would have the effect of discriminating against (1) religious groups who do not recognize the right of same-sex couples to marry (religiously) and/or (2) opposite-sex married couples. No submissions have been made as to how the *Proposed Act*, in its effect, might be seen to draw a distinction for the purposes of s. 15, nor can the Court surmise how it might be seen to do so. It withholds no benefits, nor does it impose burdens on a differential basis. It therefore fails to meet the threshold requirement of the s. 15(1) analysis laid down in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.
>
> 46 The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.

The Court recognized that it was dealing with proposed legislation and not an existing statute. It recognized that once passed, the legislation could create a conflict of rights, although not necessarily an infringement of the Charter. In this respect, the Court opined that conflicts between religion and same sex marriage which might develop in the future could be resolved in a Charter context. At paras. 52-54, the Court noted:

> 52 The right to same-sex marriage conferred by the *Proposed Act* may conflict with the right to freedom of religion if the Act becomes law, as suggested by the hypothetical scenarios presented by several interveners. However, the jurisprudence confirms that many if not all such conflicts will be resolved <u>within</u> the *Charter*, by the delineation of rights prescribed by the cases relating to s. 2(*a*). Conflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* [page721] itself by way of internal balancing and delineation.

> 53 The protection of freedom of religion afforded by s. 2(*a*) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the *Charter* and will be of no force or effect under s. 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist.
>
> 54 In summary, the potential for collision of rights raised by s. 1 of the *Proposed Act* has not been shown on this reference to violate the *Charter.* It has not been shown that impermissible conflicts -- conflicts incapable of resolution under s. 2(*a*) -- will arise.

Question 3: Protection of clergy who refuse to perform same sex marriages

Absent unique circumstances with respect to which the Court will not speculate, the guarantee of religious freedom in s. 2(*a*) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.

Question 4: Is the opposite requirement of s.5 of the Federal Law Civil Harmonization Act constitutional?

The Court refused to answer this question for the following reasons:

- The federal government has stated its intention to address the issue of same-sex marriage legislatively regardless of the Court's opinion on this question.

- As a result of decisions by lower courts, the common law definition of marriage in five provinces and one territory no longer imports an opposite-sex requirement and the same is true of s. 5 of the *Federal Law--Civil Law Harmonization Act, No. 1.* The government has clearly accepted these decisions and adopted this position as its own.

- The parties in the previous litigation and other same-sex couples have relied upon the finality of the decisions and have acquired rights which are entitled to protection.

- An answer to this question has the potential to undermine the government's stated goal of achieving uniformity in respect of civil marriage across Canada. While uniformity would be achieved if the answer were "no", a "yes" answer would, by contrast, throw the law into confusion. The lower courts' decisions in the matters giving rise to this reference are binding in their respective provinces. They would be cast into doubt by an advisory opinion which expressed a contrary view, even though it could not overturn them.

The *Civil Marriage Act* was enacted by Parliament and has received royal assent and is now part of Canadian law.[32] No religious institution or its clergy is obliged to perform a same sex marriage but same sex couples are entitled by law to marry in the same manner as heterosexual couples. The Court's opinion about the validity of the same sex marriage legislation is a victory for a part of our community whose rights have often been ignored, and also for those who accept that in a free and democratic society, alternative sexual orientation should not affect anyone's matrimonial rights.

An interesting aspect of the sanctioning of same-sex marriage in Canada is the impact it will have on marriage breakdown, as traditionally understood. In light of the decision in *Halpern*,[33] same-sex marriages have been celebrated in Ontario since August 2003.

Within days of their marriage, a same-sex couple separated and filed divorce proceedings. On September 13, 2004, Mesbur J. of the Superior Court of Justice of

32 Civil Marriage Act. S.C. c. C-38, Royal Assent on 20th July 2005.

33 *Halpern v. Canada (Attorney General).* [2003] O.J. No. 2268 (Ont. C.A., McMurtry C.J.O., MacPherson and Gillese JJ.A., June 10th, 2003)

Ontario heard the divorce application in *M.(M.) v. H (J.)*[34] but did not issue her reasons until November 19, 2004. To grant the same-sex couple a divorce, Mesbur J. had to find the definition of spouse under s. 2(1) of the *Divorce Act*[35] unconstitutional on the basis that it contravenes s.15(1) of the *Canadian Charter* by discriminating against same-sex married couples, and that the contravention is not justified under s. 1. Mesbur J. held that the appropriate remedy is for the court to redefine "spouse" in section 2(1) of the *Divorce Act* so that it means "either of two persons who are married to one another" and the divorce was granted.

British Columbia v. Imperial Tobacco Canada Ltd. – SCC – Sept. 29, 2005

This decision is the culmination of a battle by the B.C. government against the largest tobacco manufacturers which began in 1997. It followed on the heels of U.S. legislation, litigation settlement with the tobacco manufacturers to cover health costs.[36]

Section 2(1) of the British Columbia *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (the "Act") give the government a right of action an action against tobacco manufacturers to recover health care expenditures in treating

34 [2004] O.J. No. 5314, November 19, 2004 (Ont. Sup. Ct.) (Mesbur, J.).

35 R.S.C. 1985 (2nd Supp.) c.3

36 Information about the US Tobacco Litigation Settlement, which took place in August and September 1997 are available at http://news.findlaw.com/legalnews/lit/tobacco/#sites

individuals exposed to those products. The Supreme Court's decision holds that the Act is constitutional.

The B.C. government's first attempt to require tobacco manufacturers to pay for the cost of tobacco-related wrongs, the *Tobacco Damages Recovery Act*, S.B.C. 1997, c. 41, was struck down by the B.C. Supreme Court on the basis that the legislation in relation to extra-provincial civil rights and therefore *ultra vires* B.C. Legislature.[37]

Under the new Act, "Liability hinges on those individuals having been exposed to tobacco products because of the manufacturer's breach of a duty owed to persons in British Columbia, and on the government of British Columbia having incurred health care expenditures in treating disease in those individuals caused by such exposure."[38]

The *Act* is retroactive in its application. Moreover, the government may bring an aggregate claim and benefits from as reversed onus of proof, which requires that the government prove only that the tobacco manufacturer a) breached a common law, equitable or statutory duty or obligation it owed to persons in British Columbia who have been or might become exposed to cigarettes; b) that exposure to cigarettes can cause or contribute to disease; and c) that during the manufacturer's breach, cigarettes manufactured or promoted by the manufacturer were offered for sale in British Columbia.

37 *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, (2000), 184 D.L.R. (4th) 335, 2000 BCSC 312.

38 Per Major J., B.C. v. Imperial Tobacco Ltd. para. 1

Once these elements have been proved, the court must presume that a) the population that is the basis for the government's aggregate claim would not have been exposed to cigarettes but for the manufacturer's breach; and b) such exposure caused or contributed to disease in a portion of the population that is the basis for the government's aggregate claim.[39]

The B.C. government sued five tobacco manufacturers and the Canadian Tobacco Manufacturers' Council[40] each of whom defended on the basis that the Act was unconstitutional.

The British Columbia Supreme Court also held the new Act unconstitutional on the same basis and dismissed the actions. The B.C. Court of Appeal allowed government's appeal, finding that the Act were "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the *Constitution Act*, 1867, and that the extra-territorial aspects of the Act, if any, are incidental to it. The Court of Appeal also dismissed arguments that the Act interfered with the independence of the judiciary and the rule of law. The Supreme Court of Canada upheld the B.C.C.A.

The Supreme Court of Canada, Major J. writing for a unanimous Court, held that:[41]

> "the cause of action that constitutes the pith and substance of the Act is properly

39 Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, ss. 10, 3() and (2)

40 Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., JTI Macdonald Corp., British American Tobacco (Investments) Limited, Philip Morris Incorporated, Philip Morris International Inc.

41 British Columbia v. Imperial Tobacco Canada Ltd. ibid., paras. 37-38, 40, 43

> described as located "in the Province" under s. 92(13) of the Constitution Act, 1867. The Act is meaningfully connected to the province as there are strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs).
>
> The Act also respects the legislative sovereignty of other jurisdictions. Though the cause of action may capture, to some extent, activities occurring outside of British Columbia, no territory could possibly assert a stronger relationship to that cause of action than British Columbia. The breaches of duty to which the Act refers are of subsidiary significance to the cause of action created by it, and thus the locations where those breaches might occur have little or no bearing on the strength of the relationship between the cause of action and British Columbia."

The Supreme Court dismissed the argument that the *Act* violates the independence of the judiciary on the basis that:[42]

a) The court retains at all times its adjudicative role, and the ability to exercise that role without interference.

b) The Court must independently determine the applicability of the *Act* to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, then independently determine whether its assessment of the evidence supports a finding of liability.

c) The fact that the *Act* shifts onuses of proof in respect of some of the elements of an aggregate claim or limits the compellability of certain information does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence.

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42 SCC, para. 54-55

This decision is bound to have a national impact in Canada over the next few years. Legislation is already in place in Ontario[43] and Newfoundland and Labrador.

Newfoundland and Labrador's *Tobacco Health Care Costs Recovery Act*,[44] adopted in 2001, is similar to the B.C. legislation. In Ontario, *the Ministry of Health and Long-term Care Statute Law Amendment Act, 1999* amends the provincial Health Insurance Act to allow the Minister of Health and Long—Term Care to bring an action against "to recover costs incurred to pay for insured services rendered as a result of the person's negligence or wrongful act or omission."[45]

In 2000, the government of Ontario sued in the United States District Court in Washington, D.C. to recover health costs from the major tobacco companies for treating people in Ontario suffering from tobacco-related diseases but the lawsuit was dismissed on the grounds of remoteness, i.e., the failure to demonstrate a direct connection between the injury suffered by the Province of Ontario and the damage allegedly caused by the tobacco manufacturers.[46] The judge cited an earlier decision in which the Republic of Guatemala sought a similar recovery.[47] The Guatemala case

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43 Ministry of Health and Long-term Care Statute Law Amendment Act, 1999, S.O. 1999, c.10, ss. 59.1

44 *Tobacco Health Care Costs Recovery Act*, S.N.L. c.T-42, Assented to May 24, 2001.

45 www.theglobeandmail.com/servlet/story/RTGAM.20050929.wtobac0929/BNStory/National The *Long-Term Care Act*, 1994 was amended by adding the following section: 59.1 (1) If the Minister has paid for approved services as a result of the negligence or other wrongful act or omission of a person, the Minister has a right, independent of his or her subrogated right under subsection 59 (2), to recover, directly against that person, the costs for approved services that have been incurred in the past and that will probably be incurred in the future as a result of the negligence or the wrongful act or omission. (2) The Minister may bring an action in his or her own name for recovery of the costs referred to in subsection (1).

46 *In Re TOBACCO/GOVERNMENTAL HEALTH CARE COSTS LITIGATION*, [2000] CADC-QL 208; MDL Docket No. 1279, Misc. No. 99-213 (U.S. Dist. Court for the D.C., P.L. Friedman J. August 7, 2000)

47 *The Republic of Guatemala v. The Tobacco Institute*, 83 F.Supp.2d 125 (D.D.C. 1999).

was dismissed on the basis of remoteness and also because of the inapplicability of the U.S. RICO[48] statute to foreign governments. Appeals from the decision were dismissed at every level including the U.S. Supreme Court.[49]

The Supreme Court of Canada's decision has brought interesting comments from politicians and industry experts. Ontario Attorney-General Michael Bryant noted that "Obviously a major constitutional hurdle has been cleared for actions of this sort but the province will have to consider issues such as the cost of pursuing a lengthy suit, and then weigh the prospects of winning a case." Quebec's Minister of Health and Social Services, Philippe Couillard, said launching a suit is tempting since Quebec could seek hundreds of millions of dollars in compensation. But he remained hesitant, raising questions about the difficulty of gathering proof to mount a case against the tobacco industry.

Manitoba Health Minister Tim Sale wondered whether the companies will have any assets left to tap after years of litigation. U.S. tobacco firms have paid billions to settle suits in that country, he said. If the companies collapsed or were restructured, there might not be anything to recover. "This wouldn't be the first time companies have been reorganized after a massive disaster," he said. David Sweanor, a law

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48 Racketeer Influenced and Corrupt Organizations Act, 1970.

49 *SEIU Health & Welfare Fund v. Philip Morris Inc.* 249 F.3d 1068 (2001) (Republic of Guatemala was also an appellant in this case); and see *Guatemala v. Tobacco Inst., Inc.* 534 U.S. 994; 122 S. Ct. 463; 151 L. Ed. 2d 380; 2001 U.S. LEXIS 10006; 70 U.S.L.W. 3315 (Certiorari denied by USC Oct 29, 2001)

professor at the University of Ottawa, said the Supreme Court decision creates a "doomsday scenario" for the tobacco companies and could lead them to bankruptcy.

Governments' claims for health care costs from tobacco manufacturers are a two-edged sword, which require a delicate financial balance. On the one hand, governments would like to recover the billions of dollars in healthcare costs attributable to smoking-related illnesses. On the other, the bankruptcy of tobacco manufacturers would have a serious deleterious economic effect on state, provincial and national economies in Canada and the United States, including losses of billions of dollars in tax revenues, job layoffs and unemployment. Governments would have to bear new expenses without a source of recovery.

Notwithstanding the recognized dangerous of smoking, 20 to 30% of the population still smoke. If North American tobacco manufacturers were forced out of business, underground and foreign sources of cigarettes would continue to supply the demand. In the face of this reality, governments would like to recovery just enough damages from tobacco manufacturers to ensure that they are able to pay but still carry on business. Fortunately, "just enough" amounts to hundreds of billions of dollars.

Newfoundland v. N.A.P.E. - Supreme Court of Canada - October 28, 2004

The right of Newfoundland and Labrador's female health care and hospital workers to enforce a pay equity agreement was at issue in this case. The government had agreed

to pay equity in 1988 but in 1991, it passed the *Public Sector Restraint Act*, to prevent the pay equity agreement from coming into force. The government's justification for reneging on contractually-agreed rights was that the financial crisis affecting the Province of Newfoundland was so severe that the government could not afford the $24 million earmarked for the pay equity program without putting the credit-rating and solvency of the province in serious jeopardy.

The judgment of Binnie J., writing for a unanimous 7-judge Court,[50] accepted that the Act contravened s. 15(1) of the *Canadian Charter.* The judgment turned on whether the legislation was saved by s. 1. After an exhaustive review of the caselaw concerning the test for justification under s.1, Binnie J. concludes that: [51]

a) "a measure whose sole purpose is financial" is not a sufficient justification under s. 1;

b) there might be instances in which the potential impact upon the public purse is of sufficient magnitude to justify limiting the rights of individual citizens; but that

c) financial considerations combined with other public policy considerations *could* qualify as sufficiently important objectives under s.1.

From this analysis, Binnie J. concludes that:[52]

> The result of all this, it seems to me, is that courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the

50 McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

51 *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66 paras. 61-69

52 *Newfoundland (Treasury Board) v. N.A.P.E.*, supra., para. 72

> basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis. It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise "whose sole purpose is financial". The weighing exercise has as much to do with social values as it has to do with dollars. In the present case, the "potential impact" is $24 million, amounting to more than 10 percent of the projected budgetary deficit for 1991-92. The delayed implementation of pay equity is an extremely serious matter, but so too (for example) is the layoff of 1,300 permanent, 350 part-time and 350 seasonal employees, and the deprivation to the public of the services they provided.

Newfoundland's severe financial crisis resulted from the loss of more than $200 million in transfer payments from the federal government. The crisis was so severe that it did not amount just to a debate over "rights versus dollars". Binnie J. put it this way at para. 75:

> Loss of credit rating, and its impact on the government's ability to borrow, and the added cost of borrowing to finance the provincial debt which, in the case of Newfoundland, requires "[h]undreds of millions of dollars every year in interest" (Hansard, supra, at p. 362), are matters of high importance. The President of the Treasury Board told the House of Assembly that "the financial health of the Province was at stake" (Hansard, supra, at p. 359). The Newfoundland Government had already experienced a period of trusteeship in the 1930s, a fact glumly referred to by the President of the Treasury Board in his speech. The financial health of the Province is the golden goose on which all else relies. The government in 1991 was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts, was undertaken to promote other values of a free and democratic society: Oakes, supra, at p. 136; M. v. H., 1999 CanLII 686 (S.C.C.), [1999] 2 S.C.R. 3, at para. 107. And, as Sopinka J. pointed out in Egan v. Canada, 1995 CanLII 98 (S.C.C.), [1995] 2 S.C.R. 513, at para. 104, "[I]t is not realistic for the Court to assume that there are unlimited funds to address the needs of all."

Binnie J. then goes on to assess how the Act was implemented and concludes that the government's response to its fiscal crisis was also proportional to its objective.[53]

a) as the pay equity payout represented a significant portion of the budget, its postponement was rationally connected to averting a serious financial crisis.

b) the government's response was tailored to minimally impair rights in the context of the problem it confronted. Despite the scale of the fiscal crisis, the government proceeded to implement the pay equity plan, albeit at a slower pace. The government also initiated a consultation process with the union to find alternative measures. There were broad cuts to jobs and services.

c) On a balance of probabilities the detrimental impact of a delay in achieving pay equity did not outweigh the importance of preserving the fiscal health of a provincial government through a temporary but serious financial crisis.

As a result, the Supreme Court held that "the exceptional financial crisis called for an exceptional response. In such cases, a legislature must be given reasonable room to manoeuvre. The seriousness of the crisis, combined with the relative size of the $24 million required to bring pay equity in line with the original schedule, are the compelling factors in that respect. The fiscal measures adopted by the government did more good than harm, despite the adverse effects on the women hospital workers." However, the concepts expressed by the Court are likely to be offered as

53 Per Binnie J. para. 85

excuses for less than exemplary corporate conduct. Judges will have scrutinize corporate conduct carefully to be satisfied that the standard which existed in the *Peoples v. Wise* exists.

As a result, in this case, dollars did trump rights, but in the view of the Supreme Court, they did so for a valid constitutional purpose.

The case is instructive because it demonstrates how fragile human rights are and how liable they are to be trumped by concerns which we had thought to be irrelevant.

Peoples Department Stores v. Wise – Supreme Court of Canada - October 29, 2004

This decision of the Supreme Court of Canada was heard by a seven-judge panel, namely, Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ., but Iacobucci J. did not participate in the judgment.

The facts are summarized in the headnote as follows:[54]

> Wise Stores Inc. ("Wise") acquired Peoples Department Stores Inc. ("Peoples") from Marks and Spencer Canada Inc. ("M & S"). L.W., R.W. and H.W. (the "Wise brothers") were majority shareholders, officers and directors of Wise, and the only directors of Peoples. Because of covenants imposed by M & S, Peoples could not be merged with Wise until the purchase price had been paid. Almost from the outset, the joint operation of Wise and Peoples did not function smoothly. Parallel bookkeeping, combined with shared warehousing arrangements, caused serious problems for both

54 Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461 (October 29, 2004: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ. – Iacobucci J. did not participate in the judgment.

> companies. As a result, their inventory records were increasingly incorrect. The situation, already unsustainable, was worsening. L.W. consulted the vice-president of administration and finance of both Wise and Peoples in an attempt to find a solution. On his recommendation, the Wise brothers agreed to implement a joint inventory procurement policy whereby the two firms would divide responsibility for purchasing. Peoples would make all purchases from North American suppliers and Wise would, in turn, make all purchases from overseas suppliers. Peoples would then transfer to Wise what it had purchased for Wise, charging Wise accordingly, and vice versa. The new policy was implemented on February 1, 1994. Before the end of the year, both Wise and Peoples declared bankruptcy. Peoples' trustee filed a petition against the Wise brothers. The trustee claimed that they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors, in breach of their duties as directors under s. 122(1) of the *Canada Business Corporations Act* ("CBCA"). In the alternative, the trustee claimed that the Wise brothers had in the year preceding the bankruptcy been privy to transactions in which Peoples' assets had been transferred to Wise for conspicuously less than fair market value within the meaning of s. 100 of the *Bankruptcy and Insolvency Act* ("BIA"). The trial judge found the Wise brothers liable on both grounds. The Court of Appeal set aside the trial judge's decision.

At issue was whether the Wise brothers, owners of both Wise Stores and Peoples through separate corporations, had a duty to the creditors to avoid an accounting process which did not benefit Peoples' creditors, and particularly so, when the corporations were in the "neighbourhood of insolvency".

The case turns on the scope of the duties of directors under s. 122(1) of the *Canada Business Corporations Act* ("CBCA"), which provides as follows:

> 122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

In reaching the conclusion that the directors did not breach any duty, Major and Deschamps JJ, writing for a unanimous Court, held that the accounting system put in

place by the directors of Wise and Peoples was not dishonest and was based on professional advice. At para. 39-40, the Court notes:

> 39 However, it is not required that directors and officers in all cases avoid personal gain as a direct or indirect result of their honest and good faith supervision or management of the corporation. In many cases the interests of directors and officers will innocently and genuinely coincide with those of the corporation. If directors and officers are also shareholders, as is often the case, their lot will automatically improve as the corporation's financial condition improves. Another example is the compensation that directors and officers usually draw from the corporations they serve. This benefit, though paid by the corporation, does not, if reasonable, ordinarily place them in breach of their fiduciary duty. Therefore, all the circumstances may be scrutinized to determine whether the directors and officers have acted honestly and in good faith with a view to the best interests of the corporation.
>
> 40 In our opinion, the trial judge's determination that there was no fraud or dishonesty in the Wise brothers' attempts to solve the mounting inventory problems of Peoples and Wise stands in the way of a finding that they breached their fiduciary duty.

Major and Deschamps JJ. also make the following observations at para. 42-43:

> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.
>
> In assessing the actions of directors it is evident that any honest and good faith attempt to redress the corporation's financial problems will, if successful, both retain value for shareholders and improve the position of creditors. If unsuccessful, it will not qualify as a breach of statutory duty.
>
> 43 The various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(*a*) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be [page483] confused with the interests of the creditors or those of any other stakeholders.

As a result, the threshold for determining the obligation to creditors is "honest conduct in the best interests of the corporation, measured by an objective standard." If directors manage the corporation's business in good faith without fraud or self-dealing, the Court will not fault them if a creditor happens to suffer a loss.

This case does not relieve the shareholders from a claim under oppression remedy provisions of the CBCA[55] or the OBCA.[56] Under s. 238(d) of the CBCA and s.245(c) of the OBCA, a creditor may have standing to make an oppression claim if considered "a proper person" in the discretion of the Court.

The test will continue to be whether directors have acted honestly, on a reasonably-informed and prudent basis in the best interests of the corporation. At para. 67, the Court states:

> Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

However, the concepts expressed by the Court are likely to be offered as excuses for less than exemplary corporate conduct. Judges will have scrutinize corporate

55 Canada Business Corporations Act (R.S. 1985, c. C-44) s.241

56 Business Corporations Act Ontario, R.S.O. 1990, c. B.16, s.248

conduct carefully to be satisfied that the standard which existed in the *Peoples v. Wise* exists.

Cases deserving "Honourable Mention"

In the course of our research for this paper, we culled dozens of cases, many of which are also significant. Of course, it is not possible to mention them all. Other speakers will discuss significant cases in particular fields of law. We did come across three other cases we found worthy of special note:

Is an ex-spouse entitled to renew a claim for support?

The financial consequences of marriage breakdown occupy the collective attention of a large segment of the Canadian population. This is not surprising given that about 40% of marriages end in divorce. Further, the earning and re-marriage capacity of husbands and wives and is often disparate, especially in so-called "traditional marriages" where the wife has sacrificed or delayed her career to rear the children while the husband has developed significant earning capacity in his profession or business, and will usually have a larger retirement savings plan and in some cases, a pension plan.

Following divorce, an ex-wife's efforts to re-enter the workforce and to re-establish herself may only be temporarily successful. A second marriage or common law relationship may eliminate the need for support. However, the stark reality is that second "spousal" relationships are not necessarily a permanent answer. An ex-

spouse who may not have required support after the divorce may be in inferior financial straits a few years later.

In *Tierney-Hynes v. Hynes,* the Ontario Court of Appeal grappled with the difficult question of the re-entitlement of a former spouse to support after support has terminated. In this particular case, the reinstatement of spousal support flowed from the termination of spousal support because of the husband's temporary reduction during his studies. Our detailed analysis refers to how the case may apply to a broader range of fact situations.

Consequences of an employer's indifference to an employee's illness

In *Keays v. Honda Canada Inc.*,[57] Justice MacIsaac of the Superior Court of Justice of Ontario, awarded a dismissed employee 24 months salary and benefits for wrongful dismissal. The case is remarkable because of the additional award of $500,000 punitive damages for the employer's outrageous conduct in refusing to accept the employee's claims of chronic fatigue syndrome and the employer's failure to accommodate when medical evidence confirmed the employee's claim. The Court held that the employer discriminated against the employee by requiring him to validate each medical absence more rigourously than other employees.[58]

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57 [2005] O.J. 1145 (MacIsaac J., Ontario Superior Court of Justice - March 17, 2005)

58 The Courts have become less tolerant of employers who disregard the human rights and basic dignity of employees. Along similar lines, the Ontario Superior Court of Justice awarded significant Wallace damages, punitive and aggravated damages in Bouma v. Flex-N-Gate Canada, [2004] O.J. No. 5664 (Ont. S.C.J. – Gates J.)

Crossing the Line on Judicial Bias

In *Mugesera v. Canada (Minister of Citizenship and Immigration),*[59] the Supreme Court of Canada heard a deportation case involving a hard-line Hutu leader from Rwanda. Mugesera, who obtained landed immigrant status in Canada in 1993, was believed to have incited, murder, genocide and crimes against humanity in Rwanda. The Supreme Court held as there were reasonable grounds to believe that Mugesera committed a crime against humanity, he was inadmissible to Canada by virtue of ss. 27(1)(g) and 19(1)(j) of the *Immigration Act* and he was ordered deported.

The result was a strong statement for the importance Canadian courts place on the denial of landed immigrant rights to persons who, based on their heinous behaviour elsewhere may pose a danger to Canada or Canadians. Serious as these matters are, the case is seminal for another reason. The Supreme Court rejected as out of hand and unacceptable a motion for a permanent stay of the proceedings made by appellant's counsel on the grounds of bias of the whole Court.

Mugesera's counsel, the outspoken Quebec City lawyer, Guy Bertrand, brought a motion for a permanent stay of the deportation proceedings on the basis of alleged abuse of power and abuse of process by the then Minister of Citizenship and Immigration and the current Minister of Justice and an apprehension of bias on the part of the Supreme Court as a whole.

59 [2005] S.C.J. No. 39 - Supreme Court of Canada June 28, 2005

Underlying Bertrand's motion was that "Jewish individuals and organizations had strongly influenced the Minister of Citizenship and Immigration and the Minister of Justice to launch the appeal of the Federal Court of Appeal's decision. Bertrand alleged that Minister of Justice Irwin Cotler had appointed Justice Rosalie Abella to the Supreme Court so that she could hear this appeal.

In fact, Justice Abella voluntarily had recused herself from the appeal immediately after her appointment to Court on the basis that her husband, Professor Irving Abella, was Chair of the Canadian Jewish Congress War Crimes Committee, which had lobbied for Mugesera's deportation and Canadian Jewish Congress had obtained intervenor status in the appeal (but Professor Abella was not involved in the intervention). Bertrand's argument was that the mere fact that Abella J. was a member of the Court, whether she participated in the appeal or not, impaired the whole Court from adjudicating on his appeal.

Not only did Bertrand's motion for a permanent stay fail but the judges of the Supreme Court of Canada ruled that his actions crossed the line of what counsel may argue in the proper representation of a client. In dismissing the motion out of hand, the 8-judge panel made this strong statement at paras 16-17:[60]

> 16 Although it is not our usual practice, the content of the motion and of its allegations compels us to point out that it is unprofessional and unacceptable. It constitutes an unqualified and abusive attack on the integrity of the Judges of this Court. In an attempt to establish the alleged Jewish conspiracy and abuse of process

60 Mclachlin C.J. And Major, Bastarache, Binnie, LeBel, Deschamps, Fish And Charron JJ. As further explained, Abella J. had voluntarily recused herself within days of her appointment to the Court and long before the motion.

> against the Mugeseras, this pleading systematically referred to irresponsible innuendo. In addition, it refers to exhibits that are irrelevant and whose content is entirely inappropriate and misleading. Thus, it is obvious from the motion and its supporting exhibits that it was drafted with little concern for the rigour, restraint and respect for the facts required of all lawyers involved in judicial proceedings as an officer of the court. We are compelled to say that none of the allegations in the motion, no portion of the affidavits filed in support of the motion, and none of the documents to which these affidavits refer justifies the motion with respect to members of this Court or to the appellant's decision to initiate and pursue this appeal. The only abuse of process from this motion lies at the feet of the respondent Mugesera and Mr. Bertrand.
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> 17 Regretfully, we must also mention that the motion and the documents filed in support of it include anti-Semitic sentiment and views that most might have thought had disappeared from Canadian society, and even more so from legal debate in Canada. Our society is a diverse one, home to the widest variety of ethnic, linguistic and cultural groups. In this society, to resort to discourse and actions that profoundly contradict the principles of equality and mutual respect that are the foundations of our public life shows a lack of respect for the fundamental rules governing our public institutions and, more specifically, our courts and the justice system.

The members of the Court were offended by Mr. Bertrand's allegations of bias and the accompanying anti-semitic slurs against Justice Abella, the Minister of Justice and Professor Abella, Canadian Jewish Congress and against the entire Canadian Jewish community. None of the anti-semitic allegations were supported by any evidence.

Following the appeal, the Quebec Bar Association announced that it was considering disciplinary proceedings against Bertrand, which as of the publication of this paper, have not been concluded.[61] For his part, Bertrand did not feel chastised by the Supreme of Canada's rebuke. On the contrary, he stated publicly that the Supreme Court "crucified him."[62]

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61 "Canadian lawyer slammed over Jewish conspiracy claims" Ha'aretz Newspaper Online Edition, www.haaretz.com, August 17, 2005

62 www.ledevoir.com/2005/08/18/88469.html: Guy Bertrand part en guerre contre la Cour suprême : [Translation] Yesterday, Me Bertrand defended himself against the allegation that

Conclusion

The protection of rights by the Supreme Court of Canada has not lost any steam. In proper cases, the Court is not hesitating to strike down legislation under s. 15 of the Charter and appears to find fewer s.1 obstacles than it did a decade or more ago. On the other hand, the Court has upheld governments' rights to pursue socially-accepted objectives, such as the recovery of tobacco-related health expenditures and to maintain fiscal objectives. A generation ago, the concept of suing tobacco manufacturers for health cost might have been unheard of. Now it has become a worldwide phenomenon.

A generation ago, pay equity was not a fact of life. In the Newfoundland Public Employees' case, the pendulum may have swung too far. The Supreme Court recognized, even if somewhat reluctantly, that human rights are subject to real-world financial concerns. They can only be implemented when funds are available. The Court had to strike a fine balance between rights and government fiscal policy.

Toronto, October 2005. Igor Ellyn, QC iellyn@ellynlaw.com
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he is anti-semitic. "I never mentioned a Jewish conspiracy, " he said. He laments the fact that he was not afforded an opportunity to explain the matter to the judges of the Supreme Court. According to him, he is being condemned on the basis of an alleged affidavit was intended to support his motion for a stay of the appeal. "So, I was condemned by the highest court on the basis of a non-existent document," he said.