January 13, 2016

Faculty Favourites: Celebrating a Supreme Court of Canada Anniversary

Editor's Note

2016 is the 140th anniversary of the year that the Supreme Court of Canada began hearing cases. Our colleagues at the Bennett Jones Law Library are marking the occasion with a display, and asked us to nominate some notable Supreme Court of Canada cases for inclusion. The cases could be selected on the basis that they were our favourites, had the most impact on people's lives (positive or negative), and/or were the most significant to our particular fields of study. Below is a compilation of responses from Faculty members and the Directors of some of the Faculty's Centres and Institutes. Readers in Calgary are encouraged to drop by the Law Library to check out the display, and – for readers everywhere – if you have your own favourites, let us know by adding a comment to this post.

John-Paul Boyd

Family law often surprises practitioners by the extent to which certain bedrock concepts, like the circumstances in which spousal support is payable or the foundations of entitlement to child support, are rooted in a theoretical framework rather than economics. Practitioners are also often surprised by the speed with which the superabundance of published decisions in family law cases can obscure and obstruct those frameworks.

In *D.B.S. v S.R.G.*, 2006 SCC 37, the lead case in a quartet of appeals from Alberta, Bastarache J provides an extraordinarily clear and concise survey of the historical principles governing the award and variation of child support, the intent and impact of the Child Support Guidelines, and the muddled law accumulating to that point on retroactive awards of child support. From this masterly work of scholarship, Justice Bastarache concluded that retroactive awards must not be viewed as extraordinary and reserved only for exceptional circumstances, and by articulating four key factors that must be considered on any application for retroactive support. Bastarache J.'s remarkable decision overhauled the Canadian law on retroactive support awards and gave separated parents, and family law lawyers, much needed certainty in an area of law that frequently attracts significant financial consequences for both payors and recipients.

In *Miglin v Miglin*, 2003 SCC 24, an appeal from Ontario, the court addressed the tricky issue of the duties separating spouses owe to each other when negotiating a settlement of the issues arising from the end of their relationship. The law prior to this decision emphasized the importance of severing the legal and financial ties between separated spouses, and generally upheld even unfair settlements where it was clear that the spouses had entered into the settlement voluntarily and with an understanding of its consequences. Writing for the majority, Bastarache and Arbour JJ noted the special uncertainty and vulnerability of separated spouses negotiating settlements, and crafted a new test for the setting aside of such agreements that examines the extent to which they comply with the objectives of the governing legislation and anticipate the spouses' future circumstances.

Although the new test appropriately departed from the former clean break mode, the analysis of Lebel J in dissent went significantly further and undertook an important examination of the social context of marriage and marriage breakdown. Lebel J observed that the feminization of poverty is an entrenched social phenomenon in Canada and that the disadvantages flowing from marriage and its breakdown tend to fall disproportionately on women. Lebel J concluded that the traditionally high degree of proof necessary to establish the unconscionability of agreements generally is inappropriate to agreements between spouses, as the assumptions underpinning the enforceability of freely chosen bargains do not apply to the same extent as they do to agreements in the commercial context. The fairness of negotiations between spouses may be impacted by inequalities in bargaining power rooted in the nature of the parties' relationship and by the fact that it is typically women who come to the bargaining table as the financially dependent spouse, and thus the more vulnerable party in the negotiating process.

Shaun Fluker

How to fit the large swath of legal power exercised by today's executive branch and its delegates within the contours of the rule of law has proven itself to be perhaps the most perplexing challenge facing the Supreme Court of Canada in recent times. There is little doubt this challenge has pushed traditional principles guiding the judicial review of executive and administrative decision-making in Canada to the breaking point. The majority opinion in the Supreme Court of Canada's May 2008 decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 proclaims to address this challenge head on and embarks on a path towards the development of a principled and coherent framework to guide judicial review. Such high ambition would surely place *Dunsmuir* amongst the Court's existing administrative law heavyweight decisions such as *Roncarelli v Duplessis*, [1959] SCR 121, *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311, *CUPE v New Brunswick Liquor Corporation*, [1979] 2 SCR 227, *Baker v Canada*, [1999] 2 SCR 817, and *Ocean Port Hotel v British Columbia (Liquor Control and Licencing Branch)*, 2001 SCC 52, [2001] 2 SCR 781. Unfortunately however, the impact of *Dunsmuir* has fallen well short of its lofty ambition. Indeed, following the guidance set out in *Dunsmuir* judicial review of executive and administrative decisions in Canada has become more incoherent and unprincipled than ever before. *Dunsmuir* is thus noteworthy as one of the Supreme Court of Canada's most spectacular jurisprudential failures.

Ian Holloway

Rather than nominating a case, I'd like to nominate an event. That was the appointment, in 1943, of Ivan Cleveland Rand to the Court. Here is why:

For a profession whose stock in trade is the past, lawyers tend to have an appallingly short sense of history. For many Canadian lawyers, history now begins in 1982, the year we patriated the constitution and adopted the *Charter of Rights*. This seems a terrible shame, for the law in Canada in fact forms an important part of the rich tapestry on which the Canadian story has been played out. Indeed, it would be only a slightly sardonic stretch to suggest that history of Canada could properly be entitled "Peace, Order and Good Government, and all that".

One of the greatest Canadian judges of all was Ivan Cleveland Rand. Rand was born in 1884, in Moncton, New Brunswick, into a working-class railway family. Following high school, he went to work as an audit clerk with the Inter-Colonial Railway. After five years at the Railway, Rand enrolled at Mount Allison University, where he studied first Engineering, and then Arts. Following his BA, Rand worked briefly as a clerk in a Moncton law office. But in the Fall

of 1909 (after a preparation which included committing to memory major portions of Blackstone's *Commentaries*) he enrolled in the Harvard Law School.

Rand began his post-Harvard working life in Medicine Hat, where he practiced for a dozen years. But the call of Home proved much too strong to resist, and in the early 1920s, he returned to Moncton. He dabbled in politics (he served briefly as Attorney-General of New Brunswick), but in the late 20s, he rejoined the railway, where he served as general counsel to the CNR. In 1943 – directly from the railway, something which would be unthinkable today! – he was appointed to the Supreme Court of Canada, where he served until 1959, when he reached the mandatory retirement age of 75.

Outside the legal profession, Rand attained his place in popular consciousness through his work on two non-judicial projects: his service as the Canadian representative to the 1948 UN Special Commission on Palestine, and his work to resolve the bitter Ford strike of 1946 (which gave rise to the so-called "Rand Formula" as a means of avoiding disputes over compulsory union dues).

By any measure, Rand was a man of extraordinary accomplishment. He was a Companion of the Order of Canada and a King's Counsel. He was a graduate of Mount Allison University and the Harvard Law School. He was a Barrister of the Supreme Courts of New Brunswick and Alberta. He was a labour arbitrator, Royal Commissioner and UN rapporteur. But as we contemplate the anniversary of the first sitting of the Supreme Court of Canada, he was most importantly of all a jurist without compare. It was Rand who wrote the lead decision in *Noble v Alley*, [1951] SCR 64, which struck down a restrictive covenant that forbade the sale of property to Jews and non-whites. It was Rand, alone, who acknowledged legal rights of Japanese Canadians when the Canadian government was moving to intern them and to seize their property during the Second World War. It was he, in *Smith and Rhuland v Nova Scotia*, [1953] 2 SCR 95, who was prepared to defend the freedom of expression of the Communist Part of Canada during the height of the "red scare". And, most famously of all, it was he who wrote the judgment in *Roncarelli v Duplessis,* [1959] SCR 121, which struck down the actions of the Premier of Quebec to persecute the Jehovah's Witnesses for their beliefs.

It is because of those judgments – and so many others – that at his retirement, the Chief Justice of Canada described Mr. Justice Rand's collected jurisprudence as "a memorial which will endure as long as our system of the administration of justice continues". Unlike today's judges, Ivan Rand had no *Charter of Rights and Freedoms.* All he had was the common law, together with his skill as a common lawyer. Yet he was able to fashion a body of jurisprudence that, even sixty years later, makes one feel extremely proud to be a Canadian lawyer. That is why I am nominating his appointment to the Court as my favourite event in Supreme Court of Canada history.

Jennifer Koshan

My favourite Supreme Court of Canada decision is *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 ("*Meiorin*"). *Meiorin* considered the issue of whether aerobic fitness standards established by the British Columbia government for forest firefighters discriminated on the basis of sex, and if so, whether the standards could be defended as a *bona fide* occupational requirement (BFOR). The Supreme Court's unanimous decision in *Meiroin,* authored by McLachlin J (as she then was), has had a major impact in the field of human rights and is my favourite for several reasons. First, the Court adopted a unified approach to discrimination, abolishing the distinction between direct and

adverse effects discrimination as artificial, malleable, difficult to apply, contrary to the remedial focus of human rights legislation, and perhaps most importantly, as legitimating systemic discrimination. Second, as a result of this unified approach, all cases where *prima facie* discrimination can be shown are now subject to the same analysis in terms of whether the standard is justified as a BFOR. The new approach to BFOR analysis requires employers and other human rights respondents to justify why their standards are legitimate and necessary, rather than simply being required to tinker with those standards for individual claimants. In adopting this new approach, the Court agreed with the analysis of Shelagh Day and Gwen Brodsky, two of my human rights heroes, that the old approach was problematic in that it:

> [did] not challenge the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allow[ed] those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated." (see "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Canadian Bar Review 433 at 462).

A third reason that *Meiorin* is my favourite Supreme Court decision is that it is one of the few decisions in the Court's history where it has found and remedied sex discrimination (see also *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114; *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219; *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252). Interestingly, almost all of the cases where the Court has accepted claims of sex discrimination have been brought under human rights legislation rather than the *Canadian Charter Rights and Freedoms*. The only *Charter* case to date where the Court has upheld a claim of discrimination against women is one where it overturned a BC Court of Appeal judgment and restored the arbitrator's decision without providing its own reasons (see *BC Teachers' Federation v. BC Public School Employers' Association*, 2014 SCC 70; see also *Trociuk v BC*, [2003] 1 SCR 835 (allowing a man's claim of sex discrimination) and *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381 (finding sex discrimination against women to be justified under section 1 of the *Charter*). There is still much work for the Court to do under section 15 of the *Charter*, where adverse effects discrimination claims – whether based on sex or other grounds – continue to be treated adversely, contrary to the lessons of *Meiorin* (see Jonnette Watson Hamilton and Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Review of Constitutional Studies 191, available here).

Linda McKay-Panos

While there have been many significant human rights and civil liberties cases, *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 stands out. There were no less than 17 intervenors by the time the case reached the Supreme Court. The case was significant because of the remedy that was ordered by the Supreme Court and because of the analysis that the Court undertook in determining that sexual orientation should be included as a protected ground in Alberta's *Individual's Rights Protection Act* ("*IRPA*", now the *Alberta Human Rights Act*, RSA 2000, c A-25.5).

Mr. Vriend tried to complain to the Alberta Human Rights Commission, arguing that he was discriminated against in the area of employment on the ground of sexual orientation. The Commission advised Vriend that he could not make a complaint under the *IRPA*, as sexual orientation was not included as a protected ground. Vriend then filed a motion in the Alberta

Court of Queen's Bench and was successful in obtaining a declaration that the omission of the protection on the basis of sexual orientation in the *IRPA* was an unjustified violation of s. 15(1) of the *Charter*. Justice Russell granted the declaration and ordered that "sexual orientation" be read into various sections of the *IRPA* as a protected ground. On appeal to the Alberta Court of Appeal, two justices – McClung JA and O'Leary JA — allowed the government's appeal. Hunt JA dissented. McClung JA held that the omission of "sexual orientation" from the *IRPA* did not amount to "governmental action" as required by s. 32 of the *Charter*. Thus, in his view, the court could not use the *Charter* to force the legislature to enact a provision dealing with a "divisive issue" if it had chosen not to. Both McClung and O'Leary JJA held that *Charter* s. 15(1) was not violated by the *IRPA*, and thus any inequality that existed was because of the state of social affairs and not because of the operation of the *IRPA*. Hunt JA disagreed and held that *Charter* s. 15(1) was violated by the failure of the Alberta government to provide protection from discrimination on the basis of sexual orientation. Further, in her judgment, the violation of *Charter* s. 15(1) could not be saved by *Charter* s. 1.

Vriend then appealed to the Supreme Court of Canada. All nine justices sitting on the SCC heard the matter, although Justice Sopinka did not take part in the judgment, as he passed away in November 1997. Justice Major wrote the sole dissenting judgment. The majority held that under-inclusive legislation could be subjected to *Charter* scrutiny and that the *Charter* did not merely apply to positive actions that encroached on rights or excessive exercise of authority. In addition, the majority held that the omission of sexual orientation from the protected grounds under the *IRPA* created a distinction between gays and lesbians and other disadvantaged groups which were protected under the Act. Further, the omission of sexual orientation had a disproportionate effect on gays and lesbians. The *IRPA* thus denied formal and substantive equality to gays and lesbians. Finally, the omission could not be saved by *Charter* s. 1. The majority ordered that "sexual orientation" be read in as a ground in several sections of Alberta's *IRPA*.

In addition to being a ground-breaking case for recognizing sexual orientation as a ground for protection from discrimination, the case is also distinctive because the Court ordered that words be read in to existing legislation as a *Charter* remedy. After having succeeded in his case eight years after being denied the right to complain, Vriend never did proceed with his complaint to the Alberta Human Rights Commission.

Martin Olszynski

British Columbia v Canadian Forest Products Ltd., [2004] 2 SCR 74, 2004 SCC 38 [*Canfor*]. This was a close call for me, between *Canfor* and the Supreme Court's landmark environmental law decision in *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3. But while the latter has undoubtedly had a more profound impact on Canadian environmental law, that legacy is also a mixed one (with several passages having caused decades of confusion over the breadth of federal environmental jurisdiction). The relevant issue in *Canfor* was whether the defendant forest company was liable to the province for the environmental harm cause by a forest fire that was the result of the company's negligence. Writing for the majority, Justice Binnie held that the province could indeed sue for environmental loss, including the loss of "the services provided by the ecosystem to human beings, including food sources, water quality and recreational opportunities" (at para 138), but that in this case the province had failed entirely to present any evidence of such loss. Justice Binnie went on to describe the kind of evidence that could be tendered in such a case, drawing on the principles and methods of

environmental economics (see generally paras 138 – 154). Although *Canfor* has yet to meet the considerable expectations of commentators of the time (*e.g.* Jerry Demarco et al. described it as "a potential watershed" in "Opening the Door for Common Law Environmental Protection in Canada: The Decision in *British Columbia v Canadian Forest Products Ltd*," 15 J Env L & Prac 233-255), its impact on Canadian environmental law and policy is undeniable. It has influenced several legislative initiatives including the 2009 *Environmental Enforcement Act*, which incorporated the concepts of environmental damage into the sentencing provisions of nine federal environmental statutes, and more recently the amendments to Canada's on and offshore oil and gas regimes, which now contain provisions for the recovery of environmental damages associated with oil spills. Insofar as the Supreme Court's environmental law jurisprudence goes, it is also probably the most sophisticated and demonstrative of the Canadian judiciary's capacity for tackling difficult and complex issues.

Jonnette Watson Hamilton

My favourite Supreme Court of Canada case is *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 1997 CanLII 327. In *Eldridge*, the court recognized that the hearing-impaired had an equal right to access medical services which required the government to provide funded sign language interpretation. *Eldridge* raised equality-seekers' hopes for a substantive equality analysis of section 15 of the *Canadian Charter of Rights and Freedoms*. It was the first Supreme Court case to challenge the government's failure to act to remedy disadvantage under section 15. It was thus the first Supreme Court decision in which the government's obligation to promote equality — and not just prevent discrimination — was given some real effect. The hope had been that the Court would order the disadvantage remedied, not just because it was necessary to ensure equal treatment, but because the failure to remedy disadvantage was, in itself, a violation of the government's obligation to promote equality. *Eldridge* included *dicta* that moved somewhat in the direction of recognizing that courts could impose positive obligations on governments without undermining the legitimacy of democracy. However, the promise of *Eldridge* has yet to be kept.