

Judging the Judges:

The Supreme Court of Canada's Record on Individual and Economic Freedom and Equality

By Chris Schafer



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through education, communication and litigation**

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TABLE OF CONTENTS

Introduction	5 - 6
Summary	6 - 8
Methodology	8 - 9
Summaries of Cases (2000– 2006)	10 - 24
Analysis	24 - 31
Conclusion	31 - 32
Appendix (excluded cases)	33 - 51

Introduction

Canadian constitutional scholar Patrick Monahan notes that, “Far from being the marginal institution of past decades, today’s Supreme Court appears to have assumed an increasingly pivotal role in resolving the constitutional and political conflicts of the nation.”¹ This observation stems from the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 and the associated expansion of judicial review that came with it. This development has in turn led to an increasingly contentious debate in Canada about the proper role of the courts.

Prior to 1982, Canadian courts reviewed lawmaking by federal and provincial legislative bodies on federalism grounds only, by ensuring that laws passed by either level of government fell within their respective jurisdiction under the Constitution. Virtually all cases were decided as to whether federal and provincial laws complied with the Constitution’s enumeration of federal and provincial powers.

After the adoption of the *Charter*, the courts’ power of judicial review was expanded by subjecting federal and provincial legislation to the *Charter*’s constitutional limits, including fundamental freedoms such as expression, assembly, and association. Section 52 of the *Constitution Act, 1982* states that, “any law that is inconsistent with the provisions of the Constitution is...of no force or effect.” Accordingly, judges are empowered to review legislation as to its conformity with the enumerated rights set out in the *Charter*.

In Canada, the *Charter* is designed to limit action governments can take with respect to individuals and the sphere of individual freedom known as civil society; “its language of rights and freedoms seems to define a zone of autonomy for the individual within which the state may not intrude.”²

The Supreme Court of Canada, insulated from the democratic pressures of governing, is particularly well suited to act as a check and balance against the infringement of individual and economic freedom and equality by government. This places the Court in the position to guarantee and defend individual and economic freedom and equality before the law. Accordingly, we evaluate the performance of the Justices and the Supreme Court as a whole, in defending individual and economic freedom and the equality of individuals before the law, and by preventing the power of governments from expanding beyond its constitutional limits.

¹ Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 1.

² Robert J. Sharpe & Katherine E. Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 32.

In this paper, by “individual freedom” we mean freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press; freedom of peaceful assembly; and association. By “economic freedom” we mean the basic human right to earn, own and enjoy private property, and such protections as due process (for example, that the government does not take an individual’s property without a fair process, including just and timely compensation), and freedom of contract. With respect to “equality before the law” we mean equality of opportunity rather than equality of result or condition, and the equality of individuals before the law rather than the equality of groups before the law. It is our belief that while a properly functioning society requires government to maintain order, enforce contracts, protect against outside military threats, and address various market failures, society functions best when citizens are free from excessive and arbitrary government involvement in their lives.

Prior analyses of judicial decisions have sometimes resulted in accusations of “judge-bashing.” But pointing out the fact that not all forms of judicial decision-making are philosophically identical is not a criticism of the Court. Rather, it simply explains the reality of judicial decisions. *Charter* rights are not absolute because judges can limit individual rights and freedoms under section 1 of the *Charter* to protect broader community interests. However, judicial decisions necessarily have the effect of either reining in the power and scope of government, thereby preserving individual and economic freedom, or expanding the sphere of government influence and activity to the detriment of these freedoms. This report assesses the Supreme Court’s recent record in fulfilling its constitutional role of safeguarding against violations of individual and economic freedom and equality before the law.

This exercise is important because individual and economic freedoms are crucial to the social and economic well-being of Canadians. Such freedoms go hand in hand with desirable social and economic outcomes such as greater economic growth and rising incomes.³ In fact, individual freedom and economic freedom often advance each other. Economic freedom begets individual freedom, and vice versa, both leading to increased economic prosperity.

Summary

In an attempt to review the philosophies of Supreme Court Justices on a range of issues that impact on individual and economic freedom and equality, we reviewed decisions of the Court from January 1, 2000 to December 31, 2006, that clearly implicate vital individual and economic freedoms and equality.

³ James Gwartney et al., *Economic Freedom of the World: 2005 Annual Report* (Vancouver: The Fraser Institute, 2005).

For the purposes of the analysis, a “pro-freedom” decision is one in which a majority of the court is supportive of one or more of the following: individual freedom, economic freedom, or equality before the law (equality of opportunity for individuals). A Justice who makes a pro-freedom decision 70 percent of the time or more is considered to be a stronger supporter of individual and economic freedom and/or equality before the law, whereas those Justices scoring below that percentage are considered to be weaker supporters of individual and economic freedom and/or equality before the law.

After examining these cases, we have reached the following conclusions about the Supreme Court of Canada and its Justices:

- The Court issued pro-freedom decisions 83% of the time and anti-freedom decisions 17% of the time.
- Retired Justice John Major was the strongest supporter of freedom. He supported freedom in 100% of his decisions. Retired Justice Claire L’Heureux-Dubé was the weakest supporter of freedom, supporting it only 50% of the time.
- Strong supporters of freedom include Chief Justice Beverley McLachlin (90%), followed closely by Justices Ian Binnie and Michel Bastarache at 83%, and retired Justice Charles Gonthier at 80%.
- Retired Justice Frank Iacobucci and Justice Morris Fish were slightly less strong supporters of freedom, defending freedom in 76% and 75% of their decisions respectively.
- Weak supporters of freedom include Justices Louise Arbour with a 59% track record of defending freedom, followed by Justice Louis Lebel at 60% and Justice Marie Deschamps at 64%.
- In the non-unanimous judgments studied, a slim majority of Justices reached a pro-freedom decision a majority of the time.
- In the judgments studied involving fundamental freedoms such as speech, the Justices are almost evenly divided, with 45% of Justices being stronger supporters of fundamental freedoms and 55% being weaker supporters of fundamental freedoms.
- In the cases studied that concerned economic freedom, the Justices are divided 60/40, with 60% of Justices being stronger supporters of economic freedom and 40% being weaker supporters of economic freedom.
- In the judgments studied involving issues of equality, the Justices are divided 70/30, with 70 percent of Justices deciding cases in a pro-equality

fashion, as compared to 30 percent of Justices who reached anti-equality decisions.⁴

After an explanation of our methodology, summaries of the major cases from the recent past implicating individual and economic freedom and equality are provided. Following these descriptions we conduct an in-depth analysis of the Justices' decisions and explain our findings more fully.

Methodology

Assessing the decisions of the Supreme Court of Canada and its individual Justices is a difficult task. The compilation of cases to include in the assessment, in addition to the analysis itself, necessarily reflects the author's judgment. In selecting the cases, we avoided certain issues that divide those who recognize the importance of individual and economic freedom, such as whether or not the state has a legitimate role in restricting pornography or prostitution.⁵ The recent decision in *R. v. Kouri*⁶, where the Supreme Court decided that consensual sexual activity in private clubs poses no threat to society, and consequently should not be considered criminal, is an example of a case excluded from this analysis. We realize that our selection of cases will elicit disagreement from across the ideological spectrum.

In addition, Justices Rothstein, Abella, and Charron are excluded from this study as they have not participated in a sufficient number of decisions to allow for meaningful analysis. Justice Rothstein did not participate in any of the decisions included in this study, while Justices Abella and Charron only participated in one decision included in this study.

The task of judging the judges is complicated further by the very nature of judicial decision-making.⁷ Cases are decided on the basis of the unique facts in each

⁴ With respect to a "pro-equality" decision, we mean a decision that favours equality of opportunity for individuals rather than equality of result or condition for groups.

⁵ Consequently, other cases excluded from this study include criminal law cases involving the *Charter's* section 2 fundamental freedoms and section 7 right to "life, liberty and security of the person." See also footnote 7, re exclusion of cases involving minority language education rights under section 23 of the *Charter*.

⁶ [2005] 3 S.C.R. 789.

⁷ With respect to equality issues, judging the judges is complicated even further in Canada as a result of the early interpretation—still in force—of the *Charter's* section 15 equality rights as meaning substantive equality (equality of condition or result) rather than equality of opportunity. The substantive equality provision concerning affirmative action programs in section 15(2) of the *Charter* also complicate any analysis of equality that is undertaken. In addition, the minority language education rights under section 23 of the *Charter* grant special status to the linguistic minority French-or English-speaking population of each province. As such, the *Charter* cases that

case, and only rarely on the basis of principles alone. Judicial opinions are usually both complex and nuanced, consequently providing greater or lesser strength for the underlying legal proposition. Sometimes Justices will follow past precedents even if they think that the earlier case or cases were wrongly decided, and such decisions do not reveal the judge's personal philosophy on social, political, and economic issues. Similarly, a Justice who writes a decision is sometimes simply the spokesperson for several judges who assent to a majority or minority position, and the judgment itself may not necessarily reflect the nuances of individual opinions or philosophical orientations of the concurring Justices. Furthermore, the Justices' rankings are in part a function of the cases presented and selected for review by the author.

As such, a Justice's decision in any one case may not provide a complete picture of his or her views on the substantive legal issue in question. Sometimes the Court or a particular Justice may decide a less important case in a "pro-freedom" fashion, but in another more precedent-setting case may fail to protect individual freedom. Rather than attempting to assign different weights or scores to the Court's decisions or the decisions of individual Justices on some sort of numeric scale, and in doing so introduce an untenable amount of subjectivity, each Justice was simply assigned a straight-forward "pro-freedom" or "anti-freedom" (or "pro-equality" or "anti-equality") grade in each case, whether as author, or as concurring in the majority or dissenting judgment.

With the above caveats aside, over time these factors will nevertheless generally balance out to produce a picture of the Court and the record of each of its individual Justices in protecting the individual and economic freedom and equality before the law. This will especially be the case when analysis of the kind presented in this paper includes decisions of the Court from a greater number of years, as is planned for the future by the Canadian Constitution Foundation. We have selected the cases from the year 2000 through to the end of 2006 that we believe provide the clearest insights into the Justices' views on the proper scope of governmental involvement in the areas of individual and economic freedom. We present our findings below.

deal with s. 15(2) and 23 of the *Charter*, in addition to section 25 of the *Charter* (aboriginal rights), are excluded from this study.

It should also be noted that judicial decision making under the Charter is complicated further by the inclusion of section 1 of the *Charter*, which states that the rights and freedoms are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In this study, a decision is categorized as "pro-freedom" or "pro-equality" if the final decision upholds individual or economic freedom or equality before the law, regardless of whether or not, for example, a Justice or Justices reached a pro-freedom judgment solely as a result of their analysis under s. 1 of the *Charter*.

Summaries of Cases⁸

2006

Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 (Pro-Freedom).

In an 8-0 decision, the Court struck down the prohibition against wearing a kirpan (a religious object that is a small dagger) to school. Different Justices used different analyses to arrive at their decisions: a constitutional analysis and an administrative analysis. Five Justices held that a total prohibition is an unjustifiable violation of religion under section 2(a) of the *Charter* (constitutional law analysis). Two Justices held that the school board's council of commissioners made an unreasonable decision by disregarding the right to freedom of religion without considering the possibility of a solution that posed little or no risk to the safety of the school environment (administrative law analysis).

Majority (Pro-Freedom): McLachlin, Bastarache, Binnie, Fish, Deschamps, (Abella), (Charron), (Major took no part in this judgment)

Dissent: not applicable

The constitutional analysis notes that a total prohibition against wearing a kirpan to school undermines the value of this particular religious symbol and sent students the message that some religious practices do not merit the same protection as others. Accommodating the plaintiff in this case by allowing him to wear his kirpan under certain conditions, is a pro-freedom interpretation of the Charter's section 2(a) freedom of religion and conscience.

2005

Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791 (Pro-Freedom)

In a 4-3 decision, the Court struck down Quebec's ban on private health care insurance for medically necessary health services. On the basis of the Quebec *Charter of Human Rights and Freedoms*, the majority held that a total ban on private health insurance is not necessary to preserve a good public health system. However, the Court split evenly (3-3 with one abstainer, Deschamps) on whether the ban violated the *Canadian Charter of Rights and Freedoms*.

Majority (Pro-Freedom): McLachlin, Major, Bastarache, Deschamps⁹

⁸ It should be noted that although Justices Rothstein, Abella, and Charron are mentioned in the summary of cases included in this section, they are noted in brackets to show the fact that they were excluded from the analysis in this study.

⁹ Justice Deschamps decided this case under Quebec legislation, remaining silent on whether a prohibition on private health insurance violates the Charter's section 7 right to "life, liberty and

Dissent (Anti-Freedom): Binnie, LeBel, Fish

Chief Justice McLachlin and Justices Major and Bastarache concluded that the prohibition on private insurance contained in section 15 of the *Quebec Health Insurance Act* and section 11 of the *Hospital Insurance Act* violated the *Charter's* section 7 right to “life, liberty and security of the person,” and that this violation was not in accordance with the principles of fundamental justice. They further concluded that this infringement of section 7 could not be justified in a free and democratic society. In addition, the justices endorsed the conclusion of Justice Deschamps, who found that the prohibition against contracting for private health insurance was an unjustifiable violation of the Quebec *Charter* (the right to “life, liberty and personal inviolability”). As such, the majority ruling is pro-freedom because it affirms the individual’s right to use his or her own resources to access essential medical services outside of the government’s health care monopoly and waiting lists.

The dissent agreed with the majority that in some instances people might have their section 7 *Charter* rights to life or security of the person put at risk by the prohibition against private health insurance. But the dissent argued that this deprivation of life and of security of the person does not violate any principle of fundamental justice. They held that Quebec’s law was not arbitrary because the total ban on private health insurance was a rational and necessary means to preserving a public health system based on need rather than ability to pay.¹⁰

2004

***Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575 (Pro-Freedom)**

The Court held, 7-0, that the municipality of Victoria had no right to retain the benefit of the extra works and improvements furnished by the land developer Pacific National Investments Ltd. without paying for them. The City of Victoria had agreed to re-zone 22 acres from the existing industrial designation to permit residential and commercial uses, on condition that the developer build roads, parkland, walkways and a new seawall, at a total cost exceeding \$1 million. However, when the developer applied for building permits to develop its two water lots, the City Council violated the contract by down-zoning these lots to

security of the person.” Nevertheless, her reasoning and analysis are pro-freedom like that of McLachlin, Major, and Bastarache, by affirming the individual’s right to preserve his or her own health.

¹⁰ The Canadian Constitution Foundation is supporting a constitutional challenge to Alberta’s health care laws launched in 2006 by Bill Murray, a Chartered Accountant in Calgary. Alberta’s laws are almost identical to the Quebec law struck down by the Supreme Court of Canada in *Chaoulli*.

permit only one-storey commercial buildings, thereby eliminating the two stories of residential condominiums.

Majority (Pro-Freedom): McLachlin, Major, Bastarache, Binnie, LeBel, Deschamps, Fish

Dissent: not applicable

The Court had rejected the breach of contract claim brought by the developer in a prior decision: *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 980. In 2000, the Court held that, under the provincial law governing municipalities, the City of Victoria lacked the statutory authority to make and be bound by an implied term to keep the zoning in place for a reasonable time to allow for completion of the project. However, in this 2004 decision, the Court decided that the City of Victoria had no right to retain the benefit of the extra works and improvements carried out by the developer without paying for them.

Anderson v. Amoco Canada Oil and Gas, [2004] 3 S.C.R. 3 (Pro-Freedom)

The Court upheld, 5-0, a contract for the sale of land, entered into almost one-hundred years ago. The contract divided the ownership interest in oil and gas on the basis of the phase the hydrocarbon was in under initial conditions at the time the contract for the sale of land was entered into.

Majority (Pro-Freedom): McLachlin, Major, Bastarache, Binnie, Deschamps

Dissent: not applicable

According to the Court, the parties chose to divide their interest by contract. "It is not open to a party to argue later that division was meaningless on the basis that no rights can attach until the substance is reduced to possession. When the substance, which was not in their possession at the time of the contract, is reduced to possession the date and terms of the contract govern their relative entitlement." In other words, the Court is saying that the terms of the historical contract govern entitlement to sub-surface petroleum rights that come into possession at some point in the future.

Hodge v. Canada (Minister of Human Resources Development), [2004] 3 S.C.R. 357 (Pro-Freedom)

The Court held, 7-0, that former spouses, whether married or common law, do not qualify for a survivor's pension under the *Canada Pension Plan*, according to the clear wording of this legislation. Since former married spouses and former common law spouses are treated the same, there is no distinction on marital status and therefore no discrimination under section 15 of the *Charter*.

Majority (Pro-Freedom): McLachlin, Major, Bastarache, Binnie, LeBel, Deschamps, Fish (Iacobucci and Arbour took no part in this judgment)

Dissent: not applicable

The Court rejected the arguments that “economic dependency” continues to exist after the end of a common law relationship. This ruling’s result is that the responsibility of common law spouses will not extend beyond the end of a common law relationship.

Hartshorne v. Hartshorne, [2004] 1 S.C.R. 550 (Pro-Freedom)

In a 6-3 decision, the majority upheld as fair a marriage agreement voluntarily entered into by two individuals. The agreement rendered the parties separate as to property, but with a provision that the wife would be entitled to a three percent interest in the matrimonial home for each year that the parties were married up to a maximum of forty-nine percent. Despite the fact that independent legal advice had been obtained by the wife, in addition to a right to spousal support included in the agreement, the dissent agreed with the trial judge opinion that the agreement was unfair, and that reapportionment was necessary.

Majority (Pro-Freedom): McLachlin, Iacobucci, Major, Bastarache, Arbour, Fish

Dissent (Anti-Freedom): Binnie, LeBel, Deschamps

The majority respected the right and the choice of spouses to substitute a consensual regime for the statutory regime that would otherwise be imposed on them. According to the majority, “...in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime.”

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657 (Pro-Freedom)

The Court upheld as valid, in a 7-0 decision, the provisions of the *Canada Health Act* and the relevant British Columbia legislation, which allow legislators to decide on funding for “ABA/IBI” autism therapy to autistic children. The Court rules that providing funding for non-core services to some groups but not to others is not discriminatory, in and of itself. The statutory scheme is by its very nature a partial health plan, not designed to meet all medical needs. As such, the exclusion of particular non-core services such as a specific autism therapy cannot be seen as

an adverse distinction based on an enumerated ground under section 15 of the *Charter*.

Majority (Pro-Freedom): McLachlin, Major, Bastarache, Binnie, LeBel, Deschamps, Fish

Dissent: not applicable

The Court upheld the principle that “...the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.”

Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827 (Anti-Freedom)

In a 6-3 ruling, the Court upheld restrictions on communications by citizens (described as “third parties” under the law) during an election campaign. At issue were several new sections of the *Canada Elections Act*. Section 350 limits “third party” or citizen election advertising expenses to \$3,000 in a given electoral riding and \$150,000 nationally. Section 351 prohibits individuals or groups from splitting or colluding for the purposes of circumventing these spending limits. Sections 352 to 357, 359, 360 and 362 require a citizen to identify itself in all of its election advertising, to appoint financial agents and auditors, and to register with the Chief Electoral Officer. The Justices held that these restrictions do not violate the *Charter’s* section 2(d) right to freedom of association and the *Charter’s* section 3 right to vote.

All nine Justices agreed that restrictions on citizens (except one particular restriction¹¹) infringe the right to freedom of expression under section 2(b) of the *Charter*. The majority justified the infringement of freedom of expression as reasonable, ignoring the absence of evidence to support a connection between limits on citizen spending and “electoral fairness.” The majority stated that, “Perception is of utmost importance in preserving and promoting the electoral regime in Canada.”

Majority (Anti-Freedom): Iacobucci, Bastarache, Arbour, LeBel, Deschamps, Fish

Dissent (Pro-Freedom in part): McLachlin, Major, Binnie (Dissenting in Part)

¹¹ Section 351 of the *Canada Elections Act* prevents a “third party” from circumventing (or attempting to circumvent) the restrictions in any manner, including by splitting itself into two or more entities or acting in collusion with another third party. The majority decided that this provision does not infringe s. 2(b) freedom of expression under the Charter. The minority felt that s. 351 was so connected to the spending limits in s. 350 that both sections are unconstitutional.

The minority appreciates the importance of what is at stake in this case, namely the very foundation upon which democracy rests: the right of citizens to freely and effectively communicate their views on issues during an election campaign, using their own resources to do so. According to the minority, “The denial of effective communication to citizens violates free expression where it warrants the greatest protection—the sphere of political discourse. Section 350 puts effective radio and television communication beyond the reach of ‘third party’ citizens...Effective expression of ideas thus becomes the exclusive right of registered political parties and their candidates.”

The dissent is less supportive of freedom of expression rights on polling day, finding that the polling day blackout in section 323 of the *Canada Elections Act* infringes s. 2 (b) of the *Charter*, but is justified under s. 1 as a reasonable measure in a free and democratic society.¹²

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 1 S.C.R. 76 (Pro-Freedom)¹³

The Court held, 6-3, that section 43 of the Criminal Code, which excludes reasonable physical correction of children by their parents and teachers from the assault provisions of the Code, does not offend the *Charter’s* section 7 right to “security of the person” or discriminate contrary to the *Charter’s* section 15 equality rights.

The majority held that the intrusion of the Criminal Code into family life should be limited. According to the majority, “The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risk ruining lives and breaking up families—a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process.”

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, Bastarache, LeBel, Binnie (dissenting in part)¹⁴

¹² This portion of the decision by the dissent is excluded from the study for purposes of analytical simplicity. It should be noted that on October 16, 2006, the Supreme Court of Canada heard the appeal in *Paul Charles Bryan v. Her Majesty The Queen and The Attorney General of Canada*, concerning whether s. 329 of the *Canada Elections Act* is an unjustifiable violation of the freedom of expression under s. 2(b) of the *Charter*. This section prohibits the transmission of election results of an electoral district to the public in another electoral district before the close of polling stations in that other district. On March 15, 2007, the Supreme Court ruled in a 5-4 judgment, that although s. 329 of the *Canada Elections Act* infringes freedom of expression, this infringement is justified under s. 1 of the *Charter*.

¹³ The analysis of this case examines the judicial decision with respect to the family and not the teaching profession. This decision was made for reasons of analytical simplicity because Justice Binnie dissents in part, reaching two separate conclusions with respect to the family and the teaching profession.

Dissent: (Anti-Freedom): Arbour and Deschamps

The minority would recognize children as de facto adults. This view would give the state power over, and into, family life because any assertion of “children’s rights” will, in practice, have to be asserted by the state or its agents rather than by parents, because children are incapable of asserting rights on their own.

The majority notes that children depend on parents for guidance and discipline, to protect them from harm and to promote their development within society. The majority respects the autonomy of the family unit and the need to protect families from state interference. The majority recognizes that s. 43 of the Code provides parents with the ability to carry out the reasonable education and correction of children without the threat of sanction by the criminal law.

2003¹⁵

***Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Quebec Inc.*, [2003] 3 S.C.R. 228 (Pro-Freedom)**

The Court held, 7-0, that section 18.2 of the Quebec *Charter of Human Rights and Freedoms* does not protect an employee from dismissal where the employee is not available for work because he or she is incarcerated. According to Bastarache, “The purpose of the Act is not to eliminate completely the civil consequences of the sentence. Section 18.2 is therefore of no assistance to an incarcerated employee where the actual result of the dismissal is the fact that he is not available for work.”

Majority (Pro-Freedom): Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel, Deschamps

Dissent: not applicable

In upholding the freedom of employers to dismiss employees who are not available for work because they are in prison, the Court notes that a distinction

¹⁴ Justice Binnie is included with the “pro-freedom” judges because of the conclusion he reaches. In his section 15 *Charter* analysis, he argues that the equality rights of children are violated by denying children the protection of the criminal law against the infliction of physical force. However, in his section 1 *Charter* analysis he argues that the infringement of children’s equality rights is justified because the legislative objective of limiting the intrusion of the Criminal Code into family life is pressing and substantial.

¹⁵ *Vann Niagara Ltd. v. Oakville (Town)*, [2003] 3 S.C.R. 158 was excluded from this study. Although the case deals directly with freedom of expression under the *Charter* in relation to a municipal by-law limiting the size of billboards, the short judgment of the Court, delivered orally by Arbour J., was insufficient in scope to allow for a thorough review of the judicial reasoning behind the decision of the Court.

must be drawn between the civil consequences of a sentence that has been lawfully imposed on an offender, and the stigmatization an offender may suffer because of a past criminal conviction.

Trociuk v. British Columbia (Attorney General), [2003] 1 S.C.R. 835 (Pro-Freedom)

The Court held, 7-0, that the British Columbia *Vital Statistics Act* infringed the equality rights of fathers by providing mothers with absolute discretion to “unacknowledge” biological fathers on birth registration forms, and not include the surname of the father in a child’s surname.

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour

Dissent: not applicable

The Court notes that this section of the *Vital Statistics Act* constitutes discrimination on the basis of sex because it explicitly makes a distinction on the enumerated ground of sex under s. 15 of the *Charter*.

Miglin v. Miglin, [2003] 1 S.C.R. 303 (Pro-Freedom)

This case concerns the proper approach to determining an application for spousal support under the *Divorce Act*, where the spouses have executed a final agreement that addresses all matters respecting their separation, including a release of any future claim for spousal support. In upholding the final separation agreement, the majority defends freedom of contract by stating that striking down the agreement “...would seriously undermine the significant policy goal of negotiated settlement and would undermine the parties’ autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns.”

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour

Dissent (Anti-Freedom): LeBel, Deschamps

The dissent rejects the freedom of individuals to structure their own affairs upon marital breakdown, thereby imposing legislative solutions. According to the dissent, “Excessive deference to separation agreements because they are presumed to represent the objective expression of the parties’ free will is an undesirable policy.”

2002

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429 (Pro-Freedom)

This case concerned a (now-defunct) Quebec welfare regulation that reduced welfare payments in the late 1980s from \$434 to \$163 per month for able-bodied adult recipients under 30, unless they entered job training, community work, or school. In a 5-4 decision, the majority held that the welfare regulation did not breach the equality provisions of section 15 of the *Charter*. Further, in a 7-2 decision, the Court held that the regulation did not deprive the claimant of her section 7 *Charter* right to security of the person.

Section 15:

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, Binnie

Dissent (Anti-Freedom): L'Heureux-Dubé, Bastarache, Arbour, LeBel

The majority held the regulation did not infringe the *Charter's* section 15 equality right. The Court ruled that Ms. Gosselin and other able-bodied young adults did not suffer from pre-existing disadvantage and stigmatization on the basis of age, and that their human dignity was not undermined by this regulation.

Section 7:

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel

Dissent (Anti-Freedom): L'Heureux-Dubé, Arbour

The majority held that the regulation did not infringe the *Charter's* section 7 right to security of the person. The dominant strand of jurisprudence on section 7 sees its purpose as protecting life, liberty and security of the person from deprivations that occur as a result of an individual's interaction with the justice system and its administration. The majority rejected the interpretation of section 7 as the basis for a positive state obligation to guarantee adequate living standards.

Ruby v. Canada (Solicitor General), [2002] 4 S.C.R. 3 (Pro-Freedom)

This case involved a constitutional challenge to a procedural section of the *Privacy Act*, that provides for mandatory *in camera* ("in closed chambers") and *ex parte* (brought without notice to the other side) proceedings where the government denies an applicant's request for access to personal information on the grounds of national security or the maintenance of foreign confidences. The Court held, 9-0, that to the extent that the *in camera* provision in s. 51(2)(a) of the *Privacy Act* excluded both the appellant Ruby and the public from the

proceedings in question, the provision violated the freedom of expression rights in section 2(b) of the *Charter*.

Majority (Pro-Freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel.

Dissent: not applicable

Under the *Privacy Act*, section 51(2)(a) mandated that the hearing be held *in camera* and did not limit the *in camera* requirement to only those parts of a hearing that involved the merits of an exemption. The requirement that the entire hearing of a section 41 application, or appeal there from, be heard *in camera* was held by the majority of the Court to be too stringent. The appropriate remedy was to read down s. 51(2)(a) so that it applied only to the *ex parte* submissions mandated by s. 51(3) of the *Privacy Act*.

R. v. Guignard, [2002] 1 S.C.R. 472 (Pro-Freedom)

This case concerned a sign erected by Mr. Guignard on one of his buildings, expressing his dissatisfaction with the services of an insurance company. He was prosecuted by the City of Saint-Hyacinthe for violating a municipal planning by-law, which prohibited erection of advertising signs outside an industrial zone. In a 9-0 decision, the Court struck down sections of the by-law that violate freedom of expression.

Majority (Pro-Freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel

Dissent: not applicable

The Court properly noted that, "Freedom of expression is fundamental to the life of every individual and plays a critical role in the development of our society." According to the Court, "Given the tremendous importance of economic activity in our society, a consumer's "counter-advertising" assists in circulating information and protecting the interests of society just as much as does advertising or certain forms of political expression." By restricting the right to use this optimum means of expression to certain designated places, the by-law in question infringed rights to freedom of expression under section 2(b) of the *Charter*.

R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverage (West) Ltd., [2002] 1 S.C.R. 156 (Pro-Freedom)

The Court upheld, 9-0, the freedom of expression associated with union secondary picketing. Secondary picketing is the picketing of locations other than the place of employment, such as retail outlets that sell the products produced by

the company being picketed. The Court held secondary picketing to be generally lawful unless it involves tortious or criminal conduct.

Majority (Pro-Freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel

Dissent: not applicable

The Court noted that “Both primary and secondary picketing engage freedom of expression, a value enshrined in s. 2(b) of the *Charter*.” In support of freedom, the Court held that freedom of expression vis-à-vis secondary picketing ought to be upheld because “Picketing which breaches the criminal law or one of the specific torts will be impermissible, regardless of where it occurs.”

2001

R. v. Mentuck, [2001] 3 S.C.R. 442 (Pro-Freedom)

The Court decided, 9-0, to uphold freedom of expression by striking down a publication ban concerning police operational methods. According to the Court, “Such a ban would seriously curtail the freedom of the press in respect of an issue that may merit widespread public debate. It would also have a deleterious effect on the right of the accused to a fair and public trial, which includes the right to have the media access the courtroom and report on the proceedings.”

Majority (Pro-freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel

Dissent: not applicable

The Court decided that the publication of the names and identities of the police officers in question would create a serious risk to the efficacy of current and similar police operations, and as such, that this particular aspect of the publication ban ought to remain in force. However, the Court noted that in general, the names of police officers who testify against accused persons “need not, and should not, be the subject of publication bans...”, thus reaffirming support for section 2(b) freedom of expression *Charter* rights.

R. v. O.N.E., [2001] 3 S.C.R. 478 (Pro-Freedom)

For the reasons given in *R. v. Mentuck*, the Court held, 9-0 that a publication ban on information about undercover police investigative techniques should not have been ordered by the trial judge. According to the Court, “...such a ban would abridge freedom of the press in respect of discussions that lie at the core of freedom of expression and the accused’s right to a public trial would be seriously compromised by such a ban.”

Majority (Pro-freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel

Dissent: not applicable

The Court upheld a one-year publication ban on information that could identify the police officers involved in an investigative operation, including their names, likenesses and physical descriptions. The Court held that a publication ban was necessary to further the administration of justice. However, the Court noted that, “[t]he identity of police officers should not, as a matter of general practice, be shrouded in secrecy forever, absent serious and individualized dangers.”

Dunmore v. Ontario (Attorney General)¹⁶, [2001] 3 S.C.R. 951 (Anti-Freedom)

No law placed restrictions on farm employees to associate or to organize themselves into unions. Nevertheless, the Court held, 8-1, that the absence of agricultural workers from the provincial statutory labour relations regime violated their freedom of association under section 2(d) of the *Charter*.

The majority held that the “...freedom to organize exists independently of any statutory enactment, although its effective exercise may require legislative protection in some cases.”

Majority (Anti-Freedom): McLachlin, Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel, L'Heureux-Dubé

Dissent (Pro-Freedom): Major

In arguing for the constitutionality of the absence of agricultural workers from the provincial statutory labour relations regime, the lone dissenter upheld the conception of fundamental freedoms as “negative freedoms,” the exercise of which imposes no obligations on other people. According to Justice Major, “s. 2(d) does not impose a positive obligation of protection or inclusion on the state in this case. Prior to the enactment of the *Labour Relations Act*, agricultural workers had historically faced significant difficulties organizing and the appellants did not establish that the state is causally responsible for the inability of agricultural workers to exercise a fundamental freedom.” The mere absence of one group of workers from a protective or pro-union labour relations statutory regime is not conclusive evidence of a *Charter* violation.

¹⁶ The section 15 equality portion of this decision is not commented on. It was only addressed at any length by L'Heureux-Dubé, and was not central to the decision reached in the case.

***Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 (Pro-Freedom)**

The Court, by a margin of 8-1, ordered the British Columbia College of Teachers to approve Trinity Western University's education program. At issue in this case was reconciling the religious freedoms of individuals attending Trinity Western University to become accredited teachers, with the alleged equality concerns of students in B.C.'s public school system who would be taught by teachers who graduated from a program that condemned homosexual behaviour.

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel

Dissent (Anti-Freedom): L'Heureux-Dubé

The majority noted that "tolerance of divergent beliefs is a hallmark of a democratic society." According to the Court, "Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected."

Dissenting Justice L'Heureux-Dubé asserted a goal of "providing the best possible educational environment for public school students in British Columbia." In so doing, she ignored the fact that "There is nothing in the TWU Community Standards, which are limited to prescribing conduct of members while at TWU, that indicates that graduates of TWU will not treat homosexuals fairly and respectfully."

2000

***Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (Anti-Freedom)**

The Court, 8-1, set aside an interlocutory injunction which prevented the enforcement of spending limits on citizens (referred to as "third parties" in the legislation) during the 2000 federal election campaign. Before the 2000 election writ was issued, Harper was seeking a declaration that the provisions of the *Canada Elections Act* that imposed limits on citizen spending on advertising during a federal election campaign were unconstitutional because they limited the right of free expression under section 2(b) of the *Charter*. The temporary injunction obtained by Harper in the lower courts would have suspended these provisions during the 2000 federal election, pending a full trial.

Majority (Anti-Freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel

Dissent (Pro-Freedom): Major

Despite the fact that the Attorney-General in this case admitted to a violation of freedom of expression and an absence of evidence that the injunction would cause some harm, the majority favoured the presumption that legal restrictions on citizen spending during election campaigns are prima facie valid as serving the public interest.

The lone dissent by Major noted that, “We should be loathe to interfere with political speech, especially in the midst of a federal election.”

Pacific National Investments Ltd. v. Victoria (City), [2000] 2 S.C.R. 919 (Anti-Freedom)

In a 4-3 decision, through an exercise of statutory interpretation, the Court opted to ignore contractual rights accruing to a land developer. The land purchase agreement between the developer, Pacific National Investments Ltd., and the British Columbia Enterprise Corporation (BCEC), a crown corporation, stated that it was binding only if the City granted the subdivision of the lands and passed the requisite zoning, which it did. However, the City later rezoned the two water lots such that the developer could no longer implement the plans. Pacific National Investments Ltd. sued for breach of contract and maintained that the rezoning by the City was effectively a “down-zoning,” in breach of the City’s implied obligations.

Majority (Anti-Freedom): Gonthier, Iacobucci, Arbour, LeBel

Dissent (Pro-Freedom): Major, Bastarache, Binnie

According to the dissent, “...where a municipality enters a contract with a legitimate purpose, that contract must be honoured. The City should not be able to terminate with impunity a contract that it uniquely crafted, thoughtfully entered into, received the full benefit of, and concedes is lawful...The public interest would not be served by allowing the City to escape its commitments.”

In upholding the important principle of contractual obligation, the dissent acknowledged that, “[i]t would be contrary to business sense and to all obligations of fairness to conclude that the condition precedent regarding zoning had to be met but was not protected in any way from unilateral retraction.”

In ensuring that obligations accruing from a dutifully executed contract are met, the dissent, unlike the majority, acknowledged that although city councils cannot bind future councils, contracts can be carefully crafted in order to adequately meet the objectives of different parties. As such, in order to give this particular contract business efficacy, the City would owe compensation in the event that the

land purchased by the developer was down-zoned without the passage of reasonable time.

Analysis

The Court's Record on Freedom

Examining the 23 cases in this study, we find that the Court issued pro-freedom¹⁷ decisions 83 percent of the time (19 out of 23 cases) and anti-freedom decisions 17 percent of the time (4 out of 23 cases).¹⁸ Between January 1, 2000 and December 31, 2006, almost all of the Justices reached pro-freedom decisions a majority of the time, although retired Justice Claire L'Heureux-Dubé reached a pro-freedom decision only 50 percent of the time, in respect of cases in this study.

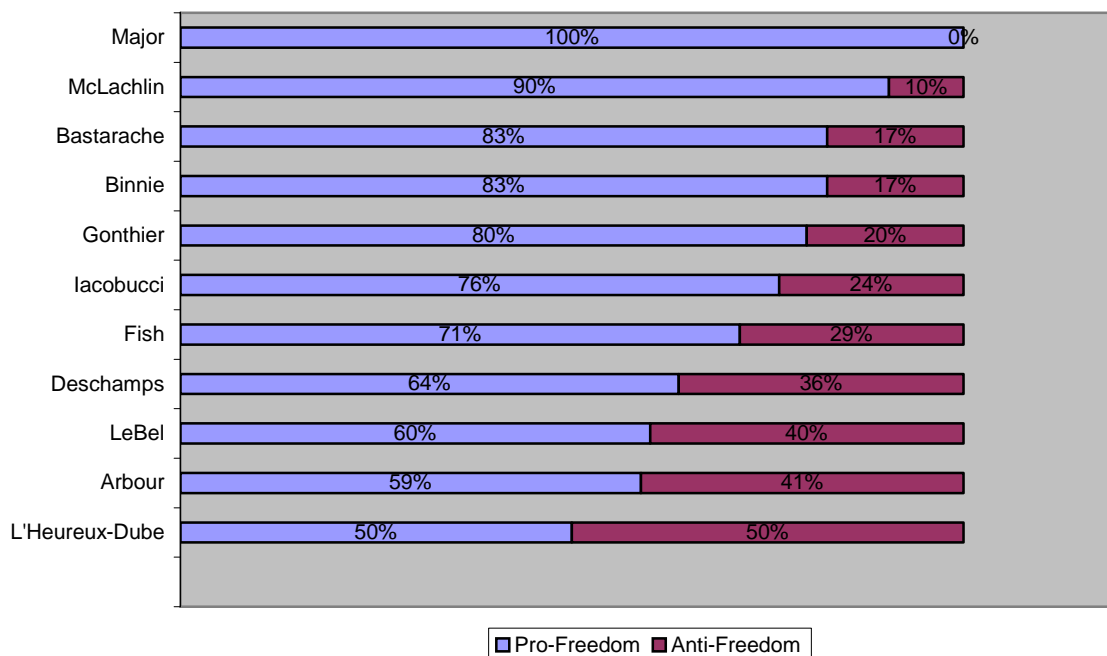
The Justices' Overall Record on Freedom

Leading the way in protecting freedom is retired Justice John Major, who cast pro-freedom votes in 100 percent of his decisions studied. Trailing Justice Major is the current Chief Justice Beverley McLachlin with a 90 percent record of defending freedom, followed by Justices Ian Binnie and Michel Bastarache at 83 percent, and retired Justice Charles Gonthier at 80 percent. Retired Justice Frank Iacobucci and Justice Morris Fish defended freedom in 76 and 71 percent of their decisions studied, respectively.

¹⁷ A "pro-freedom" decision is one in which a Justice is supportive of one or more of the following: individual freedom, economic freedom, or equality before the law (equality of opportunity for individuals). A Justice who makes a pro-freedom decision 70 percent of the time or more is considered to be a stronger supporter of individual and economic freedom and/or equality before the law, whereas those Justices scoring below that percentage are considered to be weaker supporters of individual and economic freedom and/or equality before the law.

¹⁸ For the purposes of the analysis, *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, is counted twice, with the section 7 analysis counting as one case and the section 15 analysis counting as another case. As such, the total number of "cases" included for analysis in this study is 23, in respect of 22 Supreme Court rulings. This was done because Justice Bastarache for example, reached an anti-freedom decision with respect to his section 15 analysis, but reached a pro-freedom decision with respect to his section 7 analysis of the *Charter*.

Overall Record of Justices in Decisions



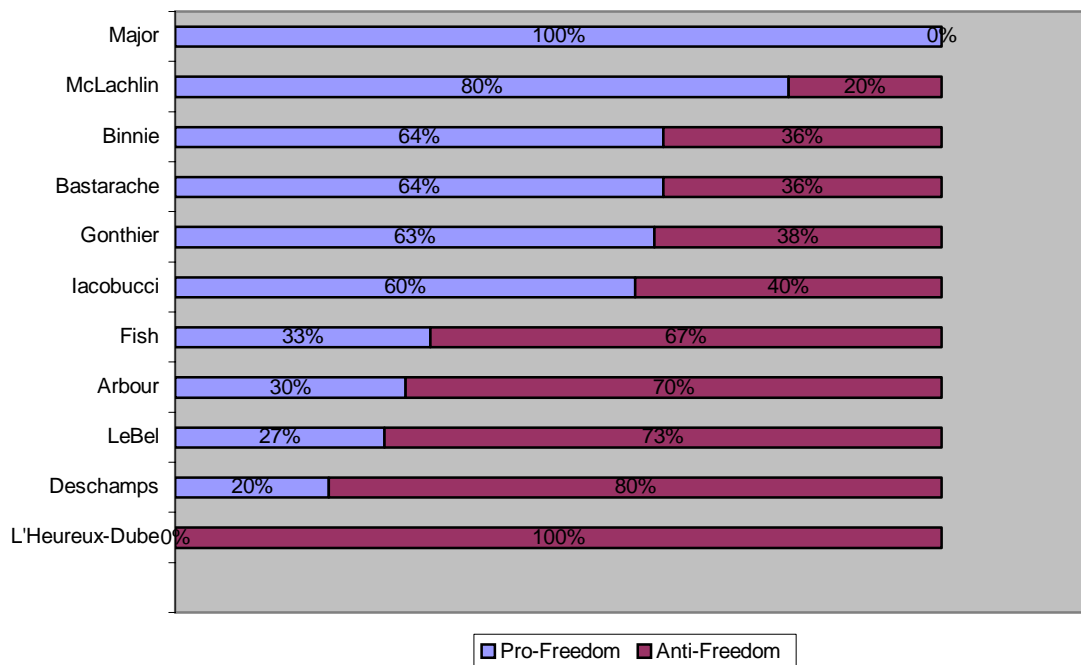
The member of the Court with the weakest record of protecting freedom is retired Justice Claire L'Heureux-Dubé, defending freedom only 50 percent of the time. Other members of the Court with a weaker record of defending freedom include former Justice Louise Arbour at 59 percent and Justice Louis LeBel at 60 percent, followed by Justice Marie Deschamps at 64 percent.

The Justices' Overall Record in Non-Unanimous Decisions

The Justices' record in defending freedom in non-unanimous decisions¹⁹ is another way of examining the Justices' record. Arguably, it may be a better indicator than the Justices' overall record because cases with non-unanimous decisions usually involve more contentious issues, which are more likely to expose differences of opinion amongst individual Justices.

¹⁹ These decisions include: *Chaoulli v. Quebec (Attorney General)*, *Hartshorne v. Hartshorne*, *Harper v. Canada (Attorney General)* (2004), *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, *Miglin v. Miglin*, *Gosselin v. Quebec (Attorney General)* (s. 7 and s. 15), *Dunmore v. Ontario (Attorney General)*, *Trinity Western University v. British Columbia College of Teachers*, *Pacific National Investments Ltd. v. Victoria (City)*, *Harper v. Canada (Attorney General)* (2000).

Record of Justices in Non-Unanimous Decisions



Once again, retired Justice John Major leads the way in pro-freedom non-unanimous decisions, ruling in a pro-freedom fashion 100 percent of the time. Another strong pro-freedom voice in non-unanimous judgments was Chief Justice Beverley McLachlin with an 80 percent record of promoting freedom. Justices with weaker records of defending freedom in these decisions include: Justices Ian Binnie and Michel Bastarache at 64 percent, retired Justice Charles Gonthier at 63 percent, and retired Justice Frank Iacobucci at 60 percent with respect to pro-freedom non-unanimous decisions.

The weakest members, all of whom cast or concurred in anti-freedom non-unanimous decisions a majority of the time include: Justice Morris Fish, former Justice Louise Arbour, Justice Louis Lebel, Justice Marie Deschamps, and retired Justice Claire L'Heureux-Dubé. Justice L'Heureux-Dubé decided in an anti-freedom fashion 100 percent of the time with respect to the non-unanimous decisions she participated in that were included in this study.

The Justices' Record in Decisions Involving Fundamental Freedoms

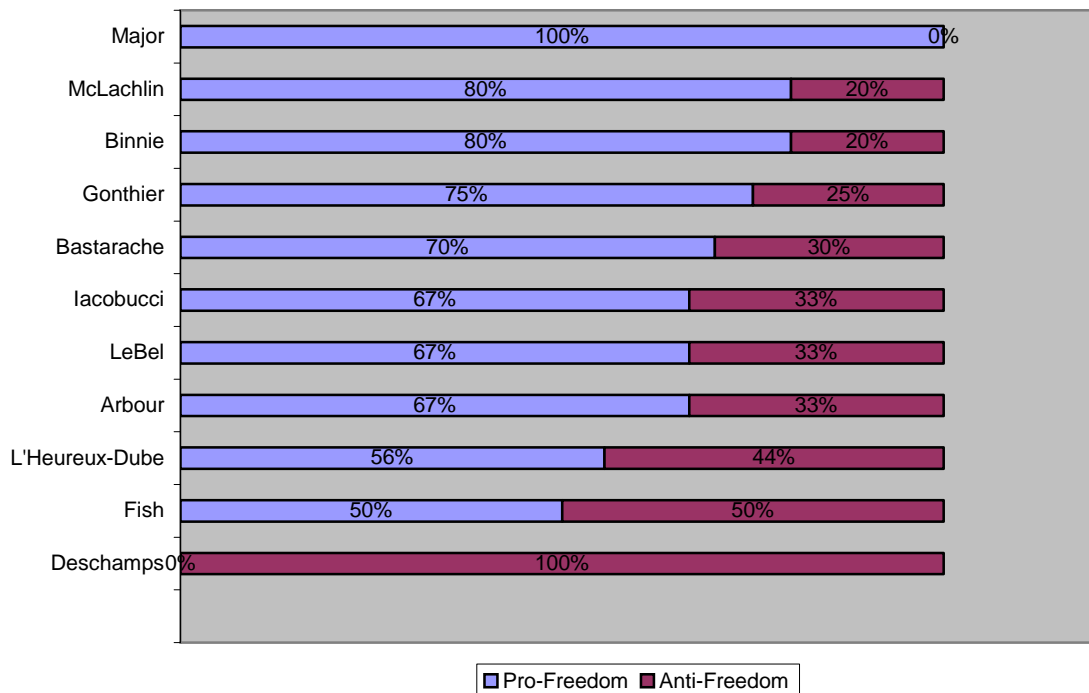
In decisions involving the fundamental freedoms²⁰ provided for under section 2 of the *Charter*,²¹ the strongest Justice was retired Justice John Major who decided

²⁰ These decisions include: *Multani v. Commission scolaire Marguerite-Bourgeoys*, *Harper v. Canada (Attorney General)* (2004), *Ruby v. Canada (Solicitor General)*, *R. v. Guignard*,

in a pro-freedom fashion 100 percent of the time. The weakest Justice was Marie Deschamps who made anti-freedom judgments 100 percent of the time.

The other Justices with a strong pro-freedom record involving fundamental freedoms includes: Chief Justice Beverley McLachlin, Justice Ian Binnie, retired Justice Charles Gonthier, and Justice Michel Bastarache. Members of the Court with a weaker pro-freedom record with respect to these decisions are: retired Justices Frank Iacobucci, former Justice Louise Arbour, and Justice Louis LeBel at 67 percent, followed by retired Justice Claire L’Heureux-Dubé at 56 percent and Justice Morris Fish at 50 percent.

Record of Justices in Decisions Involving *Charter* Section 2 Fundamental Freedoms



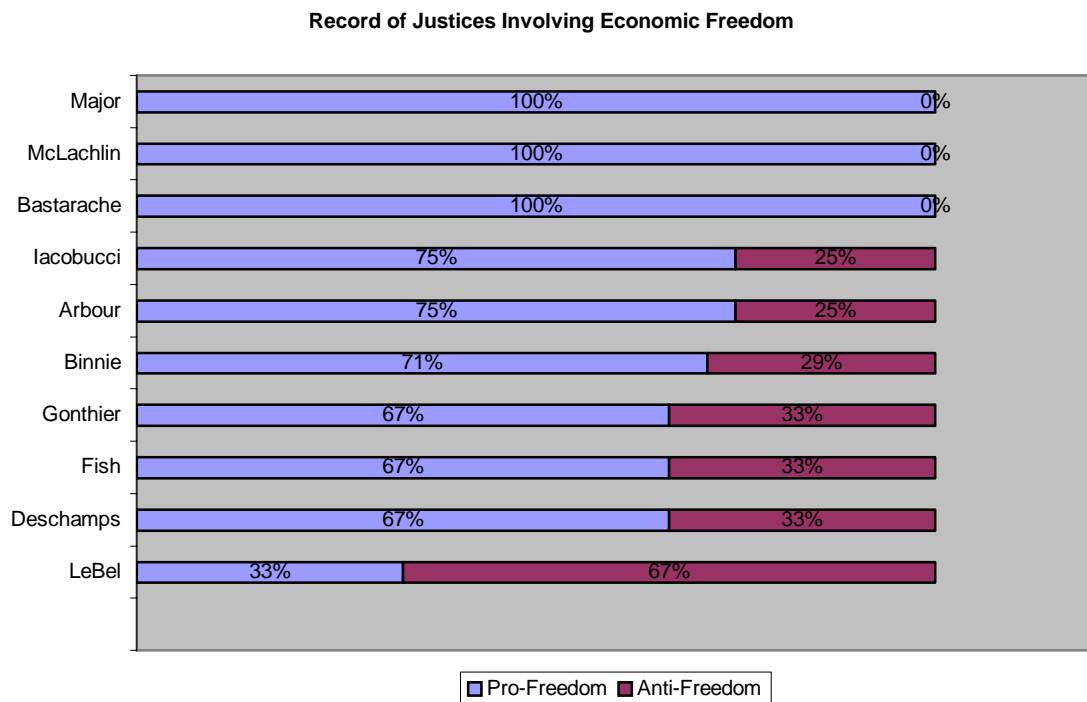
R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverage (West) Ltd., R. v. Mentuck, R. v. O.N.E., Dunmore v. Ontario (Attorney General), Trinity Western University v. British Columbia College of Teachers, Harper v. Canada (Attorney General) (2000).

²¹ These freedoms include: freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association.

The Justices' Record in Decisions Involving Economic Freedom

With respect to the cases²² studied that concerned economic freedom,²³ Justice John Major was again the strongest pro-freedom voice on the Court, whereas Justice Louis LeBel was the weakest supporter of economic freedom, making a pro-freedom judgment in only 33 percent of these cases.

The stronger supporters of economic freedom include retired Justice Frank Iacobucci and former Justice Louis Arbour who both reached pro-freedom decisions 75 percent of the time in these cases, in addition to Justice Ian Binnie who made pro-freedom decisions 71 percent of the time. Weaker supporters of economic freedom, who all made pro-freedom decisions only 67 percent of the time in cases involving issues of economic freedom, include retired Justice Charles Gonthier, Justice Morris Fish, and Justice Marie Deschamps.



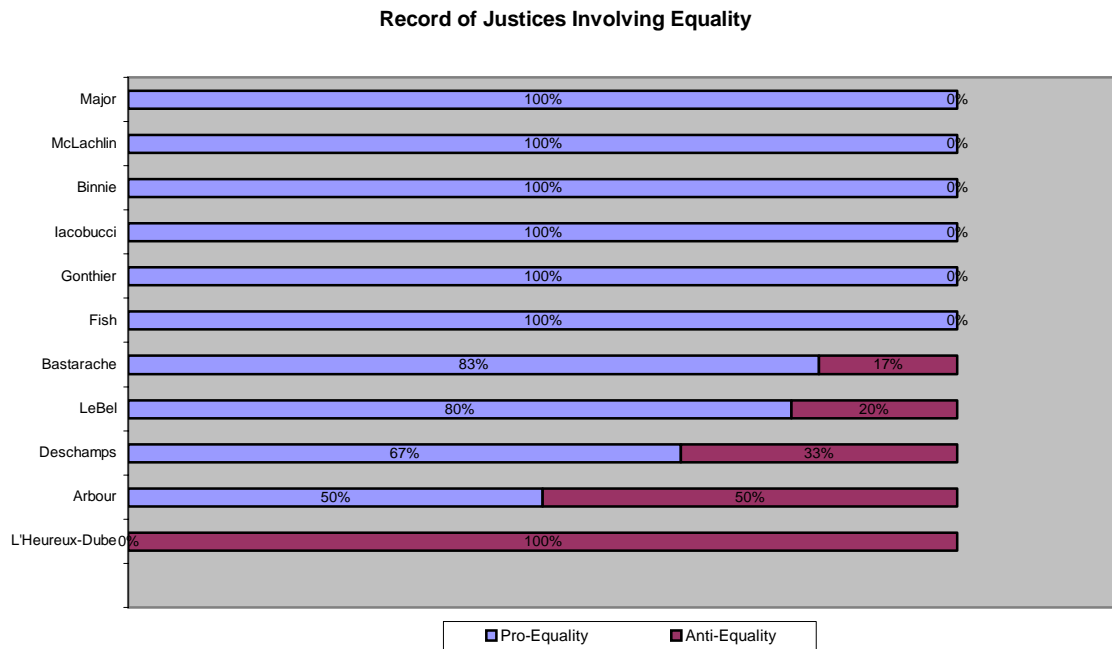
²² These cases include: *Chaoulli v. Quebec (Attorney General)*, *Pacific National Investments Ltd. v. Victoria (City)*, *Anderson v. Amoco Canada Oil and Gas*, *Hartshorne v. Hartshorne*, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Quebec Inc.*, *Miglin v. Miglin*, *Pacific National Investments Ltd. v. Victoria (City)*.

²³ As aforementioned, by economic freedom we mean the basic human right to earn, own and enjoy private property; freedom of contract; and such protections as due process (that the government does not take an individual's property without a fair trial or without just and timely compensation).

The Justices' Record in Decisions Involving Equality

The Justices' record in decisions involving issues of equality²⁴ reveals a 70/30 split, with 70 percent of Justices deciding cases in a pro-equality fashion, as compared to 30 percent of Justices who reached anti-equality decisions. The strongest supporters of equality are retired Justices John Major, Charles Gonthier, Frank Iacobucci, Chief Justice Beverley McLachlin, Justice Ian Binnie, and Justice Morris Fish. These present and retired Justices, all decided equality-related cases in a pro-freedom fashion 100 percent of the time in the cases included in this study. Other strong supporters of equality include Justices Michel Bastarache and Louis LeBel.

The weakest supporter of equality is retired Justice L'Heureux-Dubé, who reached an anti-equality decision in 100 percent of her decisions included in this study. Justice Marie Deschamps at 67 percent and former Justice Louise Arbour at 50 percent are weaker supporters of equality.



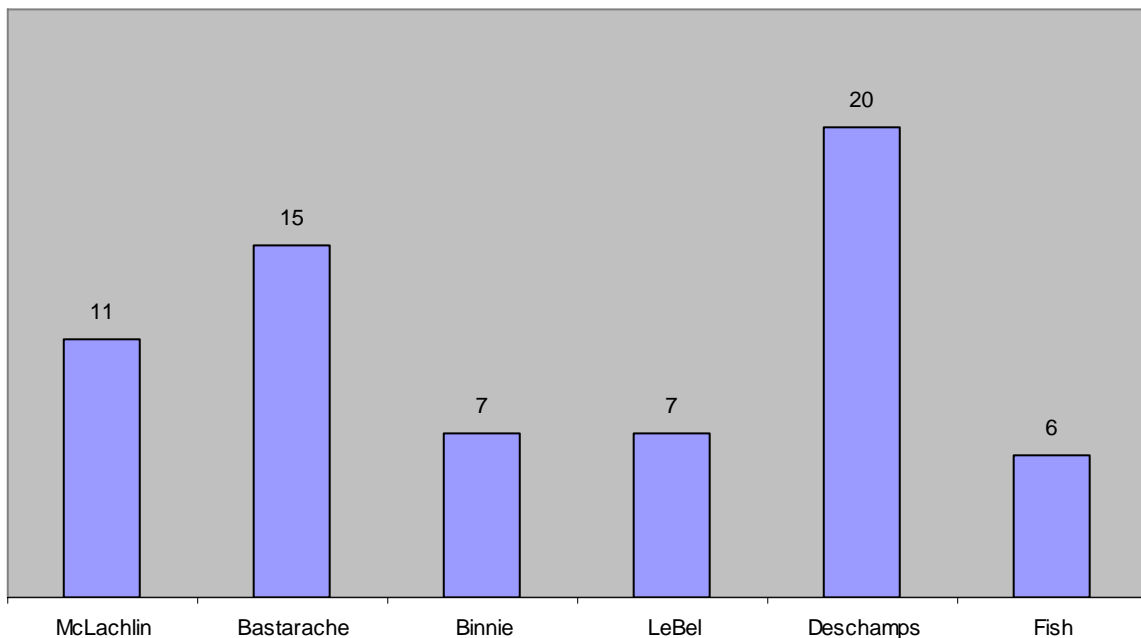
²⁴ These decisions are: *Hodge v. Canada (Minister of Human Resources Development)*, *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, *Trociuk v. British Columbia (Attorney General)*, *Gosselin v. Quebec (Attorney General) (s. 15)*, *Trinity Western University v. British Columbia College of Teachers*. As aforementioned, with respect to equality, we mean equality of opportunity rather than equality of result or condition, and equality of individuals before the law rather than the equality of groups before the law.

The Current Court's Record on Freedom: Prospects for the Future

The Court²⁵ currently has more Justices that are stronger supporters of freedom than those who are weaker supporters of freedom. The stronger supporters of freedom include: Chief Justice Beverley McLachlin and Justices Ian Binnie, Michel Bastarache, and Morris Fish. The weaker supporters of freedom include: Justices Louis LeBel and Marie Deschamps.

When one examines how long the current Justices have to serve on the Court (considering the current age of each Justice and the mandatory retirement age of 75 years for Supreme Court Justices), Justices Morris Fish, Ian Binnie, and Louis LeBel are nearing retirement. Justice Morris Fish has a possible six years left on the Court and Justices Ian Binnie and Louis LeBel have seven years respectively.

Length of Time Until Mandatory Retirement of Current Court



Of these three Justices (Fish, Binnie, and LeBel), two are stronger supporters of freedom. As such, any future appointments of Justices who are weaker supporters of freedom could shift the composition of the Court towards one that is weaker in its support of freedom than that of the current Court. This is as a result of the fact that current Justice Marie Deschamps, who is a weaker supporter of freedom, has twenty years until mandatory retirement, and during this time Justices Binnie and Fish, two stronger supporters of freedom, may be replaced

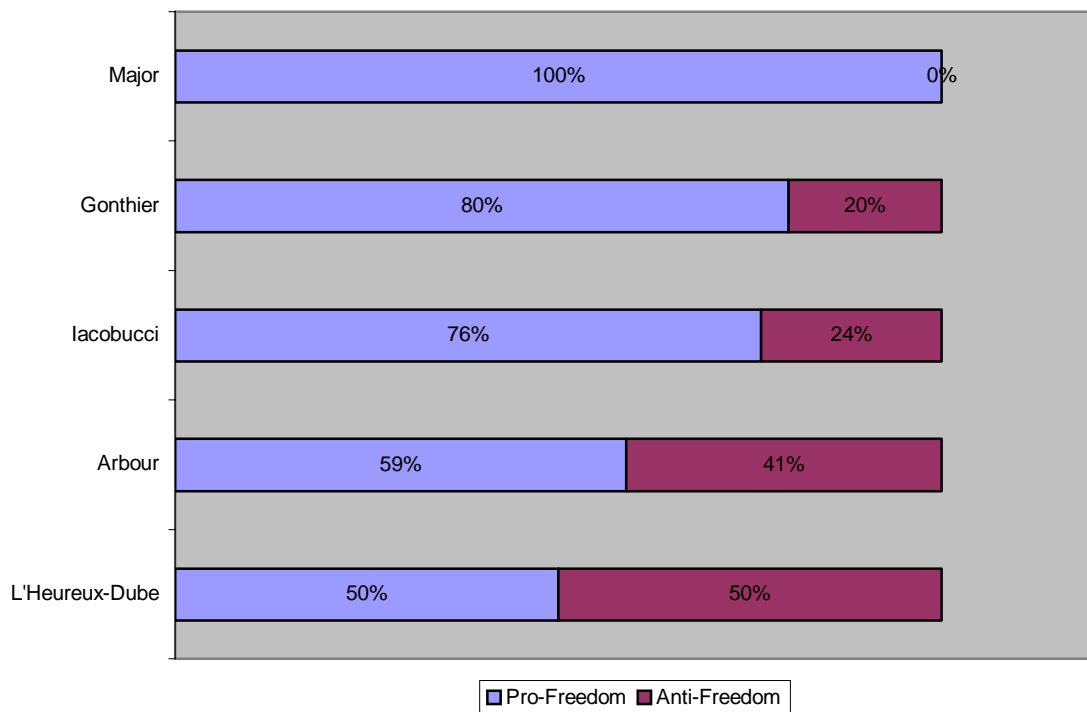
²⁵ Excluding Justices Rothstein, Charron, and Abella, who have not participated in any or a sufficient number of cases studied in order to be included in this study.

by weaker supporters of freedom. This may be exacerbated if, in a future analysis, any or all of the excluded Justices in this study (Rothstein, Charron, and Abella) turn out to be weaker supporters of freedom.

The Retired Justices' Record on Freedom

With respect to the five Justices included in this study who have now retired or who have left the Court, three of them (Justices Major, Gonthier, and Iacobucci) were strong supporters of freedom. The loss of these three Justices was somewhat counter-balanced by the loss of Justices Louise Arbour and Claire L'Heureux-Dubé, who were among the weakest supporters of freedom.

Where Retired/Former Justices Stand on Freedom



Conclusion

The analysis suggests the Supreme Court of Canada is fulfilling its important constitutional role of safeguarding individual and economic freedom and checking against excessive government power. While it is hoped that the Court will continue to protect and defend these freedoms and provide for equality before the law, the prognosis presents some cause for concern.

Between January 1, 2000, and December 31, 2006, the Court lost its strongest defender of freedom, Justice John Major, in addition to two other strong supporters of freedom: Justices Gonthier and Iacobucci. This loss was not equally balanced with the loss of three Justices less supportive of freedom, as

only Justices Louise Arbour and Claire L'Heureux-Dubé left the Court during this time.

When one takes into consideration the current Justices most nearing the mandatory age of retirement, two are stronger supporters of freedom. As such, any future appointment(s) of a Justice who is a weaker supporter of freedom could significantly shift the composition of the Court. This is due to the fact that current Justice Marie Deschamps, who is a weaker supporter of freedom, has twenty years until mandatory retirement, and during this time Justices Ian Binnie and Morris Fish, two stronger supporters of freedom, may be replaced by weaker supporters of freedom. This may be exacerbated or remedied depending on how the excluded Justices in this study (Rothstein, Charron, and Abella) perform.

- Appendix -

List of Excluded Cases by Year

2006

R. v. Morris, 2006 SCC 59

McDiarmid Lumber Ltd. v. God's Lake First Nation, 2006 SCC 58

R. v. Khelawon, 2006 SCC 57

R. v. Angelillo, 2006 SCC 55

R. v. Larche, 2006 SCC 56

R. v. Sappier, R. v. Gray, 2006 SCC 54

R. v. Dery, 2006 SCC 53

Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52

R. D. v. Her Majesty the Queen, 2006 SCC 51

Federation des producteurs acericoles du Quebec v. Regroupement pour las commercialization des produits del'erable inc., 2006 SCC 50

AstraZeneca Canada Inc. v. Canada (Minister of Health), [2006] 2 S.C.R. 560

Pharmascience Inc. v. Binet, 2006 SCC 48

R. v. Krieger, 2006 SCC 47

Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada, 2006 SCC 46

R. v. Shoker, 2006 SCC 44

Walker v. Ritchie, 2006 SCC 45

Robertson v. Thomson Corp., 2006 SCC 43

Isen v. Simms, 2006 SCC 41

R. v. Hazout, 2006 SCC 42

Blank v. Canada (Minister of Justice), 2006 SCC 39

R. v. Kong, 2006 SCC 40

D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, 2006 SCC 37

Celanese Canada Inc. v. Murray Demolition Corp., 2006 SCC 36

GMAC Commerical Credit Corporation – Canada v. T.C.T. Logistics Inc., [2006] 2 S.C.R. 123

Ronal David Baier et al. v. Her Majesty the Queen in Right of Alberta (Motion), 2006 SCC 38

United Mexican States v. Ortega; United States of America v. Fiessel, [2006] 2 S.C.R. 120

United States of America v. Ferras; United States of America v. Latty, [2006] 2 S.C.R. 77

R. v. Boulanger, [2006] 2 S.C.R. 49

Goodis v. Ontario (Ministry of Correctional Services), [2006] 2 S.C.R. 32

Fidler v. Sun Life Assurance Co. of Canada, 2006 SCC 30

Her Majesty the Queen v. Public Service Alliance of Canada, 2006 SCC 29

Buschau v. Rogers Communications Inc., 2006 SCC 28

R. v. B.W.P.; R. v. B.V.N., 2006 SCC 27

Kim Thi Pham v. Her Majesty the Queen, 2006 SCC 26

Leskun v. Leskun, 2006 SCC 25

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Mattel, Inc. v. 3894207 Canada Inc., [2006] 1 S.C.R. 772

Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée, [2006] 1 S.C.R. 824

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Bisaillon v. Concordia University, [2006] 1 S.C.R. 666

Childs v. Desormeaux, [2006] 1 S.C.R. 643

R. v. Gagnon, [2006] 1 S.C.R. 621

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2005

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Edgar Richard Goforth c. Sa Majesté la Reine

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R. v. Wiles, [2005] 3 S.C.R. 895

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Charlebois v. Saint John (City), [2005] 3 S.C.R. 563

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R. v. Pires; R. v. Lising, [2005] 3 S.C.R. 343
R. v. Rodrigue, [2005] 3 S.C.R. 384
Boucher v. Stelco Inc., [2005] 3 S.C.R. 279
Contino v. Leonelli-Contino, [2005] 3 S.C.R. 217
E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia, [2005] 3 S.C.R. 45
R. v. R.C., [2005] 3 S.C.R. 99
Conférence des juges du Québec v. Quebec (Attorney General), [2005] 3 S.C.R. 41
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Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 539
R. v. Turcotte, [2005] 2 S.C.R. 519
British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473
R. v. Roberge, [2005] 2 S.C.R. 469
R. v. Hamilton, [2005] 2 S.C.R. 432
GreCon Dimter inc. v. J. R. Normand inc., [2005] 2 S.C.R. 401
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R. v. G.R., [2005] 2 S.C.R. 371
R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220
R. v. Woods, [2005] 2 S.C.R. 205
Toronto Star Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188

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Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100

R. v. Orbanski; R. v. Elias, [2005] 2 S.C.R. 3

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R. v. Stender, [2005] 1 S.C.R. 914

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Janssen-Ortho Inc. v. Novopharm Ltd., [2005] 1 S.C.R. 776

Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667

Glegg v. Smith & Nephew Inc., [2005] 1 S.C.R. 724

R. v. Fice, [2005] 1 S.C.R. 742

Bristol-Myers Squibb Co. v. Canada (Attorney General), [2005] 1 S.C.R. 533

Prebushewski v. Dodge City Auto (1984) Ltd., [2005] 1 S.C.R. 649

R. v. Dionne, [2005] 1 S.C.R. 665

R. v. Gunning, [2005] 1 S.C.R. 627

H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401

R. v. Chow, [2005] 1 S.C.R. 384

R. v. Mapara, [2005] 1 S.C.R. 358

R. v. Paice, [2005] 1 S.C.R. 339

Fédération des producteurs de volailles du Québec v. Pelland, [2005] 1 S.C.R. 292

Gladstone v. Canada (Attorney General), [2005] 1 S.C.R. 325

R. v. P.E.C., [2005] 1 S.C.R. 290

R. v. R.G.L., [2005] 1 S.C.R. 288

Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238

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Vaughan v. Canada, [2005] 1 S.C.R. 146

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R. v. Decorte, [2005] 1 S.C.R. 133
Tsiaprailis v. Canada, [2005] 1 S.C.R. 113
Marche v. Halifax Insurance Co., [2005] 1 S.C.R. 47
R. v. Krymowski, [2005] 1 S.C.R. 101
R. v. Clark, [2005] 1 S.C.R. 6
R. v. Grandinetti, [2005] 1 S.C.R. 27
R. v. Ménard, [2005] 1 S.C.R. 24
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R. v. Deschamplain, [2004] 3 S.C.R. 601
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Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511
Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550
R. v. Smith, [2004] 3 S.C.R. 507
R. v. Zurowski, [2004] 3 S.C.R. 509
R. v. Saunders, [2004] 3 S.C.R. 505
Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461
R. v. Blake, [2004] 3 S.C.R. 503
R. v. Tessling, [2004] 3 S.C.R. 432
Lefebvre (Trustee of); Tremblay (Trustee of), [2004] 3 S.C.R. 326
Ouellet (Trustee of), [2004] 3 S.C.R. 348
Martineau v. M.N.R., [2004] 3 S.C.R. 737

Entreprises Sibeca Inc. v. Frelighsburg (Municipality), [2004] 3 S.C.R. 304
Glykis v. Hydro-Québec, [2004] 3 S.C.R. 285

Mugesera v. Canada (Minister of Citizenship and Immigration), [2004] 3 S.C.R. 323

Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin, [2004] 3 S.C.R. 257

Côté v. Rancourt, [2004] 3 S.C.R. 248

R. v. Chan, [2004] 3 S.C.R. 245

R. v. Perrier, [2004] 3 S.C.R. 228

Cabiakman v. Industrial Alliance Life Insurance Co., [2004] 3 S.C.R. 195

Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec, [2004] 3 S.C.R. 95

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152

R. v. Mann, [2004] 3 S.C.R. 59

Nova Scotia Power Inc. v. Canada, [2004] 3 S.C.R. 53

R. v. Raponi, [2004] 3 S.C.R. 35

R. v. Demers, [2004] 2 S.C.R. 489

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, [2004] 2 S.C.R. 427

Application under s. 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248

R. v. Kerr, [2004] 2 S.C.R. 371

Vancouver Sun (Re), [2004] 2 S.C.R. 332

R. v. Rémillard, [2004] 2 S.C.R. 246

British Columbia v. Canadian Forest Products Ltd., [2004] 2 S.C.R. 74

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Banque nationale de Paris (Canada) v. 165836 Canada Inc., [2004] 2 S.C.R. 45

Bibaud v. Québec (Régie de l'assurance maladie), [2004] 2 S.C.R. 3

Finney v. Barreau du Québec, [2004] 2 S.C.R. 17

Monsanto Canada Inc. v. Schmeiser, [2004] 1 S.C.R. 902

Bank of Nova Scotia v. Thibault, [2004] 1 S.C.R. 758

Nutribec Ltée v. Quebec (Commission d'appel en matière de lésions professionnelles), [2004] 1 S.C.R. 824

Pritchard v. Ontario (Human Right Commission), [2004] 1 S.C.R. 809

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Alberta Union of Provincial Employees v. Lethbridge Community College, [2004] 1 S.C.R. 727

Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672

Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629

R. v. Fontaine, [2004] 1 S.C.R. 702

R. v. Lohrer, [2004] 1 S.C.R. 627

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Penetanguishene Mental Health Centre v. Ontario (Attorney General), [2004] 1 S.C.R. 498

Pinet v. St. Thomas Psychiatric Hospital, [2004] 1 S.C.R. 528

Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc., [2004] 1 S.C.R. 456

John Doe v. Bennett, [2004] 1 S.C.R. 436

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485

R. v. Cheddesingh, [2004] 1 S.C.R. 433

CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339

Gifford v. Canada, [2004] 1 S.C.R. 411

R. v. Smith, [2004] 1 S.C.R. 385

C.U. v. Alberta (Director of Child Welfare), [2004] 1 S.C.R. 336

Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303

R. v. Kehler, [2004] 1 S.C.R. 328

Townsend v. Kroppmanns, [2004] 1 S.C.R. 315

9050-3400 Québec Inc. v. Riverin, Girard & Associés Inc., [2004] 1 S.C.R. 301

R. v. Daoust, [2004] 1 S.C.R. 217

R. v. Lyttle, [2004] 1 S.C.R. 193

Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249

Crystalline Investments Ltd. v. Domgroup Ltd., [2004] 1 S.C.R. 60

Giguère v. Chambre des notaires du Québec, [2004] 1 S.C.R. 3

I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal, [2004] 1 S.C.R. 43

Vann Niagara Ltd. v. Oakville (Town), [2003] 3 S.C.R. 158

2003

R. v. Clay, [2003] 3 S.C.R. 735

R. v. Malmo-Levine; R. v. Caine, [2003] 3 S.C.R. 571

Beals v. Saldanha, [2003] 3 S.C.R. 416

R. v. Wu, [2003] 3 S.C.R. 530

British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371

R. v. Taillefer; R. v. Duguay, [2003] 3 S.C.R. 307

Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263

Maranda v. Richer, [2003] 3 S.C.R. 193

National Trust Co. v. H & R Block Canada Inc., [2003] 3 S.C.R. 160

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3

Ontario v. O.P.S.E.U., [2003] 3 S.C.R. 149

Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77

Deloitte & Touche LLP v. Ontario (Securities Commission), [2003] 2 S.C.R. 713

R. v. S.A.B., [2003] 2 S.C.R. 678

Gurniak v. Nordquist, [2003] 2 S.C.R. 652

Imperial Oil Ltd. v. Quebec (Minister of the Environment), [2003] 2 S.C.R. 624

R. v. Phillips, [2003] 2 S.C.R. 623

R. v. Bédard, [2003] 2 S.C.R. 621

Paul v. British Columbia (Forest Appeals Commission), [2003] 2 S.C.R. 585

E.D.G. v. Hammer, [2003] 2 S.C.R. 459

K.L.B. v. British Columbia, [2003] 2 S.C.R. 403

M.B. v. British Columbia, [2003] 2 S.C.R. 477

R. v. Edgar, [2003] 2 S.C.R. 388

R. v. Johnson, [2003] 2 S.C.R. 357

R. v. Kelly, [2003] 2 S.C.R. 400

R. v. Mitchell, [2003] 2 S.C.R. 396

R. v. Smith, [2003] 2 S.C.R. 392

Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259
R. v. Blais, [2003] 2 S.C.R. 236
R. v. Powley, [2003] 2 S.C.R. 207
ParrySound (District) Social Services Administration Board v. O.P.S.E.U., Local 324, [2003] 2 S.C.R. 157
R. v. Williams, [2003] 2 S.C.R. 134
Unifund Assurance Co. v. Insurance Corp. of British Columbia, [2003] 2 S.C.R. 63
R. v. Asante-Mensah, [2003] 2 S.C.R. 3
Figueroa v. Canada (Attorney General), [2003] 1 S.C.R. 912
Bell Canada v. Canadian Telephone Employees Association, [2003] 1 S.C.R. 884
Ell v. Alberta, [2003] 1 S.C.R. 857
R. v. Owen, [2003] 1 S.C.R. 779
Starson v. Swayze, [2003] 1 S.C.R. 722
Caisse populaire Desjardins de Val-Brillant v. Blouin, [2003] 1 S.C.R. 666
R. v. Buhay, [2003] 1 S.C.R. 631
Barrie Public Utilities v. Canadian Cable Television Assn., [2003] 1 S.C.R. 476
C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539
Churchland v. Gore Mutual Insurance Co., [2003] 1 S.C.R. 445
KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada, [2003] 1 S.C.R. 433
Z.I. Pompey Industrie v. ECU-Line N.V., [2003] 1 S.C.R. 450
R. v. Arradi, [2003] 1 S.C.R. 280
R. v. Larue, [2003] 1 S.C.R. 277
R. v. P.A., [2003] 1 S.C.R. 275
Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226
Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247
Desputeaux v. Éditions Chouette (1987) inc., [2003] 1 S.C.R. 178
Martin v. American International Assurance Life Co., [2003] 1 S.C.R. 158
R. v. Allen, [2003] 1 S.C.R. 223
Allen v. Alberta, [2003] 1 S.C.R. 128
Goudie v. Ottawa (City), [2003] 1 S.C.R. 141

R. v. Knight, R. v. Hay, [2003] 1 S.C.R. 156
R. v. Willis, [2003] 1 S.C.R. 127
R. v. M.S., [2003] 1 S.C.R. 125
Reference re Earth Future Lottery, [2003] 1 S.C.R. 123
Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), [2003] 1 S.C.R. 66
R. v. Feeley, [2003] 1 S.C.R. 64
R. v. Zinck, [2003] 1 S.C.R. 41
R. v. Harriott, [2003] 1 S.C.R. 39
R. v. R.R., [2003] 1 S.C.R. 37
R. v. Pelletier, [2003] 1 S.C.R. 4
R. v. Wise, [2003] 1 S.C.R. 3

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Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710
Prud'homme v. Prud'homme, [2002] 4 S.C.R. 663
Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325
373409 Alberta Ltd. (Receiver of) v. Bank of Montreal, [2002] 4 S.C.R. 312
R. v. Squires, [2002] 4 S.C.R. 323
R. v. Harvey, [2002] 4 S.C.R. 311
Spar Aerospace Ltd. v. American Mobile Satellite Corp., [2002] 4 S.C.R. 205
Wewaykum Indian Band v. Canada, [2002] 4 S.C.R. 245
Apotex Inc. v. Wellcome Foundation Ltd., [2002] 4 S.C.R. 153
Harvard College v. Canada (Commissioner of Patents), [2002] 4 S.C.R. 45
Quebec (Attorney General) v. Laroche, [2002] 3 S.C.R. 708
R. v. Jarvis, [2002] 3 S.C.R. 757
R. v. Ling, [2002] 3 S.C.R. 814
Macdonell v. Quebec (Commission d'accès à l'information), [2002] 3 S.C.R. 661
R. v. Neil, [2002] 3 S.C.R. 631
R. v. Noël, [2002] 3 S.C.R. 433
R. v. Wilson, [2002] 3 S.C.R. 629
Sauve v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519

Krieger v. Law Society of Alberta, [2002] 3 S.C.R. 372
R. v. Hall, [2002] 3 S.C.R. 309
Canam Enterprises Inc. v. Coles, [2002] 3 S.C.R. 307
CIBC Mortgage Corp. v. Vasquez, [2002] 3 S.C.R. 168
Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, [2002] 3 S.C.R. 209
Schreiber v. Canada (Attorney General), [2002] 3 S.C.R. 269
Somersall v. Friedman, [2002] 3 S.C.R. 109
R. v. Shearing, [2002] 3 S.C.R. 33
Babcock v. Canada (Attorney General), [2002] 3 S.C.R. 3
R. v. Burke, [2002] 2 S.C.R. 857
R. v. Handy, [2002] 2 S.C.R. 908
Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773
R.C. v. Quebec (Attorney General); R. v. Beauchamps, [2002] 2 S.C.R. 762
Ross River Dena Council Band v. Canada, [2002] 2 S.C.R. 816
R. v. Perciballi, [2002] 2 S.C.R. 761
Family Insurance Corp. v. Lombard Canada Ltd., [2002] 2 S.C.R. 695
First Vancouver Finance v. M.R.N., [2002] 2 S.C.R. 720
Heredi v. Fensom, [2002] 2 S.C.R. 741
Stewart v. Canada, [2002] 2 S.C.R. 645
Walls v. Canada, [2002] 2 S.C.R. 684
R. v. Robicheau, [2002] 2 S.C.R. 643
Bank of America Canada v. Mutual Trust Co., [2002] 2 S.C.R. 601
Bell Express Vu Limited Partnership v. Rex, [2002] 2 S.C.R. 559
Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522
Tremblay v. Syndicat des employées et employés professionnels-les et de bureau, section locale 57, [2002] 2 S.C.R. 627
Berry v. Pulley, [2002] 2 S.C.R. 493
Gronnerud (Litigation Guardians of) v. Gronnerud Estate, [2002] 2 S.C.R. 417
R. v. Hibbert, [2002] 2 S.C.R. 445
R. v. S.G.F., [2002] 2 S.C.R. 416
R. v. Carlos, [2002] 2 S.C.R. 411

R. v. V.C.A.S., [2002] 2 S.C.R. 414
Housen v. Nikolaisen, [2002] 2 S.C.R. 235
Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), [2002] 2 S.C.R. 146
R. v. Brown, [2002] 2 S.C.R. 185
Smith v. Co-operators General Insurance Co., [2002] 2 S.C.R. 129
Théberge v. Galerie d'Art du Petit Champlain inc., [2002] 2 S.C.R. 336
R. v. Braich, [2002] 1 S.C.R. 903
R. v. Cinous, [2002] 2 S.C.R. 3
R. v. Lamy, [2002] 1 S.C.R. 860
R. v. Sheppard, [2002] 1 S.C.R. 869
Sarvanis v. Canada, [2002] 1 S.C.R. 921
R. v. Mac, [2002] 1 S.C.R. 856
Goulet v. Transamerica Life Insurance Co. of Canada, [2002] 1 S.C.R. 719
Lavoie v. Canada, [2002] 1 S.C.R. 769
Oldfield v. Transamerica Life Insurance Co. of Canada, [2002] 1 S.C.R. 742
Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., [2002] 1 S.C.R. 678
Ward v. Canada (Attorney General), [2002] 1 S.C.R. 569
Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595
Bannon v. Thunder Bay (City), [2002] 1 S.C.R. 716
R. v. Fliss, [2002] 1 S.C.R. 535
St-Jean v. Mercier, [2002] 1 S.C.R. 491
Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, [2002] 1 S.C.R. 405
R. v. Regan, [2002] 1 S.C.R. 297
Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249
R. v. Law, [2002] 1 S.C.R. 227
Bank of Montreal v. Dynex Petroleum Ltd., [2002] 1 S.C.R. 146
Krangle (Guardian ad litem of) v. Brisco, [2002] 1 S.C.R. 205
R. v. Tessier, [2002] 1 S.C.R. 144
R. v. Benji, [2002] 1 S.C.R. 142

Al Sagban v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 133

Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84

2001

Antwerp Bulkcarriers, N.V. (Re), [2001] 3 S.C.R. 951

Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of), [2001] 3 S.C.R. 907

R. v. Larivière, [2001] 3 S.C.R. 1013

Sam Lévy & Associés Inc. v. Azco Mining Inc., [2001] 3 S.C.R. 978

Osoyoos Indian Band v. Oliver (Town), [2001] 3 S.C.R. 746

Privacy Act (Can.) (Re), [2001] 3 S.C.R. 905

Prévost-Masson v. General Trust of Canada, [2001] 3 S.C.R. 882

R. v. Khan, [2001] 3 S.C.R. 823

Smith v. Canada (Attorney General), [2001] 3 S.C.R. 902

R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575

R. v. Golden, [2001] 3 S.C.R. 679

R. v. Hynes, [2001] 3 S.C.R. 623

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Cooper v. Hobart, [2001] 3 S.C.R. 537

Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562

R. v. Jabarianha, [2001] 3 S.C.R. 430

R. v. Nette, [2001] 3 S.C.R. 488

R. v. Scott, [2001] 3 S.C.R. 425

Derksen v. 539938 Ontario Ltd., [2001] 3 S.C.R. 398

R. v. Rhee, [2001] 3 S.C.R. 364

Hollick v. Toronto (City), [2001] 3 S.C.R. 158

Law Society of British Columbia v. Mangat, [2001] 3 S.C.R. 113

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Canadian Pacific Ltd. v. Montreal Urban Community, [2001] 3 S.C.R. 426

R. v. J.W.R., [2001] 3 S.C.R. 7

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R. v. Mankwe, [2001] 3 S.C.R. 3
671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983
Ludco Enterprises Ltd. v. Canada, [2001] 2 S.C.R. 1082
Singleton v. Canada, [2001] 2 S.C.R. 1046
Van de Perre v. Edwards, [2001] 2 S.C.R. 1014
Berendsen v. Ontario, [2001] 2 S.C.R. 849
Naylor Group Inc. v. Ellis-Don Construction Ltd., [2001] 2 S.C.R. 943
R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867
Saint-Romuald (City) v. Olivier, [2001] 2 S.C.R. 898
Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781
R. v. Russell, [2001] 2 S.C.R. 804
R.v. Arcuri, [2001] 2 S.C.R. 828
Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc., [2001] 2 S.C.R. 743
Marcoux v. Bouchard, [2001] 2 S.C.R. 726
Monenco Ltd. v. Commonwealth Insurance Co., [2001] 2 S.C.R. 699
Ivanhoe inc. v. UFCW, Local 500, [2001] 2 S.C.R. 565
Sept-Îles (City) v. Quebec (Labour Court), [2001] 2 S.C.R. 670
Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534
Boston v. Boston, [2001] 2 S.C.R. 413
Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460
Fortin v. Chrétien, [2001] 2 S.C.R. 500
Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), [2001] 2 S.C.R. 281
R. v. Pan; R. v. Sawyer, [2001] 2 S.C.R. 344
114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241
McKinley v. BC Tel, [2001] 2 S.C.R. 161
Noël v. Société d'énergie de la Baie James, [2001] 2 S.C.R. 207
Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc., [2001] 2 S.C.R. 100
Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132
Therrien (Re), [2001] 2 S.C.R. 3

Mitchell v. M.N.R., [2001] 1 S.C.R. 911
R. v. Find, [2001] 1 S.C.R. 863
R. v. Peters; R. v. Rendon, [2001] 1 S.C.R. 997
R. v. Parent, [2001] 1 S.C.R. 761
R. v. Dutra, [2001] 1 S.C.R. 759
R. v. Pakoo, [2001] 1 S.C.R. 757
R. v. Rideout, [2001] 1 S.C.R. 755
R. v. Kelly, [2001] 1 S.C.R. 741
R. v. Ruzic, [2001] 1 S.C.R. 687
Walker Estate v. York Finch General Hospital, [2001] 1 S.C.R. 647
Westec Aerospace Inc. v. Raytheon Aircraft Company, [2001] 1 S.C.R. iv
United States of America v. Cobb, [2001] 1 S.C.R. 587
United States of America v. Kwok, [2001] 1 S.C.R. 532
United States of America v. Shulman, [2001] 1 S.C.R. 616
United States of America v. Tsioubris, [2001] 1 S.C.R. 613
Saskatchewan Indian Gaming Authority Inc. v. CAW-Canada, [2001] 1 S.C.R. 644
R. v. W.B.C., [2001] 1 S.C.R. 530
R. v. Z.L., [2001] 1 S.C.R. 528
Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General), [2001] 1 S.C.R. 470
Markevich v. Canada, [2003] 1 S.C.R. 94
R. v. McClure, [2001] 1 S.C.R. 445
Backman v. Canada, [2001] 1 S.C.R. 367
Miller v. Canada, [2001] 1 S.C.R. 407
Miller v. Monit International Inc., [2001] 1 S.C.R. 432
Spire Freezers Ltd. v. Canada, [2001] 1 S.C.R. 391
R. v. Berntson, [2001] 1 S.C.R. 365
R. v. Guttman, [2001] 1 S.C.R. 363
United States v. Burns, [2001] 1 S.C.R. 283
Ellis-Don Ltd. v. Ontario (Labour Relations Board), [2001] 1 S.C.R. 221
R. v. Deane, [2001] 1 S.C.R. 279
R. v. Ferguson, [2001] 1 S.C.R. 281

R. v. Parrott, [2001] 1 S.C.R. 178

R. v. Sharpe, [2001] 1 S.C.R. 45

R. v. Latimer, [2001] 1 S.C.R. 3

2000

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Whirlpool Corp. v. Camco Inc., [2000] 2 S.C.R. 1067

Whirlpool Corp. v. Maytag Corp., [2000] 2 S.C.R. 1116

R. v. Araujo, [2000] 2 S.C.R. 992

Syndicat de l'enseignement du Grand-Portage v. Morency, [2000] 2 S.C.R. 913

R. v. Simard, [2000] 2 S.C.R. 911

Martel building Ltd. v. Canada, [2000] 2 S.C.R. 860

R. v. Knoblauch, [2000] 2 S.C.R. 780

R. v. Avetysan, [2000] 2 S.C.R. 745

R. v. Beauchamp, [2000] 2 S.C.R. 720

R. v. Charlebois, [2000] 2 S.C.R. 674

R. v. Russell, [2000] 2 S.C.R. 731

Musqueam Indian Band v. Glass, [2000] 2 S.C.R. 633

R. v. J.-L.J., [2000] 2 S.C.R. 600

R. v. Sutton, [2000] 2 S.C.R. 595

R. v. N.M.P., [2000] 2 S.C.R. 857

R. v. M.O., [2000] 2 S.C.R. 594

R. v. Darrach, [2000] 2 S.C.R. 443

R. v. Lévesque, [2000] 2 S.C.R. 487

Public School Boards' Assn. of Alberta v. Alberta (Attorney General), [2000] 2 S.C.R. 409

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307

R. v. D.D., [2000] 2 S.C.R. 275

R. v. Caouette, [2000] 2 S.C.R. 271

R. v. Hamelin, [2000] 2 S.C.R. 273

R. v. Morrissey, [2000] 2 S.C.R. 90

R. v. Oickle, [2000] 2 S.C.R. 3
R. v. Starr, [2000] 2 S.C.R. 144
F.N. (Re), [2000] 1 S.C.R. 880
Friedmann Equity Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842
Lovelace v. Ontario, [2000] 1 S.C.R. 950
Will-Kare Paving & Contracting Ltd. v. Canada, [2000] 1 S.C.R. 915
R. v. Khan, [2000] 2 S.C.R. 915
R. v. Cacheway, [2000] 1 S.C.R. 838
Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783
Reference re Gruenke, [2000] 1 S.C.R. 836
R. v. A.R.B., [2000] 1 S.C.R. 781
Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703
R. v. Jolivet, [2000] 1 S.C.R. 751
Laflamme v. Prudential-Bache Commodities Canada Ltd., [2000] 1 S.C.R. 638
Non-Marine Underwriters, Lloyd's of London v. Scalera, [2000] 1 S.C.R. 551
Sansalone v. Wawanesa Mutual Insurance Co., [2000] 1 S.C.R. 627
Ajax (Town) v. CAW, Local 222, [2000] 1 S.C.R. 538
R. v. G.D.B., [2000] 1 S.C.R. 520
Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494
R. v. A.G., [2000] 1 S.C.R. 439
R. v. Arrance, [2000] 1 S.C.R. 488
R. v. Arthurs, [2000] 1 S.C.R. 481
R. v. Biniaris, [2000] 1 S.C.R. 381
R. v. Molodowic, [2000] 1 S.C.R. 420
R. v. Wust, [2000] 1 S.C.R. 455
Ingles v. Tutkaluk Construction Ltd., [2000] 1 S.C.R. 298
Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342
Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, [2000] 1 S.C.R. 360
R. v. Brooks, [2000] 1 S.C.R. 237
R. v. Wells, [2000] 1 S.C.R. 207

R. v. Bunn, [2000] 1 S.C.R. 183
R. v. L.F.W., [2000] 1 S.C.R. 13
R. v. Proulx, [2000] 1 S.C.R. 61
R. v. R.A.R., [2000] 1 S.C.R. 163
R. v. R.N.S., [2000] 1 S.C.R. 149
Kovach v. British Columbia (Workers' Compensation Board), [2000] 1 S.C.R. 55
Lindsay v. Saskatchewan (Workers' Compensation Board), [2000] 1 S.C.R. 59
Public School Boards' Assn. of Alberta v. Alberta (Attorney General), [2000] 1 S.C.R. 44
Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3