

The Five Most Significant Decisions of the Courts in 2000-2001¹

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¹And A Few Others Which Deserve "Honourable Mention"

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Special Introduction: Attack on the USA, September 11, 2001

The horrific terrorist attacks on the United States of America, which shook the world on the morning of September 11th, 2001, played an unanticipated role in the preparation of this paper.

We open with this observation so that those who read these remarks years from now will appreciate our collective mood at the time of writing these comments.

As our thoughts are with the thousands of victims and tens of thousands who mourn them, and as we reflect about those who were injured, who lost homes, businesses and possessions and those whose heroic acts saved lives, we are struck by how the destruction of the World Trade Center, the damage to the Pentagon and the crash of four commercial aircraft has changed the world.

What we thought important last week has suddenly become mundane. What was significant yesterday is now banal.

Despite the tragedy and our concerns for the well-being of freedom-loving people and our democratic way of life, we struggle to return to normalcy. We struggle to remember that the world has endured great shocks and has survived and we pray that it will do so again. We struggle to recall that the preservation of our way of life is paramount. Central to our democratic way of life is the rule of law and the protection of rights. In this spirit, we return the most significant cases decided in Canadian courts during the last 12 months.

Introduction

In the three years since we last embarked on the task of selecting the five most significant cases, the case names and the subject matter may have changed, but there has been at least one

constant. The task has not become any easier. Mediation and arbitration have moved some cases out of the court, but the courts are still “alive and well” and generate thousands of decisions in both criminal and civil fields. The task of selecting the five most important cases is daunting³.

Our barometer of judicial “importance” has been to select those cases which made the most impact — which will impact the greatest change in our society. Change is sometimes difficult to discern because it does not take place in a vacuum.. As will be seen, our courts decide whether make changes or maintain the status quo on the basis of the context in which the case is presented. In the case of prayer in the Legislature or the approach to so-called “mercy killing”, the determination of the Courts to maintain the status quo is significant.

The cases we have selected focus, in part, on a trend by the courts to shape “Canadian values.” The shaping of our national values is a role the Courts have undertaken over the years but it is especially important as the norms and demographics of our global village and country change. Half a century ago, when the Canadian population was far more ethno-culturally homogenous and before human rights enjoyed their current protection, Canadian courts were far slower to protect on individual rights. These distinctions were expressed in the court decisions of the day.⁴

³Eugene Meehan, immediate past president of the Canadian Bar Association and Supreme Court of Canada expert, who gave this speech in September, 2000, believes “the 10 most important cases” would be better.

⁴In *Re Noble and Wolf*, [1949] O.R. 503, five Ont. C.A. judges (Robertson CJO. Henderson, Hope, Hogg and Aylesworth JJ.A.) held that a restrictive covenant in a deed for cottage property that “the land should never be sold to any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood” was valid and enforceable. Robertson CJO, speaking for the Court, stated: “It is common knowledge that, in the life usually

Today, our country, particularly in its major urban areas, is more cosmopolitan, and more diverse, racially, culturally and ethnically, than even a generation ago. The recognition and protection of human and individual rights is the norm of every democratic society and the foundation upon the *Canadian Charter of Rights and Freedoms* (the Charter) is built. However, contextual application to specific situations is still problematic.

Overview: The Five Most Important Cases

The Court's attention to Canadian values begins with the Supreme of Canada's second appeal in *Regina v. Latimer*⁵ For months, Robert Latimer's so-called mercy killing of his severely disabled daughter occupied national headlines. On January 18th, 2001, the Supreme Court of Canada upheld his conviction for murder and sentenced him to life imprisonment without parole for 10 years. The trial judge had granted Latimer a constitutional exemption from the statutory minimum of 10 years. In this case, the court establishes Canadian values in respect of mercy killing.

*Ontario (Speaker of the Assembly) v. Ontario (Human Rights Commission)*⁶ is an unusual case which appears to take a step backward in the judicial protection of religious equality in Ontario's public institutions. The Ontario Court of Appeal rejected the claim of the Ontario Human Rights

led at such places, there is much intermingling, in an informal and social way, of the residents and their guests, especially at the beach. . . The purpose of the clause . . . obviously to assure, in some degree, that the residents are of a class who will get along well together. To magnify this innocent and modest effort to establish and maintain a place suitable for a pleasant summer residence into an enterprise that offends against some public policy, requires a stronger imagination than I possess." It took nearly two years for the SCC to reverse this ignoble judgment: See *Noble v. Alley* [1951] S.C.R. 64

⁵[2001] 1 S.C.R. 3 (SCC - Jan 18/2001, McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Binnie, Arbour JJ.)

Commission to prevent the recitation of The Lord's Prayer, a prayer which only forms part of the Christian liturgy, from being recited at the open of sessions of the Ontario Legislature. The interrelationship of "church and state" seems to buck the current trend of recent decisions affecting religious pluralism, especially in Ontario, where faiths other than Christianity have hundreds of thousands of adherents. However, as will be seen, the case may be a triumph of form over substance.

In United States of America v. Burns,⁷ the Supreme Court of Canada makes a strong statement that Canada will not tolerate the imposition of capital punishment upon Canadian citizens, even if convicted of murder in a jurisdiction which has capital punishment. In that case, the Court held that as a condition of extradition on a charge of murder, the Minister of Justice must seek an undertaking from the extraditing state not to ask for the death penalty. The "long arm" of Canada's legislative rejection of capital punishment is an important expression of our values particularly, in light of the frequency of imposition of the death penalty in the U.S.

Relationships between employers and employees came under scrutiny in the decision of the Supreme Court of Canada in *McKinley v. B.C. Tel*⁸, which examined whether employee dishonesty is always a justification for dismissal. As will be seen, the Court decided 7-0 that some employee dishonesty warrants lesser sanctions than dismissal.

⁶[2000] 196 D.L.R.(4th) 136, (Ont CA - May 11, 2001 - Finlayson, Charron and Rosenberg JJ.A.)

⁷[2001] S.C.R. 283 (SCC - Feb 15, 2001, McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.)

Finally, in *Boston v. Boston*⁹, the Supreme Court of Canada tackled a difficult family problem. Pensions have a dual quality in the scheme of marriage breakdown . They are assets for the purpose of equalization net family property. However, when the former spouse begins to draw benefits from the pension, it also because the source of income from spousal support could be payable. The considered the concept of “double-dipping” and rejected *it by in a 7-2 decision*..

Other Important Cases

We left a space open on our list for the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*¹⁰ which was argued on December 14, 2000, but the Court has not yet rendered its decision. In this case, the trial judge and jury awarded \$1,000,000 punitive damages to the Plaintiffs upon a finding of the insurer’s trumped-up allegation of arson following the destruction of the Plaintiff’s home by fire. The Ontario Court of Appeal reduced the punitive damages award to a paltry \$100,000 but Laskin J.A. strongly dissented. The Supreme Court of Canada is expected to deliver a definitive statement on punitive damages in Canada but has not yet done so at the date of this writing. If the Court upholds the trial judgment and permits an award of punitive of damages of \$1 million, it will have a great impact on the civil litigation in Canada.

⁸[2001] S.C.J. No. 40 (SCC - June 28, 2001, McLachlin CJ, L’Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.)

⁹[2001] S.C.J. No. 45, July 12, 2001: SCC, McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.)

¹⁰December 14, 2000. S.C.C. Bulletin, 2000, p. 2296 (Before: McLachlin C.J. and L’Heureux-Dubé, Gonthier, Major, Binnie, Arbour and LeBel JJ.)

Fellowes MacNeil v. Kansa General International Insurance Co.¹¹ is a case which should make every lawyer in this room lose sleep and reflect on the expanding scope of our duty to clients. The Ontario Court of Appeal dismissed the majority of an appeal by a law firm from a judgment of more than \$6 million for negligence against Kansa, one of the firm's principal clients. The negligence lay in the failure of the law firm to advise the insurer about a possible coverage issue.

The frightening aspect of the decision is that the law firm had not been retained to give this advice. However, the Court held that the law firm had a duty to advise about the potential coverage issue even before becoming solicitor of record for the insurer. But, of course, the case is not limited just to its particular facts. On May 17th, 2001, the Supreme Court of Canada granted leave to appeal but the appeal has not yet been heard.

Regina v. Latimer - Supreme Court of Canada - January 18, 2001¹²

Robert Latimer was a "salt of the earth" man, a farmer from Wilkie, Saskatchewan. He had no criminal past apart from the incident which gave rise to this appeal. Latimer was charged with first degree murder of 12 year-old severely disabled daughter, Tracy, who suffered from a severe form of cerebral palsy. Tracy was said to have mental capacity of a four-month old baby. Her condition was

¹¹[2000] SCCA No. 543, leave granted May 17, 2001 from [2000] O.J. No. 3309 (Ont. C.A., Sept 11, 2000).

permanent and she was bedridden much of the time. She was fully dependent on others for the most basic functions. It was believed that she was suffering a great deal of pain which could not be relieved by medication because it conflicted with her epileptic medication and her difficulty in swallowing. Tracy experienced five to six epileptic seizures daily.

After learning that the doctors wished to perform further surgery on Tracy, which Latimer perceived as additional and unnecessary mutilation, Latimer decided, painfully, to take his daughter's life. He carried Tracy to his truck, seated her in the cab and inserted a hose from the truck's exhaust into the cab. Tracy died of asphyxiation due carbon monoxide. Latimer said at first that she had died in her sleep but he later conceded what he had done. In effect, Latimer was seeking to be exonerated for the death on the basis that his daughter's death was merciful, painless and relieved her of further suffering. Of course, there is no principle of Canadian law which permits mercy killing.

In fact, this was Latimer's second trial and the second time his case went to the SCC. At the first trial, Latimer was found guilty of second degree murder and

¹²[2001] 1 S.C.R. 3 (McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Binnie,

sentenced to life imprisonment without parole for 10 years, but the Supreme Court of Canada ordered a new trial because the prosecutor had tampered with the jury selection process.¹³

At the second trial, Latimer was again convicted of second degree murder. However, the trial judge granted a constitutional exemption from the mandatory minimum sentence of life imprisonment without parole for 10 years on that basis that it was cruel and unusual punishment contrary to s.12 of the Charter and sentenced Latimer to one year's imprisonment and one year on probation to be served on his farm.. The Saskatchewan Court of Appeal affirmed the conviction but reversed the sentence and imposed the mandatory minimum. Latimer appealed to the Supreme Court.

Arbour JJ.)

¹³R. v. Latimer [1997] 1 S.C.R. 217, reversing (1995), 134 Sask. R. 1, 101 W.A.C. 1, 126 D.L.R. (4th) 203, 1995] 8 W.W.R. 609, 99 C.C.C. (3d) 481, 41 C.R. (4th) 1, dismissing the accused's appeal from his conviction of second degree murder.

In the Supreme Court, Latimer argued that his trial had been unfair for two reasons:

1. The trial judge refused to rule on whether the jury could consider the defence of necessity before the closing addresses to the jury. After defence counsel made submissions on the necessity defence, the judge ruled that the jury could not consider that defence.
2. The jury should have been entitled to consider the necessity defence, and, in the alternative, that the timing of the judge's ruling rendered the trial unfair.

After the jury had begun deliberating, the jury sent a written question to the judge asking if it could have input on sentencing. The trial judge told the jury that it was not to concern itself with the penalty, but the judge also said that after the verdict was reached, he and the jury might discuss sentencing. Only after the verdict had been reached did the trial judge explain that there was a mandatory minimum sentence for second degree murder. Latimer argued that the judge misled the jury

and that the trial was unfair because the judge undermined the jury's power to nullify.¹⁴

The Defence of Necessity

The requirements for the necessity defence are:

- Imminent peril: This defence was not met because Latimer did not face peril, and there was no element of Tracy's medical condition that placed her in a dangerous situation where death was the only alternative. The Court held that "ongoing pain did not constitute an emergency in this case," and that "Tracy's situation was not an emergency."

¹⁴The term "jury nullification" refers to that rare situation where a jury knowingly chooses not to apply the law and acquits a defendant regardless of the strength of the evidence against him. See *R. v. Latimer*, [2001] 1 SCR 3 para. 57

- Accused must have no reasonable legal alternative to breaking the law: there was s no air of reality¹⁵ to this element because Latimer “had at least one reasonable legal alternative: he could have struggled on, with what was unquestionably a difficult situation, by helping Tracy to live and by minimizing her pain as much as possible.” The SCC held that there was no air of reality to the requirements for this defence. As a result, the trial judge was correct not to allow the jury to consider it.

Latimer’s the defence of necessity was an attempt to justify the “mercy killing” but the SCC’s decision shows that defence of necessity is not well-suited to an argument that euthanasia is legal. On the evidence, it was clear that Latimer and his family could have struggled on to care for Tracy. He had did not have to kill her. Therefore, it was improbable that the Court could have decided in any other way on this element. The question is whether the defence of necessity could or should have been expanded or stretched, beyond the precedents which were followed, to cover euthanasia.

¹⁵“Air of reality” is the usual test for determining whether a particular defence should be put to the jury

The SCC analyzes the defence of necessity¹⁶ and points out that it rests on a realistic assessment of human weakness but it applicable only to those rare cases where true “involuntariness” is present. The Court quotes Dickson, J, later C.J., in *Perka v. The Queen*, as follows:¹⁷

[The defence of necessity] rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable.

In our view, the defence of necessity does not appear to fit circumstances of this case and it is questionable whether it fits the concept of euthanasia in general. The defence of euthanasia is focused on the necessity of the accused. The moral concept of euthanasia is focused on the mercy that one attaches to the suffering of the deceased. Was it “necessary” to end the suffering of Tracy? Clearly not and that is why the Court unanimously rejected the defence. The SCC further held that the timing of the removal of the necessity defence from the jury did not render the trial unfair

¹⁶[2001] 1 SCR 3 para.26

¹⁷[1984] 2 S.C.R. 232

Latimer's second ground of appeal addressed the issue of jury nullification. In rejecting this defence, the Court held that it is appropriate and desirable for the jury not to know the penalty associated with the crime before the verdict is rendered. The fact that there is a minimum sentence should not influence the jury's consideration of guilt. Further, the SCC held that an accused person does not have a right to jury nullification. Even if the jury may have been more likely to acquit had the trial judge advised the jury of the minimum sentence, this does not render Latimer's trial unfair.

Constitutional Exemption From Minimum Sentence

Latimer argued that the mandatory minimum sentence of life in prison without parole for 10 years constituted cruel and unusual punishment and therefore violated s.12 of the Charter. SCC noted that the test for determining whether a punishment is "cruel and unusual" is "whether the punishment prescribed is so excessive as to outrage standards of decency".

In other words, the effect of the punishment must not be grossly disproportionate to what would have been appropriate. This test requires a consideration of various

factors, for example, the actual effect of the punishment on the particular accused, the existence of valid alternatives to the punishment.

SCC also stressed that the Court must defer to Parliament's valid legislative objectives under the criminal law.

In applying these principles, the SCC observed that Latimer's actions resulted in the "most serious of all possible consequences, namely, the death of the victim..." Even if second degree murder is reduced (in the level of criminal responsibility) in comparison to first degree murder, it cannot be denied that second degree murder is accompanied by an extremely high degree of moral culpability.

The Court stated that it was mindful of Latimer's good character and standing in his community, his "tortured anxiety" about Tracy's well-being, and his laudable perseverance as a caring and involved parent. However, these factors could not displace the serious gravity of Latimer's offence.

The Court also held that the mandatory minimum sentence is consistent with valid penological goals and sentencing principles, and that it was mindful of the

important role that the mandatory minimum sentence plays in denouncing murder. Further, the Court commented that denunciation is particularly important where the victim is a vulnerable person with respect to age, disability, or other factors.

This analysis demonstrates why *Latimer* is important. The assessment of Canadian values by the full Supreme Court here is very simple: murder is murder. There is no middle ground. This 7-judge panel of the Court was not ready to create a “judicial euthanasia” category of murder. It is interesting that five of the seven judges heard the appeal in *Rodriguez v. British Columbia*,¹⁸ which rejected physician or patient-assisted suicide of a patient suffering from ALS (Lou Gehrig’s disease). As a result, the Court concluded in *Latimer*, as it did it in *Rodriguez* that there was no violation of s.12 of the Charter. Presumably recognizing that many thought that the result was unduly harsh for *Latimer*, the Court noted that the Parliament may pardon a person under the royal prerogative of mercy in s.749 of the *Criminal Code*.

Ontario (Speaker of the Legislative Assembly)
*v. Ontario (Human Rights Commission)*¹⁹

¹⁸[1993] 3 S.C.R. 519. McLachlin J, now C.J., and L’Heureux-Dubé J. dissented in *Rodriguez* but were part of the majority in *Latimer*

¹⁹[2000] 196 D.L.R.(4th) 136, (Ont CA - May 11, 2001 - Finlayson, Charron and Rosenberg J.J.A.)

Ontario Court of Appeal, May 11, 2001

Freitag, a “non- Christian” member of the public, filed a complaint with Ontario Human Rights Commission alleging that the recital of the Lord’s Prayer in the Ontario Legislature breached his right to equal treatment with respect to services without discrimination because of his creed, in accordance with s.1 of the Ontario Human Rights Code.²⁰

The Lord’s Prayer is recited by the Speaker of the Ontario Legislature pursuant to Standing Order of the House 8(c) enacted July 25/89, but in fact, but prayers, including The Lord’s Prayer, have been recited in the Legislative Assembly since at least 1792.

²⁰R.S.O. 1990, c.H.19.

The Speaker requested Ontario Human Rights Commission to exercise its discretion to not deal with the complaint²¹ and to dismiss it outright on the basis of lack of jurisdiction. The Commission declined to exercise this discretion. It dealt with the complaint, but decided not to refer the complaint to board of inquiry because (1) insufficient evidence to support it, and (2) it considered that the complaint raised issues which should be determined under the Charter.

The Speaker moved before the Divisional Court for judicial review of the decision of the Human Rights Commission. The Speaker sought an Order setting aside the decision of the Human Rights Commission that it had jurisdiction over Freitag's complaint. The Divisional Court allowed the judicial review and held that the Human Rights Commission did not have jurisdiction.²² The Ontario Court of Appeal affirmed the decision of the Divisional Court and dismissed the appeal.

Divisional Court

This is probably an example of the fractured adage "bad facts make interesting law". At the time the case reached the Divisional Court, it could have been said that before it was already moot. The Human Rights Commission had accepted jurisdiction but dismissed the complaint. In effect, the Speaker of the Legislature proceeded to the Divisional Court to ensure that the issue would not be raised again. However, both Divisional Court and the Court of Appeal held that the appellate standard of correctness was applicable to decisions of the Human Rights Commission and accordingly, matter was not moot.²³

²¹R.S.O. 1990, c.H.19, s.34(1)(c).

²²[2000] O.J. No. 3416 (July 7, 2000, Div. Ct., McRae, Sedgwick and Pardu JJ.)

²³[2001] O.J. No. 2180 at para. 52, per Finlayson, J.A.

One wonders why the Speaker of Legislature failed to encourage the government to exercise sound political judgment by varying the Standing Order. A reasonable result might have been to abandon the public reading of a prayer important only to some faiths (and possibly, offensive to others), or alternatively, to have the prayers of different faiths read on an alternating basis. Whatever the reasoning, the Speaker decided to go to Court.

The majority of the Divisional Court (Pardu J., dissenting) held that Standing Orders (including the impugned one) are at the very heart of the day to day operation of the Legislature and an integral part of its proceedings, and fall within the scope of “parliamentary privilege,” namely, the rights and immunities enjoyed by legislative bodies and their members which are recognized as being necessary to ensure that the legislature is independent and able to carry out its functions²⁴. As such, the Court held that the complaint was outside the Human Rights Commission’s jurisdiction and allowed the application for judicial review. The Human Rights Commission appealed to the Court of Appeal.

Decision of Ontario Court of Appeal

²⁴“parliamentary privilege” dates back to the Bill of Rights of 1689 (Eng. 1 Will & Mar. sess.2, c.2)

Finlayson, J.A., writing for the Court, rejected Human Rights Commission's argument that it had jurisdiction to determine whether the offering of the prayers is lawful or necessary to the conduct of the Ontario Legislature's business and upheld decision of Divisional Court to allow judicial review of the Human Commission's decision to inquire into the complaint. The Court of Appeal decided that the Human Rights Commission was asking the wrong question.

- The real issue is not whether prayers are necessary but whether the Standing Orders are necessary for the proper functioning of the legislature. "Necessity" applies to categories of matters – each particular exercise within a privilege is not scrutinized against a standard of necessity. The Court reasoned that Standing Orders are necessary, and therefore protected by parliamentary privilege.
- This means that neither the courts nor any quasi-judicial body has the right to inquire into the contents of the Standing Orders or to question whether a particular part of the Standing Orders is necessary or lawful²⁵. Matters relating to the internal workings of the Ontario Legislature are immune from examination by the Human Rights Commission even when they those actions are alleged to breach the Ontario Human Rights Code.²⁶

Penetanguishene case

²⁵[2001] O.J. No. 2180, para. 23, per Finlayson J.A.,

²⁶[2001] O.J. No. 2180, para. 48, per Finlayson J.A.,

Mr. Freitag made a cause célèbre of the prayers recited by various levels of government in Ontario and he was successful in his first trip to the Ontario Court of Appeal. In *Freitag v. Penetanguishene*,²⁷ he challenged the custom of the mayor of the Town of Penetanguishene to invite councillors to rise to recite The Lord's Prayer. In an affidavit filed in that case, the mayor state that the purpose of the practice was to have the Council take a moment's pause to recognize the importance of their deliberations and the moral value of those deliberations.

Freitag lived in the Town and attended Council meetings. He noted that members of the public often rose to recite the prayer and although he was not obliged to do so, he was intimidated and uncomfortable. He applied to the Human Rights Commission. The Human Rights Commission refused to establish a board of inquiry and the motions judge dismissed the application for a declaration on the basis that the practice was trivial and did not violate Freitag's right of religion under the *Charter*.²⁸

The Ontario Court of Appeal saw the matter differently. Feldman, J.A., speaking for the Court,²⁹ held that the mayor's invitation to council members to rise and recite the prayer was government action protected by the *Charter* and that the mayor's authority to conduct the meetings derives directly from the *Municipal Act*.³⁰ She held that the purpose of the prayer was to impose a Christian moral tone

²⁷(1999) 47 O.R. (3d) 301, (Ont. C.A.)

²⁸*Freitag v. Penetanguishene* (1998), 49 C.R.R. (2d) 172, 44 M.P.L.R. (2d) 176 (Ont. G.D., Hermiston J.)

²⁹*Freitag v. Penetanguishene* (1999) 47 O.R. (3d) 301 (Ont.C.A. Catzman, Laskin and Feldman JJ.A.)

³⁰*Freitag v. Penetanguishene*, Ont. C.A. at pp.305-36 O.R., per Feldman J.A.

on the deliberations of the Council. That, the Court of Appeal held, violated Freitag's freedom of conscience and religion under the *Charter*, and it was hardly trivial and insubstantial.

Against this backdrop, one might have expected Freitag's battle to keep The Lord's Prayer out of the Ontario Legislature to be successful. However, Finlayson, J.A.'s view was this:³¹

In terms of comparing the case decided by Feldman J.A. to the case at bar, it must first be noted that in *Freitag v. Penetanguishene*, supra, the offending body was a municipal council, not a provincial legislative assembly. This is an extremely significant difference. A municipal council is a creation of the legislature and only has those powers granted and delegated to it by the province. In the case at bar, the Court is being asked to scrutinize the actions of a provincial legislative body that enjoys constitutional status. It is the direct successor to the "mother of all parliaments" in the United Kingdom. The Assembly elected the Speaker from within its membership and clothed the Speaker with far-reaching powers to oversee all of the business of the House. With or without the Standing Orders, the Speaker's activities as they relate to the internal procedures of the legislature are protected by the same constitutionally-entrenched privileges that protect the independence of the Legislature itself.

Since the scope and application of parliamentary privilege were not even considered in *Freitag v. Penetanguishene*, supra, it cannot be said that that case binds the Court's hands in the case at bar. It is my opinion that Feldman J.A.'s decision is of little guidance to the issues in the case at bar, given that our inquiries are not directed at determining whether the actions of the Speaker violate human rights legislation or the Charter, but, rather, are directed at deciding whether the shield of parliamentary privilege protects the Speaker, even when his acts allegedly conflict with provisions of the Code.

In a triumph of form over substance, Ontario is in the bizarre position that The Lord's Prayer cannot be recited at municipal council meetings but it can be recited

³¹[2001] O.J. No. 2180, paras. 46-47, per Finlayson, J.A.

in the Ontario Legislature (unless the Standing Order is amended). The result, for which leave to appeal to the Supreme Court does not appear to have been sought, is troublesome but not inconsistent with previous decisions of the Court.

In *Adler v. Ontario*,³² the Supreme Court of Canada considered the thorny issue of the funding of religious schools other than Catholic schools, for which funding was provided under s. 93(1) of the Canadian Constitution. Iacobucci J., writing for the majority, rejected the argument that the funding of Catholic separate schools but not other religious schools contravened the equality provisions of s. 15(1) of the Charter should be rejected for two reasons:

[First], it would fall "fairly and squarely" (at p. 1196) within s. 29 of the Charter which explicitly exempts from Charter challenge all rights and privileges "guaranteed" under the Constitution in respect of denominational, separate or dissentient schools. Second, . . . s. 93 . . . was nonetheless "immune" from Charter review because it was "legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise".

The net effect of the Lord's Prayer case, as in the religious school funding case, is that Canadian Courts have been unwilling to assert religious equality against the legislative body which passes the "equality-generating" legislation.

*United States of America v. Burns - Supreme Court of Canada - February 15, 2001*³³

The effect of this judgment of the Supreme Court of Canada could have important political ramifications in light of the events of September 11, 2001 and “America’s new war against terrorism”. Suppose that some of the planners of the attacks on New York were Canadian citizens residing in Canada and were wanted as accessories to the murder of hundreds of people in the United States. In accordance with the Supreme Court’s decision, Canada’s Minister of Justice would first have to secure the undertaking of the United States not to seek the death penalty upon conviction before proceeding to extradite these individuals.

These are the facts:

- Burns and Rafay were 18-year-old Canadian citizens who are wanted for the cold-blooded murder of three members of Rafay’s family in the State of

³²[1996] 3 S.C.R. 609, affirming (1994) 19 O.R. (3d) 1 (Ont.C.A.)

³³[2001] S.C.R. 283 (SCC - Feb 15, 2001, McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.)

Washington. Burns allegedly committed the acts while Rafay watched. Burns was a contract killer for Rafay, who wanted his family's assets and life insurance proceeds. After the murders, Burns and Rafay returned to Canada.

- The United States charged Burns and Rafay with the murders, which were capital offences according to the law of the State of Washington, and applied to the Minister of Justice to seek extradition of Burns and Rafay for trial in the State of Washington. The then Minister of Justice, Allan Rock, ordered their extradition without seeking assurances from the United States that if Burns and Rafay were convicted, the death penalty would not be imposed.
- Burns and Rafay submitted to the Minister that he was obliged to obtain these assurances under ss. 6(1), 7 and 12 of the *Charter* on the basis that the imposition of the death penalty would shock the Canadian conscience because they were only 18 and were Canadians. The Minister rejected these claims and signed the extradition order.

B.C. Court of Appeal

The British Columbia Court of Appeal (BCCA) ruled that the unconditional extradition order violated Burns' and Rafay's mobility rights under s.6 of the *Charter*.³⁴ The rationale of the judgment, *inter alia*, was that if Burns and Rafay were put to death in the State of Washington, they would not be able to exercise a right of return to Canada under s.6(1) of the *Charter*.

Donald, J.A. rejected the argument that life imprisonment without parole would have the same effect on the basis that "where there is life, there is hope". Moreover, the court indicated that the government of Canada had a higher duty to its own citizens than to aliens, and that Canadian citizens are perfectly entitled to consider Canada a safe haven.

The BCCA therefore set aside the Minister's decision and directed him to seek assurances that death penalty would not be sought as a condition of surrender. The Minister of Justice appealed to the SCC, which dismissed the appeal.

³⁴(1997) 116 C.C.C. (3d) 524, (BCCA, per Donald J.A & McEachern CJBC, Hollinrake JA dissenting)

Background information about the law of extradition

When extradition is sought, after an extradition judge has determined that the offence falls within the scope of the *Extradition Treaty* between Canada and the US (the “Treaty”), the Minister of Justice makes a decision under s.25(1) of the *Extradition Act* whether or not to surrender the fugitive, and if so on what terms

Article 6 of the Treaty permits Canada to refuse extradition unless provided with assurances that if extradited and convicted, the fugitives will not suffer the death penalty. The Minister of Justice had a policy that assurances should be sought only in exceptional cases of which this was not one.

Washington State is one of 38 of the United States which have retained the death penalty. A person convicted of aggravated first degree murder in the State of Washington (which is the crime for which Burns and Rafay were sought) will either be sentenced to life imprisonment without the possibility of parole, or to death. This means that the person will either die in prison by execution or will die

in prison of by other causes. There is no possibility of freedom, apart from executive clemency.

Decision of the Supreme Court of Canada

The Court rejected the argument under s.6(1) of the *Charter*,³⁵ but concluded that the BCCA reached the correct conclusion. Burns and Rafay were entitled to succeed on the ground that their extraditions to face the death penalty would violate their rights guaranteed by s.7 of the *Charter*.³⁶

The Court stated the “root questions” of this case as (1) whether the Constitution of Canada supports that Minister’s position that assurances need only be sought in exceptional cases, or whether the Constitution supports the respondents’ position that assurances must always be sought barring exceptional circumstances, and (2) whether exceptional circumstances are present in this case.

³⁵S. 6(1) of the *Charter* provides: Every citizen of Canada has the right to enter, remain in and leave Canada.

³⁶Section 7 of the *Charter* provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

The Court affirmed that it is generally for the Minister, not the Court, to assess the weight of competing considerations in extradition policy. The Court held, however, that the availability of the death penalty opens up a different dimension. Because of the unique finality and irreversibility of the death penalty, the Court concluded that it should consider whether the Minister's decision was constitutional. The importance the Court attached to the issue of finality and non-reversibility of capital punishment is expressed in the opening paragraphs of the unanimous judgment of the Court³⁷:

Legal systems have to live with the possibility of error. *The unique feature of capital punishment is that it puts beyond recall the possibility of correction.* In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, *the result could have been the killing by the government of innocent individuals.* The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution.

The possibility of a miscarriage of justice is but one of many factors in the balancing process which governs the decision by the Minister of Justice to extradite two Canadian citizens, Glen Sebastian Burns and Atif Ahmad Rafay, to the United States. A competing principle of fundamental justice

³⁷[2001] 1 S.C.R. 283 at 294-295 para. 1-2, per The Court.

is that Canadians who are accused of crimes in the United States can ordinarily expect to be dealt with under the law which the citizens of that jurisdiction have collectively determined to apply to offences committed within their territory, including the set punishment. [Note: Our italics]

The Court found that B and R would clearly be deprived of their liberty and security of the person by the extradition order because their lives would be at risk. The issue is whether the deprivation would be in accordance with the principles of fundamental justice.

The Court stated that the “balancing process” mandated by the previous jurisprudence of *Kindler* and *Ng* (companion cases decided in 1991, both involving non-citizens of Canada – in both cases the Minister had been entitled to extradite without assurances) is still the correct approach for determining whether an extradition order without assurances is constitutional. The balancing simply means that the court is to weigh general factors and factors specific to the particular fugitive in determining whether an extradition is contrary to the principles of fundamental justice.

Although we consider that this test is vague, the Supreme Court did provide some factors which “arguably favour extradition without assurances”:

- That if assurances are sought and refused, B and R may not face trial at all;
- That justice is best served by a trial in the jurisdiction where the crime was allegedly committed;
- That individuals who choose to leave Canada must generally accept the local law, procedure and punishments which the foreign state applies to its own residents;
- That extradition is based on principles of comity and fairness to other cooperating states in rendering mutual assistance in bringing fugitives to justice;
- That there has traditionally been judicial deference given to ministerial extradition decisions.

The Court held that although government policy at any particular moment may or may not be consistent with principles of fundamental justice, the fact that successive governments and Parliaments over a period of almost 40 years have refused to inflict the death penalty, reflects a fundamental Canadian principle about the appropriate limits of the criminal justice system.

The Court also referred to Canada's advocacy at the international level for the abolition of the death penalty, international initiatives opposing extradition without assurances, international initiatives to abolish the death penalty, and the fact that state practice (as evidence of an international trend) increasingly favours abolition of the death penalty.

In the final analysis, the Court has made a very strong statement of Canadian values: it is preferable to provide a haven to a Canadian fugitive from justice rather than turn him or her over to a jurisdiction where the death penalty might be imposed upon conviction

This expression of our values toward the death penalty differs greatly from our American neighbours. These are values with which the majority of Canadians

have been very comfortable for years and which we also wholeheartedly support. Coupled with compassionate refugee and immigration policies and the right to apply for Canadian citizenship after three years of residence, our government must ensure that Canada does not provide a haven for persons whose purpose in coming here is to threaten the freedoms Canadians and Americans cherish.

McKinley v. BC Tel - Supreme Court of Canada - June 28, 2001³⁸

In this case, the Supreme Court of Canada establishes new parameters for the discipline of non-union employees, short of dismissal, and importantly, establishes that the dishonesty of an employee is not necessarily justification for dismissal.

Martin McKinley was a chartered accountant who was employed by BC Tel for almost 17 years when he was terminated in August, 1994. In 1993, he became hypertensive. His condition was controlled with medication and some time off work at first, but by May, 1994, McKinley's blood pressure began to rise again, and following his doctor's advice, he took a leave of absence.

³⁸[2001]S.C.J. No. 40 (SCC - June 28, 2001: McLachlin C.J. and L'Heureux-Dubéé, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.)

In July, 1994, McKinley's superior raised the issue of his termination from employment. McKinley indicated that he wished to return to work but in a position with reduced responsibility. McKinley was advised that BC Tel would attempt to find a suitable position for him. At the end of August, 1994, while he was still on medical leave, McKinley's employment was terminated. BC Tel made a severance offer which McKinley rejected and he commenced an action for wrongful dismissal.

BC Tel initially defended on the basis that it had offered McKinley a compensation package in lieu of reasonable notice. BC Tel also alleged that it used its best efforts to locate an alternate suitable position for M within BC Tel. In an amended Statement of Defence, BC Tel pleaded that the appellant's illness "frustrated the object of his employment." This defence was abandoned during the trial, the Court permitted BC Tel to amend its pleadings once again. For the first time, BC Tel alleged just cause for dismissal on the basis that McKinley had lied about his medical condition and the treatments available for it.

BC Tel's position was based on a letter McKinley wrote to one of his doctors in which he acknowledged that the doctor had recommended a certain medication for

hypertension. The letter indicated that the doctor had advised McKinley that this treatment should be begun upon his return to work, if his blood pressure remained high. BC Tel claimed that McKinley deliberately withheld the truth as to the doctor's recommendations regarding the use of the medication, and accordingly, that McKinley could return to work without endangering his health.

At trial, the judge held that there was sufficient evidence to put the question of just cause for dismissal to the jury. In instructing the jury, the judge stated that in order for just cause to exist, the jury must find (a) that the appellant's conduct was dishonest in fact, and (b) that "the dishonesty was of a degree that was incompatible with the employment relationship."³⁹ The jury found in favour of M and awarded him approx \$100,000 in general damages, \$1000 in special damages, \$100,000 in aggravated damages, \$6000 in pension contributions, prejudgment interest, and costs.

The B.C. Court of Appeal set aside the jury award and ordered a new trial on the basis that dishonesty is always cause for dismissal. Thus, by instructing the jury that McKinley's dishonesty was just cause only if it was a degree that was "incompatible with the employment relationship", the B.C. Court of Appeal considered that the trial judge committed a reversible error.⁴⁰

³⁹Unreported, BC Supreme Court, Paris J. (sitting with a jury), November 27, 1997.

⁴⁰[1999] B.C.J. No. 1075, (BCCA, Hollinrake, Ryan and Hall JJ.A., May 7, 1999)

Supreme Court of Canada

The question is whether any dishonesty, in and of itself, suffices to warrant an employee's termination, or whether the nature and context of such dishonesty must be considered in assessing whether just cause for dismissal exists. The SCC also considered whether the jury award representing an extended notice period was reasonable, whether the question of aggravated and punitive damages were put to the jury properly.

The Court observed that there were two lines of authority relevant to the question before it: One line of authority which suggests that the nature of the dishonesty and the circumstances must be considered, and another line of authority which seems to indicate that dishonest conduct alone, regardless of its degree, creates just cause for dismissal.

Context must be Considered whether dishonesty amounts to just cause

The Court's unanimous decision, written by Iacobucci J., reviews some old English decisions⁴¹ which had held that a finding of misconduct does not by itself give rise to just cause. Rather, these cases held that the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist. In other words, the disobedience or misconduct only justified dismissal if it demonstrated that the servant had repudiated the contract or one of its essential conditions.

A significant aspect of the Court's analysis is that context is important. The Court expressed its reject of the notion that a "black and white" approach was applicable to dealings with employees. This may be consistent with earlier judgments in the employment law field.⁴² So far, we are not talking specifically about dishonesty, just a contextual approach to assessing whether misconduct in general justifies dismissal.

⁴¹*Clouston & Co. v. Corry*, [1906] A.C. 122, *Laws v. London Chronicle, Ltd.*, [1959] 2 All E.R. 285

⁴²*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701

The Court stated that the contextual approach has also been adopted in decisions by several Canadian appellate courts. For example, the Nova Scotia Court of Appeal in *Blackburn v. Victory Credit Union*⁴³ held that an employee's misconduct does not inherently justify dismissal without notice unless it is "so grievous" that it intimates the employee's abandonment of the intention to remain part of the employment relationship.

The court observed that an application of a contextual approach leaves the trier of fact with discretion as to whether a dishonest act gives rise to just cause. The court gave some examples where misconduct, in the circumstances was held to constitute just cause, and some examples where misconduct was held not to be sufficiently serious to justify dismissal – e.g. "the misconduct in question merely reflected a single incident of 'poor judgment'⁴⁴.

⁴³(1998), 36 C.C.E.L. (2d) 94 (NSCA)

⁴⁴[2001] S.C.J. No. 40, para. 34, per Iacobucci J.

The Court stated that this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour.

Dishonesty Warrants Dismissal Without Notice

The Court referred to two English cases⁴⁵ in which the employees had committed fraudulent acts and these acts were held to provide justification for dismissal without notice. The English Court of Appeal indicated that any dishonest conduct which "ruptures the trust inherent to the employer-employee relationship provides just cause." Although one might find in this language a possibility for the contextual or proportional approach favoured by the Supreme Court of Canada a century later, at the time, "rupturing the trust" clearly referred to any act of dishonesty.

⁴⁵*Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch.D. 339 (UKCA), *Federal Supply and Cold Storage Co. of South Africa v. Angehrn & Piel* (1911), 80 L.J.P.C. 1 (P.C.)

The Supreme Court also referred to *McPhillips v. British Columbia Ferry Corp.*⁴⁶ which was relied upon by the BCCA in this case. The court in *McPhillips* held that “dishonesty is always cause for dismissal because it is a breach of the condition of faithful service.” The BCCA distinguished the cases which had used a contextual approach in determining whether misconduct amounts to just cause, concluding that where dishonesty is found, cause is established as a matter of law. However, the court observed that in each of the cases discussed, where cause was found to exist, courts were confronted with very serious forms of employee dishonesty

Standard for Assessing When Dishonesty Provides Just Cause

⁴⁶(1994), 94 B.C.L.R. (2d) 1 (C.A.); leave to S.C.C. refused, [1995] 1 S.C.R. ix.

SCC adopted a contextual, proportional approach. The test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. The test could also be expressed as follows: Just cause for dismissal exists where the dishonesty violates an essential condition of the employment relationship, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

In *obiter*, Iacobucci observes that: "This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee's pay for any loss incurred by a minor misuse of company property. This is one of several disciplinary measures an employer may take in these circumstances. Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed."⁴⁷

⁴⁷[2001] SCJ No. 40, para. 52-53, per Iacobucci J.

This is an important development in Canadian employment law. Until this case, it had been generally understood that only union employees were subject to sanctions short of dismissal in accordance with the terms of a collective agreement. How employers treat the power to impose sanctions short of dismissal will be interesting. Perhaps the next important employment law case in the Supreme Court of Canada will assess whether the disciplinary measure was too severe and thereby amounting to constructive dismissal. To what extent will employers have to give notice of their intention to impose discipline. For now, these are interesting questions to which we do not have clear answers.

Iacobucci J.'s approach is driven by the importance the Court places on a person's employment:⁴⁸

The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in Reference Re Public Service Employee Relations Act (Alta.), 1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

⁴⁸[2001] SCJ No. 40, para. 52-53, per Iacobucci J.

This passage was subsequently cited with approval by this Court in *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, and in *Wallace*, *supra*, at paras. 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important."

Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position vis-à-vis their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.

Boston v. Boston - Supreme Court of Canada - July 12th, 2001⁴⁹

In this statement on the double nature of pensions, the Supreme Court of Canada, in a 7-2 decision (L'Heureux-Dubé and LeBel JJ., dissenting), Major J., writing for the majority, clarifies the law.

⁴⁹[2001] S.C.J. No. 45 (SCC - McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

On marriage breakdown, a vested pension payable in the future had a double nature. On the one hand, it was a capital asset to be equalized as part of the equalization of net family property. On the other, it would become a source of income when the spouse (say, the husband, for ease of reference) retired. When the pension became a source of income, should all of the income be considered part of the husband's income for the purpose of spousal support?

From the husband's perspective, the wife received a benefit from the benefit when it was equalized at the time of separation. To base support on the entire amount receivable under the pension is to permit the wife a double recovery or "double dipping."

The problem in this area of family law was exacerbated by the fact that in long term marriages where the wife had minimal job skills and earning capacity, income was a problem at the time when the husband would retire and begin to draw on his pension. The wife's income would be reduced because the husband no longer had the level of income he enjoyed while he was employed. And in some cases, the wife will have already disposed of the benefit she received from equalization of the pension plan as a capital asset several years earlier.

The *Boston* case provided a good scenario to test this issue. It was a long term marriage — 36 years. The wife had few employment skills. In fact, she raised seven children and had never been employed outside the home. He had been employed as a director of education. At the time of settlement, his Ontario Teachers' pension plan had an after-tax valuation date value of \$333,329. The wife received an equalization credit for 50% of this value.

Four years after settlement, the husband retired from his work and now receives an indexed pension of about \$8,000 per month. He works as a consultant. His assets exceed his debts by \$7,000.00. The wife invested her assets wisely and had nearly \$500,000 in assets and is debt free. At the time, the husband was paying support of \$3,433 monthly.

The trial judge took into account all of the factors and reduced the support to \$950.00 monthly. The wife appealed to the Court of Appeal⁵⁰ which increased the support to \$2,000.00 monthly, indexed and the ordered the payment of the accumulated arrears.

⁵⁰(1999) 126 O.A.C. 296 (Catzman, Labrosse and Moldaver J.J.A.)

Decision of the Supreme Court of Canada

The Supreme Court considered the following issues:

1. Is a retired payor spouse entitled to seek to reduce the support obligation to a former spouse on the basis that the pension now being received was previously considered in the distribution of matrimonial property?
2. Does the spouse who received assets in exchange for a share of the capitalized value of the other spouse's pension have an obligation to invest those assets in order to produce an income? If those assets are not invested to produce an income, should the court impute to the spouse an income based on what those assets could produce if invested and thereby reduce the spousal support obligation?

The Court reinstated the reduced support payment of \$950.00 monthly, indexed. The court reviewed the inherent unfairness of double recovery and the obligation of the spouse who does not have much income to use the proceeds of the matrimonial settlement to generate an income. The court applied the rule enunciated by Czutrin J., the motions judge, namely: “The challenge for the court is to determine how to fairly avoid ‘double recovery’.” The court also recognized that Czutrin J.’s approach was favoured by Professor James McLeod, the well-respected professor and author of family law (and incidently, my law school classmate!).⁵¹

The approach adopted by the Supreme Court involves the comparison of “apples to apples”. Because a pension represents the realization of a capital asset into an income stream for the payor spouse, the payee spouse must compare the benefit received from the pension on the same basis. The income stream from payee’s capital received from the pension on net equalization must be assessed. If that capital is not earning an income, it is appropriate for the court to give it a reasonable notional value.

⁵¹[2001] S.C.J. No. 45, at para. 44

The use of this so-called “if and when” approach to pension income allocation will prevent unfair double dipping or double recovery. The trend is to the determination of post-equalization support on the unequalized portion of the pension plan. That is the effect of the Court’s decision.

Conclusion

The five significant cases we have selected have addressed diverse aspects of the law. They may play an important role in your practice or simply provide a useful update on the state of our law. In either case, we have attempted to capture the significance of each to the legal mosaic.

Toronto, September 2001.