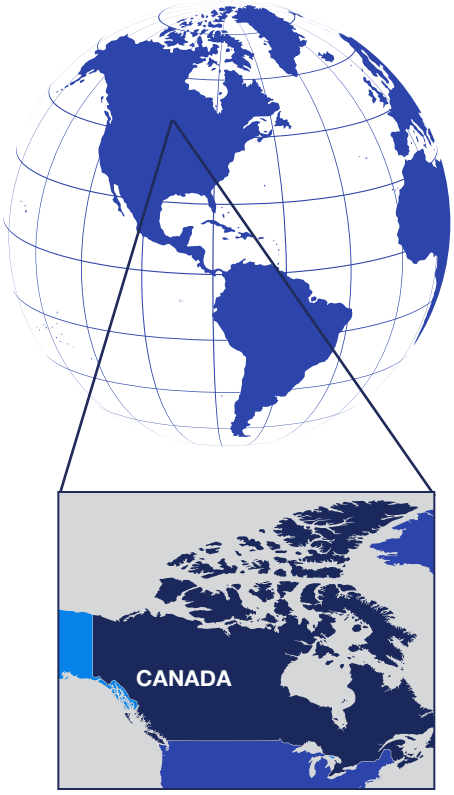

Canada

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I. INTRODUCTION

In March 2020, Canada entered the pandemic with the only national minority government under a Westminster parliamentary system. As the government is heading past the average length of a federal minority government, which is less than two years, it appears that the pandemic has afforded the country an unusual degree of political stability under these circumstances and is helping the government go on with its business largely unconcerned by the threat of a non-confidence vote. A different sort of 'business as usual' could also be observed at the Supreme Court. There, the heightened divisiveness between the justices in recent years[1] seems to have continued in the notable constitutional cases of 2020, three of which are discussed in this report. *9147-0732 Québec inc* examined the applicability to corporations of the guarantee against cruel and unusual punishment and unfolded into an unexpected lengthy debate on the judicial use of international and comparative legal sources. In *Re Genetic Non-Discrimination Act,* the Court grappled with the important issue of the scope of federal legislative authority over criminal law, but, unfortunately, it did not come to a majority decision. Probably the most constitutionally significant case of the year was *G,* in which the Court sought to restate the principles governing the use of remedies in the face of unconstitutional laws.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

National Minority Government During the Pandemic

Canadian governmental affairs during the pandemic have been characterized at all levels by a large-scale use of executive orders and unprecedented restrictions on individual liberties. Provincial governments have prohibited and, in some parts of the country, continue to prohibit interprovincial and intra-provincial travel. Since March 2020, the Canadian and US governments have agreed to close their shared land border to all non-essential travel. On January 9, 2021, the government of the province of Québec imposed the first general province-wide curfew in the country's history. Lawsuits challenging the constitutionality of government restrictions have met with limited success in the courts but are expected to continue.

During the summer of 2020, the federal government was hit by a political scandal for selecting a charity with ties to the Prime Minister and his family in order to administer a C$912-million federal student financial assistance programme. Allegations of conflicts of interest prompted the Ethics Commissioner to launch a third inquiry concerning the Prime Minister. Three parliamentary com-

[1] See H-R Zhou, "The 2019 I·CONnect-Clough Center Global Review of Constitutional Law", 'Canada', in R Albert et al (eds), (2020) 51, 52.

mittees also decided to conduct their own investigations. The Ethics Commissioner later extended his inquiry to the Finance Minister, who resigned in August. The next day, Prime Minister Trudeau sought and obtained from the Governor General the prorogation of Parliament, thereby suspending the work of all parliamentary committees. When Parliament reconvened in October, the House approved the Throne Speech, thus allowing the government to survive its first vote of confidence without much suspense.

By then, the Governor General herself was also in troubled waters after allegations of workplace harassment and abuse surfaced. Following an independent review finding her responsible of a toxic work environment, the Governor General submitted her resignation in January 2021. Pursuant to His Majesty's Letters Patent 1947, the Chief Justice of the Supreme Court of Canada was vested with the powers and authorities of the Governor General as the Administrator of the Government of Canada until the appointment of a new Governor General. Under normal circumstances, including such times under a minority government, the role of the Governor General as the Queen's representative in Canada remains purely formal and ceremonial. Almost all of the Governor General's effective powers and authorities are regulated by convention. They retain only a few and relatively vague reserve powers that can be exercised at their discretion in some circumstances when the government has lost the confidence of the House.

So far, the federal Liberal government has survived all confidence votes in the House, owing largely to the prevailing reluctance to force a national election campaign in the middle of the pandemic. However, the recent successes of all incumbent provincial governments at their general elections, including two minority governments that won a majority mandate, may change the status quo in Ottawa. The weakness of the opposition parties could also weigh in the balance. In particular, the current Opposition Leader has assumed office only in August 2020 after his predecessor was pushed to resign following his party's defeat at the 2019 general election. As the mass vaccination campaign gets underway, one can expect the Liberal Party to be on the lookout for the next opportunity to return to the campaign trail in the hope to regain a majority mandate.

III. CONSTITUTIONAL CASES

1. Québec (AG) v 9147-0732 Québec inc: Judicial use of international and foreign law and whether a corporation can suffer cruel and unusual punishment

While bills of rights are assumed to protect individual rights and freedoms, courts in Canada have on occasion extended the scope of some parts of the Canadian Charter of Rights and Freedoms 1982 to corporations, such as protection against unreasonable search or seizure (s 8)[2] and the right to be tried within a reasonable time (s 11*b*)).[3] In *9147-0732 Québec,* the Supreme Court was asked for the first time whether a corporation had a right not to be subjected to cruel and unusual punishment under s 12 of the Charter. In that case, the respondent corporation challenged the mandatory minimum fine of C$30,843 that it received for having carried out construction work without holding a valid license. The Court summarily held that, because s 12 referred to human pain and suffering and was anchored in the notion of human dignity, it did not apply to a corporation, notwithstanding the fact that human beings were behind its legal existence and that, in many cases, they would ultimately suffer the consequences of punishments imposed on the corporation.

While the finding of the inapplicability of s. 12 to corporations should have settled the case, the justices were drawn into an extensive tangential debate on constitutional interpretation, especially the appropriate role of international and foreign law. In her judgment, Abella J (Karakatsanis and Martin JJ concurring) cited a wide range of international rights instruments and foreign national laws in further support of the Court's unanimous conclusion that the prohibition against cruel and unusual punishment excludes corporations. Abella J's use of international and comparative law drew firm condemnation from the majority justices of the Court who viewed her 'indiscriminate' use of international and comparative sources as 'a marked and worrisome departure' from established Supreme Court practice, prompting them to set out a 'coherent and consistent methodology' for considering non-domestic sources.

For the majority justices, distinctions must be made between binding and non-binding international instruments, on the one hand, and pre-Charter and post-Charter instruments, on the other hand. Binding international instruments should carry more persuasive weight than non-binding instruments because they trigger the presumption of conformity with the Charter, according to which the latter provides a 'protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified' (para 31). By contrast, a court choosing to rely upon non-binding international instruments adopted after 1982 'should explain *why* it is doing so, and *how* they are being used (that is, what weight is being assigned to them)' (para 40). However, such explanation is less necessary for non-binding pre-Charter international instruments and certain foreign national instruments of historic importance as they 'can clearly form part of the historical context of a *Charter* right and illuminate the way it was framed' (para 41). The drafters of the Charter drew on them 'because they were the best models of rights protection, not because Canada had ratified them' (id). Finally, the majority justices opined that 'particular caution' should be exercised when referring to foreign national sources, 'as the measures in effect in other countries say little (if anything at all) about the scope of the rights enshrined in the Canadian *Charter'* (para 43).

[2] *Hunter v Southam Inc,* [1984] 2 SCR 145.
[3] *R v CIP Inc,* [1992] 1 SCR 843.

In the end, the most prudent (and perhaps wisest) way to dispose of the appeal came from Kasirer J who simply adhered to the Court's view that the guarantee against cruel and unusual punishment does not apply to corporations, without needing to engage in the debate on the judicial use of international and comparative legal sources. Nonetheless, one could still suggest that that debate had the merits of bringing the Court to reaffirm the persuasiveness of international and comparative law and its rejection of 'pure' or 'new' textualism pursuant to which constitutional interpretation 'is strictly restricted to the text of the Constitution' (para 12).

2. Reference re Genetic Non-Discrimination Act: What Is a Criminal Law?

Criminal law is arguably the widest head of legislative power assigned to Parliament under s 91(27) of the 1867 Constitution. Since at least the end of the Second World War, it has been defined in the case law as composed of three essential elements: a prohibition, a penalty and a valid criminal law purpose. Much of the debate would revolve around the meaning of the third substantive element of the definition. Read too narrowly, and Parliament cannot properly exercise its authority to determine which conducts present the degree of danger that amounts to a crime. Read too widely, and virtually any human activity within exclusive provincial jurisdiction could end up falling under federal purview. Over the decades, the Supreme Court was closely divided between two main camps. Under the last iteration of the broader approach, a criminal law must respond to a reasonable apprehension of a risk of harm. By contrast, proponents of a narrower approach argue that the harm must be 'real', that there must be a sufficient connection between the apprehended harm and the evil in question.

The constitutional challenge to the federal Genetic Non-Discrimination Act 2017 arose in unusual circumstances. It originated from as a private member's bill introduced in the Senate, which was eventually approved in the Commons in a free vote despite the opinion of the Minister of Justice and the Justice Department that the bill, if enacted, would be unconstitutional. The Act, a succinct 11 articles, prohibits anyone from requiring a genetic test or disclosing or using the results of a genetic test without consent as a condition of providing goods or services or otherwise entering into a contractual relationship. When the matter of the constitutionality of the Act reached the courts, the Attorney General of Canada took the rare step of siding with the provincial Attorney Generals who challenged Parliament's Act, prompting one justice to note somewhat wryly the 'unusual congruence of views'.

At the Supreme Court level, five justices ultimately agreed in separate sets of judgments that the Act was a valid exercise of the federal power under s 91(27). Karakatsanis J (Abella and Martin JJ concurring) adopted the broader approach to s 91(27). For her, the 'pith and substance' of the Act was to protect people's control over their personal information disclosed by genetic tests and to prevent genetic discrimination based on that information. More specifically, the conduct prohibited by the Act could lead to abuse of a person's genetic information and stigmatization of some people because of their genetic characteristics, and therefore threatened individual autonomy and personal privacy. The prohibited conduct also posed a risk to public health to the extent that some people will forego beneficial testing for fear of genetic discrimination. Since these matters were traditional interests of criminal law, Karakatsanis J concluded that the impugned Act was a valid exercise of Parliament's jurisdiction over criminal law.

Kasirer J's dissenting judgment represented the view of the plurality of the Court owing to the split majority reasons. For him, the pith and substance of the Act was to regulate contracts and the provision of services by prohibiting certain genetic tests with a view to promoting public health. Applying the narrow approach to s 91(27), Kasirer J found that the impugned Act did not seek to suppress or prevent genetic discrimination and its purported threat to public health, individual autonomy and personal privacy. On the contrary, the Act encouraged Canadians to undergo genetic testing as beneficial to public health. Therefore, Kasirer J concluded that the Act was ultra vires Parliament's criminal law power. In a separate judgment, Moldaver J (Côté J concurring) found that the impugned Act was a valid exercise of Parliament's criminal law power under either a broad or a narrow approach. Indeed, the Act is directed at suppressing a real threat to health, as many Canadians were choosing to forego genetic testing and thereby suffering preventable disease because of the fear that their genetic test results could be used against them.

The deep division among the justices makes it difficult to work out any valuable principle from their extensive discussion. The most one can venture to suggest is that a broad view of what constitutes a criminal law somehow continues to prevail, although a significant amount of uncertainty surrounds its critical substantive element. More generally, the debate on the limits of Parliament's power under s 91(27) is illustrative of the longstanding tensions between the more centralized and the more decentralized conceptions of the Canadian federation. While the Genetic Non-Discrimination Act may not have provided the best basis to revisit the issue, this reference case represents a missed opportunity for the Supreme Court to contribute some certainty to this important area of the division of powers.

3. Ontario (AG) v G: Rights to equality and suspension of declaration of invalidity

In 2000, the legislature of the province of Ontario enacted Christopher's Law ('Act'), named in memory of an 11-year-old boy who was abducted, raped and murdered in 1988 by a 45-year-old repeated psychopathic sex offender three months after his conditional release from jail. The Act created a sex offender registry based on the American model, a recommendation of the 1993 report of the coroner's inquest into Christopher's death.

Under the Act, persons who are convicted or found not criminally responsible on the account of mental disorder ('NCRMD') of a sex offence must report to a police station to have their personal information added to the province's sex offender registry and then updated therein regularly for at least

ten years. They are also subject to random police checks and their names remain on the registry even after their death. Offenders who are granted a discharge are exempted from having to register or are removed from the registry and relieved of the reporting obligations. However, those who are found NCRMD and receive a discharge can never be removed from the registry and relieved of the reporting obligations.

In 2002, the respondent was found NCRMD of two counts of sexual assault on his wife. The assaults occurred as a result of a manic episode caused by a bipolar disorder. A year later, the respondent received an absolute discharge of the offences. Since the day he was placed on the sex offender registry, the respondent complied with all of his reporting obligations. During that time, the respondent had not engaged in any criminal activity and had been in full remission after completing treatment for his condition. However, because he was found NCRMD, he was not eligible to have his name removed from the registry and be relieved of the reporting obligations. In 2017, the respondent decided to challenge the Act as a violation of his rights to equality on the basis of mental disability under s 15 of the Charter.

The Supreme Court unanimously upheld the appeal court's suspended declaration of invalidity of the Act insofar as it applied to those found NCRMD of sexual offences but had been absolutely discharged. The Court found that the impugned law created a distinction based on s 15's enumerated grounds of mental disability. That law stereotyped persons with mental illness as inherently dangerous and put them in a worse position than those found guilty. It also perpetuated the historical and enduring disadvantage of people suffering from mental illnesses. While the justices generally agreed that the Act violated the s 15 rights of individuals with mental disability, they were divided on the proper approach to constitutional remedies.

Section 52(1) of the 1982 Constitution states that: 'any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.' As such, the language of s 52(1) allows courts a fair amount of flexibility in crafting appropriate remedies. However, the applicable principles had become somewhat muddled over time with the mounting number of laws held unconstitutional. In G, the Supreme Court attempted to restore some structure to the application of constitutional remedies.

Karakatsanis J delivered the majority judgment. She interpreted the case law as requiring courts to exercise 'principled discretion' in determining the proper constitutional remedies. If the government wanted to obtain a delay from the immediate effects of a declaration of invalidity, it had to demonstrate the existence of an overriding compelling public interest to temporally keep an unconstitutional law on the books. In respect of the Act's violation of s 15, Karakatsanis J recognized that 'the need to safeguard *Charter* rights and ensure constitutional compliance of all legislation weigh heavily in favour of an immediately effective declaration' (para 171). However, allowing now the removal from the registry of those found NCRMD of sexual offences and absolutely discharged poses a risk to public safety as this group is at a statistically higher risk of committing crimes than the general population. Moreover, granting an immediate declaration of invalidity could hinder the legislature's ability to consider new policies regarding the registry and appropriate amendments to the Act in response to the present judgment. Karakatsanis J concluded that the evaluation of the weight of the remedial principles as applied to the Act justified a 12-month suspension of the declaration of invalidity.

Rowe J disagreed with the majority's balancing approach, which, in his view, lacked analytic structure and provided no meaningful guidance. He supported reaffirming an earlier precedent pursuant to which a suspension should be granted in certain instances of underinclusive laws or where an immediate declaration of invalidity would pose a potential danger to the public or would otherwise threaten the rule of law. In a partly dissenting judgment, Côté and Brown JJ would have restricted even further the use of suspensions only to protect the rule of law and public safety. An immediate declaration of invalidity of the Act would mean that persons found NCRMD would be removed from the registry irrespective of their risk of reoffending. Therefore, Brown and Côté JJ agreed with the majority justices that a suspension was warranted in this particular case to protect public safety and the rule of law.

Suspending a declaration of invalidity entails that the claimant who has successfully brought a constitutional challenge to the courts would be left after the judgment in the same position as if the challenge had not taken place, thus raising the question whether the claimant should receive an individual exemption from the suspension. In Karakatsanis J's view, the claimant who has 'braved the storm of constitutional litigation' and obtained a judgment that will benefit society at large, has done the public interest a service (para 142). Individual remedies can help incentivize claimants to bring cases that carry substantial societal benefits. Brown and Côté JJ rejected Karakatsanis J's reasoning, arguing that granting an exemption to the claimant only is unfair to others who are in the same situation, some of whom may well be unable to participate in court proceedings. Nevertheless, Karakatsanis J stated that, 'when the effect of a declaration is suspended, an individual remedy for the claimant will often be appropriate and just', and that 'there must be a compelling reason to deny the claimant an immediate effective remedy' (paras 147, 149). In the case of the respondent, Karakatsanis J upheld the Court of Appeal's decision to exempt him from the suspension, considering his spotless record and the absence of indication of risk to public safety. Brown and Côté JJ would have denied the exemption and Rowe J declined to weigh in on the issue since the suspension had expired by the time the case was decided.

G is a serious attempt to overhaul the criteria for suspending declarations of invalidity. In doing so, the majority of the Supreme Court signified its continued embrace of a Dworkinian approach to constitutional adjudication. However, one can appreciate Rowe J and the dissenting justices' scepticism on whether the majority's reasons will

provide sufficient guidance to courts asked to grant suspended declarations of invalidity. In respect of individual exemptions, both the majority and dissenting justices raised legitimate policy considerations. Here, the majority's 'compelling reason' standard signals a clear shift from the Court's long-standing official position[4] in that it recognizes 'ancillary' constitutional exemptions as part of the courts' toolbox of remedies for unconstitutional laws.

IV. LOOKING AHEAD

Without a doubt, the most anticipated decision of 2021 will be in the Supreme Court reference case on the constitutionality of the federal 'carbon tax', where the Court is expected to revisit its four decade-old precedent on the federal power to make laws for the peace, order and good government of Canada under s 91 of the 1867 Constitution.[5] Another pending case that initially garnered much public attention is the constitutional challenge of a law passed in the middle of the 2018 municipal election campaign by the newly elected Conservative government of Ontario that unilaterally reduced the number of Toronto City wards and councilors by half.[6] 2021 will also mark the mandatory retirement of Abella J, whom many consider as the most left-leaning judge currently sitting on the Supreme Court. As was the case for the two previous Supreme Court appointments made by the current Liberal government, an independent advisory committee chaired by a former prime minister was set up and is tasked to recommend suitable candidates to the Prime Minister.

V. FURTHER READING

R Alford, *Seven Absolute Rights: Recovering the Foundations of Canada's Rule of Law* (McGill-Queens' University Press 2020)

F Chevrette, H Marx and H-R Zhou, *Constitutional Law: Fundamental Principles – Notes and Cases* (Thémis 2021), transl. *Droit constitutionnel: principes fondamentaux – notes et jurisprudence* (2nd rev'd edn by H-R Zhou, Thémis 2021)

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N Karazivan and J Leclair (eds), *The Political and Constitutional Legacy of Pierre Elliott Trudeau* (LexisNexis 2020), transl. *L'héritage politique et constitutionnel de Pierre Elliott Trudeau* (LexisNexis 2020)

C Mathen and M Plaxton, *The Tenth Justice* (UBC Press 2020)

[4] See F Chevrette, H Marx and H-R Zhou, "Constitutional Law: Fundamental Principles – Notes and Cases" (Thémis 2021), 752-60.

[5] "Saskatchewan (AG) v Canada (AG) (SCC 38663)", "Ontario (AG) v Canada (AG) (SCC 38781)", "British Columbia (AG) v Alberta (AG) (SCC 39116)", appeal heard 22-23 September 2020.

[6] "City of Toronto v Ontario (AG)", hearing scheduled 16 March 2021 (SCC 38921).