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Introduction – 2019 Constitutional Cases at the Supreme Court: Up Close and in Person

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Introduction – 2019 Constitutional Cases at the Supreme Court: Up Close and in Person

Sonia Lawrence*

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I. INTRODUCTION

From the vantage point of Summer 2020, 2019 seems almost a mirage. The conditions created across Canada by government and individual responses to COVID-19 were all but unimaginable when 2019 drew to a close, and the legal issues that preoccupy those interested in constitutional and public law now revolve around rapidly evolving rules and policies designed to protect public goods like health and health care. Questions of profound significance to constitutional lawyers, such as the location of limits on state powers, the appropriate roles and relative competencies of courts and governments, the place of state law in creating the good life, and how to think about the nature of a public/private divide, are all in play on a daily basis in late Summer 2020. Yet, many of us do not have time to reflect on them, caught up as we are in the complexities of work life and family life during the COVID-19 pandemic.

* Associate Professor, Osgoode Hall Law School. With deep thanks to Faiza Tariq for superlative research assistance, and many thanks for the advice and camaraderie of my co-convenors of the 2020 version of Osgoode Hall Law School’s Annual Constitutional Cases Conference, Professors Benjamin Berger and Emily Kidd White. The conference was scheduled for April 6, 2020 and cancelled due to COVID-19. I am profoundly grateful to all the authors of pieces in this volume, who persevered with their contributions despite losing out on the delights of the conference itself.

Looking back always offers advantages that were unavailable in the moment. We can see patterns, perhaps, that were not visible as situations were unfolding. We have the benefit of more time to reflect and see things that we originally did not. We have the benefit of being able to bring together thoughts at the time and thoughts that crystallized only in time. The strangeness of this looking back is that — much more than any other broadly shared moment that I have experienced — it seems from this vantage point that we are looking back at a Before from an After.¹

The construction of Befores and Afters will also affect analysis, and may both produce insights and induce fallacy in the same ways that historiographers warn us about. Now in the After, urgent legal matters continue to arise across the country — perhaps even more than usual — but some of the Supreme Court’s work has ground to a halt. Cases scheduled for hearings in March, April and May 2020 were adjourned — tentatively — to June 2020.² As June drew closer with little hope of the pandemic easing, Chief Justice Wagner took the opportunity to modernize the justice system. As a result, the first-ever video hearing was held in June 2020.³ Last year, we foresaw none of this. For all the surprises and disappointments that a year of decisions must produce, everything proceeded in quite an orderly fashion. Decisions were made. Judgments were written and released. Hearings were held. It was the Before, and things were normal.

Still, when we were in 2019, we did not treat it as some generic “before” undifferentiated from any time other than March 2020 and after. We were conscious of being in the early years of the “Wagner Court”. We saw the release of the former Chief Justice McLachlin’s autobiography. Justice Clément Gascon retired and was replaced by Justice Nicholas Kasirer. The Court decamped en masse to Winnipeg to hold a hearing. Through all this, the justices ground through the usual, ordinary set of very important cases.

This brief effort to summarize the year “before” will obviously fall short. But it starts with a brief tour of some of the jurisprudence, much of it taken up in greater detail by the authors of other pieces in this volume. I focus instead on the agreement and disagreement among members of the Court. I then move to consider three particular aspects of 2019: a road trip, a new report and the circumstances of a retirement. My analysis of these events is an effort to understand the ways the Court wants to be more open to some version of the public, and an attempt to raise questions about the implications of the Supreme Court’s methods.

¹ Others will have different experiences, of course. Here I am reflecting on my own history, which involved immigration to Canada in the 1970s and life in Toronto since.

² Supreme Court of Canada, “Notice about COVID-19”, online: <<https://www.scc-csc.ca/court-cour/notice-avis-COVID-19-eng.aspx>> (retrieved: August 27, 2020).

³ Supreme Court of Canada, Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, “The Court’s first-ever hearing fully by video-conference” (June 9, 2020), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/rw-2020-06-09-eng.aspx>>.

II. THE DECISIONS AND THE DECISION-MAKERS

The Court issued 67 decisions in 2019.⁴ For the purposes of this paper, I have labelled 19 of these “constitutional” decisions and considered them in this brief numerical tour.⁵ Three were division of powers cases (one of which revolved around

⁴ Supreme Court of Canada, *2019 Year in Review*, online: <<https://www.scc-csc.ca/review-revue/2019/index-eng.aspx>>.

⁵ The complete list of cases: *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.); *R. v. Bird*, [2019] S.C.J. No. 7, 2019 SCC 7 (S.C.C.); *R. v. Morrison*, [2019] S.C.J. No. 15, 2019 SCC 15 (S.C.C.); *R. v. Myers*, [2019] S.C.J. No. 18, 2019 SCC 18 (S.C.C.); *R. v. Mills*, [2019] S.C.J. No. 22, 2019 SCC 22 (S.C.C.); *Canada (Public Safety and Emergency Preparedness) v. Chhina*, [2019] S.C.J. No. 29, 2019 SCC 29 (S.C.C.) [hereinafter “*Chhina*”]; *R. v. Le*, [2019] S.C.J. No. 34, 2019 SCC 34 (S.C.C.); *R. v. Stillman*, [2019] S.C.J. No. 40, 2019 SCC 40 (S.C.C.); *Fleming v. Ontario*, [2019] S.C.J. No. 45, 2019 SCC 45 (S.C.C.); *R. v. Poulin*, [2019] S.C.J. No. 47, 2019 SCC 47 (S.C.C.); *Orphan Well Assn. v. Grant Thornton Ltd.*, [2019] S.C.J. No. 5, 2019 SCC 5 (S.C.C.) [hereinafter “*Orphan Wells*”]; *R. v. James*, [2019] S.C.J. No. 52, 2019 SCC 52 (S.C.C.); *R. v. M. (K.J.)*, [2019] S.C.J. No. 55, 2019 SCC 55 (S.C.C.); *Desgagnés Transport Inc. v. Wärsilä Canada Inc.*, [2019] S.C.J. No. 58, 2019 SCC 58 (S.C.C.) [hereinafter “*Desgagnés*”]; *Canada (Attorney General) v. British Columbia Investment Management Corp.*, [2019] S.C.J. No. 63, 2019 SCC 63 (S.C.C.) [hereinafter “*British Columbia Investment Management Corp.*”]; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.); *Bell Canada v. Canada (Attorney General)*, [2019] S.C.J. No. 66, 2019 SCC 66 (S.C.C.); *Canada Post Corp. v. Canadian Union of Postal Workers*, [2019] S.C.J. No. 67, 2019 SCC 67 (S.C.C.) [hereinafter “*Canada Post*”]; *R. v. Omar*, [2019] S.C.J. No. 32, 2019 SCC 32 (S.C.C.). I did make line calls that some readers will no doubt dispute. For instance, my list includes *Chhina*, in which the main issue is *habeas corpus* without significant reference to the Constitution. It does not include *R. v. Barton*, [2019] S.C.J. No. 33, 2019 SCC 33 (S.C.C.), in which a variety of Charter rights are or may be at stake: the equality rights of the victim, the accused’s right to full answer and defence since these issues were not particularly engaged by the writers. It does not include *R. v. Goldfinch*, [2019] S.C.J. No. 38, 2019 SCC 38 (S.C.C.) or *R. v. V. (R.)*, [2019] S.C.J. No. 41, 2019 SCC 41 (S.C.C.), both of which also considered the proper approach to s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46 and its restriction of the use of the complainant’s prior sexual history by the defence. It does not include *Denis v. Côté*, [2019] S.C.J. No. 44, 2019 SCC 44 (S.C.C.), in which the Court deals with a subpoena served on a journalist, and in doing so mentions the way in which s. 2(b) “includes freedom of the press” (at para. 46). I have included the *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.) administrative law “trilogy” (which for the purposes of this accounting constitutes two cases, as *Bell Canada v. Canada (Attorney General)*, [2019] S.C.J. No. 66, 2019 SCC 66 (S.C.C.) contains both Bell and the NFL case), as well as *Canada Post Corp. v. Canadian Union of Postal Workers*, [2019] S.C.J. No. 67, 2019 SCC 67 (S.C.C.), despite the fact that these cases tend to fall generally into public law and are more questionable as constitutional law (the counter argument is that these cases are about the constitutional role of judicial review). I removed *R. v. Blanchard*, [2019] S.C.J. No. 9, 2019 SCC 9 (S.C.C.) because the Court indicates the case was not a constitutional case (the Crown conceded the availability of the

section 125 of the Constitution rather than sections 91 and 92) and three were administrative law cases. One dealt with section 3, the right to vote. The remainder falls into the category of constitutional criminal law, under section 7, sections 11(d), 11(e), 11(f), 11(i), and section 8 (and of course, some of these cases included multiple claims). There were no cases dealing with section 35 of the Constitution and none with the fundamental freedoms under section 2. Neither were there any dealing with equality (whether these absences are significant in terms of the Court's caseload requires a much broader consideration than undertaken here).

In this set of 19 cases, the appellants were successful 11 times. The Crown won seven of these cases and lost six, although for these numbers I have excluded from consideration *Orphan Wells*, *Desgagnés*, *British Columbia Investment Management Corp.*, *Vavilov*, *Bell and NFL* and *Canada Post* since it is difficult to determine the box into which each should go. The federal government received a significant infusion of tax revenue from the outcome in *British Columbia Investment Management Corp.*, but British Columbia had participated in that case, also arguing that the monies were payable to the federal government. Alberta looks successful in *Orphan Wells*, as does Quebec in *Desgagnés*, and in both cases, the federal government did not intervene. Maybe we could count these in a provincial win category but surely not the federal loss category. We might also count them as wins for “public” regulation of private enterprise or private property. Finally, the overturning of decisions of administrative tribunals in *Vavilov* and *Bell and NFL* might be counted as losses to the federal government, which had delegated power to those tribunals, but the question of what, exactly, the legislature intended in those delegations was after all at the heart of those cases, so I leave them out of this accounting. *Canada Post* I find the most difficult to categorize on these terms.⁶ Remedially, both *Frank*

defence of extreme intoxication akin to automatism, but Brown J. wrote for the panel of nine “we expressly refrain from deciding the availability of this defence in the absence of an adequate record on the constitutional issues, full submissions and notice to the proper parties”), but of course declining to consider the constitutional issues was an important decision. I included *R. v. Myers*, in which the Court sets out the proper approach to s. 525 of the *Criminal Code*, because the reasons lightly and infrequently refer to s. 11 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “the Charter”] (“Today, the right not to be denied reasonable bail without just cause, which is enshrined in s. 11(e) of the *Canadian Charter of Rights and Freedoms*, operates as a key organizing principle of Part XVI of the *Criminal Code*”: *R. v. Myers*, [2019] S.C.J. No. 18, 2019 SCC 18, at para. 25 (S.C.C.)). I included decisions from the bench if constitutional issues were clearly engaged (e.g., *R. v. Omar*; *R. v. James*). Delightfully endless debates of relatively little consequence are possible about these choices and categories. What is clear is that the unanimity rate, at least, will fluctuate considerably depending on the position the analyst takes.

⁶ In this post-*Vavilov* reasonableness review case, a Health and Safety officer had determined the employer did not comply with s. 125(1)(z.12) of the *Canada Labour Code*, R.S.C. 1985, c. L-2. An appeals officer rescinded the contravention: 2014 OHSTC 22. The Federal Court dismissed the union's application for judicial review: [2016] F.C.J. No. 272,

and *Morrison* saw section 52 invoked to render legislation “of no force and effect”.⁷

Compared to past years, court-watchers might be interested to see that the rate of unanimity has dropped even further when all the Court’s cases are considered, to 42 per cent from last year’s 48 per cent.⁸ In the 19 cases considered here, 12 included dissents, two had only partial dissents, three included concurrences but no dissents, and two were unanimous. Again, without more numbers, this might not be a helpful statistic. Is the rate of unanimity meaningful? If it is, is it meaningful that the rate for these “constitutional” cases is so much lower (on the Supreme Court’s own metric this would produce a unanimity rate of 26 per cent for this group of cases).⁹

Some things do seem to have changed. In 2018, Jamie Cameron’s review highlighted a team of dissenting justices: Côté, Brown and Rowe JJ.¹⁰ However, in 2019, this team was less prominent in the cases considered. They came together in *Bird*, *Morrison* and *Myers*, as well as *Fleming*, *Vavilov* and *Canada Post*. It may be that some more convergence would have happened had they sat on more cases together, but Rowe J. was on just 14 of the 19 panels, and Côté J. on 16.¹¹ Justice

2016 FC 252 (F.C.). The Federal Court of Appeal reinstated the original decision of the Health and Safety Officer: [2017] F.C.J. No. 708, 2017 FCA 153 (F.C.A.). The Supreme Court allowed the appeal and reinstated the decision of the appeals officer. The employer, ultimately, is successful in this case.

⁷ *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1, at para. 83 (S.C.C.) (“Accordingly, based on s. 52 of the *Constitution Act, 1982*, ss. 222(1) (b) and (c), 223(1)(f) and 226(f) of the Act are declared to be of no force or effect; the words ‘a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident’ are struck from s. 11(d) of the Act and are replaced with the words ‘an elector who resides outside Canada’; and the word ‘temporarily’ is struck from ss. 220, 222(1) and 223(1)(e) of the Act”); *R. v. Morrison*, [2019] S.C.J. No. 15, 2019 SCC 15, at para. 157 (S.C.C.) (“[s. 172.1(3)] of the *Code* ... infringes s. 11(d) of the *Charter*, and that infringement cannot be saved under s. 1. It is therefore without force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*”). Mr. Morrison was sent back for another trial.

⁸ Supreme Court of Canada, Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, “The Court’s first-ever hearing fully by video-conference” (June 9, 2020), at 35, online: <<https://www.scc-csc.ca/judges-juges/spe-dis/rw-2020-06-09-eng.aspx>>.

⁹ The Supreme Court’s own report counts as “unanimous” all cases in which “all judges agree on the outcome (the practical effect for the parties involved), not on their reasons for that outcome. A ‘unanimous’ judgment may therefore have more than one set of reasons”. Supreme Court of Canada, Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, “The Court’s first-ever hearing fully by video-conference” (June 9, 2020), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/rw-2020-06-09-eng.aspx>>. I replicated that operationalization here, without endorsing it.

¹⁰ Professor Jamie Cameron, “A Chief and Court in Transition: The Wagner Court and the Constitution” (2020) 94 S.C.L.R. (2d) 3.

¹¹ Justices Rowe and Côté diverged only on *Frank v. Canada (Attorney General)*, [2019]

Brown wrote reasons in eight of these cases (he was part of all 19 counted in this article) but seven of the eight were co-written (all but the majority reasons in *Mills*). With Côté J., yes, in *Frank*, but also with Martin J. in *Le*, Moldaver J. in *Stillman*, Wagner C.J.C. in *Desgagnés* (joint concurring reasons) and Abella J. (joint dissenting reasons) in *M. (K.J.)*. He was part of the majority reasons (listed as jointly written by all the judges involved) in *Vavilov* and *Bell and NFL*. When he was not writing, Brown J. signed on to the Karakatsanis J. authored majority in *British Columbia Investment Management Corp.*, the Rowe J. authored majority in *Canada Post*, dissented alongside Abella, Karakatsanis and Martin JJ. in *James*, with Karakatsanis and Martin JJ. in *Omar* (the latter two were dealt with in oral reasons), and with Karakatsanis and Abella JJ. in *Poulin*.

Writing more often alone, Karakatsanis J. wrote in the same number of cases (eight) as Brown J. Only two of these were jointly written.¹² She wrote the majority reasons in *Chhina* and *British Columbia Investment Management Corp.*, a set of concurring reasons in *Morrison*, another in *Mills*, joint concurring reasons with Abella J. in *Vavilov*, joint dissenting reasons with Abella J. in *Bell and NFL* and a dissent in *Poulin*. Justice Moldaver also wrote in eight cases. Four were jointly authored. He was the sole author of the majority reasons in *Bird* and *M. (K.J.)*, a one-paragraph concurrence in *Mills*, and the dissent in *Le* (where he was joined by the Chief Justice). Furthermore, on the set of 2019 cases considered here, there is nothing remarkable about Côté J.'s record of dissenting — as a percentage it is lower than the rates racked up by Abella, Brown, Karakatsanis and Martin JJ.

Of course, I now must make the point that absent a broad quantitative and searching quantitative analysis, this kind of counting, bounded so artificially in time and in substance, is but a playful pastime for dedicated court-watchers. Only a deeper analysis could help us identify whether a judge has started appearing in the

S.C.J. No. 1, 2019 SCC 1 (S.C.C.) and *R. v. Stillman*, [2019] S.C.J. No. 40, 2019 SCC 40 (S.C.C.) (in which Rowe J. dissented). Justices Brown and Rowe were at odds in *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.) (Brown J. dissenting), *R. v. Stillman*, [2019] S.C.J. No. 40, 2019 SCC 40 (S.C.C.) (Brown J. wrote the majority, Rowe J. dissented), *R. v. James*, [2019] S.C.J. No. 52, 2019 SCC 52 (S.C.C.) (oral reasons, Brown J. dissented), *R. v. M. (K.J.)*, [2019] S.C.J. No. 55, 2019 SCC 55 (S.C.C.) (Brown J. dissented), *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, [2019] S.C.J. No. 58, 2019 SCC 58 (S.C.C.) (Rowe and Côté JJ. wrote the majority reasons, Brown J. co-wrote a concurrence with the Chief Justice) and *R. v. Omar*, [2019] S.C.J. No. 32, 2019 SCC 32 (S.C.C.) (oral reasons, Brown J. dissented). Justices Côté and Brown diverged on *R. v. Poulin*, [2019] S.C.J. No. 47, 2019 SCC 47 (S.C.C.), *Orphan Well Assn. v. Grant Thornton Ltd.*, [2019] S.C.J. No. 5, 2019 SCC 5 (S.C.C.), *R. v. James*, [2019] S.C.J. No. 52, 2019 SCC 52 (S.C.C.) (oral reasons), *R. v. M. (K.J.)*, [2019] S.C.J. No. 55, 2019 SCC 55 (S.C.C.), *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, [2019] S.C.J. No. 58, 2019 SCC 58 (S.C.C.) and *R. v. Omar*, [2019] S.C.J. No. 32, 2019 SCC 32 (S.C.C.) (oral reasons).

¹² This is not a comment on how much work was done, only on the extent to which judges engage in joint writing projects.

majority more often because they have changed their own positions, because they have become more conciliatory and likely to compromise and come to consensus, because the cases are raising very different issues (which might indicate that leave practices are changing), or because other members of the Court are now more likely to share their views. At best we can ask whether something is or is not a trend if it seems to happen frequently — or we might be able to cast some light on similar questions asked in past years. On that latter point, it does seem worth pointing to clear indications that allies and opponents form and reform around different points of agreement and disagreement on this Court. Justices Abella and Karakatsanis co-write in the administrative law cases, but Abella J. dissents against the Karakatsanis J.—written majority reasons in *Chhina*. The “flashes of attitude” noted by Jamie Cameron in last year’s review in the Brown, Rowe and Côté JJ. dissents did not block Abella and Brown JJ. from writing together in *M. (K.J.)*.¹³ It is possible that the zones of agreement between judges usually divided are at least as interesting — if not more so — than their divergences.

III. DIVISION OF POWERS/FEDERALISM CASES

To continue the theme of misleading numbers, even though none of the three cases this year in which the Court considered the meaning of the Constitution in our federal system, the outcome did not oust provincial legislation. These cases do serve to illustrate some of the fault lines on the Court. The sharp dissent from Côté and Moldaver JJ. in *Orphan Wells* puts some emphasis on statutory interpretation as well as potentially unwanted extra-legal outcomes of the majority decision. There is a mild disagreement leading to a concurrence in *Desgagnés*, and a partial dissent from the Chief Justice, writing alone and taking a purposive approach over a technical one in *British Columbia Investment Management Corp.*

Orphan Wells (sometimes known as *Redwater*) is of interest to both those curious about bankruptcy law and those focused on environmental matters. The majority found no conflict (and hence no operation of federal paramountcy) between the federal *Bankruptcy and Insolvency Act*¹⁴ and the obligations placed on licensees under Alberta’s comprehensive licensing regime regarding reclamation of any abandoned wells. The dissent of Moldaver and Côté JJ. turns on the interpretation of section 14.06(4) of the BIA, which, according to them, “assumes . . . the common law power of trustees to disclaim assets”.¹⁵ Justices Moldaver and Côté repeatedly call on the majority to have attention to this interpretation (they do not), which the dissent supports with the words of a Director in the Department of Industry who had been involved in the drafting: “we must give effect to this choice

¹³ Professor Jamie Cameron, “A Chief and Court in Transition: The Wagner Court and the Constitution” (2020) 94 S.C.L.R. (2d) 3, at para. 14.

¹⁴ R.S.C. 1985, c. B-3 [hereinafter “BIA”].

¹⁵ *Orphan Well Assn. v. Grant Thornton Ltd.*, [2019] S.C.J. No. 5, 2019 SCC 5, at para. 195 (S.C.C.), per Moldaver and Côté JJ., dissenting.

and to the words that Parliament has used.”¹⁶ The dissent concludes on a sharp note which makes clear that they do not think there is any reasonable dissent from the position they have taken on interpretation:

[I]n matters of statutory interpretation this Court is one of law, not of policy. . . . “it is not the role of this Court to decide the best regulatory approach to the oil and gas industry”; decisions on these matters are made — indeed, they *have been made* — by legislators, not judges. And the law in this case supports only one outcome.¹⁷

These words recall Jamie Cameron’s discussion last year in these pages of the tone decisions have taken, about which she sounded a cautionary note. In that regard, the majority decision is far from incomprehensible in light of existing jurisprudence, particularly given the increasing reference to cooperative federalism in this kind of case at the Court.¹⁸

Much later in the year, the Court released a decision in *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, which similarly employs judicial restraint to prevent the erosion of provincial authority.¹⁹ When parts in a ship’s engine failed, the question became the law under which the contract dispute would be adjudicated, since the contract did not say — Quebec law or maritime law?²⁰ These two choices would distribute multi-million-dollar burdens in diametrically opposite ways. The relevant heads of power are the navigation and shipping power of the federal government, and the civil rights powers of the province, with maritime law also in play (not a head of power, but certainly a complicating and important factor). Framing the matter as “the sale of marine engine parts intended for use on a commercial vessel”,²¹ the majority saw a true double aspect to the matter. As Hanley and Pierce discuss in their contribution to this volume, the majority decision does seem to clear up lingering questions about maritime law and division of powers stemming from how *Ordon Estate v. Grail*²² was to be treated after *Canadian Western Bank v.*

¹⁶ *Orphan Well Assn. v. Grant Thornton Ltd.*, [2019] S.C.J. No. 5, 2019 SCC 5, at para. 199 (S.C.C.), *per* Moldaver and Côté JJ., dissenting.

¹⁷ *Orphan Well Assn. v. Grant Thornton Ltd.*, [2019] S.C.J. No. 5, 2019 SCC 5, at para. 290 (S.C.C.), *per* Moldaver and Côté JJ., dissenting [emphasis in original].

¹⁸ *Orphan Well Assn. v. Grant Thornton Ltd.*, [2019] S.C.J. No. 5, 2019 SCC 5, at paras. 185-186 (S.C.C.), *per* Moldaver and Côté JJ., dissenting.

¹⁹ Stephanie Ben-Ishai, “The Supreme Court on Federalism, Bankruptcy and Maritime Law” in this volume writes “It was also raised in *Desgagnés*, where restraint was cited as necessary to avoid the erosion of provincial authority”.

²⁰ Sean Hanley & Sean Pierce, “Of Dominant Tides: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.* and the Growing Acceptance of Provincial Jurisdiction in Maritime Matters”, in this volume.

²¹ *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, [2019] S.C.J. No. 58, 2019 SCC 58, at para. 23 (S.C.C.).

²² [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.).

Alberta,²³ which laid down rules limiting the use of federal interjurisdictional immunity.²⁴ Finally, as pointed out by Ben-Ishai's treatment in this volume, the majority used "the principles of cooperative federalism" in holding that provincial law (in this case, Quebec contract law) prevailed.²⁵

British Columbia Investment Management Corp. is the last of the cases in this section, and it is a bit of an odd one, since it concerns section 125 of the *Constitution Act*.²⁶ At issue was whether the British Columbia Investment Management Corporation (BCI) had to pay collect and remit GST on the costs of making investments. The investments were made by BCI in its role as provider of investment management services to the province's public sector pension plans along with other Crown entities (in fulfilling these duties, BCI became, in 2013, the fourth-largest pension fund manager in Canada). Under the federal *Excise Tax Act*,²⁷ BCI should have been collecting GST on investment management fees and remitting it to the federal government. But for a large number of funds, BCI was recovering management costs on the assets and not collecting or remitting taxes.²⁸ Also complicating the case were intergovernmental agreements entered into by British Columbia and the federal government, the Reciprocal Taxation Agreement and the 2009 Comprehensive Integrated Tax Coordination Agreement.

The first issue was whether section 125 of the *Constitution Act* applied to these funds.²⁹ With the GST clearly constituting taxation, the question here was simply whether "the subject matter of the tax must be property belonging to the . . . provincial Crown" for section 125 to apply in this case.³⁰ While the majority interpreted the *Excise Tax Act* in a technical manner, and found that it did not apply to the portfolios held by BCI, the Chief Justice, writing alone in dissent, took a far more purposive approach to section 125. He fixated on the jurisprudence which

²³ [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.).

²⁴ See Sean Hanley & Sean Pierce, "Of Dominant Tides: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.* and the Growing Acceptance of Provincial Jurisdiction in Maritime Matters" in this volume.

²⁵ See Stephanie Ben-Ishai, "The Supreme Court on Federalism, Bankruptcy and Maritime Law" in this volume.

²⁶ *Constitution Act, 1982*, s. 125, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

²⁷ R.S.C. 1985, c. E-15.

²⁸ *Canada (Attorney General) v. British Columbia Investment Management Corp.*, [2019] S.C.J. No. 63, 2019 SCC 63, at para. 16 (S.C.C.).

²⁹ *Canada (Attorney General) v. British Columbia Investment Management Corp.*, [2019] S.C.J. No. 63, 2019 SCC 63, at para. 55 (S.C.C.).

³⁰ *Canada (Attorney General) v. British Columbia Investment Management Corp.*, [2019] S.C.J. No. 63, 2019 SCC 63, at para. 68 (S.C.C.).

listed two main purposes for the section: protection of federalism and democracy promotion.³¹ Taking these purposes as paramount, he argued that a “substance over form” argument should prevent the mechanism by which BCI was collecting fees from governing whether or not the fees were subject to federal tax. Ultimately, the Chief Justice agreed with the others that the intergovernmental agreements bound BCI to pay the tax regardless — but the gap between the two approaches to applying section 125 seems quite significant.

In these division of powers cases, the Court continues to promote forms of flexible federalism and to value cooperative arrangements between the provinces and the federal government. There is no about-turn in the jurisprudence; rather, there is some clarification.³² One fact seems to warrant attention: the federal government did not participate as an intervener in either *Orphan Wells* or *Desgagnés*. There have been many arguments about the significance of a province or the federal government intervening or not intervening to “protect” or “claim” jurisdiction. In *Orphan Wells*, the federal government declined to participate in a way that would have supported Grant Thornton in avoiding the strictures of Alberta environmental protections. In *Desgagnés*, the federal government declined to participate in a way that would have allowed Wärtisilä the benefit of maritime law (not, after all, legislation passed by the Canadian parliament but rather a complex body of custom and common law) rather than Quebec law. As the Court continues to champion flexible and cooperative federalism in its language and in outcomes, we might keep an eye on what happens in division of powers cases in which one government does not participate, versus those in which both are engaged, as well as the implications in any struggle for resources between the public and the private sphere.

IV. CHARTER RIGHTS (NON-CRIMINAL CASES)

One of this year’s hotly anticipated cases was the first constitutional case released: *Frank*, in which Canadian citizens who had been non-resident for five years challenged the *Canada Elections Act*³³ prohibition on voting in federal elections for those in similar positions. As discussed by both Dawood and Weinrib (who focuses on the dissent) in this volume, the majority fairly easily found a violation of the democratic right under section 3³⁴ and most of the action took place

³¹ *Canada (Attorney General) v. British Columbia Investment Management Corp.*, [2019] S.C.J. No. 63, 2019 SCC 63, at paras. 144 and 145 (S.C.C.), Wagner C.J.C. in partial dissent (“representatives at one level of government to determine how to spend taxes . . . levied [by the other]”).

³² See Sean Hanley & Sean Pierce, “Of Dominant Tides: *Desgagnés Transport Inc. v. Wärtisilä Canada Inc.* and the Growing Acceptance of Provincial Jurisdiction in Maritime Matters”, in this volume (pinpoint to sentence beginning “While this might seem uncontroversial”).

³³ S.C. 2000, c. 9.

³⁴ The federal government conceded this violation, which raises other concerns about the

under section 1.³⁵ The Chief Justice wrote the 5-2 majority decision, holding that the legislation failed the section 1 test at minimal impairment,³⁶ while commenting negatively but not deciding on the argument at rational connection.³⁷ Justice Rowe concurred, expressing concern about the possible relevance of residence to section 3, which he thought was given short shrift in the majority. The big surprise in *Frank* was how Côté and Brown JJ. in dissent pushed for a (radically) new approach to section 1 that would be considerably more deferential to Parliament.

As Weinrib notes, the interpretation of Côté and Brown JJ. is ignored in the majority decision, described as “largely semantic” and a “departure from decades of *Charter* jurisprudence, [which] neither raised nor argued at any stage of these proceedings and ... need not be considered in order to dispose of this appeal”.³⁸ However, the sheer novelty of the approach to the text and meaning of section 1 does suggest a close watch of Côté and Brown JJ. in future outings of section 1 *outside* the criminal law context (recall that there were no other such cases this year). Given their radical departure from past (and current majority) positions, the far more expansive role granted to Parliament in terms of defining rights they offer, and the deferential stance set up by these commitments, we can assume that these views will continue to animate both justices in their deliberations and reasoning.

V. CRIMINAL/CONSTITUTIONAL CASES

In *Le* and *Fleming*, the Court acted to rein in police actions. The very close decision in *Le*, covered in this volume by Khoday, has majority reasons by Brown and Martin JJ. The decision is notable for the way that, as Khoday puts it, Brown and Martin JJ. have “explicitly written race into the story of psychological detentions” in contrast to past cases, especially *R. v. Grant* in 2009.³⁹ *Fleming* is a bit out of place here, since it is not truly a criminal case. It arose out of Fleming’s

s. 1 analysis familiar from s. 2(b) cases: *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1, at para. 4 (S.C.C.).

³⁵ See Yasmin Dawood, “The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter” and Jacob Weinrib, “The *Frank* Dissent’s Novel Theory of the Charter: The Rhetoric and the Reality”, in this volume.

³⁶ *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1, at para. 65 (S.C.C.).

³⁷ *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1, at para. 60 (S.C.C.).

³⁸ *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1, at para. 41 (S.C.C.).

³⁹ See Amar Khoday, “Ending the Erasure?: Writing Race into the Story of Psychological Detentions – Examining *R. v. Le*” in this volume at; *R. v. Grant*, [2009] S.C.J. No. 32, 2009 SCC 32 (S.C.C.) (as Khoday writes, “Save for Binnie J.’s consideration of race in his concurrence, the *Grant* majority’s treatment of race is conspicuous by its absence”). See also Danardo S. Jones, “Lifting the Judicial Embargo on Race-Based Charter Litigation: A Comment on *R. v. Le*” (2019) 67(1&2) *Crim. L.Q.* 42.

tort suit against the Ontario Provincial Police claiming “general damages for assault and battery, wrongful arrest, and false imprisonment, as well as aggravated or punitive damages and damages for violation of his rights under ss. 2(b), 7, 9 and 15 of the *Canadian Charter of Rights and Freedoms*”.⁴⁰ Justice Côté wrote the reasons (a dissenter no longer, perhaps), joined by the other six members of the panel, declining to follow the Ontario Court of Appeal’s decision to recognize a “new common law police power to preventatively arrest a law-abiding individual in order to protect them from harm by third parties”, as discussed by Skolnik and MacDonnell in this volume.⁴¹ Both *Le* and *Fleming* seem likely to have practical significance in the contemporary context, given ongoing and increasing concerns about over-policing of racial minorities and given some hints that we may be experiencing an increase in public protest.

Against the notion that *Le* and *Fleming* are a trend, however, the Court in *Omar* issued a very short oral decision (Brown, Karakatsanis and Martin JJ. dissenting) allowing the appeal “substantially for the reasons of Brown J.A. at the Court of Appeal”⁴² and suggesting the possibility of remedies other than exclusion under section 24. The dissenters based their position on the reasons of Sharpe J.A. in the court below and suggested in their turn: “It may be that consideration should be given to whether the police should caution persons that they stop and question that such persons need not remain or answer questions, but the dissenters would leave this for another day.”⁴³ One potentially important fact: *Omar* is another young Black man stopped, questioned and searched on little to no evidence.⁴⁴ The Brown, Karakatsanis and Martin trio had written the majority in *Le* against dissenters Wagner C.J.C. and Moldaver J., but lost the lead when Côté and Rowe JJ. were added to the group for *Omar*. Both voted to allow the appeal.

Mills is another case with obvious contemporary resonance. In *Mills*, only Martin J. took the position that section 8 was engaged by a police sting investigation which led to Mills being charged with child luring. Despite the efforts of the Canadian Civil Liberties Association, the Criminal Lawyers’ Association, and the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Mr. Mills’s internet messages to a child (actually, a police officer posing as a child online) were not

⁴⁰ *Fleming v. Ontario*, [2019] S.C.J. No. 45, 2019 SCC 45, at para. 22 (S.C.C.).

⁴¹ See Terry Skolnik & Vanessa MacDonnell, “Policing Arbitrariness: *Fleming v. Ontario* and the Ancillary Powers Doctrine” in this volume.

⁴² *R. v. Omar*, [2019] S.C.J. No. 32, 2019 SCC 32, at para. 1 (S.C.C.).

⁴³ *R. v. Omar*, [2019] S.C.J. No. 32, 2019 SCC 32, at para. 2 (S.C.C.).

⁴⁴ The panel which heard *R. v. Le* at the Ontario Court of Appeal was comprised of Doherty, Brown and Lauwers JJ.A. (see [2018] O.J. No. 359, 2018 ONCA 56 (Ont. C.A.)). The panel that heard *R. v. Omar* consisted of Sharpe, Paciocco and Brown JJ.A. (see [2018] O.J. No. 6346, 2018 ONCA 975 (Ont. C.A.)). Justice Brown was in the majority on *Le*, but dissented on *Omar*. In both cases, the majority decision of the Ontario Court of Appeal was overturned.

treated as private. Justice Brown, joined by Abella and Gascon JJ., wrote the majority decision, holding that the objective reasonableness of subjective expectations of privacy required a normative inquiry focused on “when Canadians *ought* to expect privacy, given the applicable considerations”.⁴⁵ For this group, the significance of the context rests on the fact that a child is involved, and that the communication medium is the Internet:

This Court has recognized that children are especially vulnerable to sexual crimes; that the Internet allows for greater opportunities to sexually exploit children; and that enhancing protection to children from becoming victims of sexual offences is vital in a free and democratic society. . . . [O]n the normative standard of expectations of privacy described by this Court, adults cannot reasonably expect privacy online with children they do not know. That the communication occurs online does not add a layer of privacy, but rather a layer of unpredictability.⁴⁶

Justice Karakatsanis, joined by the Chief Justice, wrote concurring reasons focused on the fact that the police were communicating in writing with Mills. This led to the conclusion that there was no search or seizure: “Email and Facebook messenger users are not only aware that a permanent written record of their communication exists, they actually create the record themselves.”⁴⁷ This concurrence dismissed the concern of the Criminal Lawyers’ Association that “not applying s. 8 in the present case opens the door to the police posing as internet therapy providers or even creating their own dating service in an effort to monitor the addictions or sexual preferences of Canadians”, saying instead that the correct approach to any future situations where “police impersonation tactics offend society’s notions of decency and fair play” will involve courts using tools *other* than section 8 to push back.⁴⁸ Justice Moldaver, unable to pick a favourite between the majority and the concurrence, simply said: “[E]ach set of reasons is sound in law and each forms a proper basis for . . . dismissing Mr. Mills’ appeal.”⁴⁹

Only Martin J. walked the difficult path of recognizing the significance of online sexual exploitation *and* calling for checks on state surveillance (a task which rendered her reasons more than twice as long as those of Brown J.).⁵⁰ The configuration of this appeal is thus something like 3:2:1:1, a decision that is difficult

⁴⁵ *R. v. Mills*, [2019] S.C.J. No. 22, 2019 SCC 22, at para. 20 (S.C.C.) [emphasis in original].

⁴⁶ *R. v. Mills*, [2019] S.C.J. No. 22, 2019 SCC 22, at para. 23 (S.C.C.) [citations omitted].

⁴⁷ *R. v. Mills*, [2019] S.C.J. No. 22, 2019 SCC 22, at para. 48 (S.C.C.), Karakatsanis J., concurring.

⁴⁸ *R. v. Mills*, [2019] S.C.J. No. 22, 2019 SCC 22, at paras. 61, 63 (S.C.C.), Karakatsanis J., concurring.

⁴⁹ *R. v. Mills*, [2019] S.C.J. No. 22, 2019 SCC 22, at para. 66 (S.C.C.), Moldaver J., concurring.

⁵⁰ *R. v. Mills*, [2019] S.C.J. No. 22, 2019 SCC 22, at para. 72 (S.C.C.), Martin J., concurring in the result.

to rely on in a critically important area of legal, social and technological change. Justice Martin framed the question as follows:

... At the end of the Cold War era, the way to obtain a real-time *record* of a conversation was to *record* it. Today, the way to obtain a real-time record of a conversation is simply to engage in that conversation. . . . Should this shift in communication technology now allow the state to access people's private online conversations at its sole discretion and thereby threaten our most cherished privacy principles?⁵¹

Justice Martin specifically rejects the decision of the majority that the nature of the relationship in question here (an adult, and a child who is a perfect stranger to the adult) diminishes the privacy expectations. Later, having found that screen capture also violated section 8, she pushed the reasonableness question back to the legislature: “The question as to what standard of reasonableness would be required for prior judicial authorization of varied forms of proactive police investigations is one best left to Parliament.”⁵² Even Martin J. thought the evidence did not need to be excluded under section 24(2).

The child-luring provisions of the *Criminal Code* under which Mr. Mills had been charged were the subject of the decision in *Morrison*. Mr. Morrison claimed certain provisions of section 172.1 violated the Charter, specifically that section 172.1(3) violated section 11(d) and that section 172.1(4) violated section 7:

172.1 (3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

Morrison also argued that the mandatory minimum contained in section 172.1(2)(a) of the *Criminal Code* violated section 12. The majority agreed that section 172.1(3) violated section 11(d) and could not be saved under section 1, striking it down under section 52. On this point, both Abella and Martin JJ. agreed. However, the majority also held that the reasonable steps requirement under section 172.1(4) did not violate section 7, but merely limited the accused's access to an affirmative defence, leading to Abella J.'s partial dissent. Finally, the majority sent the challenge to the mandatory minimum back to the trial judge, “should Mr. Morrison be convicted again”,⁵³ a solution rejected by Karakatsanis J., who would have found the

⁵¹ *R. v. Mills*, [2019] S.C.J. No. 22, 2019 SCC 22, at para. 89 (S.C.C.), Martin J., concurring in the result [emphasis in original].

⁵² *R. v. Mills*, [2019] S.C.J. No. 22, 2019 SCC 22, at para. 146 (S.C.C.).

⁵³ *R. v. Morrison*, [2019] S.C.J. No. 15, 2019 SCC 15, at para. 145 (S.C.C.).

sentencing provision violated section 12 and could not be saved by section 1.

In the last criminal/constitutional case considered here, *M. (K.J.)*, the Court considered how the presumptive ceilings set out in 2016's *R. v. Jordan*⁵⁴ should apply in the context of charges under the *Youth Criminal Justice Act*.⁵⁵ Everyone claims to agree that there is an "enhanced need for timeliness in youth matters".⁵⁶ After that, though, three distinct positions emerge.

Justice Moldaver, who co-wrote the majority reasons in *Jordan*, again wrote the majority (joined by Wagner C.J.C., Gascon, Côté and Rowe JJ.), holding that, without any particular systemic problem of delay in youth proceedings, there was no need to create a new set of rules. Instead, the fact that the defendant was a youth would be a case-specific factor which might mean that stays would be less rare in such cases. But in this case, where the total time was 18 months and 26 days before sentencing on charges including aggravated assault and possession of a weapon for a dangerous purpose were laid in 2015 when K.J.M. was 15, the Court attributed two months or so to defence delay, and no stay was needed. Both of Moldaver J.'s co-writers from *Jordan*, Brown and Karakatsanis JJ., dissented, raising the question of whether *Jordan* was assigned to these co-writers in an effort to build consensus among similar but not identical views, especially given Karakatsanis J.'s concerns about how Moldaver J.'s reasons heighten *Jordan*'s defence initiative requirements.

Justices Abella and Brown, writing together (Martin J. concurring), would have set a 15-month presumptive ceiling for youth, focusing on a number of concerns including the lack of attention to youth proceedings in *Jordan*, clear indications that Parliament intended to separate the youth and adult systems and that in fact using the *Jordan* rules might afford youth less protection than they otherwise had against delay. Justice Karakatsanis did not agree with Abella and Brown JJ. that a specific test for youth should be developed. Instead, she held that *Jordan* should be "adapted" to meet the YCJA, the text of which calls particular attention to the need for timeliness in the context of youth proceedings.⁵⁷ Where her departure from the majority becomes acute, as described above, is in the application of *Jordan* to K.J.M.'s case.⁵⁸ Her dissent argues that stays below the ceiling in the youth context "will not be 'rare' or limited to 'clear cases'" and, unlike the majority (which made the same claim), her decision follows through.⁵⁹

⁵⁴ [2016] S.C.J. No. 27, 2016 SCC 27, [2016] 1 S.C.R. 631 (S.C.C.).

⁵⁵ S.C. 2002, c. 1 [hereinafter "YCJA"].

⁵⁶ *R. v. M. (K.J.)*, [2019] S.C.J. No. 55, 2019 SCC 55, at para. 4 (S.C.C.).

⁵⁷ *R. v. M. (K.J.)*, [2019] S.C.J. No. 55, 2019 SCC 55, at para. 208 (S.C.C.), *per* Karakatsanis J., dissenting.

⁵⁸ *R. v. M. (K.J.)*, [2019] S.C.J. No. 55, 2019 SCC 55, at para. 220 (S.C.C.), *per* Karakatsanis J., dissenting.

⁵⁹ *R. v. M. (K.J.)*, [2019] S.C.J. No. 55, 2019 SCC 55, at para. 78 (S.C.C.) ("While stays below the ceiling may be 'rare' when considered against the entire body of applications for

VI. ADMINISTRATIVE LAW

After opening with *Frank*, the year closed with perhaps the most anticipated set of cases in some time, the *Vavilov* trilogy. As discussed in this volume by Macklin, Daly and Sossin, the cases focused on the standard of review and the Court had signalled that the decisions would attempt to clarify and simplify the framework set out in *Dunsmuir v. New Brunswick*,⁶⁰ which had long been considered overly complex and difficult to apply.⁶¹

In *Vavilov*, Abella and Karakatsanis JJ. wrote joint concurring reasons, although the “concurring” masks a quite fundamental disagreement. Justices Abella and Karakatsanis, in a concurrence of 145 paragraphs, decry the majority’s lack of fidelity to the culture of deference developed in Canadian administrative law over the past 40 years:

[T]he majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court’s jurisprudence for the last four decades. The majority’s reasons are an encomium for correctness and a eulogy for deference.⁶²

Then, from paragraphs 254 to 278, this concurrence pulls out all the stops in laying out the harms of the majority position. All apex courts understand how “[r]espect for precedent . . . safeguards this Court’s institutional legitimacy”⁶³ so “the unprecedented wholesale rejection of an entire body of jurisprudence . . . is particularly unsettling”.⁶⁴ The majority decision brings “chaos” because it can only “undermine legal certainty”.⁶⁵ One might well ask where they concur! The answer is limited to “eliminating the category of ‘true questions of jurisdiction’ and foreclosing the use of the contextual factors identified in *Dunsmuir*” and, of course, how this should apply to Mr. Vavilov.⁶⁶

a stay under the ceiling, they may be less ‘rare’ when considered against the smaller body of *youth* applications for a stay under the ceiling” [emphasis in original]).

⁶⁰ [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.).

⁶¹ Audrey Macklin, “Seven Out of Nine Legal Experts Agree: Expertise No Longer Matters (in the Same Way) after *Vavilov*!” in this volume; Paul Daly, “*Vavilov* and the Culture of Justification in Contemporary Administrative Law” in this volume; Lorne Sossin, “The Impact of *Vavilov*: Reasonableness and Vulnerability” in this volume.

⁶² *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 201 (S.C.C.), Abella and Karakatsanis JJ., concurring.

⁶³ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 261 (S.C.C.), per Abella and Karakatsanis JJ., concurring.

⁶⁴ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 267 (S.C.C.).

⁶⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 270 (S.C.C.).

⁶⁶ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65,

In *Bell and NFL*,⁶⁷ the companion decisions in which correctness review is applied, the concurrence turns into a joint dissent. This shift on the part of Abella and Karakatsanis JJ. supports the conclusion reached by some scholars: while *Vavilov* does provide some much-needed clarity, *Bell and NFL* illustrates the significance of the “judicial attitude” of the Court doing the application.⁶⁸ While Abella and Karakatsanis JJ. point to a multitude of factors that ought to support an attitude of deference toward the CRTC, the majority finds the CRTC decision unreasonable, and accordingly substitutes their own interpretation. But there might be more in the switch. While some identify the approach of the majority in *Vavilov* as a conservative approach,⁶⁹ Macklin’s contribution to this volume illustrates the complications of dichotomizing views about judicial review in the context of the breadth of the administrative state. Macklin addresses the bifurcation of the administrative law, into some fields where there are “competent, expert and dispassionate administrative actors” and others where there are “inexpert or simply under-resourced decision-makers”.⁷⁰ This bifurcation largely maps onto a division between field of administrative law “regulating marginalized populations” and those that do not:

2019 SCC 65, at para. 282 (S.C.C.), Abella and Karakatsanis JJ., concurring.

⁶⁷ *Bell Canada v. Canada (Attorney General)*, [2019] S.C.J. No. 66, 2019 SCC 66 (S.C.C.).

⁶⁸ See Mary Liston, “Bell is the Tell I’m Thinking of” (Guest Post) (April 29, 2020), *Paul Daly, Administrative Law Matters* (blog), online: <<https://www.administrativelawmatters.com/blog/2020/04/29/bell-is-the-tell-im-thinking-of-mary-liston/>>, quoting either *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 48 (S.C.C.) (“Deference is both an attitude of the court and a requirement of the law of judicial review”) or Abella and Karakatsanis JJ., concurring in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at paras. 288 and 294 (S.C.C.) (“Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not ‘disguised correctness review’, as some have used the phrase. Deference, after all, stems from respect, not inattention to detail”).

⁶⁹ See Mary Liston, “Bell is the Tell I’m Thinking of” (Guest Post) (April 29, 2020), *Paul Daly, Administrative Law Matters* (blog), online: <<https://www.administrativelawmatters.com/blog/2020/04/29/bell-is-the-tell-im-thinking-of-mary-liston/>>: “But it [*sic*] hard not to look at the political currents from the south and see that they have been imported into *Bell*: the libertarian attack on the administrative state, demands to roll back *Chevron* deference, and renewed calls for a revived and enhanced non-delegation doctrine to ensure non-arbitrary grants of power to administrative decisionmakers. . . . [I]t may be that the economic power of the private sphere and its profit motives ultimately won the day with the invalidation of the CRTC’s decision” [footnotes omitted].

⁷⁰ Audrey Macklin, “Seven Out of Nine Legal Experts Agree: Expertise No Longer Matters (in the Same Way) after *Vavilov*!” in this volume.

As a result lawyers who work for marginalized people might find themselves in common cause with a completely different group of legal actors calling for more robust judicial review -those with “a principled objection to a pluralist vision of the rule of law, or an ideological antipathy toward the redistributive dimensions of the modern administrative state.”⁷¹

Obviously, we might say the same about judges. Justices Abella and Karakatsanis do seem strange bedfellows for the *Vavilov* majority. But *Vavilov*’s case involved clear indications that the adjudicator did not understand the significance of some aspects of the case and the full context of the statute in question. Immigration law is an administrative decision-making context relatively notorious for being hostile to those that come before it. *Bell and NFL*, in contrast, involved a highly sophisticated decision-maker which had devoted considerable time to the particular questions in the case, including holding public consultations. Yet the *Vavilov* framework, as applied by the majority, overturned *both* decisions.

VII. BEYOND THE JUDGMENTS, BEHIND THE CURTAIN?

Having dispensed with the cases, and referred to the other judgments in this volume which take them up in more detail, I now move beyond the judgments released. In 2019, a series of developments highlighted the efforts of the Wagner Court to shape and solidify its reputation and legitimacy in the eyes of the Canadian public. Last year, Jamie Cameron wrote about the new Chief Justice’s commitment to transparency, and there have certainly been more than a few mentions of that word.⁷² There was a road trip, the creation of an annual “Year in Review” report from the Court, and finally the complex events of May 2019 just prior to the retirement of Gascon J. Taken together, these illustrate an institution relying on

⁷¹ Audrey Macklin, “Seven Out of Nine Legal Experts Agree: Expertise No Longer Matters (in the Same Way) after *Vavilov*!” in this volume, under the heading “strange bedfellows”.

⁷² Sean Fine, “‘We have nothing to hide’: Chief Justice urges use of hearings for appeal court nominees, citing transparency” *The Globe and Mail* (August 9, 2019), online: <<https://www.theglobeandmail.com/canada/article-we-have-nothing-to-hide-chief-justice-wagner-advocates-for-more/>>; Sean Fine, “Chief Justice Richard Wagner promises new era of transparency for Supreme Court” *The Globe and Mail* (February 1, 2018), online: <<https://www.theglobeandmail.com/news/national/new-chief-justice-richard-wagner-spelling-out-court-decisions-for-the-masses/article37827572/>>; Supreme Court of Canada, Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, “Official Welcome Ceremony for the New Chief Justice” (February 5, 2018), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-02-05-eng.aspx>>; Cristin Schmitz, “Chief Justice Wagner improves public communication, brings new ideas, change to top court, CJC and NJI” *The Lawyer’s Daily* (February 7, 2019), online: <<https://www.thelawyersdaily.ca/articles/10165/chief-justice-wagner-improves-public-communication-brings-new-ideas-change-to-top-court-cjc-and-nji>>; Leslie MacKinnon, “Chief justice wants to make courts more open and transparent” *iPolitics* (June 22, 2018), online: <<https://ipolitics.ca/2018/06/22/chief-justice-wants-to-make-courts-more-open-and-transparent/>>.

sometimes sophisticated and sometimes almost clumsy methods to connect with some form of “public” and to influence the way the Court is perceived. The public is invited to have access, but the Court then has to decide where the lines to that access must be drawn, and the new ventures move far beyond the rather staid Twitter account opened in 2015 and the curious example of Amicus, the Supreme Court of Canada’s owl mascot.⁷³ Sounding in different registers, the trip, the report and the news releases related to Gascon J. illustrate a Court trying to shape its image through more than just judgments, to maintain legitimacy in an age where calculated forms of access “behind closed doors” is a commonplace of celebrity.⁷⁴

VIII. A ROAD TRIP FOR THE COURT

Everything about the hearings held in Winnipeg suggests that this was a trial balloon for a program that would continue. Every year, a different city!⁷⁵ What will happen to that plan now that COVID-19 has arrived is unclear. But in his introductory speech, the Chief Justice described why he thought it was important to hold these hearings outside of Ottawa:

At the Supreme Court, our essential task is to make independent and impartial decisions about issues that matter to Canadians ... we clarify the law for everyone. That is why it is important that people understand how and why a given decision was reached. It is hard to have faith in something if you don’t understand it. This is why I believe it is so important for people to see how the justice system works, in person, as those in the public gallery will today.⁷⁶

⁷³ Supreme Court of Canada @SCC_eng, “He’s looking forward to ten more years meeting Canadians at the Court!” (January 18, 2019 at 3:25 p.m.), online: <https://twitter.com/SCC_eng/status/1086358923362344961> (Supreme Court tweet announcing that Amicus will be celebrating his 10th birthday in 2019, also includes line drawing and photograph of Amicus in the courtroom).

⁷⁴ See, e.g., Olga Frishman, “Court-Audience Relationships in the 21st Century” (2017) 86:2 *Miss. L.J.* 213-272 (Frishman explores “methods courts use to communicate with their audiences that are not part of their official roles” at 215).

⁷⁵ I say this because the speeches for the occasion are quite clearly focused on Winnipeg as a city and a specific geographic location. We might have expected, given the federal nature of our country, to hear the visit promoted and described as a visit to Manitoba — but it was not. See: Supreme Court of Canada, Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, “Words of Welcome on the occasion of the Court’s first-ever sitting outside of Ottawa” (September 25, 2019), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/rw-2019-09-25-1-eng.aspx>>; Supreme Court of Canada, Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, “Meet the Judges: Get to Know Your Supreme Court” (September 25, 2019), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/rw-2019-09-25-2-eng.aspx>>.

⁷⁶ Supreme Court of Canada, Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, “Words of Welcome on the occasion of the Court’s first-ever sitting outside of Ottawa” (September 25, 2019), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/rw-2019-09-25-1-eng.aspx>>.

Later, in a “meet the judges” session at the Museum of Human Rights, the Chief Justice repeated many of these phrases, adding,

It is hard to trust a decision maker if you don't know who they are. This is why I believe it is so important to show you how our justice system works, and who judges are, up close, and in person.

That is why my colleagues and I are here today. That is why we are hearing cases for the first time ever outside of Ottawa. We want you to see and understand what we do. Being here in Winnipeg makes it a little easier for you to see your highest court in person. Since my appointment as Chief Justice, one of my main priorities has been to make the Court more open and accessible to all Canadians. Not just legal professionals or people who happen to live in Ottawa. Everyone.⁷⁷

These are fairly remarkable statements. The road trip was described as part of a “continuing commitment to increasing access to justice”.⁷⁸ But in these passages, the emphasis was on seeing and through seeing, understanding. Setting aside for the moment the question of whether an appellate hearing is a good illustration of “how our justice system works” (let alone one that will be meaningful for most non-lawyers), I want to focus on the emphasis on seeing the judges “in person”. In these passages, and on the Winnipeg trip, this meant that both the judges and the observing “small c” citizen are there “in real life”.⁷⁹ But why does the “person” of any individual judge matter to the public? And why should that part of the public's interest, in turn, matter to the Court? Judicial authority, historically, is usually attached to and predicated on the authority and prestige of the role and not the person. That is, scholars have often pointed to the elaborate trappings of judges and judging, robes and wigs literally, and unique procedures figuratively concealing the fact that judges are individuals who have been invested with tremendous power by the state and are significantly unaccountable for the exercise of that power. Given that part of how legitimacy has been maintained, what exactly does a court mean when it wants you to meet a judge “up close and in person”? What is the mischief to prevent, the goal to attain through this meeting?

The Chief Justice's repetition of the phrase “It is hard to have faith in something if you don't understand it” invites us to ask about the choice of the words “faith” and “understanding”. Does faith come from understanding? If so, what is the public to understand?⁸⁰ The Chief Justice spoke of “understanding the how and why of

⁷⁷ Supreme Court of Canada, Speech by Richard Wagner, “Meet the Judges: Get to Know Your Supreme Court” (25 September 2019), online: <<https://www.scc-csc.ca/review-revue/2019/index-eng.aspx>>.

⁷⁸ Supreme Court of Canada, Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, “The Court's first-ever hearing fully by video-conference” (June 9, 2020), at 8, online: <<https://www.scc-csc.ca/judges-juges/spe-dis/rw-2020-06-09-eng.aspx>>.

⁷⁹ For many years, Supreme Court hearings have been available via webcast.

⁸⁰ See, for instance, Amnon Reichman, “The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar” (2007) 95 (Special Issue) *Calif. L. Rev.* 1619:

decisions”, but also understanding the role of the court (“what we do”). Yet there is no question that the general public will not understand “the how and why” of decisions the way that trained students of law can.⁸¹ They are more likely to be forced to take the Court’s version of “how and why” for granted. And the Chief Justice seemed to treat the word “faith” as similar to the word “trust”, and saw trust as based on “knowing” who the decision-makers are.

In assessing and analyzing these statements, we could look for evidence about these two things, whether we trust decisions more when we know the decision-makers, whether we trust more when we understand the how and why as explained by the decision-maker. But we can also clearly imagine counter-examples, where knowing the people and understanding the reasons could degrade trust. For instance, knowing who the judges are is arguably more widespread in the U.S., through the mechanism of Congressional confirmation hearings which have long been a well-watched spectacle. That example does not clearly show that introducing the public to the judges would — in all contexts and across all kinds of introductions, all judges and all audiences — produce trust. It is, perhaps, more accurate to say that introductions carefully controlled by the Court itself, in service of its own legitimacy and power, can be a useful tool in creating that trust.

In fact, it seems highly unlikely that bringing a lay public into a hearing of the kind conducted at the Supreme Court would significantly increase understanding of the how and why of decisions. But on the other form of understanding, that is, understanding the *role* of the Supreme Court, it seems clear that an explanation from the Chief Justice of the role of the Court can be presented to the audience. In other words, the lay public is not deducing, from the evidence of one specific hearing, the role of the Court. Instead, they are being told, by the Chief Justice, what that role is, how important it is, how much it matters, and how conscientiously and carefully it is done. The Chief Justice at least partially anticipates the skepticism I am offering here:

This isn’t because we want to be “popular.” Courts make decisions that are definitely *unpopular*. It is an occupational hazard. We don’t need Canadians to love us; trust me, we have thick skins. We can take it. But we do want you to *understand* us – what our role is in Canadian society, what kind of work we do, and how that work affects you.⁸²

“Given that the law is a complex notion, what does public confidence in a court demand? Surely, it cannot be reduced to a matter for public relations experts, for that would imply that judicial performance is but a show” (at 1622, citations omitted). In this piece, Reichman concentrates on unpacking the notion of the “public” into a series of different practices or audiences evaluating judicial performance using different values, symbols and languages.

⁸¹ I do not mean they will not understand. I mean that they are unlikely to understand in the way that lawyers do, and, further, that judges are accustomed to writing for judges and lawyers.

⁸² Supreme Court of Canada, Speech by Richard Wagner, “Meet the Judges: Get to Know

Well, maybe they do not want to be popular, and the Chief Justice dropping the puck at a hockey game between two Canadian teams is just a way of fixing the Court to other obviously bedrock Canadian things.⁸³ Legitimacy is the term to focus on here, and of course popularity is not the same. As any former high school student knows, popularity may come and go. Legitimacy has more staying power.

IX. ANNUAL REPORTS AND OTHER TEXTS

Road trips are not the only way the Court is moving toward informing the public. Another tradition revolving around “explaining” the work of the Court to the public was inaugurated in 2019. The first Year in Review report was released in April 2019 and covers the work of the Court during the 2018 calendar year. Slickly produced, replete with purportedly candid photographs of the judges (robed and more casually dressed, interacting in hallways, sitting around their case conference table, very frequently smiling) and pages of infographics, the report is interesting beyond the content. It seems to be written using the same guide to “reader friendliness” as the plain-language summaries discussed below.

Among other things, the report provides an exhaustive form of metricization: pie charts, line graphs, and other visual representations of the workload of the Court and change over time. How many appeals were heard?⁸⁴ In which areas of law?⁸⁵ From which provinces?⁸⁶ How many decisions on leave to appeal?⁸⁷ How many hearing days per year?⁸⁸ How long does a decision take?⁸⁹ What it does not provide may also be instructive. Unlike the Year in Review you are presently reading, the Court’s report does not discuss how the Court split, or lined up in particular decisions (not even on the page which briefly summarizes “Notable Decisions”).⁹⁰ All that is

Your Supreme Court” (25 September 2019), online: <<https://www.scc-csc.ca/review-revue/2019/index-eng.aspx>>.

⁸³ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at paras. 8-9 (S.C.C.).

⁸⁴ Supreme Court of Canada, *2018 Year in Review*, at 15, online: <<https://www.scc-csc.ca/review-revue/2018/index-eng.aspx>>.

⁸⁵ Supreme Court of Canada, *2018 Year in Review*, at 9, online: <<https://www.scc-csc.ca/review-revue/2018/index-eng.aspx>>.

⁸⁶ Supreme Court of Canada, *2018 Year in Review*, at 15, online: <<https://www.scc-csc.ca/review-revue/2018/index-eng.aspx>>.

⁸⁷ Supreme Court of Canada, *2018 Year in Review*, at 12, online: <<https://www.scc-csc.ca/review-revue/2018/index-eng.aspx>>.

⁸⁸ Supreme Court of Canada, *2018 Year in Review*, at 13, online: <<https://www.scc-csc.ca/review-revue/2018/index-eng.aspx>>.

⁸⁹ Supreme Court of Canada, *2018 Year in Review*, at 16, online: <<https://www.scc-csc.ca/review-revue/2018/index-eng.aspx>>.

⁹⁰ Supreme Court of Canada, *2018 Year in Review*, at 10, online: <<https://www.scc-csc.ca/review-revue/2018/index-eng.aspx>>.

offered is a bar graph illustrating the number of unanimous versus split decisions, since 2009, ranging from a high of 79 per cent unanimity in 2014 to a low of 48 per cent in 2018.⁹¹ The 2019 Year in Review (released in April 2020) is very similar. It features a mass of candid photographs from the trip to Winnipeg, including a double-page spread of the Chief Justice dropping the puck at a game between the NHL's Calgary Flames and Winnipeg Jets.⁹²

If the road trip is best understood as a public relations exercise, designed to bolster or protect the Court's institutional prestige and legitimacy, to generate faith and trust and to allow the Court to put its own version of its role in front of the public, the Year in Review document seems similar. It has perhaps a pinch more substance albeit no personal touch. In contrast, we have the "reader-friendly summaries" initiative. Often referred to as plain-language summaries, the Court's "Cases in Brief" resource was launched in March 2018 with *R. v. Carson*.⁹³ These Briefs offer a plain-language tour of the majority decision in each and every case.

In March 2020, the Court began surveying users of the Cases in Brief. The questions from this survey suggest what the Court was trying to do with these summaries.⁹⁴ For instance, the survey asks many questions about who is reading the summaries and why, questions which clearly indicate that the Court suspects that many readers are not just "interested members of the public" but lawyers, law students, and others who work in the legal field. Amusingly (who answers no?), the survey asks "In general, do you find reading legal texts difficult?". But a series of questions suggests what they are hoping to do with the Cases in Brief: use easy vocabulary and sentence structure; provide good explanations of legal concepts; provide accurate descriptions of the decisions. Given the Court's approach to openness, it seems very likely that they will be publishing the results (the online survey does not indicate when it will close).

Although there are suggestions that the target audience for the briefs are the general public, rather than the professional media, work by Schneiderman (in the Canadian context) and Moran (in the U.K.) on the relationship between the media and the courts suggests that we should understand the briefs as another way of attempting to shape public opinion about the Supreme Court.⁹⁵ In particular,

⁹¹ Supreme Court of Canada, *2018 Year in Review*, at 15, online: <<https://www.scc-csc.ca/review-revue/2018/index-eng.aspx>>. The unanimity rate dropped even further in 2019.

⁹² Supreme Court of Canada, *2019 Year in Review*, at 8-9, online: <<https://www.scc-csc.ca/review-revue/2019/index-eng.aspx>>.

⁹³ [2018] S.C.J. No. 12, 2018 SCC 12 (S.C.C.).

⁹⁴ "Supreme Court of Canada: Cases in Brief", online: <<https://www.surveymonkey.com/r/C5TY8TZ>>. A copy of the survey is on file with author.

⁹⁵ Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2006); Leslie James Moran, "Managing the News Image of the Judiciary: the Role of

Moran's work on the role of Judicial Press Officers in the U.K. focused on how the media report about decisions and trials or appeals is helpful in thinking about how the court as an institution might be attempting to manage reporting.⁹⁶ These briefs can be considered yet another way of influencing the way Canadians learn about the Supreme Court and its work.

X. LEAVING THE COURT

There is one further illustration of the Court's approach to public relations and transparency from 2019, and it is by far the most difficult to write about. On the evening of May 8, 2019, the Ottawa Police Service asked for the public's help in locating Justice Clement Gascon, saying his family was concerned about his well-being. He was last seen in the early afternoon, near the Court's location at Kent and Wellington. At the time, he was 59 years old and had been serving on the Supreme Court since June 2014. In fact, he had already announced his intention to retire from the Court September 15, 2019, for "personal and family reasons".⁹⁷ Hours after issuing the public appeal, the police tweeted that Gascon J. had been found "safe and sound".⁹⁸

The following day, the Chief Justice thanked the Ottawa police in a statement,⁹⁹ and the Executive Legal Officer, Renée Thériault, told the press:

Judicial Press Officers" (2014) 4:4 *Oñati Socio-Legal Series* 799-818; Leslie J. Moran, "Managing the 'Critical Interdependencies' of the Media and Judiciary in the UK" in Michael Asimow, Kathryn Brown & David Papke, eds., *Law and Popular Culture: International Perspectives* (Cambridge: Cambridge Scholars Publishing, 2014).

⁹⁶ Leslie James Moran, "Managing the News Image of the Judiciary: The Role of Judicial Press Officers" (2014) 4:4 *Oñati Socio-Legal Series* 799-818. Many other fascinating questions are raised by the Cases in Brief. For instance, were challenges to the business model in traditional news media, and concerns about the availability of trained specialist justice reporters, part of the impetus for these briefs? Why do the briefs tend to omit dissents? What about the potential impact of the briefs, including whether they will have any observable impact on media reports about Supreme Court decisions? Does the rewriting and simplification change the meaning or remove aspects of the decisions visible in the original? Will the simplified style act to blunt or sharpen the conflict between majority and dissent? Will the style of writing in actual decisions be influenced by the existence of the Cases in Brief (I assume here that, like headnote summaries, the Cases in Brief summaries are seen by the judges before being released to the public).

⁹⁷ "Supreme Court of Canada's Clement Gascon stepping down for family reasons" *The Globe and Mail*, online: <<https://www.theglobeandmail.com/canada/article-supreme-court-of-canadas-clement-gascon-stepping-down-for-family-2/>>.

⁹⁸ "Supreme Court Justice Clément Gascon has been safely found, police say" *CBC News*, online: <<https://www.cbc.ca/news/politics/justice-clement-gascon-missing-1.5128783>>.

⁹⁹ Kathleen Harris, "A day after being reported missing, SCC Justice Gascon 'in good health,' family says" *CBC News* (May 9, 2019), online: <<https://www.cbc.ca/news/politics/clement-gascon-supreme-court-1.5129213>>.

INTRODUCTION

Out of respect for Justice Gascon's privacy, I can't tell you why he was absent, but I can say that we have full confidence it doesn't affect his ability to carry out his duties at the court.

This story, already surprising enough, took another turn the following week, when Gascon J. issued a statement through the Supreme Court. In the English version of the short document, he wrote:

I understand and accept that, because of my role as a judge of the Supreme Court of Canada, it is incumbent on me to offer certain explanations. They are as follows.

For over twenty years, I have been dealing with a sometimes insidious illness: depression and anxiety disorders. This is an illness that can be treated and controlled, some days better than others. On the afternoon of Wednesday, May 8, affected both by the recent announcement of a difficult and heart-rending career decision and by a change in medication, I conducted myself in an unprecedented and unaccustomed manner by going out without warning and remaining out of touch for several hours. I can neither explain nor justify what I understand to have been a panic attack, and I wish to apologize most profusely to all those who suffered as a result. This health issue has been taken care of and treated with the necessary medical support. I confirm that I am in good health, and am fully capable of performing my duties as a judge.

I wish to thank my family, my colleagues, my friends and all the others who have supported me through this trying time. Although I know that I cannot erase what happened, I wish to put it behind me and look ahead. I have learned important lessons from it and will continue to do so over time, and with the necessary patience and assistance on which I know I can count.¹⁰⁰

This statement prompted an outpouring in traditional and social media of support for Gascon J., with many describing his statement as "brave".¹⁰¹ Inevitably, comparisons with the treatment of Justice Le Dain in 1988 were raised.¹⁰² As revealed in a 2018 CBC radio documentary, Le Dain J. was removed from the Supreme Court (and erased from the record of some cases he heard and participated in) after his wife requested he be granted leave and revealed to then Chief Justice Brian Dickson that Le Dain was suffering from depression.¹⁰³ The public institutional behaviour of the 2019 Court was diametrically opposed to the situation of Le Dain J. The Chief Justice stood by Gascon J. The Court robustly agreed that he was able to carry out

¹⁰⁰ Supreme Court of Canada, "News Release" (2019).

¹⁰¹ See, e.g., Peter Zimonjic, "Supreme Court Justice Gascon attributes disappearance to depression, anxiety" *CBC News* (May 14, 2019), online: <<https://www.cbc.ca/news/politics/clement-gascon-mental-health-1.5136015>>.

¹⁰² "Justices Gerald Le Dain and Clément Gascon both suffered from depression. But the similarities end there" *CBC Radio* (May 17, 2019); Elizabeth Raymer, "Gascon's treatment by SCC lauded as compared to Le Dain's" *Canadian Lawyer* (May 19, 2019), online: <<https://www.canadianlawyer.com/news/general/gascons-treatment-by-scc-lauded-as-compared-to-le-dains/276141>>.

¹⁰³ Bonnie Brown, *One Judge Down* (CBC Radio 1, 2018).

his duties, and on his last hearing day, he was warmly feted by the Court.¹⁰⁴

Justice Gascon's statement may well have been brave. But the text of the news release also suggests that his was in some sense a compelled revelation. In the English version, the word "incumbent" is used, a word that suggests a duty to disclose the nature of his illness rather than a decision to do so. He both "understands" and "accepts" this duty.¹⁰⁵ He agrees it exists and he agrees to discharge it, in a statement released by his employer.

A final relevant consideration is that the incident, and the statement, both reached the public in the same month as Gascon J.'s last hearing date.¹⁰⁶ By mentioning this I am not suggesting that the Court as an institution, or the Chief Justice in his role or as a person, somehow failed to support Gascon J. properly. Rather, I mention the timing to point out that really we learn very little about how the Court accommodates or does not accommodate any mental illness among the judges. We learn less about how the Court would approach such a situation than we do about the Court's approach to what *should* be known about judges. If there is, indeed, a form of duty to disclose medical diagnoses created out of this event, what is the justification for that? What does it mean that Gascon J. was either urged, required or encouraged to consider it part of his duty *as a judge* to explain his "disappearance", a matter of mere hours in which he walked the streets of Ottawa. This, it seems to me, genuinely does represent something new, and it is consistent with the sentiments expressed by the Chief Justice in his "road trip" speeches, with the incessant invocation of transparency and with something that has clearly shifted starting with the McLachlin Court. That is, we, the public (or publics) are entitled to know "who judges are, up close, and in person", and this knowing apparently includes knowing about medical crises and medication use, even when the judge in question is less than one week from retirement. There is a relationship between being brave and fulfilling duties and responsibility to be sure, and none of this commentary should suggest that

¹⁰⁴ Canadian Press, "'Dignity and wisdom': Chief justice praises Gascon after final high-court case" *CTVNews* (May 16, 2019), online: <<https://www.ctvnews.ca/politics/dignity-and-wisdom-chief-justice-praises-gascon-after-final-high-court-case-1.4425476>>; Leslie MacKinnon, "Top court Justice Clément Gascon sits on his last case" *iPolitics* (May 16, 2019), online: <<https://ipolitics.ca/2019/05/16/top-court-justice-clement-gascon-sits-on-his-last-case/>>.

¹⁰⁵ The French version (of the same document) reads: « Je comprends et j'accepte qu'en raison de mes fonctions de juge de la Cour suprême du Canada, certaines réponses de ma part sont requises. »

¹⁰⁶ The Criminal Lawyers' Association, "2020 CLA Annual Spring Conference", online: <<https://criminallawyers.ca/events/2020-cla-annual-spring-conference/>>; McGill Faculty of Law, "Discussing Mental Health in the Legal Profession", online: <<https://www.mcgill.ca/law/channels/event/discussing-mental-health-legal-profession-318875>>.

Gascon J. was not courageous in his approach at the time or since.¹⁰⁷ Instead, I am asking whether in fact he was duty-bound to issue that statement, and if so, why?

Judges have always sought to control the way they are seen by the public. Fantastic garb, unique forms of address, courtrooms of a majestic scale and décor, rituals of proceeding that are often archaic, complex and mysterious, all serve to illustrate the separation of judges and judging from ordinary human activity, to ensure that the public understands judges as different from mere mortals. What is important, in these rituals, is the role, the position, the power — not the person. Yet, as scholars such as Moran have pointed out, this general rule has come under some pressure in the more recent past. For instance, his study of judicial portraiture clearly describes the increasing depiction of personal details in official judicial portraiture (whether painted or photographed). This goes beyond the ways that, for instance, bewigged judges who are all white and male look extremely similar in portraits, and includes the objects appearing in the portraits, the poses allowed, the scope of the portrait (beyond the headshot) and even the style of painting.¹⁰⁸ Moran, along with others, has extended his study to the contemporary relationship between the news media and the judiciary, describing it as a “critical interdependency” (riffing on the words of England’s then Lord Chief Justice Judge in a 2011 Keynote address, describing the independence of the media and the independence of the judiciary as “critical independences”).¹⁰⁹

Moran’s work, along with earlier work by Schneiderman in the Canadian context, may be useful in thinking through recent efforts by the Supreme Court of Canada to reach the public. The road trip, the reader-friendly summaries and the story of Gascon J. in May 2019 all suggest an increasing effort to reach a lay public, and the first and last, at least, seem to place an interesting emphasis on the specific individual identities of the judges. What is the Court responding to in taking these initiatives? How do these relate to, for instance, the new procedures and controversies around selection of judges for the Supreme Court? What about the curious incident involving the denial and then granting of leave to multiple would be

¹⁰⁷ Supreme Court of Canada, *2018 Year in Review*, at 15, online: <<https://www.scc-csc.ca/review-revue/2018/index-eng.aspx>>.

¹⁰⁸ Leslie Moran, “‘Every Picture Tells a Story’; Picturing Judicial Biography” (2014) 14:1 *Legal Information Management* 27-32.

¹⁰⁹ Leslie J. Moran, “Managing the ‘Critical Interdependencies’ of the Media and Judiciary in the UK” in Michael Asimow, Kathryn Brown & David Papke, eds., *Law and Popular Culture: International Perspectives* (Cambridge: Cambridge Scholars Publishing, 2014); Guardian Staff, “Lord chief justice’s speech on press regulation – full text” *The Guardian* (October 19, 2011), online: <<https://www.theguardian.com/media/2011/oct/19/lord-chief-justice-press-regulation>>. See also Supreme Court of Canada, Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, “The Relationship Between the Courts and the Media” (February 21, 2012), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>>.

interveners in TWU?¹¹⁰ Are these new initiatives reflected in Canada's lower courts? Without taking our eye off this year's doctrinal developments, I think that we can and should consider these questions to be critically important in understanding the contemporary Supreme Court of Canada.

¹¹⁰ See, e.g., Alice Woolley, "The Unfortunate Incident of the TWU Intervention Decisions" *ABLAWG* (September 7, 2017), online: <<https://ablawg.ca/2017/09/07/the-unfortunate-incident-of-the-twu-intervention-decisions/>>; Supreme Court of Canada, "News Release" (August 2, 2017), online: <<https://scc-csc.lexum.com/scc-csc/news/en/item/5590/index.do>>.