

# JUDICIAL POWER, LIVING TREE-ISM, AND ALTERATIONS OF PRIVATE RIGHTS BY UNCONSTRAINED PUBLIC LAW REASONING

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## I INTRODUCTION

The term ‘judicial power’ can refer to multiple different concepts. In a proper, ideal sense, it refers to the orderly exercise of judicial office, constrained appropriately by the nature of the judicial role and the range of duties applicable within it.<sup>1</sup> However, ‘judicial power’ is perhaps more commonly understood to refer precisely to something verging on the opposite of this proper usage. Many speak of ‘judicial power’ specifically when the issue at hand is the misuse of judicial power, particularly in the sense of the *de facto* powers of judges being used in an unconstrained manner not in keeping with the nature or traditions of judicial office. The concern is with what is effectively a novel assertion of power rather than a properly ordered exercise of power.

Canadian constitutional case law of recent decades — particularly since Canada’s 1982 constitutional patriation and adoption of a written bill of rights — has tended to manifest a judicial eschewing of constraints on the power of judges. In this article, I consider this Canadian example and seek to show how certain fundamental choices about judicial methodology in constitutional interpretation have had farther-reaching manifestations in several domains in which private rights are put at risk of alteration by unconstrained public law reasoning and exercises of judicial power. In particular, Canadian judges’ strong embrace of a ‘living tree’ constitutionalism that empowers the judges themselves has set the stage for the interpretation of Canada’s Indigenous rights clause pursuant to shifting judicial policy aspirations, the alteration of Canada’s freedom of association clause to follow certain judicially preferred international models entrenching significant union rights, and a more general shift away from *stare decisis* towards unconstrained judicial policy choices. In each instance, I will suggest as well that there have been significant negative effects on private rights, which have come to be a lesser concern for judges thinking principally of public law reasoning.

Although this article can detail only a few strands of Canadian constitutionalism, my suggestion is that it reflects more general patterns, and I will argue that Canada’s recent constitutional history thus serves as a warning to other states in several ways I draw together in the conclusion. This narrative, to be clear, runs counter to a significant tendency of Canadian legal academics to be much more laudatory of the Supreme Court of Canada than is the case in other jurisdictions, with that tendency arguably part of a broader phenomenon of a relatively unified elite ideology. A challenge to judicial power in Canada runs against the grain of a certain received pattern of elite thought and thus must also end up in a challenge to significant parts of

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<sup>1</sup> Cf John Finnis, ‘Judicial Power: Past, Present, and Future’, Judicial Power Project Lecture (Gray’s Inn Hall 20 October 2015) << [>>.](http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf)

Canadian legal academia, with the conclusion reflecting as well on some implications of this.

## II JUDICIAL SELF-EMPOWERMENT THROUGH THE ‘LIVING TREE’ METAPHOR

The interpretation of Canada’s constitution, especially the *Canadian Charter of Rights and Freedoms* in the *Constitution Act 1982*,<sup>2</sup> has come to be subject to an official methodology of purposive interpretation. I describe this as ‘official’ because it has become increasingly recognized that there are surprising counterexamples within Canadian constitutional interpretation where courts have put more reliance on originalist-oriented interpretation than might have been thought to be the case.<sup>3</sup> However, the still-received methodology is a form of purposive interpretation, officially grounded in a principle increasingly embraced in the post-1982 constitutional context that Canada’s constitution is a ‘living tree’.<sup>4</sup>

That ‘living tree’ principle is cited continually to the famous 1929 ‘Persons Case’, *Edwards v Canada (Attorney General)*, in which the Judicial Committee of the Privy Council had to interpret whether women were ‘persons’ for the purpose of being eligible for appointment to Canada’s Senate.<sup>5</sup> There, Viscount Sankey expressed the famous ‘living tree’ metaphor, which has been taken as permitting judges to develop evolving interpretations of Canadian constitutional provisions in light of what they consider most suitable in light of their interpretation of the provisions’ purposes and useful applications. Judges like Canada’s long-standing Chief Justice McLachlin were ready to seize upon the implications, citing Viscount Sankey’s dictum in suggesting that judges would be ready to change the interpretation of particular rights in future even in cases where they were not yet ready to exercise their discretion to do so.<sup>6</sup>

This post-1982 adoption and embrace of the living tree metaphor was as much judicial self-empowerment as anything else. Contrary to the mythology, the living tree concept took up one particular line that did not reflect the full set of reasons in *Edwards*, which actually involved much more traditional forms of textual interpretation.<sup>7</sup> However, in their post-1982 constitutional case law, the justices of the Supreme Court of Canada kept citing directly or indirectly to *Edwards* as an alleged precedential support for their contemporary exercise of significant powers to interpret the purposes of the *Charter* as they saw fit.

<sup>2</sup> The *Canadian Charter of Rights and Freedoms* consists of ss 1-34 of the *Constitution Act, 1982* (Canada).

<sup>3</sup> See generally Leonid Sirota and Benjamin J Oliphant, ‘Originalist Reasoning in Canadian Constitutional Interpretation’ (2017) 50 *University of British Columbia Law Review* 505. On the complexities of what ‘purposive interpretation’ itself means, see the discussion on this point in Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution* (2<sup>nd</sup> edn, LexisNexis, 2017).

<sup>4</sup> On the post-1982 nature of the embrace of this principle, see Bradley Miller, ‘Origin Myth: The Persons Case, the Living Tree, and the New Originalism’, in Grant Huscroft and Bradley Miller (eds) *The Challenge of Originalism* (Cambridge University Press, 2011). See also Bradley W Miller, ‘Beguiled by Metaphors: The “Living Tree” and Originalist Constitutional Interpretation in Canada’ (2009) 22 *Canadian Journal of Law and Jurisprudence* 331.

<sup>5</sup> *Edwards v Canada (Attorney General)* 1929 UKPC 86, [1930] AC 124.

<sup>6</sup> See eg *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 [82]-[83] and discussion in Grant Huscroft, ‘The Trouble with Living Tree Interpretation’ (2006) 25 *University of Queensland Law Journal* 3, 17.

<sup>7</sup> For excellent explanation on this, see Miller, above n 4.

The living tree line from *Edwards* featured as a key precedent in the justices' early adoption of their approach to 'purposive interpretation' in their 1984 decision in *Hunter v. Southam*.<sup>8</sup> And that decision grounded the 1985 decision in *BC Motor Vehicle Reference*, in which the Supreme Court decided that the intentions of the constitutional drafters had no bearing on the meaning of the text where those intentions were not consistent with the Court's purposive interpretation of the text — with this decision rendered just three years after the negotiated adoption of the text.<sup>9</sup> Later cases cite regularly to both *Hunter v. Southam* and to *Edwards* itself, thus reflecting the ongoing influence of their concepts: counting lower court decisions, the 'living tree' metaphor appears explicitly in hundreds of judgments, with its indirect influence through 'purposive interpretation' appearing in a thousand more.<sup>10</sup>

However, the influence was not from the actual reasoning in *Edwards*, which the justices may not have even read.<sup>11</sup> Rather, the ongoing usage of the one line from *Edwards* offering the 'living tree' metaphor serves as an alleged precedential support for their contemporary exercise of significant powers of retrospective choice on what was constitutionalized. Their reasoning has effectively been built upon a foundational mythology to claim heightened judicial power. And this fateful choice has set up the Supreme Court to be a leading policy-maker in Canada today.<sup>12</sup> Its implications play out in various contexts such as I shall now discuss. Ranging across several areas, they are not disconnected vignettes but expressions of an underlying decision of judicial self-empowerment.

### III JUDICIAL INDIGENOUS POLICY

The Supreme Court of Canada's ascendancy to a policy-making role extends beyond the context of the *Canadian Charter of Rights and Freedoms* and is perhaps even more strongly present in its role in interpreting s 35 of the *Constitution Act 1982*, to which it also set out to apply a 'purposive interpretation'.<sup>13</sup> This section, by which 'existing' Aboriginal and treaty rights were 'recognized and affirmed', contains 15 words that have generated 1500 pages of Supreme Court of Canada jurisprudence since 1990.

Section 35 operates as a constitutional provision under which the courts have taken up immense policy-making power in the context of a complex set of relationships between Canada and its Indigenous communities. Some of the doctrines developed in the Court's s 35 Indigenous rights jurisprudence have had massive impacts. For example, one might mention the 'duty to consult' doctrine. This doctrine requires governments to consult with Indigenous communities in certain

<sup>8</sup> *Hunter v Southam Inc.* [1984] 2 SCR 145.

<sup>9</sup> *Re B.C. Motor Vehicle Act* [1985] 2 SCR 486.

<sup>10</sup> The numbers are readily available from CanLII searches of the terms (the two searches being ("living tree" & Charter') and ("purposive interpretation" & Charter') so as to remove extraneous results not related to the *Charter*, such as a surprising number of actual horticultural references in case law).

<sup>11</sup> For one former Supreme Court of Canada justice's reflection that he had never read *Edwards* before retiring from the Court, see Hon Marshall Rothstein, 'Checks and Balances in Constitutional Interpretation' (2016) 79 *Saskatchewan Law Review* 1, 1.

<sup>12</sup> The Court was actually named 2014's 'Policy-Maker of the Year' by the Macdonald-Laurier Institute: Sean Fine, 'Think tank names Supreme Court of Canada "policy-maker of the year"' *Globe and Mail* (Toronto), 27 November 2014.

<sup>13</sup> *Constitution Act 1982*, s 35 (Canada). On purposive interpretation of s 35, see eg *R v Sparrow* [1990] 1 SCR 1075.

circumstances. Developed in its modern form in the *Haida* decision of 2004 and subsequent case law, the duty to consult is ‘triggered’ when a contemplated administrative decision has a potential adverse impact on an asserted Aboriginal or treaty right of which the government has actual or constructive knowledge.<sup>14</sup> The impact of this doctrine is enormous. It is estimated to be triggered hundreds of thousands of times per year.<sup>15</sup>

The negotiated text of s 35 recognized and affirmed ‘existing’ Aboriginal and treaty rights. That text might have been thought to refer to rights, then, that existed already in 1982. Perhaps unsurprisingly in the context of the Court’s larger post-1982 view of its role, its section 35 jurisprudence has not focused on rights that were ‘existing’ in 1982. Rather, the Court’s approach has been framed around the idea of developing the purposes or goals it sees as promoted by s 35, which it characterizes increasingly in terms of the goal of ‘reconciliation’.<sup>16</sup> In a recent decision in a modern treaty case, for example, while also saying that ‘[r]econciliation often demands judicial forbearance’, the judgment of Karakatsanis J suggests that the Court develops its rules on various s 35 issues so as to ‘advance reconciliation’.<sup>17</sup>

In assuming the power to take the steps it saw as suitable in promoting the policy goal of reconciliation, the Court must be understood — somewhat ironically — as promoting its own vision of Indigenous relations. In doing so, it does not seek to develop the guarantee of ‘existing’ rights. Thus, it does not necessarily even promote the prior rights or entitlements that had been held by Canada’s Indigenous communities before the adoption of s 35.

Perhaps the clearest example of this point is the Court’s reinterpretation of a property right through the application of a framework of public law reasoning to a previously private law concept of Aboriginal title.<sup>18</sup> In the Canadian context, which has some differences from Australia, ‘Aboriginal title’ always refers to a right consisting of exclusive ownership of land; ‘Aboriginal rights’ may encompass entitlements to activities. The pre-1982 decision of *Calder* had recognized in principle that communities who had occupied lands from time immemorial that they had not surrendered through treaties had to be recognized as holding property rights in the land under the common law doctrine of Aboriginal title.<sup>19</sup> This doctrine focused on recognizing within the common law the continuing property rights of communities that had long been present in what would become Canada.

However, the first post-1982 Aboriginal title decision, the 1997 *Delgamuukw* decision,<sup>20</sup> saw the Court take a different approach not focussed on the continuity of property rights in the same manner. Rather, the Court opined in *Delgamuukw* that the Aboriginal title test must be an application — modified as necessary in certain ways including the past moment in time determining the scope of the right — of the general

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<sup>14</sup> *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511.

<sup>15</sup> Dwight Newman, ‘The Section 35 Duty to Consult’, in Peter Oliver, Patrick Macklem and Nathalie des Rosiers (eds.) *Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017).

<sup>16</sup> The concept now appears centrally in much of the Court’s s 35 case law. See: *R v Van der Peet* [1996] 2 SCR 507 (with the main Aboriginal rights test based on the concept of reconciliation); *Mikisew Cree First Nation v Canada* 2005 SCC 69, [2005] 3 SCR 388, [1] (Binnie J stating that ‘[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples’).

<sup>17</sup> *First Nation of Nacho Nyak Dun v Yukon* 2017 SCC 58 [4], [38].

<sup>18</sup> Cf Dwight Newman, ‘The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study’ (2016) 95 *Nebraska Law Review* 432.

<sup>19</sup> *Calder v British Columbia (Attorney General)* [1973] SCR 313.

<sup>20</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

Aboriginal rights test it had developed for s 35 rights in the *Van der Peet* decision of the prior year based on the broad purpose of reconciliation.<sup>21</sup>

This decision shifted the analysis of Aboriginal title away from its existing scope under a common law doctrine to that implied by an application of public law reasoning about the policy goals the Court could find in s 35. The result was to alter private rights of Indigenous communities in a manner that actually reduced those rights relative to what they otherwise would have seemed to be under the common law doctrine.

The general Aboriginal rights test in *Van der Peet* had focussed on rights framed from culturally distinctive practices, traditions, and customs showing a continuity with the period of time prior to European contact. It has been subject to academic critiques for its inherent cultural essentialism.<sup>22</sup> In applying and adapting this test to the Aboriginal title context, the Court ended up adopting new aspects to the Aboriginal title test that add a cultural dimension to the test that would not seem to have been present in the common law property doctrine that applied before 1982.

In *Delgamuukw*, these aspects appeared in the form of an unprecedented ‘inherent limit’ on the scope of Aboriginal title — not present in the pre-1982 case law like *Calder* — such that land owned by a community in Aboriginal title could not be used in ways inconsistent with the evidential bases utilized for the establishment of title rights over particular tracts of land.<sup>23</sup> For no apparent reason, the Court offered some rather singular examples, suggesting that communities that proved title rights through showing that particular lands were hunting grounds or culturally significant sites could not make contemporary uses of the corresponding Aboriginal title lands for strip mining or the construction of parking lots.<sup>24</sup>

In a later Aboriginal title case, the 2014 *Tsilhqot’in Nation* decision,<sup>25</sup> the Court restated much of the law of Aboriginal title based on the *Delgamuukw* test. However, on the inherent limit issue, the Court now stated a new limitation on the scope of Aboriginal title without explaining whether this new limit replaced or supplemented the *Delgamuukw* inherent limit. In particular, it ended up saying that land held in Aboriginal title could not be used in ways that diminished its value for future generations — and that it would explain what this limitation meant in any particular circumstances when the circumstances arose.<sup>26</sup> Such a restriction diminishes the value of Aboriginal title lands for Indigenous communities themselves by casting a pall of uncertainty over the ways in which communities may use their own lands. The application of public law reasoning has diminished a private right previously held by Indigenous communities.

This example of Canadian adjudication on constitutionalized Indigenous land rights makes broader points about exercises of judicial power in contexts where public law adjudication has significant private law implications. My claim in some respects is that such adjudicative contexts take on distinctive characteristics that accentuate and further problematize exercises of judicial power. The standard criteria that would apply to the adjudication of private law disputes within the common law, focused on providing a reasonable degree of guidance from the law, do not apply here in the same

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<sup>21</sup> *R v Van der Peet* [1996] 2 SCR 507.

<sup>22</sup> See eg Avigail Eisenberg, ‘Reasoning About Identity: Canada’s Distinctive Culture Test’, in Avigail Eisenberg (ed.) *Diversity and Equality* (University of British Columbia Press, 2006).

<sup>23</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [111], [125]ff.

<sup>24</sup> *Ibid* [128].

<sup>25</sup> *Tsilhqot’in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257.

<sup>26</sup> *Ibid* [15], [74].

way. Moreover, the litigation incentives that normally lead the common law to attain efficient outcomes do not exist in the same ways as in other contexts.<sup>27</sup>

Within the policy-making role it has taken up, the desire to provide a neat public law test for Aboriginal rights on a general basis thus drives the Court away from enforcing the private rights of key parties. I would suggest that this is neither coincidental nor a mere feature of particular policy choices that the Court has made. Rather, it flows from the exercise of judicial power being based in a concept of developing the constitutional order in ways reflecting the Court's assessment of the goals it embodies.

Assuming that a legal order has purposive goals in such a manner assumes a centralized knowledge concerning what those goals are and how to implement them through particular doctrines. That is to say, the very assumption of having centralized purposive goals is antithetical to some degree to the standard background of individuals and communities holding private rights that they may choose to use in ways that may or may not advance those goals. That the Court's implementation of centralized goals undermines private rights of Indigenous communities is neither coincidental nor surprising. The assumption of a centralized goal of reconciliation, implemented through an exercise of judicial power, implies a restriction on aspects of private rights that could lead to a misfit with the centralized goal.<sup>28</sup>

#### IV JUDICIAL IMPOSITION OF CONSTITUTIONALISED LABOUR RIGHTS

Apart from its relationship to private rights, the Court's s 35 jurisprudence has thus far shown an impermeability to international law argumentation on the scope of Indigenous rights, perhaps in line with the aspiration of interpreting s 35 in light of a goal of reconciliation within the state. It is not impossible that the Court might one day alter that goal. In the meantime, though, other areas of its constitutional case law have seen it rush to embrace comparative and international law norms, sometimes even at the expense of factual accuracy. An area of case law that stands out in this regard is the Court's decision over the last ten years to reverse its early *Charter* jurisprudence on the relationship between the *Charter*'s 2(d) freedom of association and conclusions as to constitutionalized labour rights. The older case law had rejected claims as to labour rights in s 2(d), partly on the basis that the negotiation and drafting process leading up to the 1982 constitutional amendments had seen an explicit rejection of the idea of including labour rights.<sup>29</sup>

In a line of cases commencing with its 2007 decision in the *British Columbia Health Services* case,<sup>30</sup> the Court has now moved to entrench various labour rights into the *Charter*, including rights to collective bargaining and rights to strike. Many aspects of these decisions have been explained with reference to claimed comparative or international law norms on labour rights. This trend commenced in the *British Columbia Health Services* decision itself.<sup>31</sup> But it has continued in even larger ways in

<sup>27</sup> See generally Newman, above n 15.

<sup>28</sup> This argument of course builds on Sir Roger Scruton's combination of traditional common law concepts and Hayekian understandings of law. See eg the discussion of common law in Sir Roger Scruton, *England: An Elegy* (Bloomsbury, 2000) and Sir Roger Scruton, *Conservatism: Ideas in Profile* (Profile Books, 2017).

<sup>29</sup> See generally Brian Langille, 'The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It' (2009) 54 *McGill Law Journal* 177.

<sup>30</sup> *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia* 2007 SCC 27, [2007] 2 SCR 391.

<sup>31</sup> *Ibid* [20], [39], [69]ff.

later cases, perhaps most notably in the 2015 *Saskatchewan Federation of Labour* decision entrenching a right to strike.<sup>32</sup>

In *Saskatchewan Federation of Labour*, Abella J's opening paragraphs for the majority reflect a role for the Court in making decisions that shift through and shape history, putting her main conclusion in dramatic terms not particularly suggestive of any sort of modesty in the judicial role: 'The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction'.<sup>33</sup>

To the extent that Abella J considers that any reasoning is necessary in the course of what she appears to describe in terms of a discretionary decision to offer 'constitutional benediction', much of her reasoning is based on claims about comparative and international law. Indeed, at a formal level, shifts in attitudes to international law are part of what she suggests manifest a change in the law warranting reversal of the Court's past decisions against a constitutional right to strike, although her argument purports to be based on a broader 'historical, international, and jurisprudential landscape'.<sup>34</sup> This latter phrase is telling as to the array of materials contained within the judgment, with no detailed reasoning on why that particular array of materials actually changes a conclusion about what constitutional rights exist in Canada, other than that they offer a 'landscape', an 'emerging international consensus', or 'persuasive weight' for a conclusion that 's 2(d) has arrived at the destination' that includes a right to strike.<sup>35</sup>

The use of comparative and international law materials is always fraught with challenges, particularly in the context of tendencies by courts to cherry-pick pieces of law for persuasive weight rather than to understand living norms from other legal systems within the full context of how they operate and contribute in those systems.<sup>36</sup> These challenges, amongst others, find expression in Abella J's use of comparative and international law in *Saskatchewan Federation of Labour*, sometimes in even more shocking ways in terms of the failure to engage with what the cherry-picked pieces mean as living norms in their original contexts.

For example, in at least one instance, she actually cites as if it were persuasive comparative legal material a piece of a constitution of a foreign state that is no longer its constitution.<sup>37</sup> Thus, in this instance, she cites to dead law rather than living law as allegedly showing the 'landscape' and 'international consensus'. In another, one actually highlighted by the dissent of Rothstein and Wagner JJ but which she nonetheless continues to use in the lead judgment, she cites as persuasive a 'decision' that is not actually a judicial decision and that did not receive support from the actual decision-making body higher up the chain that did not reach the same opinion.<sup>38</sup>

This latter example is fascinating. Justice Abella's opinion states: 'Although *Convention No. 87* does not explicitly refer to the right to strike, the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized

<sup>32</sup> *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4, [2015] 1 SCR 245.

<sup>33</sup> Ibid [3].

<sup>34</sup> Ibid [62]-[63], [74].

<sup>35</sup> Ibid [69], [71], [75].

<sup>36</sup> See eg Dwight Newman 'Theorizing Duress and Necessity in International Criminal Law', in Francois Tanguay-Renaud and James Stribopoulos (eds.) *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Canadian, Domestic, and International Criminal Law* (Hart, 2012).

<sup>37</sup> See *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4, [2015] 1 SCR 245, [74] (citing the 1946 French Constitution rather than the 1958 Constitution that replaced it).

<sup>38</sup> See ibid [153].

the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention'.<sup>39</sup> The dissent of Rothstein and Wagner JJ replies: 'However, these bodies do not perform judicial functions and do not enforce obligations under ILO conventions — the CFA is an investigative body and the COE, the first stage of the ILO supervisory process, simply provides observations [...]. The Conference Committee on the Application of Standards is the second stage of the ILO supervisory process. This tripartite committee consisting of government, employer, and worker representatives has not reached a consensus on whether freedom of association includes the right to strike [...]'.<sup>40</sup> It is frankly astonishing that the judgment of Abella J does not even acknowledge these complexities that might have had implications for the persuasiveness of this material.

These difficulties, of course, might be thought of by some as examples solely of a particularly overly ambitious judgment rather than speaking to difficulties in an area of *Charter* jurisprudence *per se*. But the entire shift in Canada's section 2(d) jurisprudence in recent years reflects ultimately a decision by the Court to alter the negotiated content of the section in light of the Court's assessments of its purposes, thus precisely setting the context in which Abella J could opine on how 'the arc bends increasingly toward workplace justice'.<sup>41</sup>

The choice of one policy goal for a constitutional section is of course conceptually neatening for judicial decision-making. But such an approach does not reflect the inherent messiness of the policy-making needed in the real world, one of competing and conflicting interests and values. The approach to a right that orients it to one value alone effectively overrides a variety of other incommensurable interests in the service of the one goal at issue. And 'workplace justice', laudable though it may sound, is problematic as a goal in a constitutionalized labour rights context. It assumes that justice is on one side of the workplace rather than recognizing the complex interplays of economic factors and private interests of various parties. The approach of Abella J orients matters again too much in the context of a centralized vision that assumes the ability of the court to make better decisions than could arise from some more decentralized process. It also ends up making a centralized decision to implement a particular model of workplace relations on all contexts to which the Court's judgment applies.

Once it is open to the Court to construct policy goals that it pursues through litigation on various constitutional sections with a full awareness that it is pursuing goals rejected during the negotiation of the legal text, nothing particularly constrains these policy goals, and it is open to any given judge to set out to establish 'workplace justice' as best she sees it. The living tree can bend in any particular direction, as the underlying concept is one of flexibility in the application of judicial power.

## V JUDICIAL SELF-LIBERATION FROM *STARE DECISIS*

That said, part of what enables the Supreme Court of Canada in *Saskatchewan Federation of Labour* and cases of similar ilk to depart from past law is also a decision by the Court effectively to liberate itself — and the courts generally — rather significantly from the weight of *stare decisis*. Along with the contents of legal texts and the law itself, *stare decisis* might traditionally have been thought of as an important constraint enabling the exercise of judicial power within the proper bounds

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<sup>39</sup> Ibid [67].

<sup>40</sup> Ibid [153].

<sup>41</sup> Ibid [1].



of a judicial office. While the Supreme Court of Canada continues to acknowledge *stare decisis* in principle, McLachlin CJC has also now established an entire strand of case law that effectively says that the Court may disregard *stare decisis* when it disagrees with its implications.

That strand of case law permitting the discarding of *stare decisis* is part of the reasoning of Abella J in *Saskatchewan Federation of Labour*.<sup>42</sup> This new approach to *stare decisis* was adopted in the *Bedford* decision that reversed past precedents on the constitutionality of Canada's prostitution laws and the *Carter* decision that reversed a past case and declared that assisted suicide procedures must be made available in Canada.<sup>43</sup> In its articulation of this new approach, the Court rejects both horizontal and vertical precedent. Chief Justice McLachlin's pronouncement of the new rule on *stare decisis* in *Bedford* has no extended reasoning behind it and ultimately cites no authority other than, in effect, the view of McLachlin CJC herself:

In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.<sup>44</sup>

While other parts of the case have lines that speak to the Court's recognition of the value of *stare decisis*,<sup>45</sup> the *Bedford* rule on precedent nonetheless liberates the Court from both *stare decisis* and having to offer any real explanation for departures from *stare decisis*. In many constitutional contexts, 'legislative facts' concerning broad social contextual factors partly shape the outcomes, and many such considerations go into the proportionality analysis determining the limits on rights. Because the evidentiary record going into the determination of such legislative facts can never encompass everything that could bear on them, the possibility of a change in 'evidence' on such legislative facts thus effectively liberates the courts to retry almost any constitutional issues at any point on the basis of a new record.

Saying as much does not imply that the courts must be committed to a rigid and unalterable *stare decisis*. In some of the s 2(d) labour rights case law of recent years, in light of established transnational principles on *stare decisis* within the Anglo-American common law system, Rothstein J actually attempted to develop a framework of factors that justified a court altering its own past decisions and that it might properly contemplate while exercising the traditional judicial role.<sup>46</sup> The *Bedford* case utterly failed to engage with his judgment in this regard or even with any similar sorts of factors.

The idea that there were actual factors to consider was not Rothstein J's innovation. His judgment drew upon past Canadian cases that had discussed factors such as the presence of actual developments in the law undermining the validity of a past precedent, recognition that a precedent generates uncertainty in a manner contrary to the very values of *stare decisis*, recognition that a precedent was inconsistent with

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<sup>42</sup> Ibid.

<sup>43</sup> *Canada (Attorney General) v Bedford* 2013 SCC 73, [2013] 3 SCR 1101; *Carter v Canada (Attorney General)* 2015 SCC 5, [2015] 1 SCR 331.

<sup>44</sup> *Canada (Attorney General) v Bedford* 2013 SCC 73, [2013] 3 SCR 1101, [42].

<sup>45</sup> See eg, *ibid* [38].

<sup>46</sup> See notably his separate opinion in *Ontario (Attorney General) v Fraser* 2011 SCC 20, [2011] 2 SCR 3, [129]-[139].

prior precedents, or recognition of clear problems with a precedent in terms of unworkability, inconsistency with principle, or unfairness in operation.<sup>47</sup> He also referenced well-known international sources that have commented on these issues, notably the United States Supreme Court decision in *Casey*, whose factors include intolerable unworkability of the rule, reliance on the rule, legal developments that have effectively left the rule a remnant, or changes in facts that have undermined all justification for the old rule.<sup>48</sup> Finally, he referenced scholarly writing that had set out a number of different factors.<sup>49</sup> Admittedly, Rothstein J does not necessarily synthesize all of these factors. But his judgment contains reference to them in a way that McLachlin CJC's *Bedford* judgment does not, even in the context of actually effecting a dramatic change to the doctrine of *stare decisis* in Canada.

The effects of this partial negation of a fundamental principle of common law reasoning have implications beyond the public law context in which the *Bedford* decision was enunciated. Those private parties relying on settled principles of law in other areas, including those as far afield as mainstream commercial law fields, have a new risk generated for them in a heightened possibility that the courts will not stand by established precedents.<sup>50</sup> Again, courts applying public law reasoning in a manner associated with heightened judicial power impose real costs on private parties whose private interests are put at risk.

Although not explicitly tied to the idea of the 'living tree' within this line of case law itself, the *Bedford* doctrine on *stare decisis* is wholly consistent with its spirit of enabling assertions of judicial power to advance policy goals as judges see them. It is a concomitant augmentation of judicial power, and one that highlights clearly how far Chief Justice McLachlin's Court has departed from traditional principle and constraints on the judicial role.

## VI CONCLUSION

Focusing on this critique, of what the living tree approach adopted in recent Canadian constitutional interpretation means, highlights significant issues related to the rise of judicial power. The adoption of a written bill of rights in 1982 was taken by the Supreme Court of Canada as an invitation and opportunity to exercise much greater judicial power and policy-making functions than it ever previously assumed. In adopting a particular principle on constitutional interpretation, that of the so-called 'living tree', it has opened endless possibilities for judicial policy-making and the exercise of judicial power in the negative sense of the concept.

Examples across various areas of law bear out this concern. To take one example, the Court has taken on a major role in Indigenous policy in Canada, with a very different path playing out under a constitutionalized Indigenous rights clause as compared to that in states like Australia that have not constitutionalized that area of

<sup>47</sup> Ibid [134]-[135], citing *R v Bernard* [1988] 2 SCR 833, *R v Chaulk* [1990] 3 SCR 1303, and *R v Henry* 2005 SCC 76, [2005] 3 SCR 609.

<sup>48</sup> *Ontario (Attorney General) v Fraser* 2011 SCC 20, [2011] 2 SCR 3, [136], citing *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 US 833.

<sup>49</sup> *Ontario (Attorney General) v Fraser* 2011 SCC 20, [2011] 2 SCR 3, [137], citing Bruce V Harris, 'Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle' (2002) 118 *Law Quarterly Review* 408.

<sup>50</sup> See eg, Michael Schmeer, 'Stare Decisis or a License to Disturb Settled Matters? The Impact of the Decision in *Carter v Canada* on Commercial Litigation' (2016) *Commercial and Business Litigation Review*, <[www.canadianinstitute.com/wp-content/uploads/2017/02/Commercial-business-Litigation-Aug2016\\_Part2.pdf](http://www.canadianinstitute.com/wp-content/uploads/2017/02/Commercial-business-Litigation-Aug2016_Part2.pdf)>.

policy-making. But the particular type of Indigenous policy developed by the Court flows from its decision to orient Indigenous rights around a particular goal applied to the area by the Court itself, marking a centralized approach to a complex area of policy-making. To take a second example, also from what would be a complex area of policy-making, the Court has applied rather more simplistic goals once again to the labour rights arm of the s 2(d) freedom of association clause. In doing so, it has been ready to impose a particular model of workplace relations in a constitutionalized form, while neglecting more complex aspects of the area. Going beyond very specific areas, a third example relates to a general principle of judicial methodology, the application of the principle of *stare decisis*, where the Canadian approach has departed far from the traditional common law. Each of these assertions of judicial power has involved the application of public law reasoning in ways that have diminished private rights, thus illustrating a further danger of the rise of judicial power. To paraphrase an old trope, courts powerful enough to give you all that you want are powerful enough to take away all that you have.

The lessons of this development thus point to the need for vigilance in respect of basic foundational principles on the role of courts and their adherence to traditional principles of interpretation and judicial methodology. Once those are gone, the horse may well be out of the barn, as it were. It may become very challenging to turn back the application of judicial power once judges have taken certain steps to empower themselves and to liberate themselves from traditional constraints. Canada's track record of recent decades, particularly in the era of Chief Justice McLachlin, has more critical lessons to be learned from it than are often realized, particularly in the context of a Canadian legal academy that has been surprisingly reluctant to be critical. The latter may well be a related phenomenon to the key danger this track record identifies. Once it is accepted that courts may apply much power on a relatively discretionary basis, not subject to traditional constraints from the law on which legal scholars have expertise, it becomes increasingly difficult to critique further applications of judicial power other than on policy grounds on which legal scholars may well not have any special expertise. The augmentation of judicial power takes a whole constitutional order down a dangerous path. The rise of judicial power calls for vigilance in stopping it sufficiently early.

