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Conflict Resolution in Human Rights Cases: The Role of the Supreme Court of Canada

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Abstract

This paper examines the role of the Supreme Court of Canada (SCC) in resolving human rights conflicts and balancing individual and collective rights. With a multiple control mission, the Court must interpret the Constitution and resolve disputes over competing rights and interests, based on the principle of constitutional democracy. This paper specifically focuses on the SCC's role in conflict resolution in human rights cases, especially in the complex legal framework of protection existing in Canada. It also addresses how the Court's rulings may affect the protection of fundamental rights under the Canadian Charter, illustrated by some key examples from the Court's caselaw. To this end, the first part provides a descriptive overview of the complex fabric of human rights protection in the Canadian constitutional framework. The second part discusses the SCC's role in protecting human rights within the Canadian legal system. Ultimately, this paper underscores the fundamental role of a Supreme Court in protecting human rights in situations of multiple rights conflicts.

Keywords: Apex Courts, Balancing Rights, Canadian Charter of Rights and Freedoms, Constitutional Courts, Conflicting Rights, Supreme Court of Canada.

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I. INTRODUCTION

From 4-7 October 2022, the 5th Congress of the World Conference on Constitutional Justice (WCCJ) took place in Bali, Indonesia, bringing together constitutional law experts from around the globe to exchange opinions and experiences on matters of peace and constitutional justice. Within the WCCJ, the 5th Indonesian Constitutional Court International Symposium had the theme "Constitutional Court and Conflict Resolution" to promote constitutional justice, "understood as constitutional review including human rights caselaw – as a key element for democracy, the protection of human rights and the rule of law".[1] In Canada, these fundamental principles are overseen by the Supreme Court of Canada (SCC). As an apex court,[2] the SCC has a multiple control mission: judicial review, and the settlement of disputes between the State and individuals, as well as a court of final appeal. In this context, this paper aims to discuss the role of the SCC in resolving conflicts in human rights cases.

The legal framework for the protection of human rights in Canada is a complex one, where human rights are guaranteed by the Canadian Constitution as well as federal, provincial and territorial laws. Within the Canadian legal system, rights are not absolute, and often a balancing act between conflicting rights, or opposing interests (i.e., individual and societal) is necessary. Limiting human rights is a delicate task that needs to follow a clear legal framework. When human rights disputes arise, the crucial role of the SCC is evident to establish the rule of law and restore societal balance.

When interpreting the Canadian Constitution, the SCC can either promote or hinder the rule of law and public confidence in the Canadian legal system. Where the Court's jurisprudence is consistent in resolving a constitutional dispute, any potentially conflicting party can know its rights[3] based on established caselaw.

In this context, this paper examines the following research questions: the role of the SCC in resolving conflicts between competing rights as well as in

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[1] Venice Commission, "Concept Paper and Questionnaire" (Paper (published) presented for the 5th Congress of the World Conference on Constitutional Justice at Bali, 2021).

[2] Concerning apex courts, see Jean-François Gaudreault-Desbiens, "The Role of Apex Courts in Federal Systems: Beyond the Law or Politics Dichotomy," *Jus Politicum* 17, no. 1 (2017): 171.

[3] In this paper, the terms "human rights" and "fundamental rights" are used interchangeably.

maintaining the balance between individual and collective rights. The SCC, as a relatively new court, with a dual mandate, has interpreted the Constitution and established a solid caselaw on human rights protection, based on the principle of a constitutional democracy. The Court has thus had to guarantee the protection of human rights as well as resolve dispute in matters of conflicting rights and interests. This paper also discusses how the Court's rulings may affect the protection of fundamental rights under the Canadian Constitution based on analyzing two key illustrative examples from the Court's caselaw in criminal law matters.

To analyze the role of the SCC in resolving human rights conflicts, this paper focuses on two interconnected aspects that address the research question. In Part I, this paper provides a descriptive overview of the complex fabric of human rights protection within the Canadian legal framework. Relying on this foundational background, Part II examines the crucial role of the SCC in protecting human rights within the Canadian legal system. Together, they aim to explain how the SCC has exercised its role as an apex court and the "guardian" of the Constitution over the past decade, and how its established jurisprudence has worked to protect human rights in some complex cases. Ultimately, this paper anticipates some lessons about the essential role of an apex court such as the SCC in protecting human rights in situations of conflict of multiple rights.

II. THE MULTIDIMENSIONAL FABRIC OF HUMAN RIGHTS PROTECTION IN THE CANADIAN CONTEXT

The SCC is the highest court in Canada. It is also the equivalent of a Constitutional Court in Canada. Within the Canadian federal system, the SCC is an apex court. As has been argued, apex courts are "the highest judicial decision-maker within a federation, which has jurisdiction to decisively decide federalism-related cases, and whose rulings are not subject to any form of further review".[4] As such, the SCC has a crucial role in protecting human rights and resolving disputes, especially in cases of multiple rights conflicts. In examining this matter, this paper provides a descriptive overview of how rights are protected

[4] Gaudreault-Desbiens, "The Role of Apex Courts," 172.

within the Canadian legal framework. This will pave the way for an appreciation of the SCC, an apex court, as opposed to a constitutional court, given that it can decide questions of a constitutional nature (e.g., conflict of constitutional rights) as well as conflicts stemming from provincial or federal human rights legislation. Thus, understanding the framework for human rights protection in the Canadian context requires an overview of Canadian constitutional history. By referring to Canadian federalism (1.1), one can understand the different levels of protection of human rights. In Canada, an individual's human rights are protected by the Constitution (1.2), as well as federal, provincial and territorial laws (1.3).[5]

2.1. The Canadian Constitutional Framework: An Overview

The starting point of the Canadian constitution is "[w]hereas" (in French "considérant"), a word from which Canada's confederation was formed. One might say that Canadian constitutional justice is a story of conflict and compromise. Initially occupied by indigenous peoples and communities, Canadian territory was colonized by Europeans during the 15th and 16th centuries. From the start, French and British colonization led to intercolonial conflicts until the British Conquest, which resulted in the creation of the Dominion of Canada by the Fathers of Confederation. Officially, the creation of Canada came from the British North America Act, passed by the British Parliament on 1 July 1867. Also known as the Constitution Act, 1867, this founding legislation established Canada as a constitutional monarchy, a state form inspired by the Franco-British monarchical heritage of the first settlers,[6] although "with a Constitution similar in Principle to that of the United Kingdom".[7]

The Constitution Act, 1867[8] thus established the functioning of the Canadian federal parliamentary system, in which the Crown remains the basis for separating

[5] Canadian Heritage, "How Your Rights Are Protected," Canada.ca, accessed 2 August 2022.
[6] Carolyn Harris, "Monarchie Constitutionnelle," The Canadian Encyclopedia.ca, accessed 2 August 2022.
[7] Constitution Act, 1867, Articles 30 & 31 Victoria, c. 3 (U.K.) of 1867.
[8] Constitution Act, 1867, Articles 91, 30 & 31 Victoria, c. 3 (U.K.) of 1867. Between 1871 and 1975, other British statutes amended the "Constitution Act, 1867," including the Statute of Westminster, 1931, which granted legislative sovereignty to the Canadian Parliament, and the British North America Act, 1949 (No. 2), which authorized the Parliament of Canada to amend constitutional provisions falling strictly within its federal jurisdiction "to make Laws for the Peace, Order, and Good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

the executive, legislative and judicial powers. This led to (1) the formation of the executive power of the federal government, (2) the division of legislative powers between Parliament and the provincial legislatures,[9] and (3) the division of the judicial system into federal and provincial responsibilities (independent of the first two).[10] As "the Supreme Law of Canada",[11] the Canadian Constitution (i.e., Constitution Act, 1867 and Constitution Act, 1982)[12] provides the "fundamental rules and principles" of a democratic government.[13] It also reaffirms Canada's dual legal system, that is, Canada is bijural, having both common law and civil law systems,[14] and bilingual, having English and French as official languages.[15] Today, the Canadian territory, composed of ten provinces and three territories, is headed by the Prime Minister (the Head of Government), appointed by the Governor General as the representative of the British monarch (the Head of State), who also appoints judges.

2.2. Human Rights Enshrined in the Canadian Constitution

The Canadian Charter of Rights and Freedoms, 1982[16] (Canadian Charter) is "the official name for Part I of the Constitution Act, 1982 (contained in s. 1 to 33)".[17] It guarantees different types of rights and freedoms, such as fundamental

[9] Constitution Act, 1867, Articles 91–95, 30 & 31 Victoria, c. 3 (U.K.) of 1867. (VI. Distribution of Legislative Powers). Powers of the Parliament – Legislative Authority of Parliament of Canada under sect. 91 and Exclusive Powers of Provincial Legislatures – Subjects of exclusive Provincial Legislation under sect. 92. In concrete terms, a federal system means that both the Parliament of Canada and the provincial and territorial legislatures have the jurisdiction to make laws. However, they have different powers: Parliament can legislate for all of Canada on matters assigned by the Constitution (including trade between provinces, national defense, criminal law and money); provincial or territorial legislatures can legislate on matters within their borders (including education, property, civil rights, hospitals, and municipalities).

[10] Constitution Act, 1867, Articles 96–101 (VII. Judicature), 30 & 31 Victoria, c. 3 (U.K.) of 1867.

[11] Constitution Act, 1982, Article 52, Schedule B to the Canada Act 1982 (UK), c. 11 of 1982.

[12] Justice Laws Website, "Constitution Acts, 1867 to 1982," Justice.gc.ca, accessed 2 August 2022. There are also some other constitutional principles, mostly coming from the United Kingdom constitution like juridical independence, which are not written in those two Constitution Acts.

[13] Justice Laws Website, "Constitution Acts."

[14] The Canadian legal system is a mixed one, whereby public law in the provinces and territories is based on the British common law tradition, with distinct Canadian characteristics, while private law is based on the common law tradition, except for the province of Quebec, which has a distinct civil law tradition.

[15] Supreme Court of Canada, "2021 Year in Review – Canada's Top Court," Scc-csc.ca, accessed 2 August 2022.

[16] Canadian Charter of Rights and Freedoms, Part I of the "Constitution Act," Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on 17 April 1982.

[17] Canadian Charter of Rights and Freedoms, Article 34, Part I of the "Constitution Act," Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on 17 April 1982. See also Canada.ca, "Guide to the Canadian Charter of Rights and Freedoms," Canada.ca, accessed 2 August 2022.

freedoms (s. 2);[18] democratic rights (s. 3 to 5); mobility rights (s. 6); legal rights (s. 7 to 14);[19] equality rights (s. 15);[20] Canada's official languages (s. 16 to 22); minority language education rights (s. 23); as well as other general provisions such as Indigenous peoples' rights (s. 25) and Canada's multicultural heritage (s. 27).

As part of the supreme law of Canada, the Canadian Charter applies to all Parliament and governments but not to private individuals, businesses, or other organizations.[21] Its scope is therefore limited to the actions of "the governments of Canada, the provinces or the territories", i.e., the public relations between an individual and one of the "legislative, executive and administrative branches of government."[22] So that governments can change their laws to comply with equality rights, s. 15 did not come into force until 1985.[23]

Concerning the limitation of rights, unless Parliament and the provincial or territorial legislatures use the "notwithstanding" clause (s. 33) to enact legislation that may limit (under certain conditions) the rights included in s. 2, or s. 7 to 15, any Canadian whose fundamental freedoms or legal and equality rights have

[18] Canadian Charter of Rights and Freedoms, Article 2, Part I of the "Constitution Act," Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on 17 April 1982. It protects "freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association."

[19] The legal rights set out the protection of individual rights within the justice system to ensure fair treatment in criminal proceedings in accordance with the principles of fundamental justice. These protections are of various kinds, including the right to life, liberty and security of person and the protection to not be subjected cruel or unusual treatment or punishment.

[20] Regarding the protection of equality, the Canadian Charter guarantees that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law" regardless of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." In addition to prohibiting discrimination on any of these grounds in Canadian law or programs, affirmative action programs that seek to improve the "conditions of disadvantaged individuals or groups" are permitted under Canada.ca, "Guide to the Canadian Charter of Rights and Freedoms," Canada.ca, accessed August 2, 2022, sect. 15(2).

[21] Canadian Charter of Rights and Freedoms, Articles 32–33, discuss the application of the Canadian Charter, while Article 31 indicate that "nothing in this Charter extends the legislative powers of any body or authority," meaning that sharing of responsibilities between the federal government and the provinces remains as set out under Constitution Act, 1867, Article 91, 30 & 31 Victoria, c. 3 (U.K.) of 1867.

[22] Supreme Court Judgments, R. v. Harrer, (1995) 3 S.C.R. 562 (Supreme Court of Canada 1995), 12; Supreme Court Judgments, RWDSU v. Dolphin Delivery Ltd., (1986) 2 S.C.R. 573, 598 (Supreme Court of Canada 1986), 603–604; Supreme Court Judgments, Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, (2018) 1 S.C.R. 750 (Supreme Court of Canada 2018), 39. The Canadian Charter only applies to private actors when a violation of a fundamental right by a private party results from an act of a legislative nature or from an interaction with a public officer or a government agency, see Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022,* (Montréal (QC): Éditions Yvon Blais, 2021), 33, 35–36.

[23] Canadian Charter of Rights and Freedoms, Article 32(2), Part I of the "Constitution Act," Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on 17 April 1982. See also "Canada.ca, "Guide to the Canadian Charter of Rights and Freedoms," Canada.ca, accessed 2 August2022."

been infringed or denied by a person acting on behalf of the government "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances" (s. 24(1)), as discussed in Part II. To do so, the individual must show which rights have been violated, whereby the government will have to show that the violation constitutes a reasonable limit under s. 1, which reads as follows:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In this regard, it is important to note that the rights and freedoms guaranteed by the Canadian Charter are not absolute, as they can be limited to protect other rights or national values, but only "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (s. 1). Alternatively, if the infringement derives from a "rule of law", the SCC may strike down the part of the law that violates Charter rights and declare it invalid under s. 52 of the Constitution Act, 1982.[24]

Before the Canadian Charter came into force, many of the rights and freedoms[25] that it now includes were protected by other Canadian laws (federal and provincial), which are briefly discussed below. This overview of the complex federal and provincial legal framework highlights the probability of conflicting rights, and the necessity of a Supreme Court that can resolve human rights disputes and consolidate jurisprudence.

2.3. Human Rights at the Federal, Provincial and Territorial Levels

There are two federal laws protecting the fundamental rights of Canadians. One is the Canadian Bill of Rights, 1960,[26] which established the first fundamental rights of individuals in relation to federal government laws and policies (s. 2

[24] It should be noted that sect. 52 is not part of the Canadian Charter, but the Court may still have the power to strike down a law that violates a right or freedom guarantee under the Charter, "which itself is part of the Constitution." See Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022,* (Montréal (QC): Éditions Yvon Blais, 2021), 111.

[25] "Canada.ca, "Guide to the Canadian Charter of Rights and Freedoms," Canada.ca, accessed 2 August 2022."

[26] Canadian Bill of Rights, S.C. 1960, c. 44 of 1960.

and 5(2)). The other is the Canadian Human Rights Act, 1977,[27] which protects against harassment or discrimination[28] of employees and/or beneficiaries of services from the federal government, federally regulated private businesses and First Nations governments. These laws coexist with the Canadian Charter and provide another layer of human rights protection.

For equality rights protection, the Canadian Human Rights Commission[29] was created to receive and analyze complaints of discrimination (s. 40–41). When the allegations in the complaint require further investigation, the Canadian Human Rights Tribunal[30] Chairperson can appoint a member to hear the complaint (s. 49). That said, the Canadian Human Rights Act applies only to private law in areas of federal jurisdiction. It cannot be used to challenge the validity of other legislation based on inconsistency.[31]

There are also laws protecting human rights against discrimination in provincial and territorial jurisdiction areas, including most workplaces, housing, schools, and other services. All ten provinces and three territories have similar human rights laws to the Canadian Human Rights Act, as they apply similar principles and provide the same kind of agencies.[32] However, unlike the Canadian Charter, the provisions of these provincial and territorial laws can be abrogated and/or amended because they do not have the same constitutional primacy. Other differences exist between the Canadian Charter and provincial laws, including their scope of application. For example, in Quebec, the only civil law province in Canada (as far as private law is concerned), the Charter of Human Rights

[27] Canadian Human Rights Act, R.S.C., 1985, c. H-6 of 1981.
[28] Canadian Human Rights Act, R.S.C., 1985, c. H-6 of 1981. The prohibited grounds of discrimination are mentioned under sect. 2–3(1).
[29] Canadian Human Rights Commission, "Human Rights in Canada," Canadian Human Rights Commission, accessed 2 August 2022.
[30] Canadian Human Rights Tribunal, "Welcome to the Canadian Human Rights Tribunal," Canadian Human Rights Tribunal, accessed 2 August 2022.
[31] Supreme Court Judgments, Canada (Canadian Human Rights Commission) v. Canada (Attorney General), (2018), 2 S.C.R. 230 (Supreme Court of Canada 2018), 56; Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022*, (Montréal (QC): Éditions Yvon Blais, 2021), 23-24.
[32] The different provincial and territorial human rights agencies are listed at Canadian Human Rights Commission, "Provincial & Territorial Human Rights Agencies," Canadian Human Rights Commission, accessed 2 August 2022.

and Freedoms, 1975,[33] "applies in both the private and public law context".[34] Thus, unlike the Canadian Charter, "the scope of the Quebec Charter is not restricted to 'government action'."[35] but rather "extends to relationships between individuals and relationships between individuals and the state".[36] As such, for individuals living in Quebec, the means of enforcing their fundamental rights and freedoms will depend on the nature of the violation, i.e., by an individual conduct or by a rule of law (depending on the legislative jurisdiction in cause), since the Canadian and Quebec charters provide separate remedies for these two potential sources of infringement.[37]

To conclude this overview, it appears clearly that the Canadian human rights protection framework provides for a multilayered system whereas human rights are protected, and within which there can be conflict among different actors and/or competing rights. It is within this context that this paper addresses the question of how the SCC can play a crucial role in ensuring the protection of human rights in a democratic society and resolve conflicts in situations of competing rights.

III. THE ROLE OF THE SCC IN PROTECTING HUMAN RIGHTS

Having set the background framework of human rights protection in Canada, this part discusses the role of the SCC in resolving conflicts between competing rights and in maintaining the balance between individual and collective rights, illustrated by two key cases of the past decade. This paper focuses on the following four aspects in this part. First, it discusses the jurisdiction over human rights

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[33] Charter of Human Rights and Freedoms, R.S.Q., c. C-12 of 1975.

[34] Supreme Court Judgments, Syndicat Northcrest v. Amselem, (2004) 2 S.C.R. 551 (Supreme Court of Canada 2004), Article 38. However, in Supreme Court Judgments, Plourde v. Wal-Mart Canada Inc, (2009) 3 S.C.R. 465 (Supreme Court of Canada 2009), Article 56, this fundamental difference between the Canadian Charter and the Quebec Charter was overlooked by the Court, see Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022*, (Montréal (QC): Éditions Yvon Blais, 2021), 33.

[35] Supreme Court Judgments, Godbout v. Longueuil (City), (1997) 3 S.C.R. 844 (Supreme Court of Canada 1997), Article 93.

[36] Supreme Court Judgments, Chaoulli v. Quebec (Attorney General), (2005) 1 S.C.R. 791 (Supreme Court of Canada 2005), 33. See in paragraph 270: "It applies not only to state action but also to many forms of private relationships."

[37] Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022*, (Montréal (QC): Éditions Yvon Blais, 2021), 33–36, 111.

in the Canadian constitutional framework (2.1). It then theorizes the central role of the SCC in protecting human rights and resolving conflicts between conflicting rights (2.2). The paper moves on to discuss the SCC's recent Chief Justices, whereas the fourth section illustrates the SCC's role in settling conflicts involving fundamental rights in two recent cases (2.4).

3.1. Jurisdiction Over Human Rights in the Canadian Constitutional Framework

The SCC is often seen (and sees itself)[38] as the guardian of the Constitution for the protection of fundamental rights. However, according to the founding texts of Canadian constitutional law, the SCC is not the only court to have this role in the Canadian constitutional framework.

As previously discussed, the division of powers between Parliament and the provincial legislatures is guaranteed under the Canadian Constitution, which also divides the judicial system with respective powers for the federal and provincial governments.[39] However, in addition to their exclusive powers, all Canadian courts are considered arbiters of constitutional disputes, given the principle of constitutionalism enshrined in the Constitution Act, 1867.[40] Consequently, the courts of general jurisdiction (i.e., the courts of first instance) may be called upon to decide either constitutional disputes between Parliament and the provincial legislatures, or constitutional disputes between an individual and a government.

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[38] Several scholars have written about the self-legitimizing discourse of the SCC in its own jurisprudence, which regularly asserts and delineates the boundaries of its constitutional role, see in Kate Glover Berger, "The Supreme Court in Canada's Constitutional Order," *Review of Constitutional Studies* 21, no. 1 (May, 2016): 143; Daniel Jutras, "Le Rôle Constitutionnel de la Cour Suprême du Canada: Autoportrait (A Self-Portrait of the Supreme Court of Canada)," *Les Cahiers Du Conseil Constitutionnel* 24 (2008): 65; Warren J. Newman, "The Constitutional Status of the Supreme Court of Canada," *Supreme Court Law Review* 47, no. 2 (2009): 429; Peter W. Hogg, "The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis," *Canadian Bar Review* 80, no. 1/2 (2001): 171; Paul Daly, "A Supreme Court's Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom," *Queen's Law Journal* 41, no. 1 (2015): 1; Vanessa MacDonnell, "The Constitution as Framework for Governance," *University of Toronto Law Journal* 63, no. 4 (2013): 624.

[39] Constitution Act, 1867, Articles 91–95 (VI. Distribution of Legislative Powers), 30 & 31 Victoria, c. 3 (U.K.) of 1867. Mainly, exclusive provincial powers include: "the Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts" (paragraph 92(14)), while exclusive federal powers include: the criminal law procedure; the appointment and remuneration of provincial superior court judges; the "Constitution, Maintenance, and Organization of a General Court of Appeal for Canada" (paragraph 101), from which comes the creation of the SCC (as we will discuss further).

[40] Daniel Jutras, "Le Rôle Constitutionnel de la Cour Suprême du Canada: Autoportrait (A Self-Portrait of the Supreme Court of Canada)," *Les Cahiers Du Conseil Constitutionnel* 24 (2008)."

If an appeal is made from a first instance court's decision (i.e., provincial or federal courts), the provincial or federal court of appeal will be called upon to decide. If an appeal is made against the decision of a court of appeal, then the SCC will be the final arbiter. Thus, the SCC does not have exclusive jurisdiction to decide constitutional disputes.[41] A former SCC judge summarized the uniqueness of the SCC in the following terms:

> "Given the Supreme Court of Canada's distinctive tradition and role, it is arguably the most unique among the world's highest courts. First, it is a bilingual court, in that it hears appeals argued in both English and French, and also publishes its decisions and all official documents in both languages. Second, it deals with matters emerging from civil law and common law jurisdictions in the country, and its membership is composed of judges from both of these legal backgrounds. Third, unlike the courts of Europe, the Supreme Court of Canada serves as both a constitutional court and a supreme court for the country. Fourth, in contrast to the United States, the Supreme Court of Canada sits at the top of a unified judicial system, and may hear appeals from provincial and federal courts alike. These cases may involve issues of private law (e.g. torts, contracts and property) and public law (e.g. labour, administrative, taxation and patents). The Court thus has an extremely wide jurisdiction because it may potentially hear an appeal from any court or tribunal in the country."[42]

The SCC stands as Canada's final court of appeal for all Canadian courts.[43] In practical terms, this means that an individual must proceed up the judicial structure before submitting an appeal to the SCC. In this sense, the SCC is the final legal authority on constitutional interpretation and thus can "shape the development of constitutional law" regarding individual and collective rights.[44] But, as the highest court in Canada, the SCC has jurisdiction over disputes in every area of law, not just constitutional law. As an apex court, the SCC can settle

[41] As said before, the Canadian Charter paragraph 24(1) does not specify an exclusive jurisdiction to the SCC since any "court of competent jurisdiction" could have jurisdiction to judge a violation of the rights guaranteed by the Charter.

[42] Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers and Responsibilities," *Journal of Appellate Practice and Process* 4, no. 1 (2002): 27, 33–34.

[43] The judicial Canadian structure has four levels of court: Provincial and territorial (lower) courts; Provincial and territorial superior courts; Provincial and territorial courts of appeal and the Federal Court of Appeal; Supreme Court of Canada, which is the final court of appeal for Canada. Justice Laws Website, "The Judicial Structure – About Canada's System of Justice," Justice.gc.ca, accessed 2 August 2022.

[44] Johanne Poirier, "The Role of Constitutional Courts, A Comparative Perspective: The Supreme Court of Canada," *European Parliamentary Research Service* (July 2019).

conflicts in a broad range of human rights cases, and not just those regarding constitutional rights.

Regarding constitutional matters, there are two possible procedures: constitutional review by leave to appeal a lower court decision[45] or an appeal as of right, particularly in criminal cases;[46] advisory opinion on constitutional matters, which are named references, at the Governor in Council's request.[47]

The Court's recent docket illustrates the reach of this dual mandate in constitutional and other areas, as well as the SCC's crucial role in resolving disputes. This is seemingly a consequence of the SCC's function as an apex court, as opposed to two separate constitutional and final appeals courts. In the Court's workload over the last decade (2012–2021),[48] 5,251 applications for leave to appeal and 199 notices of appeal as of right were filed at the Court, from which 4,433 were dismissed and 461 were granted. Within appeals heard, 473 were by leave and 186 were as of right, from which 350 were dismissed, 290 were allowed and 17 are still on reserve. Regarding the outcomes of appeals decided, 371 were dismissed and 303 were allowed. Of the allowed appeals, 407 were unanimous decisions, against 269 majority decisions.

The high number of cases begs the question as to whether the apex court model creates too many potential (human rights) conflicts for a court to resolve. This question is particularly interesting if one looks to the high number of cases in which review was requested (5,215 applications and 199 cases as a matter of right) and those in which review was denied (4,333 cases). Similarly, would individuals feel that their rights were better protected by a separate Constitutional Court that had no conflicting responsibilities?

[45] Leave to appeal may be granted by the SCC where the matter is one of public importance or of law and/or fact. Supreme Court of Canada, "Role of the Court," Scc-csc.ca, accessed 2 August 2022.

[46] No leave is required for an appeal as of right in criminal matters.

[47] Special Jurisdiction of the SCC, see Supreme Court Act, R.S.C., 1985, c. S-26 of 1985. The Governor in Council can ask the SCC to interpret the constitution or the constitutionality of a legislation. Also, constitutional questions can be raised in an appeal involving individual litigants, governments or government agencies. For an example of an advisory opinion by the SCC issued on multiple provincial references about the constitutionality of a federal law aimed at combatting climate change, see Supreme Court Judgments, *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, (Supreme Court of Canada 2021).

[48] These figures were calculated based on the information available for each year on the SCC website. That said, due to pandemic court closures across the country in 2020 and 2021, some of the most recent data is inconsistent, see Supreme Court of Canada, "2021 Year in Review – Canada's Top Court," Scc-csc.ca, accessed 2 August 2022.

One relevant aspect of the apex court model used in Canada is precisely that the same court has jurisdiction over human rights disputes stemming from the Constitution as well as conflicts of rights guaranteed in provincial or federal legislation. It could be argued that, while the model of a separate Constitutional Court could provide a focused and more streamlined approach to constitutional litigation, there are some particular advantages in having an apex court, particularly in a legal context of human rights protection where constitutional rights coexist with provincial and federal laws of human rights protection. As Paul Daly puts it:

> "Apex courts, which sit at the apex of common law systems, fulfil these standard dispute-resolution and law-development functions, but they also have a unique institutional position. By virtue of their place at the top of the judicial hierarchy, their decisions and, in particular, the language used in those decisions, resonate through the legal system. Moreover, members of the legal community – judges, lawyers, legal academics, students, and laypeople – often look to apex courts for general guidance. Accordingly, the institutional position of apex courts may nudge them away from incremental development of the law based on the resolution of individual cases and towards the elaboration of general principles that can unify large areas of the law and provide meaningful guidance to the legal community and the general public."[49]

3.2. The Central Role of the SCC in the Protection of Human Rights in a Democratic Society: the Balancing of Competing Rights and Interests

The significance of the SCC's constitutional role is relatively recent. While it was constituted by Parliament in 1875, under s. 101 of the Constitution Act, 1867, the SCC only became the final court of appeal for criminal cases in 1933 and civil cases in 1949.[50] Before those dates, it was still possible to contest decisions before the Judicial Committee of the Privy Council in London.[51] Only after adopting the Canadian Charter (Constitution Act, 1982) did the role of the

49 Paul Daly, *Apex Courts and the Common Law: Introduction* (University of Toronto Press: Toronto, 2019), 4–5.
50 Supreme Court Act, Articles 3 and 35 R.S.C., 1985, c. S-26 of 1985. See also Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers and Responsibilities," *Journal of Appellate Practice and Process* 4, no. 1 (2002): 27.
51 Robin MacKay and Maxime Charron-Tousignant, "The Role of the Supreme Court of Canada – Membership and the Nomination Process," Hill Notes, accessed 2 August 2022.

SCC become more crucial,[52] having to interpret the rights and freedoms newly protected by the Constitution.[53]

Given that the Canadian Charter states that rights and freedoms are not absolute and thus can be limited by law reasonably and justifiably in a free and democratic society (s. 1), how can this acceptable limitation be assessed in practice? It was left to the SCC to establish a method of applying s. 1 to settle a conflict between individual rights and societal interests (public policy).[54] In fact, s. 1 of the Canadian Charter embodies the notion of a balancing act, by permitting limits to be placed on guaranteed rights and freedoms. This provision can be found in some international treaties, such as the International Covenant on Economic, Social and Cultural Rights. Since there is no hierarchy of rights within the Canadian Charter,[55] the SCC had to elaborate solutions to balance competing fundamental rights protected by the Canadian Charter.[56] As the SCC has indicated, "[m]ost modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate".[57]

[52] Since then, the constitutional role of the CCS is reinforced by paragraph 52(1) of the "Constitution Act, 1982," and its jurisprudence claiming responsibility "to interpret and apply the laws of Canada and of each of the provinces" as their duty "to ensure that the constitutional law prevails", see Supreme Court Judgments, *Reference re Manitoba Language Rights*, (1985) 1 S.C.R. 721 (Supreme Court of Canada 1985).

[53] Many papers have been written on the subject, see in particular Peter W. Hogg, "The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis," *Canadian Bar Review* 80, no. 1/2 (2001).

[54] The Oakes test is the SCC's analysis of the Limitation Clause in paragraph 1. Essentially, the government may limit rights and freedom to the extent that: "is set out in law; pursues an important goal which can be justified in a free and democratic society; pursues that goal in a reasonable and proportionate manner." Furthermore, see in the Justice Laws Website, "Learn about the Charter- Canada's System of Justice," Justice.gc.ca, accessed 2 August 2022. For SCC's full explanation of the Oakes test, see Supreme Court Judgments, R. v. Oakes, (1986) 1 S.C.R. 103 (Supreme Court of Canada 1986), 69–70.

[55] Supreme Court Judgments, *Reference re Same Sex Marriage,* [2004] 3 S.C.R. 698 (Supreme Court of Canada 2004), 50–53. The Canadian Charter also does not have a superior status within the Canadian constitution, see Supreme Court Judgments, *Adler v. Ontario* (1996) 3 S.C.R. 609 (Supreme Court of Canada 1996).

[56] Supreme Court Judgments, *Dagenais v. Canadian Broadcasting Corp., (1994) 3 S*.C.R. 835 (Supreme Court of Canada 1994), 877. However, not all potential conflicts imply unconstitutionality, only if the collision cannot be reconciled, in which case the fundamental values and principles of a free and democratic society should guide the SCC's analysis. Those values and principles include human dignity, the promotion of social justice and equality, and public faith in social and political institutions, all of which underlie the Canadian Charter and provide the fundamental standard for determining whether a limit on a right or freedom is reasonable despite its effects. See Henri Brun, Pierre Brun, and Fannie Lafontaine, "Chartes des droits de la personne: Législation, Jurisprudence et Doctrine," in *Collection Alter Ego, 34e Éd.* (Montréal: Wilson & Lafleur, 2021), 1/67.

[57] Supreme Court Judgments, Canada (Attorney General) v. JTI-Macdonald Corp., (2007) 2 S.C.R. 610 (Supreme Court of Canada 2007), 36.

Guided by the SCC jurisprudence, Canadian courts have interpreted the rights and freedoms protected by the Charter in a liberal manner, without reluctance to strike down laws that violate the Charter. Overall, a "generous" (rather than legalistic)[58] interpretation has been adopted by applying the metaphor of the "living tree", which allows the Canadian Charter to grow and develop over time "to meet new social, political, and historical realities often unimagined by its framers"[59] but "within its natural limits".[60]

However, to interpret the Canadian Charter, the SCC had to take a stand on some of the most controversial socio-political issues. It had to strike a balance between promoting collective interests and respecting rights guaranteed by the Canadian Charter, which were previously reserved for the legislative and/ or executive branches, triggering several criticisms (such as "judicial activism", "government of judges", "institutional legitimacy" and "legitimacy of judicial review").[61] Nevertheless, it remains the judicial body best placed to oversee "the growth and development of Canadian jurisprudence",[62] including constitutional human rights litigation, given its multiple review role as both a constitutional court and a court of final appeals. In this sense, the protection of human rights depends essentially on striking the right balance between competing rights and setting the jurisprudence to guide lower courts on the interpretation of human rights.

In addition to constitutional rights cases, which are based on the interpretation and application of the Canadian Charter, the SCC has also been called upon

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58 Supreme Court Judgments, R. v. Big M Drug Mart Ltd., (1985) 1 S.C.R. 295 (Supreme Court of Canada 1985), 344.

59 Supreme Court Judgments, Hunter v. Southam, (1984) 2 S.C.R. 145 (Supreme Court of Canada 1984), 155. We can trace the creative nature of constitutional interpretation back to 1930, over 50 years before the adoption of the Canadian Charter, through a metaphor describing the constitution as a "living tree" in Supreme Court Judgments, Edwards v. Attorney General of Canada, (1930) A.C. 124 (Supreme Court of Canada 1930), while interpreting the "British North America Act, 1867," paragraph 24. See also Robert J. Sharpe, "The Supreme Court of Canada in Changing Times," (Paper presented for Ontario Justice Education Network Summer Law Institute for Secondary School Teachers, 2003).

60 Sharpe, "The Supreme Court of Canada." Those "natural limits" are also Canada's fundamental legal values and principles contained within the Constitution, the statutes enacted by Parliament, the precedents set by the courts, the legal literature, and other international legal norms.

61 Ibid. For example, see Sharpe, "The Supreme Court," on the SCC in changing times and judicial interpretation of the Canadian Charter, which provoked ongoing debate from both the political right and left as well as many academics.

62 See Supreme Court of Canada, "Role of the Court," Scc-csc.ca, accessed 2 August2022.

to settle disputes relating to provincial human rights legislation, as a court of final appeal.[63] In such cases, while not interpreting the Constitution – i.e., the Canadian Charter – the SCC has played an important role in the resolution of conflict in human rights protection cases based on regular laws.

3.3. The SCC's Chief Justice and the Protection of Human Rights

This section looks into the changes in the Court's Chief Justices in the past decade in the context of the resolution of conflicts relating to human rights protection in Canada.

As the Supreme Court Act requires, the SCC comprises nine judges, including the Chief Justice of Canada.[64] The current Chief Justice of Canada is the Right Honorable Richard Wagner, appointed on 18 December 2017 after serving on the SCC for almost five years, succeeding the Right Honorable Beverley McLachlin, former Chief Justice of Canada from 7 January 2000 until her retirement on 14 December 2017.

As the longest-serving and first woman Chief Justice in the history of the SCC, McLachlin joined the Justice Lamer divided Court in 1989, which, as claimed by some authors, she transformed into a collegial court after being appointed Chief Justice in 2000.[65] She also arrived at a pivotal time in Canadian constitutional history: that of the newly adopted Canadian Charter, whose interpretation had yet to be formulated and implemented in cases involving the resolution of conflicts between competing individual rights and/or collective interests. Overall, the jurisprudence during her tenure was characterized by a theme of harmony, also referred to by scholars as "consensus", "accommodation", "reconciliation", "compromise" and/or "balance", an approach to deliver justice

[63] For example, see the recent decision Supreme Court Judgments, Ward v. Commission des droits de la personne et des droits de la jeunesse, 2021 SCC 43 (Supreme Court of Canada 2021).

[64] The current judges at the SCC are: The Hon. Michelle O'Bonsawin (since 1 September 2022), The Hon. Andromache Karakatsanis (since 21 October 2011), The Hon. Suzanne Côté (since 1 December 2014), The Hon. Russell Brown (since 31 August 2015), The Hon. Malcolm Rowe (since 28 October 2016), The Hon. Sheilah L. Martin (since 18 December 2017), The Hon. Nicholas Kasirer (since 16 September 2019), The Hon. Mahmud Jamal (since 1 July 2021), with The Rt. Hon. Richard Wagner, P.C., as the new Chief Justice of Canada since 18 December 2017. Supreme Court of Canada, "2021 Year in Review – Canada's Top Court," Scc-csc.ca, accessed 2 December 2022.

[65] Ian Greene and Peter McCormick, *Beverley McLachlin: The Legacy of a Supreme Court Chief Justice* (Toronto: James Lorimer & Company Ltd., Publishers, 2019), 7–9, 48.

in a judicial problem-solving way.[66] As for Charter jurisprudence, her approach has taken the form of a harmonious balance between "the individual interest asserted as protected by a right, the constitutional rights of other individuals and groups affected by that claim, and the needs of a society where these limit rights no more than is reasonable".[67] As such, many saw her as the "chief ambassador of the Charter", speaking to the public about the role of the judiciary (notably the SCC) as guardian of the values embodied in the Charter by giving voice to the deepest values of Canadian society, which have been reflected and guided by the courts since then.[68] Thus, her leadership within the Court and in public opinion has helped to demystify the judicial function, improve public understanding of it, and protect the judiciary from attacks claiming "judicial activism".[69] Simply put, she brought her own unique contribution to the way of interpreting the Canadian Charter. She left her mark with her interpretative approach of "conscious objectivity" and the harmonization of jurisprudential principles. Since Wagner was appointed Chief Justice, in his short tenure thus far, the percentage of unanimous decisions has decreased.[70]

Therefore, the analysis of recent changes in the Chief Justice of the SCC are of interest to shed light on their impact on the consistent (or otherwise) application and interpretation of the Canadian Charter (and interpretation of human rights protected by it). As the guardian of the Constitution and the final arbiter of constitutional disputes, the SCC has the power to strike down legislation that violates the Canadian Charter, which may directly impact the rights and freedoms of Canadians. Since the task of interpretation is ultimately

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[66] Marcus Moore, "Introduction: Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership," *Supreme Court Law Review* 86, no. 2 (2018): lxiii, lxxiii–lxxxvi; Marcus Moore, "Justice as Harmony: The Distinct Resonance of Chief Justice Beverley McLachlin's Juridical Genius," in *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership*, ed. Marcus Moore and Daniel Jutras (Toronto: LexisNexis, 2018).

[67] Moore, "Introduction: Canada's Chief Justice,"; Moore, "Justice as Harmony."

[68] Moore, "Introduction: Canada's Chief Justice," lxxxiv; Richard Albert, "The Expositor and Guardian of Our Constitutional Values," in *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership*, ed. Marcus Moore and Daniel Jutras (Toronto: LexisNexis, 2018).

[69] Albert, "The Expositor and Guardian," lxxxi; L'honorable Marie Deschamps, "Beverley McLachlin : Femme, Juge, Porte-Étendard," in *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership*, ed. Marcus Moore and Daniel Jutras (Toronto: LexisNexis, 2018).

[70] The ten-years trends in the percentage of unanimous decisions illustrate how often the SCC's judges agree or not in the result of a judgment: 72% in 2012, 68% in 2013, 79% in 2014, 70% in 2015, 61% in 2016, 54% in 2017, 48% in 2018, 42% in 2019, 49% in 2020 and 46% in 2021, see Supreme Court of Canada, "2021 Year in Review – Canada's Top Court," Scc-csc.ca, accessed 2 August 2022.

theirs, judges must decide in light of the values of a free and democratic society, following the principle of the "living tree" to keep pace with the evolution of society.

3.4. The SCC's Role in Settling Conflicts Involving Fundamental Rights: an Overview of Two Contrasting Illustrative Cases

To illustrate the SCC's role in settling constitutional conflicts, this paper discusses some cases which highlight the impact of the Court's judicial transitions over the past ten years to see what implications these may have on interpreting the Canadian Charter and, therefore, on protecting fundamental rights. Given their importance in illustrating the role of the SCC in resolving conflicts between individual rights and societal interests, this paper contrasts the R. v. Jordan judgment of 2016[71] (with former Chief Justice McLachlin) and the R. v. Bissonnette case of 2022[72] (with new Chief Justice Wagner). For many observers, resolving these two conflicts had a preventive function, allowing other potentially conflicting parties to know their rights based on these precedents, thus regulating and stabilizing the safeguarding of democratic principles.

Jordan, a case on appeal from the Court of Appeal of British Columbia, concerned an application under s. 11(b) of the Canadian Charter, which guarantees the right of accused persons "to be tried within a reasonable time". While all nine judges of the SCC agreed on the stay of proceedings, the analytical framework split the judges' decision 5 to 4. According to the majority (justices Abella, Moldaver, Karakatsanis, Côté and Brown), a new analytical framework was needed to apply s. 11(b) of the Canadian Charter with a presumptive ceiling of time limits for an accused to be tried within a reasonable time. For the dissenting judges (Chief Justice McLachlin and justices Cromwell, Wagner and Gascon), the jurisprudence of the last 30 years should have been maintained, with a clarification of the legal framework to balance further the many factors relevant to the application of s. 11 (b) without limiting it to numerical ceilings.

[71] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631(Supreme Court of Canada 2016).
[72] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022).

In the majority's view, since "[t]imely justice is one of the hallmarks of a free and democratic society",[73] the criminal justice system should have never let emerge "a culture of complacency towards delay"[74] which has grave effects on society. Beyond justice for the accused, this kind of culture also affects the victims, the victims' families, the justice system, and "the administration of justice".[75] Therefore, five judges ruled that the SCC precedent had to be set aside, i.e., the framework set out since *Morin* and *Askov*, to facilitate "a much-needed shift in culture" by creating incentives for the Crown counsel, the defense lawyers and the courts to foster "proactive and preventative problem solving".[76] For most judges, this approach allows "to further the interests of justice"[77] and "to maintain the public's confidence by delivering justice in a timely manner" since timely trials "are constitutionally required."[78] In contrast, in the minority's view (delivered by Cromwell), this new framework "diminishes Charter rights."[79] Instead, the "case-specific determinations of reasonableness" approach should be pursued, with some adjustments, so that the constitutional right of defendants to be tried within reasonable limits would remain "defined and applied in a way that appropriately balances the many relevant considerations".[80] Nevertheless, in the *Jordan* case, the SCC allowed the appeal and overturned the convictions by entering a stay of proceedings.

Another interesting and recent example of the role of the SCC in balancing fundamental rights and societal interests is the *Bissonnette* judgment. In this case, on appeal from the Court of Appeal of Quebec, the SCC was asked to determine whether sentencing an offender to consecutive periods of parole ineligibility (s. 745.51 (1) of the Criminal Code)[81] violated his protection against "cruel and unusual treatment or punishment" (s. 12, Canadian Charter). If so,

[73] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631 (Supreme Court of Canada 2016), 1.
[74] Ibid., 40–41.
[75] Ibid., 21–27.
[76] Ibid., 94, 112. To develop the new framework, a review of the SCC paragraph 11(b) cases over the past decade was undertaken to align the contextual approach with the new problem-solving approach, see page 107.
[77] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631 (Supreme Court of Canada 2016), 28.
[78] Ibid., 141.
[79] Ibid., 302.
[80] Ibid., 145.
[81] Criminal Code, R.S.C., 1985, c. C-46 of 1985.

whether this could be justified "in a free and democratic society" (s. 1, Canadian Charter), and if not, what remedy was appropriate.[82] Here, the role of the SCC was to resolve a conflict between, respectively, a law of Parliament (allowing judges to limit the possibility of parole of an offender for the protection of the public under s. 745.51 (1) Criminal Code, in force since 2011)[83] and access to parole consistent with human dignity ("a value that underlies the protection conferred by s. 12 of the Charter"[84] and which "requires that Parliament leave a door open for rehabilitation").[85] In other words, it was a question of reconciling the power of Parliament (to determine the objectives of denunciation and deterrence of heinous crimes) with the constitutional limits within which that power can be exercised, i.e., in accordance with Canadian values.[86] Because social norms are not fixed in time, the SCC recalled that the nature of cruel and unusual punishment could evolve "in accordance with the principle that our Constitution is a living tree capable of growth and expansion within its natural limits so as to meet the new social, political and historical realities of the modern world".[87] As such, a unanimous decision written by Chief Justice Richard Wagner declared that s. 745.51 Criminal Code is unconstitutional as it violates s. 12 of the Canadian Charter and it does not pass the test of s. 1. It was therefore declared invalid and inoperative retroactively, i.e., from the time of its adoption.[88]

These two cases illustrate the complex role of the SCC to guarantee the protection of human rights while resolving conflicts between individual rights and societal interests. In doing so, the SCC can change a precedent despite the

[82] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 25. The SCC also had to assess whether it would violate his "right to life, liberty and security" (sect. 7 Canadian Charter), but ended up not having to do so.

[83] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 35; Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, Article 5, S.C. 2011, c. 5 of 2011.

[84] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 81. See also page 59, "Although dignity is not recognized as an independent constitutional right, it is a fundamental value that serves as a guide for the interpretation of all Charter rights." It is referring to Supreme Court Judgments, Blencoe v. British Columbia (Human Rights Commission), (2000) 2 S.C.R. 307 (Supreme Court of Canada 2000), 77.

[85] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 9.

[86] R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 65, 86–87.

[87] Ibid., 65.

[88] Ibid., 26.

principle of *stare decisis*[89] (Jordan) and strike down a law (act of Parliament) retroactively despite the doctrine of *res judicata*[90] (Bissonnette), both of which are constitutional powers with concrete impacts on the fundamental rights of Canadians. Indeed, in the first case, the majority decided to overturn a precedent by shifting to a new analytical framework that complies with s. 11(b) of the Canadian Charter, so that under certain conditions, those already in the criminal justice system can assert the new analytical framework. This may have "the potential to effect positive change within the justice system, rather than succumb to the culture of complacency".[91] In the second case, the decision to invalidate s. 745.51 of the Criminal Code retroactively (despite the doctrine of *res judicata*, which normally tempers the application of the s. 52(1) Constitution Act, 1982)[92] may have consequences for those found in the justice system, "by allowing them to appeal on constitutional grounds"[93] and seek redress under s. 24(2) of the Canadian Charter.[94]

V. CONCLUSION

In a multicultural society, guided by democratic principles, the rule of law, and the protection of human rights, an apex court plays a crucial role in the settlement of disputes. In a system where fundamental rights, such as the right

[89] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631 (Supreme Court of Canada 2016), 45, 92–95. Also, it should be quickly pointed out that, despite the principle of stare decisis, the SCC may exceptionally question its own jurisprudence if it is not or no longer in conformity with the law, inapplicable or inequitable or unnecessarily complex and formalistic in practice, or if society has evolved such that a new interpretation is necessary, see Johanne Poirier, "The Role of Constitutional Courts, A Comparative Perspective: The Supreme Court of Canada," *European Parliamentary Research Service* (July 2019): 25, referring to: Supreme Court Judgments, R v. Henry, (2005) 3 S.C.R. 609 (Supreme Court of Canada 2005). See also Supreme Court Judgments, Ontario (Attorney General) v. Fraser, (2011) 2 S.C.R. 3 (Supreme Court of Canada 2011), 139. It states, "Fundamentally, the question in every case involves a balancing: do the reasons in favour of following a precedent – such as certainty, consistency, predictability and institutional legitimacy – outweigh the need to overturn a precedent that is sufficiently wrong that it should not be upheld or perpetuated?" See also Supreme Court Judgments, Carter v. Canada (Attorney General), (2015) 1 S.C.R. 331 (Supreme Court of Canada 2015), overturning: Supreme Court Judgments, Rodriguez v. British Columbia (Attorney General), (1993) 3 S.C.R. 519 (Supreme Court of Canada 1993).

[90] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 134–138.

[91] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631 (Supreme Court of Canada 2016), 104.

[92] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 136.

[93] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 135. It is referring to Supreme Court Judgments, R. v. Boudreault, (2018) 3 S.C.R. 599 (Supreme Court of Canada 2018), 103; Supreme Court Judgments, R. v. Thomas, (1990) 1 S.C.R. 713 (Supreme Court of Canada 1990), 716.

[94] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 137.

to life, liberty and equality are guaranteed by the Constitution, the SCC occupies a position of guarantor of human rights similarly to both a constitutional court and the final court of appeal. As a former SCC justice has posited, the Court has "become a fundamental national institution charged with protecting and preserving the rights and freedoms of individual Canadians ... it is beyond question that the role and function of the Supreme Court of Canada have dramatically transformed over time."[95] The aim of this paper was to take stock of how the SCC operates in a complex human rights framework and to evaluate its role as the court of final appeal for all areas of law, including in constitutional and fundamental rights matters.

This paper has thus discussed the complex framework of legal protection of human rights in Canada and highlighted the crucial role of the SCC in resolving conflicts as an apex court. Given the particularities of human rights protections in Canada, a model of apex court for conflict resolution allows for "the elaboration of general principles that can unify large areas of the law and provide meaningful guidance to the legal community and the general public".[96] The role of the SCC in providing a comprehensive final resolution in human rights cases may provide interesting lessons for other countries which have a similar human rights protection framework. This paper illustrated its research by analyzing two decisions of the SCC which contrast individual fundamental freedoms with societal interests. It has argued that in a country based on a system of constitutional monarchy and parliamentary democracy such as Canada, the SCC has a key role in guaranteeing human rights in situations of conflict between competing rights or interests. Ultimately, the paper provides an overview of the SCC's role in human rights conflict resolution and a basis for comparative analysis with other systems.

[95] Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers and Responsibilities," *Journal of Appellate Practice and Process* 4, no. 1 (2002): 39–40.
[96] Paul Daly, *Apex Courts and the Common Law: Introduction* (University of Toronto Press: Toronto, 2019), 5.

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