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Mandatory Minimums: An Update

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Until recently, mandatory minimum sentences were a rarity in Canada.[1] But today, Canada ranks second in the world — behind only the United States — in the number of offences it has that carry mandatory minimums.[2] This shift has been orchestrated in the face of a body of empirical research that shows mandatory minimums do not work. Contrary to the rhetoric espoused by our government, mandatory minimums do not deter crime. Instead, they frustrate the ability of judges to impose just sanctions, heighten the risk of wrongful convictions, and erode public confidence in the justice system. And most importantly, mandatory minimums risk being unconstitutional, an argument accepted by the Supreme Court of Canada most recently in *Regina v. Nur*.[3]

The Decision in Nur

In *Nur*, the Court struck down the three-year mandatory minimum for a first possession of a firearm, and the five-year mandatory minimum for a subsequent possession. The Court held both minimums violated section 12 of the *Charter* and that the violation could not be saved by section 1. The importance of this decision cannot be overstated — the Court has not struck down a mandatory minimum sentence since *Regina vs. Smith* decided almost 30 years ago.

In *Nur*, the Court found that the three-year mandatory minimum cast a net over a wide range of potential conduct. While most cases within the range may merit a sentence of three years or more, conduct at the less serious end of the spectrum may not.[4] For the latter offenders, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the *Criminal Code*.[5] The mandatory minimums therefore violated section 12. In arriving at this finding, the Court rejected the argument that the Crown's ability to elect to proceed summarily and thereby avoid a mandatory minimum prevents it from being grossly disproportionate. The Court found that this submission effectively delegates the courts' constitutional obligation to the prosecutors and leaves the threat of a grossly disproportionate sentence hanging over an accused's head.[6] This threat morphs into a trump card for prosecutors in plea negotiations and the Court accepted that in such conditions the possibility that wrongful convictions could occur increases.[7]

The Court also rejected the Crown's invitation to abandon the use of reasonable hypotheticals under the section 12 analysis. In *Nur*, the Crown proposed instead a new section 12 test that put a primary or exclusive focus on the offender before the court. In rejecting this invitation, the Court stressed the value of looking at scenarios beyond the facts of the instant case: "Looking at whether the mandatory minimum has an unconstitutional impact on others avoids the chilling effect of unconstitutional laws remaining on the statute books."[8]

And finally, the Court's comments under section 1 raise questions about the future of mandatory minimum sentences in general. Shortly after *Nur* was released, Justice Minister Peter MacKay wrote an editorial in the National Post where he pronounced that despite striking down the law, all nine justices "actually agreed that mandatory prison sentences are legitimate criminal justice tools."[9] The Court said no such thing. To the contrary, the Court finally listened to decades of empirical evidence that mandatory minimums do not work. Under rational connection, the Court found that the government has not established that mandatory minimum terms of imprisonment act as a deterrent against gun-related crimes. The Court held, "The empirical evidence 'is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences.'"[10] Although the Court ultimately went on to find that a rational connect does exist between mandatory minimums and the goals of denunciation and retribution, the constitutionality of the mandatory minimum failed at minimal impairment.[11]

Conclusion

Mandatory minimums are bad law. Their consequences far outweigh any of their purported benefits. Sadly, while the Americans have learned these hard lessons and are retreating from the use of mandatory minimums, Canada continues to march down the opposite path. The decision in *Nur* recognizes that mandatory minimums are bad law and its implications are far-reaching. The arguments accepted by the Court apply beyond the three and five-year mandatory minimums struck down in the decision and lay the groundwork for future challenges to other mandatory minimum sentences.

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[1] *R. v. Nur*, 2013 ONCA 677 at para. 69 [Judgment of the Ontario Court of Appeal] Appellant's Record ("A.R.") Tab 2. See also: Nicole Crutcher, "Mandatory Minimum Penalties of Imprisonment: An Historical Analysis" (2011) 44 Crim. L.Q. 279; Julian V. Roberts, "Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process" (2001) 39 Osgoode Hall L.J. 305.
[2] British Columbia Civil Liberties Association, News Release, "Mandatory Minimum Sentencing Costs Too Much" (8 September 2014) online: https://bccla.org/news/2014/09/mandatory-minimum-sentencing-costs-too-much/
[3] 2015 SCC 15.
[4] *Ibid.* at para. 82.
[5] *Ibid*.
[6] *Ibid* at para. 85 – 87.
[7] *Ibid* at para. 96.
[8] *Ibid* at para. 64.
[9] Peter MacKay, National Post, "What the Court got right – and wrong – on mandatory sentences for gun crimes" (April 21, 2015) online: http://news.nationalpost.com/full-comment/peter-mackay-what-the-court-got-right-and-wrong-on-mandatory-sentences-for-gun-crimes
[10] *Supra* note 3 at para. 114.
[11] *Ibid* at paras. 115 – 117.

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"Organizing Principles" in Canadian Jurisprudence

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The term "organizing principle" has been used in Canadian jurisprudence in recent decades. This article identifies the term's meaning and some organizing principles that have been expressly[1] recognized by the Supreme Court of Canada in certain areas of law.

I. What is an "Organizing Principle"?

The term was used recently in *Bhasin v Hrynew*[2](2014).There Cromwell J. for a unanimous court recognized good faith contractual performance[3] as an "organizing principle" of common law.[4] He explained the term's meaning as follows:

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[1] My research is restricted to cases in which the Supreme Court of Canada in those particular cases has explicitly identified an "organizing principle". A discussion of the multitude of cases in which the Court has labelled principles as "important", "fundamental", "general", "core", "key" and similar adjectives are well outside the ambit of this article. An example, from the law of restitution, is "the notion of restoration of a benefit which justice does not permit one to retain." This was identified by McLachlin J. (as she then was) (for the Majority) in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, 1992 CarswellNat 15 at para. 30, as "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle." Quoting from this case (pp. 786, 788) in *Bhasin v. Hrynew*, 2014 SCC 71, discussed below, Cromwell J. said that his "approach is consistent with that taken in the case of unjust enrichment" (para. 67).

[2] 2014 SCC 71.

[3] Special rules for good faith performance already existed for certain classes of relationships and contracts, like employment, insurance, franchise and tendering. But there was no generalized and independent doctrine of good faith performance of contracts. The law was "unsettled and piecemeal" (*Basin v. Hyrnew* at para. 33). See full discussion in *Basin v. Hyrnew* at paras. 23, 32-33, 36, 46, 54-56, 72.

[4] The complete term appears in Cromwell J.'s decision 26 times, starting at para. 33 and ending at para. 93, which are excerpted below.

> 33 In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.
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> …
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> 93 A summary of the principles is in order:
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> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
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> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
>
> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.
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> [My emphasis.]

Of course the term appears in the growing number of lower court decisions that cite *Bhasin v. Hyrnew*.
In contrast, Cromwell J. had previously used the term "key principle" in another leading contract law case, *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69 at paras. 64-66. He wrote:

> [A]n organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229 (S.C.C.), at p. 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544 (S.C.C.), at para. 124; R. M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law* (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way.[5] [My emphasis]

An organizing principle is an overarching principle from which several specific common law and *Charter* rules emanate. It "underpins and informs"[6] these rules. It is tied to the existing law.[7] A court's recognizing an organizing principle in a certain area of law is "the first step"[8] or starting point; this recognition manifests the continuing incremental evolution of the common law. The breach of an organizing principle does not inherently provide a remedy; but the breach of rules emanating from that principle does.

The application of an organizing principle to particular situations should be developed by the courts where the existing law is found to be wanting and where the development may occur *incrementally* in a way that is consistent with the structure of the common law governing the particular legal area.[9] As expected, the rules that flow from the application of an "organizing principle" will vary with the circumstances. Courts can create new rules using the principle as a framework. These rules would not necessarily apply in all cases.

As Cromwell J states, an organizing principle is not a freestanding legal rule. The principle can provide "residual protections" in the absence of "specific common law and *Charter* rules", whether existing or new. The principle might demand "different things at different times". Context is important. The task in each case is "to determine exactly what the principle demands, if anything, within the particular context at issue".[10] The exercise of this task by trial judges can lead to flexibility on one hand and, especially from the viewpoint of others, such as the parties and their counsel, uncertainty and unpredictability on the other.[11]

> The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. …

Using the word "key" instead of "organizing" suggests that the principle, while important, is not overarching. *Black's* defines "principle" as "*n.* (14c) A basic rule, law, or doctrine; esp., one of the fundamental tenets of a system" (*Black's Law Dictionary*, Bryan A. Garner ed., 10th ed. (Thomson Reuters, 2014) at p. 1386), but does not define "organizing principle".

[5] para. 64.

[6] *Bhasin v. Hrynew* at para. 33.

[7] *Bhasin v. Hrynew* at para. 71.

[8] *Bhasin v. Hrynew* at paras. 33, 63.

[9] This is a general extrapolation of the specific proposition in *Bhasin v. Hrynew* at para. 65 about good faith. See also paras. 29, 33, 40, 73, 92.

[10] *R. v. White*, [1999] 2 S.C.R. 417 at paras. 44-45 (Iacobucci J. for Majority), quoted and discussed in *R. v. Hart*, 2014 SCC 52 at para. 124 (Moldaver J. for Majority) regarding the principle against self-incrimination, discussed further below.

[11] In Cromwell J's opinion:

> 71 Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility. [*Bhasin v. Hrynew*]

II. Use of the Term Generally

A. Legal Context

The term "organizing principle" might seem new to those who attended law school many decades ago and might not have kept abreast of Supreme Court of Canada caselaw. Indeed, in the Toronto Lawyers Association's most recent nutshell about notable Supreme Court of Canada decisions of the past year (2014),[12] an attendee asked about the term's use and meaning. Guest speaker Professor Allan Hutchinson, buttressed by speaker Eric Gertner's vigorous head nod, responded to the effect, "it's not new, think back to the good neighbor principle underlying *Donoghue v Stevenson*". That celebrated principle has recently been called an "animating principle".[13]

Part III below identifies specific organizing principles that have been recognized by the Supreme Court.

B. Non-Legal Context

The term pops up in a broad assortment of disciplines and contexts outside of the law. For instance, it has been said that the solar system is based on the organizing principle that the sun is located in the centre and the planets rotate around it. Modern cities are based on the organizing principle of the grid plan to manage transportation and street addressing. Organizations can be built around a set of organizing principles, such as concepts, priorities, or goals. And in Oliver Stone's film *JFK*, mystery man "X" (portrayed by Donald Sutherland and based largely on L. Fletcher Prouty) philosophizes to New Orleans District Attorney Jim Garrison (Kevin Costner): ""ometimes I think the organizing principle of any society is for war. The authority of the state over its people resides in its war powers."[14]

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[12] TLA Nutshell: The Supreme Court of Canada in 2014 - Recent Cases, Latest Trends (November 26, 2014) Web replay / Video: https://www.cpdonline.ca/video/the-supreme-court-of-canada-in-2014-recent-cases-latest-trends.

[13] Stratas J.A.'s lucid dictum in *Paradis Honey v The Queen*, 2015 FCA 89, aptly juxtaposed both "the animating principle" of *Donoghue v. Stevenson* and what he calls "the fundamental organizing principle" governing public law and private law remedies respectively. He wrote in successive paragraphs the following:

> 128 Public authorities are different from private parties in so many ways. Among other things, they carry out mandatory obligations imposed by statutes, invariably advantaging some while disadvantaging others. As for the duty of care, does it make sense to speak of public authorities having to consider their "neighbours"- the animating principle of *Donoghue v. Stevenson* – when they regularly affect thousands, tens of thousands or even millions at a time? As for the standard of care, how can one discern an "industry practice" that would inform a standard of care given public authorities' wide variation in mandates, resources and circumstances? Even if these questions are satisfactorily answered, others remain. For example, the defence of consent – a defence that keeps the liability of many private parties in check – is often impractical or impossible for public authorities. And, unlike private parties, many other less drastic tools exist to redress public authorities' misbehaviour, including certiorari and mandamus.
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> 129 As well, the current law of liability for public authorities – the provenance and essence of which is private law – sits as an anomaly within the common law. By and large, our common law recognizes the differences between private and public spheres and applies different rules to them. Private matters are governed by private law and are addressed by private law remedies; public matters are governed by public law and are addressed by public law remedies. This has become a fundamental organizing principle: *Dunsmuir*, above; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504; *Air Canada v. Toronto Port Authority*, 2011 FCA 347; [2013] 3 F.C. 605. [My emphasis]

The above three cited cases do not use the term "organizing principle". Stratas J.A. wrote the last decision (*Air Canada. v. Toronto Port Authority*).

[14] Oliver Stone and Zachary Sklar, *JFK: The Book of the Film* (New York: Applause, 1992), p. 112.

III. Summary of Organizing Principles Articulated by the Supreme Court of Canada

In addition to contract law, as addressed above, the Supreme Court of Canada has used the term in various legal contexts. Below is a chart summarizing some specific organizing principles within seven (sometimes overlapping) areas of law as enunciated by the Supreme Court. This chart is followed by an exposition of their context and the Supreme Court decisions from which these principles originated. The Court has acknowledged that the number of organizing principles it has articulates is not exhaustive.[15]

Heading (in discussion below)	**Area of Law**	**Organizing Principle**
A.	Contract	Good faith contractual performance
B.	Constitutional	Federalism
		Democracy
		Constitutionalism and the rule of law
		Respect for minorities
		Orders of government are coordinate and not subordinate to each other
C.	*Canadian Charter of Rights and Freedoms*	Gross disproportionality (Sections 7, 12)
		Privacy (Section 8)
D.	Criminal	Principle against self-incrimination
		Presumption of innocence
		Treatment of criminal offenders as rational, autonomous and choosing agents
		Illegal domination regarding a certain class of murderers
E.	Evidence	All relevant evidence is admissible, subject to a discretion to exclude matters for certain reasons
F.	Conflict of Laws	Real and substantial connection test
		Order and fairness
G.	Public International	State or sovereign immunity

[15] *In the matter of section 53 of the* Supreme Court Act, *R.S.C., 1985, c. S-26,* [1998] 2 S.C.R. 217 at para. 32.

A. Contract Law

As discussed above, the term "organizing principle" has been used in contract law recently in *Bhasin v. Hrynew* to describe good faith contractual performance. One might expect the Court to identify other organizing principles when the appropriate opportunity arises.

B. Constitutional Law

The Supreme Court has used the term in some of its most major constitutional law decisions. There "organizing principles" are synonymous with "underlying constitutional principles".[16] These principles are part of the unwritten rules which, when combined with the written ones, comprise the Constitution.[17] The Court therefore adopts organizing principles to flesh out the "Constitution of Canada" itself.

As the Supreme Court said in the *Patriation Reference*[18] (1981), the Constitution of Canada includes "the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state."

In *Reference re Secession of Quebec*[19] (1998), after citing its decisions in the *Provincial Judges Reference*[20] (1997) and the *Patriation Reference*[21] (1981),[22] the Supreme Court wrote:

> These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. [My emphasis.][23]

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[16] See e.g. R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, Graham Garton, *The Canadian Charter of Rights Decisions Digest*, Justice Canada, Updated: April 2005 (CanLII).

[17] *Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3, 1997 CarswellNat 3038 at para. 92, where Lamer C.J.C. for the majority wrote:

> I agree with the general principle that the Constitution embraces unwritten, as well as written rules, largely on the basis of the wording of s. 52(2). Indeed, given that ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it is of no surprise that our Constitution should retain some aspect of this legacy.

[18] *Questions Concerning Amendment of the Constitution of Canada as set out in O.C. 1020/80*, [1981] 1 S.C.R. 753 at 874.

[19] *In the matter of section 53 of the* Supreme Court Act, *R.S.C., 1985, c. S-26,* [1998] 2 S.C.R. 217.

[20] [1997] 3 S.C.R. 3, 1997 CarswellNat 3038.

[21] *Questions Concerning Amendment of the Constitution of Canada as set out in O.C. 1020/80*, [1981] 1 S.C.R. 753.

[22] para. 32.

[23] para. 32. Binnie J. (for the Court) repeated "the rule of law is one of the 'fundamental and organizing principles of the Constitution'" in *R. v. Shirose*, [1999] 1 S.C.R. 565, 1999 CarswellOnt 948 at para. 18. The organizing principles in

The unwritten organizing principles established by the Supreme Court of Canada in this case can be used only to fill gaps in the express provisions of the Constitution's text, not to set aside these provisions. The written Constitution prevails over these principles.[24]

More recently, the Court in *Reference re Securities Act (Canada)*[25](2011) opined:

> 71 In the delineation of the scope of the general trade and commerce power, courts have been guided by fundamental underlying constitutional principles. The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other. As a consequence, a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence. This is one of the principles that underlies the Constitution (*Secession Reference*, at para. 58, citing *Reference re Initiative & Referendum Act (Manitoba)*, [1919] A.C. 935 (Manitoba P.C.), at p. 942). [My emphasis]

C. *Canadian Charter of Rights and Freedoms*

Organizing principles have been developed for the *Canadian Charter of Rights and Freedoms.*[26] For instance, gross disproportionality has been described as the organizing principle not only for section 12 (cruel and unusual treatment or punishment) but also for several section 7 (life, liberty and security of person) issues.[27] Privacy has been identified as the dominant organizing principle concerning section 8's guarantee of security from unreasonable search and seizure.[28]

D. Criminal Law

Organizing principles surface throughout criminal law. For example, Chief Justice Lamer in dissent in *R. v. Jones*[29] (1994) stated that the principle against self-incrimination is "a general organizing principle of criminal law from which particular rules can be derived (for example, rules about non-compellability of the accused and admissibility of confessions)".[30]

In subsequent cases, the Supreme Court adopted Lamer C.J.C.'s statement. For instance, in *R. v. White*[31] (1999), Iacobucci J. (for the Majority, including Lamer C.J.C.) wrote:

Reference re Secession of Quebec were cited in *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53 at para. 97 (Deschamps J. for Minority).

[24] *Baie d'Urfé (Ville) c. Québec (Procureur général)*, 2001 CarswellQue 2349, [2001] R.J.Q. 2520 (C.A.), applications for leave to appeal dismissed, [2001] 3 S.C.R. xi, 2001 CarswellQue 2633.

[25] 2011 SCC 66.

[26] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[27] Don Stuart, *A Less Activist Supreme Court: Gross Disproportionality Becomes Organizing Principle For Several Section 7 Standards*, (Mar. 2004) 16 C.R. (6th) 112-116. Case comment on *R. v. Malmo-Levine*, 2003 SCC 74; *R. v. Clay*, 2003 SCC 75.

[28] *R. v. Tessling*, 2004 SCC 67 at para. 19 (Binnie J. for the Court), *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, 1998 CarswellNat 752 at 41 (Iacobucci J. dissenting (Gonthier J. concurring)).

[29] [1994] 2 S.C.R. 229, 1994 CarswellBC 580.

[30] p. 249 [S.C.R.], para. 33 [Carswell].
For commentary, see e.g. Graham Garton, *The Canadian Charter of Rights Decisions Digest*, Justice Canada, Updated: April 2005 (CanLII), http://canlii.org/en/commentary/charterDigest/, [13] Right to Remain Silent / Self-Incrimination; Michael Hor, "The Privilege against Self-Incrimination and Fairness to the Accused", [1993] Singapore J. Legal Stud. 35 at p. 35 (cited by Lamer C.J.C. in *R. v. Jones* at para 37).

[31] [1999] 2 S.C.R. 417, 1999 CarswellBC 1224 at para. 41.

> 41 The principle against self-incrimination was described by Lamer C.J. in *Jones*, *supra*, at p. 249, as "a general organizing principle of criminal law". The principle is that an accused is not required to respond to an allegation of wrongdoing made by the state until the state has succeeded in making out a *prima facie* case against him or her. It is a basic tenet of our system of justice that the Crown must establish a "case to meet" before there can be any expectation that the accused should respond: *P.(M.B.)*, *supra*, at pp. 577-79, *per* Lamer C.J., *S.(R.J.)*, *supra*, at paras. 82 and 83, *per* Iacobucci J. [32]
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> …
>
> 44 The jurisprudence of this Court is clear that the principle against self-incrimination is an overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence, among many others. The principle can also be the source of new rules in appropriate circumstances. Within the *Charter*, the principle against self-incrimination is embodied in several of the more specific procedural protections such as, for example, the right to counsel in s. 10(*b*), the right to non-compellability in s. 11(*c*), and the right to use immunity set out in s. 13. The *Charter* also provides residual protection to the principle through s. 7. [My emphasis] [33]

The Supreme Court has characterized the principle against self-incrimination as "[p]erhaps the single most important organizing principle in criminal law."[34] But what is the "single most important organizing principle in criminal law" appears to be a matter of debate among Supreme Court Justices. In *R. v. Sinclair*[35] (2010), LeBel and Fish JJ. (dissenting) said:

> 156 The presumption of innocence, described as the "one golden thread" that runs "throughout the web of the English Criminal Law" (*Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (U.K. H.L.), at p. 481, *per* Lord Sankey), was recognized by this Court as the "single most important organizing principle in criminal law" (*R. v. P. (M.B.)*, [1994] 1 S.C.R. 555 (S.C.C.), at p. 577). [My emphasis]

Any competition for importance between these two organizing principles might be illusory as they are clearly related.

Other organizing principles in criminal law have also been identified. To illustrate, in *R. v. Ruzic*[36] (2001), LeBel J. wrote for the Court:

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[32] This passage was quoted by Gonthier J. (for the Court) in *R. v. Darrach*, 2000 SCC 46 at para. 54.
[33] This passage was quoted by Charron J. (for the Majority) in *R. v. Singh*, 2007 SCC 48 at para. 21. See also *R. v. Hart*, 2014 SCC 52 at para. 124, *Smith v. Jones*, [1999] 1 S.C.R. 455, 1999 CarswellBC 590 at para. 26 (Dissent).
[34] *R. v. P. (M.B.)*, [1996] 1 S.C.R. 555 at 577. See Jason MacLean, "Double Dereliction of Duty? Judicial Oversight of Police Trickery in *R. v. Welsh*", Toronto Law Journal (September 2013), fn. 21.
In Don Stuart's Annotation to *R. v. B. (S.A.)*, 2003 SCC 60, 2003 CarswellAlta 1525, the veteran professor argues in part:

> Of more general significance is the pronouncement by Arbour J. for the Court that the principle against self-incrimination the Court has developed under section 7 of the *Charter* is of "limited application". Previously the Supreme Court had described the principle as the "single most important organizing principle in criminal law" (*P. (M.B.)* (1994), 29 C.R. (4th) 209 (S.C.C.)) and one capable of growth. Growth is now stunted. This may well come as a relief to lower court judges who have often been resistant to wide applications.

[35] 2010 SCC 35n at para. 156. See also *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 1995 CarswellOnt 2 at para. 3 (Lamer C.J.C.).
[36] 2001 SCC 24.

> The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law.[37]

In *R. v. Paré*[38] (1987), Wilson J. for the Court discussed what she termed "the organizing principle" of the offences listed in section 214(5) of the *Criminal Code*.[39] The commission of these offences during the course of the homicide have the effect of classifying a murder as murder in the first degree. She said:

> This principle is that where a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime. Parliament has chosen to treat these murders as murders in the first degree.[40]

E. Law of Evidence

Organizing principles also emerge in the law of evidence. For example, in *R. v. Corbett*[41] (1988), La Forest J. (dissenting on other grounds) stated:

> 104 The organizing principles of the law of evidence may be simply stated. All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy….

F. Conflict of Laws

The real and substantial connection test is a general organizing principle of Canadian conflict of laws or private international law. Described by LeBel J. (for the Majority) in *Van Breda v. Village Resorts Ltd.*[42] (2012) as having a "Janus-like nature", this test is also a constitutional principle.[43]

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[37] para. 45. In upholding the accused's acquittal based on the defence of duress, the Court held that portions of s. 17 (the defence of duress) of the *Criminal Code* violated s. 7 of the *Charter* and were not saved by s. 1.

[38] [1987] 2 S.C.R. 618, 1987 CarswellQue 19.

[39] R.S.C. 1970, c. C-34.

[40] p. 633. Lamer C.J.C. (for the Majority) referred to the organizing principle of illegal domination from *Paré* in *R. v. Luxton*, [1990] 2 S.C.R. 711 at 722-23, 1990 CarswellAlta 144 at paras. 8, 11. He wrote (at para. 11):

> Parliament has narrowly defined a class of murderers under an organizing principle of illegal domination and has specifically defined the conditions under which the offender can be found guilty of first degree murder. [My emphasis]

In Don Stuart's Annotation to *Paré* , the learned professor challenges the very existence of the principle, writing in part:

> In *Paré*, the Supreme Court expressly rejects the view of the Law Reform Commission of Canada's working paper 33, Homicide (1984), p. 79, that there is no organizing principle in either of the list of offences for felony murder in s. 213 … or felony first degree murder in s. 214(5), and that there is no rationale for having a shorter list in the case of first degree murder. Surprisingly, the offences of robbery and assault on a police officer are contained in s. 213 but not s. 214(5). Surely these offences also involve "unlawful domination over the person"? The list of offences that automatically trigger first degree murder convictions is the product of a haphazard and expedient debate on the House of Commons floor as part of the price for the formal abolition of the death penalty. It is disappointing to find that the Supreme Court has sought to make this bargaining process seem principled.

See also *R. v. Arkell*, [1990] 2 S.C.R. 695, 1990 CarswellBC 197 at para. 11 (Lamer C.J.C. for the Majority).

[41] [1988] 1 S.C.R. 670, 1988 CarswellBC 252 (dissenting on other grounds) (Gonthier J. concurring).

[42] 2012 CarswellOnt 4268.

[43] para. 24, also paras. 22, 31.

Similarly, earlier in *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia*[44] (2003), referring to the Court's earlier decision in *Hunt v. T & N plc*[45] (1993), Binnie J. said:

> 68 The more flexible view of extraterritorial application evident in the later cases will, at least to some extent, increase the potential among the provinces for conflict. In *Hunt*, *supra*, an organizing principle of the federation was found in the requirements of order and fairness, described by the Court as "constitutional imperatives" (p. 324) [para. 56]. Within the Canadian federation, comity requires adherence to "principles of order and fairness, principles that ensure security of transactions with justice" (*Morguard, supra*, at p. 1097)…. [My emphasis]

G. Public International Law

State or sovereign immunity is an organizing principle of public international law. The Court recognized this in *R. v. Hape*[46] (2007). Recently, in *Kazemi (Estate) v. Islamic Republic of Iran*[47] (2014), LeBel J. (for the Majority) reiterated:

> 35 Conceptually speaking, state immunity remains one of the organizing principles between independent states (*R. v. Hape*, …). It ensures that individual nations and the international order remain faithful to the principles of sovereignty and equality …. Sovereignty guarantees a state's ability to exercise authority over persons and events within its territory without undue external interference. Equality, in international law, is the recognition that no one state is above another in the international order (*Schreiber*, at para. 13). The law of state immunity is a manifestation of these principles

[44] 2003 SCC 40.
[45] [1993] 4 S.C.R. 289, 1993 CarswellBC 294.
[46] 2007 SCC 26 at para. 43 (LeBel J. for the Majority).
[47] 2014 SCC 62.

IV. Conclusion

As exemplified above, organizing principles appear throughout Canadian jurisprudence in diverse areas of law. An organizing principle is an underlying principle; it is a standard that underpins and is manifested in more specific legal doctrines; it is a basis upon which specific rules can be created by the courts in the ongoing incremental development of the common law.

The Supreme Court of Canada has used the term in various legal contexts. As I have demonstrated, since the late 1980s the Court has recognized specific organizing principles in these legal areas: contract, constitutional, the *Charter*, criminal, evidence, conflicts and public international. Based on proper legal research, knowing if an organizing principle applies to your area of law or issue can be beneficial. For judges writing judgments, counsel arguing in court, and even law students writing exams, identifying and applying a recognized organizing principle, where appropriate, can add structure, focus and balance to a judgment, argument or answer. Perhaps inspired by Cromwell J.'s recent frequent use of the term in *Bhasin v. Hrynew*, we might see an increasing reference to "organizing principles" in future judgments, factums and exams.

Toronto Law Journal

Neither Sword Nor Shield: Spousal Support on Retirement

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In April of this year, the *Toronto Sun* published an article commenting on a recent decision of the Ontario Superior Court of Justice (Divisional Court), *Cossette v. Cossette*.[1] Robert Cossette, a federal civil servant, took early retirement at age 55, and promptly moved to terminate his spousal support obligation. The headline – "Retiree must still pay alimony" – sums up the *Sun*'s take.

On Cossette's appeal to the Divisional Court, the court observed that retirement "should not operate as a sword or a shield" and found that Cossette could not retire early to "immunize" himself from ongoing support payments.[2] With the retirement of baby boomers across Canada looming, the question of when, if ever, retirement will justify the variation or termination of a payor's spousal support obligation is becoming increasingly important.

Under the *Divorce Act*,[3] a court may only vary an order for spousal support where a "change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order."[4] The change must be such that, if known at the time of the order, it would have resulted in different terms.[5] As a result, if the matter was known at the time of the order, it cannot be relied on as the basis for variation.[6]

This is the threshold to be met: a material change in circumstances that was unforeseen (but not unforeseeable) at the time of the original order or agreement. Whether retirement, and the corresponding decrease in income, is a material change will depend on all the circumstances of the case.[7] As with much of family law, the cases turn heavily on the facts in question, but the key question that emerges is whether, in all the circumstances, the payor's decision to retire was reasonable.

In Ontario, voluntary retirement will not generally be considered a material change in circumstances to meet the requisite threshold for variation. In *Bullock v. Bullock*,[8] the parties were married for 23 years and had three children (who were all adults at the time of the hearing). In a final settlement, Mr. Bullock had agreed to pay spousal support of $2,500 per month "regardless of any material change…in circumstances." Mr. Bullock worked as a consultant in "process improvement and management," and earned in the

[1] Mandel, Michele, "Retiree must still pay alimony," *Toronto Sun*, April 1, 2015; *Cossette v. Cossette*, 2015 ONSC 2678, 2015 CarswellOnt 5928 (Ont. S.C.J. (Div Ct)).
[2] *Cossette*, supra, para. 17.
[3] RSC 1985, c 3 (2nd Supp).
[4] *Ibid*, s. 17(1) and (4.1).
[5] *Willick v. Willick* (1994), 6. R.F.L. 161 (S.C.C.), para. 21.
[6] *Ibid*.
[7] *Benson v. Benson*, 2008 CarswellOnt 745, [2008] W.D.F.L. 2662 (Ont. S.C.J.).
[8] 2004 CarswellOnt 919, [2004] W.D.F.L. 339 (Ont. S.C.J.).

range of $120,000 to $160,000 annually. In 2001 and 2002, his business suffered. He then brought an application to vary his support obligation on the basis that he could no longer earn an income.

The court looked at Mr. Bullock's financial circumstances, which included a recent gift of $10,000 to his daughter, his impressive work history, and the lack of evidence supporting his claim that he could not earn any income at all – he had not made any efforts to seek new employment. The court also looked at a recent affidavit sworn by Mr. Bullock, which contained a number of "negative" comments about his ex-wife. On that basis, the court concluded that Mr. Bullock was "so angry" and "resentful" at his ex-wife for having to pay support "all these years" that he had characterized his retirement as involuntary when it was in fact entirely voluntary: "a support payor cannot choose to be voluntarily underemployed, whether by retirement or otherwise, and thereby avoid his or her spousal support obligation."[9]

Bullock has since been followed in a number of Ontario decisions finding that the payor's decision to retire was unreasonable in the circumstances, and that his or her "voluntary" retirement therefore did not meet the threshold test to vary the support order in place. In assessing the reasonableness of the payor's decision to retire, the court will look to all of the financial circumstances of the parties.

In *Marshall v. Marshall*,[10] the parties were married for more than forty years. It was a traditional marriage: the wife left school to marry the husband and had worked as a retail clerk during the marriage. A few years after the parties separated, the husband's employer told him that his position was being eliminated. He was given the option to work until the end of 2011 with the same level of remuneration, and the possibility of continued employment thereafter. The husband chose to retire four months early, in August 2011. The court found that it would have been reasonable to continue working until the end of 2011, and retire at that time.[11]

The husband's evidence regarding his decision not to pay the wife was found to be "deliberately vague" and "evasive."[12] The husband had also re-partnered, and his new partner paid all the housing expenses. As a result, the court found that the husband had the means to contribute to the wife's support. Based on the wife's compensatory claim to support, which the court observed might have justified a claim to indefinite support after retirement, the husband was ordered to pay mid-range support until the end of 2011, when he could properly have retired.[13]

Similarly, in *Innes v. Innes*,[14] the husband chose to retire from his role of CEO, earning over $200,000. He continued to live a comfortable lifestyle post-separation. He provided no advance notice to the wife of his intention to retire and terminate spousal support, and did not take into account his ongoing spousal support obligation in his decision to retire.

[9] *Ibid*, paras 7 and 13.
[10] 2011 ONSC 5972, 2011 CarswellOnt 11060 (Ont. S.C.J.).
[11] *Ibid*, para. 61.
[12] *Ibid*, para. 62.
[13] *Ibid*, paras 71-72.
[14] 2013 ONSC 2254, 2013 CarswellOnt 4983 (Ont. S.C.J.).

The court found that the husband had failed to show there was a material change in circumstances, and dismissed the husband's application to vary the existing support order.[15]

In *Walts v. Walts*,[16] the parties entered into a Separation Agreement, which stipulated that Mr. Walts would continue to pay spousal support until a material change occurred. In October 2012, Mr. Walts suffered a heart attack and later returned to work three days a week for three months, before returning full time. The parties both acknowledged that it was Mr. Walts' "dream" to retire early at age 55. In November 2012, Mr. Walts brought a motion to terminate his spousal support obligation, indicating that he intended to retire in August or November of 2013. The court found that there was insufficient evidence that Mr. Walts was unable to work or forced to retire as a result of his health concerns, and found that he was retiring voluntarily. In assessing the financial impact of Mr. Walts' retirement, the court found that Mrs. Walt could not reasonably be expect to draw on her LIRA at age 55, and that she would suffer a reduction of income of $21,000 per year if spousal support was terminated. The court found there was no material change in circumstances.

In contrast with the general approach in Ontario, the courts in British Columbia have held that the law should not require a payor to maintain spousal support to force them to continue to work after becoming eligible for retirement benefits.[17] In *Powell v. Levesque*,[18] the wife appealed from an order dismissing her application to vary spousal support on her retirement from the military. The British Columbia Court of Appeal found that the judge at first instance had misapprehended her retirement after 25 years of service as "early" retirement.[19] The wife was in fact entitled to retire after 25 years service and receive her full pension. The court found there was no evidence that the wife chose to retire to avoid her support obligation, that her decision to retire was reasonable, and that her retirement was therefore a material change in circumstances as "the primary source of her income changed from employment to pension and her level of income decreased significantly thereafter."[20]

A recurring theme in the above-noted cases is the payor's intention, or impetus, to retire. In *Powell*, the fact that the wife had not retired to defeat her support obligation militated in favour of the threshold test being met. In the Ontario decisions, while the threshold seems to be set higher than in British Columbia, the courts will often consider the reasonableness of retirement in light of evidence of the payor's "negative animus" toward his or her support obligation.[21] The New Brunswick Court of Appeal, agreeing with the British Columbia Court of Appeal in *Ross v. Ross*,[22] has held that a court "should only look behind the decision to retire when a spouse is acting in bad faith."[23]

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[15] *Ibid*, paras 34-35.
[16] 2013 ONSC 6787, 2013 CarswellOnt 15214 (Ont. S.C.J.).
[17] *Powell v. Levesque*, 2014 BCCA 33, 2014 CarswellBC 186 (B.C. C.A.) citing *Ross v. Ross* (1994), 7 R.F.L. (4th) 146 (B.C. C.A.).
[18] *Walts*, supra note 16.
[19] *Ibid*, para. 31.
[20] *Ibid*, para. 34.
[21] *Bullock*, para. 7.
[22] *Ross*, supra note 17.
[23] *Vaughan v. Vaughan*, 2014 NBCA 6, 2014 CarswellNB 41, para. 20.

In Ontario, where the payor was not motivated to avoid his or her support obligation, courts have found retirement to be reasonable, and the threshold test met. In *Shepley v. Shepley*,[24] Mr. Shepley was employed as a bank manager. In early 2005, Mr. Shepley's employment became "unbearable": he testified that he was told that he was "struggling" in his job, and "under-performing."[25] Mr. Shepley met with an employment lawyer to assist him in negotiating a termination package, but his employer described his negotiating position as "ridiculous."[26] As a result, Mr. Shepley became increasingly depressed and his blood pressure elevated. In light of his deteriorating health, Mr. Shepley resigned from his employment in February 2005, and his employer agreed to pay his full salary to September 30, 2005. Mr. Shepley applied to terminate spousal support on the basis that his retirement was a material change leaving him with insufficient income to pay support. The court found that Mr. Shepley had met the threshold test and was not motivated to avoid his support obligation, but instead was concerned for his health.[27] In concluding that support should be terminated, the court considered that Mr. Shepley should not be obliged to pay support out of his capital.[28]

In *Van Horne v. Van Horne*,[29] Mr. Van Horne worked as a sports broadcaster and had a three-year contract with Sportsnet, ending in 2005. When Sportsnet renewed his contract for one year in early 2006, his fees were reduced to $170,000 from $243,000. In August 2006, Sportsnet notified Mr. Van Horne that he would no longer be on the air as of October 2006. In September 2006, Sportsnet then notified Mr. Van Horne that they were looking for a replacement, and he would be terminated as soon as one was found. Mr. Van Horne continued to work for about three weeks, and then resigned due to the adverse work environment. The court found that the reduction in Mr. Van Horne's income was a material change in circumstances,[30] and that his decision to stop working was reasonable based on the adverse work environment at Sportsnet.[31] The court observed that his decision was not "motivated by a desire to discontinue his support obligations."[32] The wife had a compensatory claim to spousal support: the court ordered that spousal support should be reduced, and that Mr. Van Horne should not be required to pay support out of his capital.[33]

In *Cossette*, the court cautioned that there may be cases in which voluntary retirement constitutes a material change in circumstances, but that:

> Every case must be determined on its own facts, with consideration of all relevant factors, including the language of settlement documents. In this case, the minutes

[24] 2006 CarswellOnt 382, [2006] W.D.F.L. 1140.
[25] *Ibid*, paras 27-29.
[26] *Ibid*, para. 30.
[27] *Ibid*, para. 72.
[28] *Ibid*, paras 69-71.
[29] 2007 CarswellOnt 3000, [2007] O.J. No. 1837.
[30] It appears to be the related decrease in income, as opposed to the fact of retirement itself, which properly meets the threshold test. Presumably, no material change in circumstances would be found where an individual retired but (somehow) maintained the same level of income. In analyzing whether the threshold for variation has been met, courts tend to conflate the fact of retirement with the change in income.
[31] *Van Horne*, *supra* note 29, paras 28-29.
[32] *Ibid*, para. 29.
[33] *Ibid*, para. 31.

> of settlement were silent on the issue of retirement. It would be beneficial for the parties to turn their minds to this eventuality when crafting terms of resolution.[34]

The court went on to adopt the comments in *Bullock* that "a payor of spousal support should make his or her retirement plans on the basis that support will continue until aggregate retirement savings can be expected to keep both former spouses at reasonable standards of living."[35] These cases all involve long-term, traditional marriages, often with a compensatory element to the recipient's claim for support. These are the quintessential baby boomers. It is critical that parties turn their minds to eventual retirement of the sole (or greater) breadwinner during the marriage when negotiating the support provisions of a separation agreement, and, conversely, any existing support obligation when considering retirement.

[34] *Cossette*, supra note 1, para. 14.
[35] *Ibid*, para. 14, citing *Bullock*, supra note 8, para. 1.

Toronto Law Journal

Arbitration and Trusts – Can Trustees be bound by arbitration?

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The use of a Family Trust is a common estate planning tool, whereby an asset, whether it be cash, a family cottage, or otherwise, is placed into a trust to be held for the benefit of the family. More often than not, when such a Family Trust is established, both spouses are named as trustees of the trust, and the beneficiaries are often the two spouses together with any children that they may have. The trust is often discretionary, whereby the trustees may distribute some or all of the trust assets to any one of the beneficiaries to the exclusion of the others.

While the administration of the trust often goes smoothly while everything is going well in the relationship, the question emerges of what should take place should the spouses later separate and commence divorce proceedings. Although we do not tend to see arbitration used as often within the estates and trusts context, the same cannot be said for family law proceedings, where, anecdotally at least, it appears that parties are much more willing to enter into binding arbitration in order to settle their dispute rather than adjudicate the matter before the courts. When the two spouses (who are also the trustees) separate, and as part of the divorce proceedings agree to enter into binding arbitration, the question often emerges of whether the internal administration of the trust can be caught up in the arbitration process?

Inevitably, as part of such an arbitration, one of the spouses will often take the position that as both trustees have signed the arbitration agreement, that the arbitrator has now assumed the powers of the trustees, and may utilize the discretion afforded to the trustees to determine how the trust assets should be distributed as part of the divorce process. Without commenting on whether a trust may be bound to the arbitration process in the event that the trustees have only signed the arbitration agreement in their personal capacities, and not their capacities as trustees, the courts have been clear that unless the terms of the trust specifically contemplate otherwise, that trustees may not delegate the fundamental decision making powers entrusted to them as trustees to any person (whether it be arbitrator or otherwise). As put by Dr. Donovan Waters in *Waters' Law of Trusts in Canada*:

> *"The courts, however, continue to adhere to the principle that a delegate may not delegate his duties when the nature of the task is one which he is required to perform personally. This prevents the trustee from appointing an agent to perform the task of this kind, whether or not he has an express, implied, or statutory power to appoint agents.* ***Indeed, any act of an agent purportedly carrying out such a task would have no legal effect; it would bind neither the trust nor any third party.****"*[emphasis added] (4th ed., pg. 913)

Using this rationale, unless the deed of trust specifically contemplates that the trustees may delegate their decision making to an arbitrator, the trustees may arguably not delegate their fundamental decision making powers to an arbitrator, for to do so would be an improper delegation of their authority. Using the

rationale provided for by Dr. Waters, any decision made by the arbitrator concerning the internal management of the trust would arguably not be binding upon the trust or any third party, as they could arguably not have assumed such powers in the first place.