



# OVERSEAS DECISIONS BULLETIN

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Decisions from the Supreme Court of the United Kingdom, the Supreme Court of Canada, the Supreme Court of the United States, the Constitutional Court of South Africa and the Supreme Court of New Zealand.

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## Arbitration

*British Columbia (Forests) v Teal Cedar Products Ltd*  
Supreme Court of Canada: [\[2013\] SCC 51](#).

**Judgment delivered:** 4 October 2013.

**Coram:** LeBel, Fish, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Arbitration – Interest – Expropriation – Province reduced forestry company's allowable annual cut to create park – Forestry company sought compensation for partial expropriation – Arbitrator awarded forestry company compound interest from date when Province reduced allowable annual cut to date of award – Whether arbitrator could award compound or only simple interest.

**Held (7-0):** Appeal allowed. Arbitrators cannot order compound interest under the Act, in the award itself, or on equitable grounds.

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## Administrative Law

*Régie des rentes du Québec v Canada Bread Company Ltd*  
Supreme Court of Canada: [\[2013\] SCC 46](#).

**Judgment delivered:** 13 September 2013.

**Coram:** McLachlin CJ, Fish, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

**Catchwords:**

Administrative law – Boards and tribunals – Jurisdiction – Appellants effected partial termination of pension plan – Legislation amending Supplemental Pension Plans Act came into force after Court of Appeal set aside Appellant’s decision and remitted case to the Appellant for redetermination – Whether it was open to the Appellant to take new statutory provisions into consideration in determining outcome of case.

Statutes – Retroactivity – Declaratory provisions – Appellants effected partial termination of pension plan – Legislation amending Supplemental Pension Plans Act came into force after Court of Appeal set aside Appellant’s decision and remitted case to the Appellant for redetermination – New declaratory provisions apply to pending cases – Whether dispute between parties was pending when provisions came into force – Whether Court of Appeal’s judgment fully and definitively adjudicated rights and obligations of parties that resulted from partial termination of pension plan – Whether the Appellant was entitled to give effect to declaratory provisions in resolving dispute between parties.

**Held (5-2):** Appeal allowed. The principle of *res judicata*, which precludes parties from relitigating an issue in respect of which a final determination has been made as between them, does not preclude the legislature from negating the effects of such a determination.

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## Citizenship and Migration Law

*Secretary of State for the Home Department v Al-Jedda*  
Supreme Court of the United Kingdom: [\[2013\] UKSC 62](#).

**Judgment delivered:** 9 October 2013.

**Coram:** Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Wilson, and Lord Carnwath JJSC.

**Catchwords:**

Citizenship and migration – Nationality – British citizenship – Deprivation of citizenship – Home Secretary deprived claimant of

British citizenship on grounds conducive to public good – Respondent’s Iraqi citizenship lost on acquisition of British nationality but arguably capable of restoration by application – Respondent made no such application – Whether effect of order renders respondent stateless – Whether order void.

**Held (5-0):** Appeal dismissed. From a plain reading of the statute and surrounding guidance, it is clear that the question is simply whether the person holds another nationality at the date of the order depriving him of his British citizenship.

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## Civil Procedure

*Waterhouse v Contractor Bonding Ltd*

Supreme Court of New Zealand: [\[2013\] NZSC 89](#).

**Judgment delivered:** 20 September 2013.

**Coram:** Elias CJ, McGrath, William Young, Chambers\* and Glazebrook JJ  
[\*Chambers J died before this judgment was delivered].

**Catchwords:**

Civil procedure – Litigation funder – Disclosure – Appellants brought proceedings in High Court against respondents alleging negligence, deceit and breach of fiduciary duty – Litigation funded by litigation funder – Whether appellant’s must disclose litigation funding agreements to respondent’s, and if so, on what terms.

**Held (4-0):** Appeal allowed in part. Where litigation is to be funded by a third party that has no prior interest in the proceedings, the following two details should be disclosed when the proceeding is commenced: the identity and location of any such litigation funder, and its amenability to the jurisdiction of the New Zealand courts. It is not necessary to disclose litigation-sensitive material, such as the terms on which funding may be withdrawn. Nor is it necessary to disclose details about the financial standing of the litigation funder.

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*Pro-Sys Consultants Ltd v Microsoft Corporation*

Supreme Court of Canada: [\[2013\] SCC 57](#).

**Judgment delivered:** 31 October 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Civil procedure – Class actions – Certification – Indirect purchasers – Appellants sued defendants for unlawful conduct in overcharging for its PC operating systems and PC applications software – Appellants sought certification of action as class proceeding under provincial class action legislation – Whether indirect purchaser actions are available as a matter of law in Canada – Whether certification requirements are met.

**Held (9-0):** Appeal allowed.

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*Sun-Rype Products Ltd v Archer Daniels Midland*  
**Supreme Court of Canada:** [\[2013\] SCC 58.](#)

**Judgment delivered:** 31 October 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Civil procedure – Class actions – Certification – Direct and indirect purchasers – Appellants alleged that respondents fixed price of high fructose corn syrup and overcharged direct purchasers and that overcharge was passed on to indirect purchasers – Whether indirect purchasers have right to bring action against alleged overcharger – Whether inclusion of indirect and direct purchasers in proposed class warrants dismissing action – Whether case meets certification requirements of having an identifiable class of indirect purchasers – Whether direct purchasers have cause of action in constructive trust.

**Held (7-2):** Appeal dismissed and cross-appeal allowed.

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*Infineon Technologies AG v Option consommateurs*  
**Supreme Court of Canada:** [\[2013\] SCC 59.](#)

**Judgment delivered:** 31 October 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Civil procedure – Class actions – Jurisdiction of Quebec court – Application for authorisation to institute class action in order to recover damages from international manufacturers that had conspired to inflate price of microchips – Whether Quebec courts have jurisdiction over dispute between international manufacturers and group consisting of direct and indirect purchasers located in Quebec given that alleged wrongdoing that forms basis of claim occurred outside Quebec.

Civil procedure – Class actions – Conditions for authorising action – Direct and indirect purchasers – Application for authorisation to institute class action in order to recover damages from international manufacturers that had conspired to inflate price of microchips – Proposed group consisted of direct and indirect purchasers who suffered losses by absorbing, in whole or in part, inflated portion of price – Whether common questions arise – Whether cause of action can be rooted in passing on of artificially inflated prices resulting from anti-competitive practices – Whether it is sufficient to prove aggregate loss at authorisation stage – Whether representative and designated member are qualified to adequately represent members of proposed group – Whether class action should be authorised.

**Held (9-0):** Appeal dismissed.

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## Constitutional Law

*Marine Services International Limited v Ryan Estate*

Supreme Court of Canada: [\[2013\] SCC 44](#).

**Judgment delivered:** 2 August 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Constitutional law – Division of powers – Navigation and shipping – Inter-jurisdictional immunity – Federal paramountcy – Federal maritime legislation provided for action by dependants in case of death of person – Provincial workers' compensation legislation prohibited actions in respect of injury against employer or worker if compensation payable – Fishermen died in maritime accident – Dependants obtained compensation under provincial workers'

compensation scheme and brought action in negligence under federal maritime legislation – Whether provincial legislation constitutionally inapplicable to federal maritime negligence claims by reason of doctrine of inter-jurisdictional immunity – Whether provincial legislation constitutionally inoperative in respect of federal maritime negligence claims by reason of doctrine of federal paramountcy.

Maritime law – Liability in tort – Statutory bar of action – Fishermen died in maritime accident in the course of employment – Whether negligence action brought by dependants under federal maritime legislation prohibited by provincial workers' compensation legislation.

Industrial law – Workers' compensation – Statutory bar of action – Compensation legislation prohibited actions against employer or worker in respect of injury if compensation payable – Fishermen died in maritime accident in the course of employment – Dependants obtained compensation and brought action in negligence – Whether death occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer – Whether statutory bar applies.

**Held (9-0):** Appeal allowed. Section 44 of the *Workplace Health, Safety and Compensation Act* is constitutionally applicable and operative and, as such, bars the action initiated by the Ryan Estates.

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*Mazibuko v Sisulu and Anor*

**Constitutional Court of South Africa:** [\[2013\] ZACC 28.](#)

**Judgment delivered:** 28 August 2013.

**Coram:** Mogoeng CJ, Moseneke DCJ, Froneman, Jafta, Khampepe, Nkabinde, Skweyiya, Van der Westhuizen and Zondo JJ.

**Catchwords:**

Constitutional law – Validity – National Assembly – Rules of Assembly – Whether Rules of Assembly permit a motion of no confidence in the President to be formulated, discussed and voted for within a reasonable time – Whether if not, Rules are invalid per s 102 of the Constitution.

Constitutional law – Justiciability – Political matters – Dispute arising in the National Assembly – Whether Court should adjudicate dispute.

**Held (5-4):** Matter is justiciable, Rules of Assembly invalid to the extent that they are contra s 102 of the Constitution, declaration of invalidity suspended for 6 months to allow National Assembly to correct the defect.

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*Divito v Canada (Public Safety and Emergency Preparedness)*  
**Supreme Court of Canada:** [\[2013\] SCC 47.](#)

**Judgment delivered:** 19 September 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Constitutional law – Charter of Rights – Mobility rights – Right to enter Canada – Minister refused offender transfer request by Canadian citizen imprisoned abroad, on basis of security concerns – Appellant challenged provisions governing international transfer of offenders – Whether statutory provisions giving Minister discretion to grant or deny transfer request violate right to enter Canada and, if so, whether violation is justified.

Human rights law – Charter of Rights – Mobility rights – Whether statutory provisions impermissibly infringe mobility rights under the Charter.

**Held (9-0):** Appeal dismissed. Although the right to enter Canada should be given a generous interpretation consistent with its purpose, the interests it was intended to protect and the broad construction of the right to enter in international law, the mobility rights guaranteed by s. 6(1) of the *Charter* do not give a Canadian citizen an automatic right to serve a sentence in Canada.

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*Mail and Guardian Media Ltd and Others v Chipu N.O. and Others*

**Constitutional Court of South Africa:** [\[2013\] ZACC 32.](#)

**Judgment delivered:** 27 September 2013.

**Coram:** Mogoeng CJ, Moseneke DCJ, Froneman, Jafta, Khampepe, Nkabinde, Skweyiya and Zondo JJ, and Bosielo and Mhlantla AJJ.

**Catchwords:**

Constitutional law – Freedom of expression – Validity – Refugees Act – Section 21(5) of the Refugees Act precludes the Refugee Appeal Board from allowing, in appropriate cases, members of the public or media to attend and report on proceedings of the Appeal Board – Whether s 21(5) of the Refugees Act is inconsistent with the right to freedom to expression in s 16 of the Constitution.

**Held (10-0):** Appeal allowed. The absolute confidentiality required under s 21(5) of the Refugees Act is not a justifiable limitation of the constitutional right to freedom of expression (which includes the freedom of the press and the freedom to receive and impart information or ideas).

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*R v Chehil*

**Supreme Court of Canada:** [\[2013\] SCC 49.](#)

**Judgment delivered:** 27 September 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Constitutional law – Charter of Rights – Search and seizure – Sniffer dogs – Airplane luggage – Police suspected accused, airline passenger, of transporting drugs – Police verified accused's checked bag using drug detection dog – Whether police had reasonable grounds to suspect accused was involved in drug-related offence – Whether drug detection dog was sufficiently reliable for sniff search to be reasonable.

Human rights law – Charter of Rights – Search and seizure – Whether drug detection dog impermissibly infringe on Canadian Charter rights.

**Held (9-0):** Appeal dismissed. The deployment of a dog trained to detect illegal drugs using its sense of smell is a search that may be carried out without prior judicial authorization where the police have a reasonable suspicion based on objective, ascertainable facts that evidence of an offence will be discovered. The reasonable suspicion threshold respects the balance struck under s 8 of the *Charter* by permitting law enforcement to employ legitimate but limited investigative techniques

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*R v MacKenzie*

**Supreme Court of Canada:** [\[2013\] SCC 50](#).

**Judgment delivered:** 27 September 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Constitutional law – Charter of Rights – Search and seizure – Sniffer dogs – Accused sought to exclude evidence of marijuana seized during highway traffic stop – Whether police had reasonable grounds to suspect accused was involved in drug-related offence – Whether search was unreasonable – Whether evidence should be excluded.

Constitutional law – Charter of Rights – Arbitrary detention – Accused sought to exclude evidence of marijuana seized during highway traffic stop – Whether accused was arbitrarily detained.

Human rights law – Charter of Rights – Search and seizure and arbitrary detention – Whether police officer impermissibly infringed on human rights under Charter.

**Held (5-4):** Appeal dismissed. Reasonable suspicion must be grounded in objectively discernible facts, which can then be subjected to independent judicial scrutiny. While it is critical that the line between a hunch and reasonable suspicion be maintained to prevent the police from engaging in indiscriminate or discriminatory practices, it is equally vital that the police be allowed to carry out their duties without undue scepticism or the requirement that their every move be placed under a scanning electron-microscope.

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*Minister of Police and Others v Premier of the Western Cape and Others*

**Constitutional Court of South Africa:** [\[2013\] ZACC 33](#).

**Judgment delivered:** 1 October 2013.

**Coram:** Mogoeng CJ, Moseneke DCJ, Cameron, Froneman, Jafta, Madlanga, Nkabinde, Skweyiya, Van der Westhuizen and Zondo JJ, and Mhlantla AJ.

**Catchwords:**

Constitutional law – Dispute between organs of state in national and provincial sphere – Commission of inquiry – Validity –

Whether ss 206(3) and (5) read with s 127(2)(e) of the Constitution authorise the Premier to appoint a commission of inquiry with coercive powers over members of the South African Police Service.

**Held (11-0):** Special leave to appeal and direct access refused. Constitution has the power to appoint such a commission.

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*MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others*  
**Constitutional Court of South Africa:** [\[2013\] ZACC 34.](#)

**Judgment delivered:** 3 October 2013.

**Coram:** Moseneke DCJ, Froneman, Jafta, Khampepe, Nkabinde, Skweyiya and Zondo JJ, and Mhlantla and Bosielo AJJ.

**Catchwords:**

Constitutional law – Right to education – Schools Act – Student denied place in Rivonia Primary School and placed on waiting list – Subsequently Head of Department of Education forcibly admitted student – Whether Schools Act permits Head of Department to override individual school’s policy – Whether if so, in doing so, the Head of Department must abide by rules of procedural fairness.

**Held (9-0):** Appeal allowed in part (7-2). Head of Department empowered to issue an instruction to the principal of Rivonia Primary School to admit the student in excess of the limit in its admission policy, but in doing so must act in a procedurally fair manner. Head of Department did not act in a procedurally fair manner.

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*The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*  
**Constitutional Court of South Africa:** [\[2013\] ZACC 35.](#)

**Judgment delivered:** 3 October 2013.

**Coram:** Mogoeng CJ, Froneman, Jafta, Khampepe, Nkabinde, Skweyiya and Zondo JJ, and Mhlantla and Bosielo AJJ.

**Catchwords:**

Constitutional law – Constitutional rights – Right to dignity, privacy and bodily and psychological integrity – Criminal Law (Sexual Offenders and Related Matters) Amendment Act 32 of 2007 (“the Act”) – ss 15 and 16 of the Act criminalise consensual sexual intercourse between children – Whether ss 15 and 16 of the Act infringe Constitutional rights.

Human rights law – Privacy rights – Whether the Act impermissibly infringes on human rights under Constitution.

**Held (9-0):** Constitutional invalidity partially confirmed. Provisions invalid to the extent that they impose criminal liability on children under 16 years of age.

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### *Stanton v Sims*

**Supreme Court of the United States:** [Docket No 12-1217.](#)

**Judgment delivered:** 4 November 2013.

**Coram:** Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

**Catchwords:**

Constitutional law – Fourth Amendment – Appellant officer searched respondent homeowner’s garden without warrant – Whether defence of qualified immunity exists – Whether prohibition on search “beyond debate”

**Held (9-0):** Appeal allowed, judgment of lower court reversed and case remanded for further proceedings.

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### *R v Vu*

**Supreme Court of Canada:** [\[2013\] SCC 60.](#)

**Judgment delivered:** 7 November 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Constitutional law – Charter of Rights – Search and seizure – Validity of search – Police obtained warrant that did not specify grounds for obtaining evidence of ownership or occupancy of

residence and not did not mention search of computers and mobile phones – Whether search warrant properly permitted a search for documents evidencing ownership or occupation – Whether warrant authorised search of computers and mobile phone – If the search was unlawful, whether evidence obtained should be excluded.

Human rights law – Charter of rights – Search and seizure – Whether police search impermissibly infringed ss 8 or 24(2) of Canadian Charter.

**Held (9-0):** Appeal dismissed. The search was unlawful but the evidence should not be excluded.

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## Contract Law

*Payette v Guay inc*

Supreme Court of Canada: [\[2013\] SCC 45.](#)

**Judgment delivered:** 12 September 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

**Catchwords:**

Contract Law – Restrictive covenants in agreement for sale of assets – Vendor subsequently became employee of purchaser under contract of employment – Whether restrictive covenants linked to contract of employment – Whether restrictive covenants reasonable as to their term and their territorial scope.

**Held (7-0):** Appeal dismissed.

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## Courts

*Ontario v Criminal Lawyers' Association of Ontario*

Supreme Court of Canada: [\[2013\] SCC 43.](#)

**Judgment delivered:** 1 August 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Courts – Jurisdiction – Appointment of amici curiae – Provincial Attorney General and amici curiae appointed by trial judges in criminal proceedings disagreed on amici’s rate of remuneration – Whether superior and statutory courts have inherent or implied jurisdiction to determine rate of remuneration of amici curiae.

**Held (5-4):** Appeal allowed (LeBel, Fish, Abella and Cromwell JJ dissenting). While the courts have the jurisdiction to set terms to give effect to their authority to appoint amici curiae, the ability to fix rates of compensation for amici is not essential to the power to appoint them and its absence does not imperil the judiciary’s ability to administer justice according to law in a regular, orderly and effective manner. Furthermore, an order that the Attorney General must provide compensation to an amicus at a particular rate is an order directing the Attorney General to pay specific monies out of public funds. While court decisions can have ancillary financial consequences, the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the public for it

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*Magidiwana and Ors v President of the Republic of South Africa and Ors*

**Constitutional Court of South Africa:** [\[2013\] ZACC 27.](#)

**Judgment delivered:** 19 August 2013.

**Coram:** Mogoeng CJ, Moseneke DCJ, Cameron, Froneman, Jafta, Nkabinde, Skweyiya, Van der Westhuizen, Zondo J and Mhlantla AJ.

**Catchwords:**

Courts – Special leave – Appeal against interim order – Applicants sought to appeal against interim decision of the High Court – Whether general rule that courts do not hear appeals against interim orders that have no final effect should be set aside in this case – Whether it is in the interests of justice to grant leave in the particular circumstances of this case where the disputed issues still have to be determined in the main review application.

**Held (10-0):** Appeal unanimously dismissed. No reasonable prospects of success and not in the interests of justice to grant leave to appeal at this stage.

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# Criminal Law

*Ifeanyi Jude Akulue v The Queen*

Supreme Court of New Zealand: [\[2013\] NZSC 88](#).

**Judgment delivered:** 19 September 2013.

**Coram:** Elias CJ, McGrath, William Young, Glazebrook and Gault JJ.

**Catchwords:**

Criminal law – Defences – Compulsion and necessity – Appellant charged with importation and conspiring to supply methamphetamine – In District Court appellant accepted that statutory defence of compulsion not available – Court of Appeal held evidence not sufficient to raise defence of necessity – Appellant’s affidavit stated threats to kill family members – Whether evidence sufficient to raise defences.

**Held (5-0):** Appeal dismissed.

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*Gul (Mohammed) v R*

Supreme Court of the United Kingdom: [\[2013\] UKSC 64](#).

**Judgment delivered:** 23 October 2013.

**Coram:** Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Kerr, Lord Reed, Lord Hope and Lord Judge JJSC.

**Catchwords:**

Criminal law – Terrorism – Disseminating terrorist publications – Defendant uploaded onto internet videos showing attacks by insurgents on coalition forces in Iraq and Afghanistan – Whether attacks by those engaged in armed struggle against government “terrorism” – Whether international law requires domestic definition of terrorism to be read down.

International law – Application of international law to domestic criminal law – Whether international law requires domestic definition of terrorism to be read down.

**Held (7-0):** Appeal dismissed.

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*R v Cairney*

**Supreme Court of Canada:** [2013] SCC 55.

**Judgment delivered:** 25 October 2013.

**Coram:** McLachlin CJ, Fish, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

**Catchwords:**

Criminal law – Defences – Provocation – Self-induced provocation – Whether fact that accused induced act or words said to constitute provocation precludes the defence of provocation from being left to jury – Whether objective and subjective elements of provocation established, lending an air of reality to this defence – Whether defence of provocation should have been submitted to jury.

**Held (5-2):** Appeal dismissed. The trial judge erred in leaving the defence of provocation with the jury as there was no air of reality to the defence.

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*R v Pappas*

**Supreme Court of Canada:** [\[2013\] SCC 56.](#)

**Judgment delivered:** 25 October 2013.

**Coram:** McLachlin CJ, Fish, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

**Catchwords:**

Criminal law – Defences – Provocation – Whether objective and subjective elements of provocation established, lending an air of reality to this defence – Whether victim's provoking comments were sudden, in the sense that accused was caught unprepared and surprised by them – Whether defence of provocation should have been submitted to jury.

**Held (7-0):** Appeal dismissed. On the evidence in this case, there was no air of reality to the defence of provocation and the defence should not have been left to the jury. The conviction for second degree murder, however, is affirmed.

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## *Burt v Titlow*

**Supreme Court of the United States:** [Docket No 12-414](#).

**Judgment delivered:** 5 November 2013.

**Coram:** Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

### **Catchwords:**

Criminal law – Habeas corpus – Review – Standards of review – Respondent state prisoner filed federal habeas petition challenging state court's decision rejecting his ineffective assistance of counsel claim – Court of Appeal reversed denial of petition finding that factual predicate for state court's decision was an unreasonable interpretation of factual record – Whether counsel's conduct was ineffective – Whether deference should be afforded to state court.

**Held (9-0):** Appeal allowed. Judgment reversed on ground that the state court's decision that the prisoner was adequately advised to withdraw a guilty plea was reasonable and supported by the record

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## **Environmental Law**

### *West Coast Ent Inc v Buller Coal Ltd*

**Supreme Court of New Zealand:** [\[2013\] NZSC 87](#).

**Judgment delivered:** 19 September 2013.

**Coram:** Elias CJ, McGrath, William Young, Chambers\* and Glazebrook JJ [\*Chambers J died before this judgment was delivered].

### **Catchwords:**

Environmental law – Resource consents – Open coal coast mine – Coal extracted to be exported to China and result in emission of CO<sub>2</sub> – Whether the effect of the proposed use on climate change is a consideration to be taken into account in granting the resource consents.

**Held (3-1):** Appeal dismissed. A purposive interpretation of s 104(1)(a), read in the context of the statute as a whole (including especially the amendments made in 2004 to remove climate change as a concern of regional councils when in planning for or in consenting to discharges of greenhouse gases) precluded consent authorities from taking into account the climate change effects resulting from the end

use of the coal mined when considering applications for resource consents for the mining activities.

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### *Castonguay Blasting Ltd v Ontario (Environment)*

**Supreme Court of Canada:** [\[2013\] SCC 52.](#)

**Judgment delivered:** 17 October 2013.

**Coram:** McLachlin CJ, LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ

**Catchwords:**

Environmental law – Offences – Obligation to report to the Ministry of Environment any discharge of contaminant into natural environment – Appellant’s blasting operations propelled rock debris into air, damaging home and car – Appellant failed to report to the Ministry of Environment discharge of contaminant – Whether reporting requirement triggered in this case.

**Held (7-0):** Appeal dismissed. Appellant was required to report the discharge of fly-rock forthwith to the Ministry of Environment.

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## Equity

### *Szepietowski (Nee Seery) v The National Crime Agency*

**Supreme Court of the United Kingdom:** [\[2013\] UKSC 65.](#)

**Judgment delivered:** 23 October 2013.

**Coram:** Lord Neuberger PSC, Lord Sumption, Lord Reed, Lord Carnwath and Lord Hughes JJSC.

**Catchwords:**

Equity – Marshalling – Availability of remedy – Statutory scheme to recover assets purchased with proceeds of crime – Agency implementing scheme alleged defendant had assets purchased with proceeds of crime – Settlement whereby agency gave second charge over defendant’s investment property – Bank had first charge over both investment property and defendant’s family home – Proceeds of sale of investment property only sufficient to repay debt under bank’s first charge – Agency relied on doctrine of marshalling to seek sale of family home to pay amount secured

by its second charge on investment property – Whether doctrine applicable where no debt due from mortgagor to second mortgagee – Whether terms of deed of settlement and of charge precluded marshalling in any event.

**Held (5-0):** Appeal allowed.

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## Evidence

*Fukofuka v The Queen*

**Supreme Court of New Zealand:** [\[2013\] NZSC 77](#).

**Judgment delivered:** 16 August 2013.

**Coram:** Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ.

**Catchwords:**

Evidence – Identification evidence – *Evidence Act 2006* (NZ) (“the Act”) s 126 – Appellant convicted of wounding with intent to cause grievous bodily harm and theft – Crown case at trial based solely on complainant’s identification of the appellant as one of his attackers – Whether trial judge’s mandatory warning in relation to use of identification evidence at summing up met requirements of s 126 of the Act.

**Held (5-0):** Appeal unanimously allowed and a new trial ordered. The Court found that the Judge failed to meet the mandatory requirements of s 126 of the Act in two respects. First, he did not tell the jury that a mistaken identification can result in a serious miscarriage of justice and in particular did not make it clear that the risk of this is not just theoretical but has occurred in actual cases. Secondly, he did not direct the jury that a mistaken witness can be convincing. More generally, he also failed to identify appropriately the strengths and weaknesses of the identification evidence.

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## Family Law

*In the matter of A*

**Supreme Court of the United Kingdom:** [\[2013\] UKSC 60](#).

**Judgment delivered:** 9 September 2013.

**Coram:** Lady Hale DPSC, Lord Wilson, Lord Reed, Lord Hughes and Lord Toulson JJSC.

**Catchwords:**

Family law – Children – Custody rights – Jurisdiction – Habitual residence – Child born in Pakistan while British-resident mother forcibly detained there by father – Father thwarted mother’s attempt to bring child to England – Mother returned alone and applied to English court for order for return of child – Whether child born in Pakistan acquired on birth habitual residence in England – Whether prior physical presence in England a necessary prerequisite of finding of habitual residence – Whether court in any event has jurisdiction to order return on basis of child’s nationality.

**Held:** Mother’s appeal allowed. The court has inherent jurisdiction to make the orders in this case on the basis of child’s British nationality. The case is however remitted to the judge to consider as a matter of urgency whether it is appropriate to exercise this exceptional jurisdiction.

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## Health Law

*Cuthbertson v Rasouli*

**Supreme Court of Canada:** [\[2013\] SCC 53.](#)

**Judgment delivered:** 18 October 2013.

**Coram:** McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

**Catchwords:**

Health law – Consent to withdrawal of treatment – Health practitioners – Physicians sought to remove life support and provide palliative care to unconscious patient on basis that all appropriate treatments exhausted and continuation of life support of no medical benefit – Patient’s substitute decision-maker disagreed and refused to provide consent – Whether withdrawal of treatment constitutes “treatment” under *Health Care Consent Act 1996* – Whether consent regime under Act governs withdrawal of life support and therefore consent required – Whether substitute decision-maker’s refusal to provide consent must be challenged before Consent and Capacity Board pursuant to the Act rather than in the courts under the common law.

**Held (5-2):** Appeal dismissed. Consent of substitute decision maker required.

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*James (AP) v Aintree University Hospitals NHS Foundation Trust*  
**Supreme Court of the United Kingdom:** [\[2013\] UKSC 67](#).

**Judgment delivered:** 30 October 2013.

**Coram:** Lord Neuberger PSC, Lady Hale DPSC, Lord Clarke, Lord Carnwath and Lord Hughes JJSC.

**Catchwords:**

Health law – Medical treatment – Consent to withdrawal of treatment – Patient lacking capacity – NHS trust sought declarations that withdrawal of certain treatments from critically ill patient lacking capacity in his best interest and lawful – Guidance on correct approach to determining best interests – Whether court to consider whether treatment rather than its withdrawal in patient’s best interests – Whether test objective or subjective – Weight to be attached to patient’s wishes – Whether court to consider whether treatment worthwhile in interests of patient’s general well-being and overall health – Whether declarations correctly granted.

**Held (5-0):** Appeal dismissed. The trial judge applied the right principles and reached a conclusion which he was entitled to reach on the evidence before him. But the Court of Appeal were right to reach the conclusion they did on the basis of the fresh evidence before them. Technically, therefore, the appeal is dismissed.

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## Human Rights Law

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See also [Constitutional Law](#): *Divito v Canada (Public Safety and Emergency Preparedness)*

See also [Constitutional Law](#): *R v Chehil*

See also [Constitutional Law](#): *R v MacKenzie*

See also [Constitutional Law](#): *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*

See also [Constitutional Law](#): *R v Vu*

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*Osborn; Booth v The Parole Board; In re Reilly*  
Supreme Court of the United Kingdom: [\[2013\] UKSC 61](#).

**Judgment delivered:** 9 October 2013.

**Coram:** Lord Neuberger PSC, Lady Hale DPSC, Lord Kerr, Lord Clarke and Lord Reed JJSC.

**Catchwords:**

Human rights law – Prisoners’ rights – Release on licence – Prisoners serving indeterminate sentences after expiry of tariff – Parole Board decided not to recommend release or transfer to open conditions and refused request for oral hearing – Recall to prison of determinate sentence prisoner – Parole Board decided not to recommend re-release and refused request for oral hearing – Whether procedural fairness required oral hearing – Whether common law standards sufficient and compatible with Convention rights – Whether damages to be awarded for breach.

**Held (5-0):** Appeal allowed. The board breached its common law duty of procedural fairness to the appellants, and article 5(4) of the European Convention, by failing to offer them oral hearings.

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*Regina (Chester) v Secretary of State for Justice and another; McGeoch v Lord President of the Council and another*  
Supreme Court of the United Kingdom: [\[2013\] UKSC 63](#).

**Judgment delivered:** 16 October 2013.

**Coram:** Lady Hale DPSC, Lord Hope, Lord Mance, Lord Kerr, Lord Clarke, Lord Sumption and Lord Hughes.

**Catchwords:**

Human rights law – Free elections – Interference with – Statutory blanket ban on convicted prisoners voting – European Court of Human Rights held ban incompatible with Convention right – Whether Supreme Court to apply ruling – Whether declaration of incompatibility to be granted – Whether European Union law provides for an individual right to vote.

**Held (7-0):** Appeal dismissed. With regard to claims under the Convention, the Supreme Court applies the principles in *Hirst (No 2)* and

*Scoppola* regarding the blanket ban on voting, but declines to make any further declaration of incompatibility in respect of *Chester*. With regard to EU law, this does not provide an individual right to vote paralleling that recognised by the ECtHR in its case-law. The resolution of these appeals does not require a reference to the Court of Justice of the European Union.

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*Secretary of State for Work and Pensions v R (on the application of Reilly and another)*

**Supreme Court of the United Kingdom:** [\[2013\] UKSC 68.](#)

**Judgment delivered:** 30 October 2013.

**Coram:** Lord Neuberger PSC, Lord Mance, Lord Clarke, Lord Sumption and Lord Toulson JJSC.

**Catchwords:**

Human rights laws – Forced or compulsory labour – Return to work scheme – Requirement to undertake unpaid work as condition of continued receipt of social security benefit – Whether breach of Convention right not to be required to perform forced or compulsory labour.

Statutes – Validity – Whether ultra vires – Primary legislation allowed for regulations to require jobseeker allowance claimants' participation in return to work schemes of a "prescribed description" – Regulations named Employment, Skills and Enterprise Scheme but did not describe it – Whether meeting statutory requirement – Whether lawfully made.

**Held (5-0):** On ground (i) lawfulness, the Supreme Court dismisses the Secretary of State's appeal, holding that the 2011 Regulations are invalid, since they did not contain a sufficiently detailed "prescribed description" of the SBWA or CAP schemes. On ground (ii) notification, the Court dismisses the Secretary of State's appeal, holding that the notice given to the second Respondent was insufficiently detailed. On ground (iii) publication, the Supreme Court holds that the Secretary of State had failed to provide sufficient information about the schemes to the Respondents. On ground, (iv) forced labour, the Court dismisses the Respondents' cross-appeal: the Regulations do not constitute forced or compulsory labour. Given the existence of the 2013 Act and 2013 Regulations, however, the appropriate form of the order would require submissions from counsel.

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## Industrial Law

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See also [Constitutional Law](#): *Marine Services International Limited v Ryan Estate*

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## International Law

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See also [Criminal Law](#): *Gul (Mohammed) v R*

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## Maritime Law

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See also [Constitutional Law](#): *Marine Services International Limited v Ryan Estate*

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## Statutes

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See also [Administrative Law](#): *Régie des rentes du Québec v Canada Bread Company Ltd*

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*Grootboom v National Prosecuting Authority and Another*  
Constitutional Court of South Africa: [\[2013\] ZACC 37](#).

**Judgment delivered:** 21 October 2013.

**Coram:** Moseneke DCJ, Froneman, Jafta, Khampepe, Nkabinde, Skweyiya and Zondo JJ, and Mhlantla and Bosielo AJJ.

### Catchwords:

Statutes – Interpretation – Public Service Act (“the Act”) – Appellant employee of National Prosecuting Authority suspended in 2005 on allegations of misconduct – While on suspension appellant left to study in UK for 12 months – During this period respondent’s informed appellant that he had been discharged from the public service per operation of s 17(5)(a)(i) of the Act – This section provides for the deemed discharge of public servants

who absent themselves from their official duties for longer than one calendar month without their employers' permission – Labour Court and Labour Appeal Court dismissed appellant's appeal – Supreme Court refused leave to appeal against Labour Appeal Court's decision – Whether suspended employee as barred from being at work and from performing official duties could be said to have absented himself from those duties without employer's permission.

**Held (9-0):** Appeal allowed.

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## Taxation

*Envision Credit Union v Canada*

**Supreme Court of Canada:** [\[2013\] SCC 48](#).

**Judgment delivered:** 26 September 2013.

**Coram:** McLachlin CJ, LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**Catchwords:**

Taxation – Income Tax – Corporations – Amalgamations – Amalgamating credit unions sought to avoid flow-through of certain tax attributes to double claim capital cost allowance and reset preferred rate amount – Whether amalgamation a “qualifying amalgamation” satisfying requirements of s. 87 of the Income Tax Act – Whether “qualifying amalgamation” provisions apply to readjust amalgamated corporation's tax attributes.

**Held (7-0):** Appeal dismissed.

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## Torts

*Woodland v Essex County Council*

**Supreme Court of United Kingdom:** [\[2013\] UKSC 66](#).

**Judgment delivered:** 23 October 2013.

**Coram:** Lady Hale DPSC, Lord Clarke, Lord Wilson, Lord Sumption and Lord Toulson JJSC.

**Catchwords:**

Torts – Negligence – Duty of care – Local education authority – Appellant school pupil injured during school-arranged swimming lesson organised and provided off-site by independent contractor – Swimming teacher and lifeguard employed by independent contractor – Appellant brought personal injury claim – Whether local education authority liable for negligence of independent contractor – Whether local education authority owed non-delegable duty to secure that reasonable care taken of school pupils at location remote from school.

**Held (5-0):** Appeal against the order striking out the allegation of a non-delegable duty allowed. The case will now return to the High Court to determine whether the appellant was in fact a victim of negligence.

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