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Charter Dialogue Revisited – Or Much Ado About Metaphors

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CHARTER DIALOGUE REVISITED—OR "MUCH ADO ABOUT METAPHORS"©

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This article is a sequel to the 1997 article "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)." In the present article, the authors review various academic critiques of their "dialogue" theory, which postulates that *Charter* decisions striking down laws are not the last word, but rather the beginning of a "dialogue," because legislative bodies are generally able to (and generally do) enact sequel legislation that accomplishes the main objective of the unconstitutional law. The authors also examine the Supreme Court of Canada's dicta on the "dialogue" phenomenon, and update the data on which their 1997 article was based. They conclude that the dialogue phenomenon is alive and well and that the critique of the original article is largely "much ado about metaphors."

Cet article représente la suite l'article datant de 1997, intitulé « Le dialogue sur *la Charte* entre les tribunaux et les législatures (et si *la Charte* des droits n'était finalement pas si mauvaise) ». Dans cet article, les auteurs se penchent sur diverses critiques de leur théorie du « dialogue », laquelle postule que les décisions au titre de *la Charte* des droits et libertés, lorsqu'elles abrogent certaines lois, ne constituent pas des décisions péremptoires, mais plutôt le début d'un « dialogue », car les corps législatifs sont en général capables (et le font d'ailleurs généralement) de décréter une législation ultérieure atteignant le principal objectif de la loi anticonstitutionnelle. Par ailleurs, les auteurs examinent les opinions de la Cour Suprême concernant le phénomène du « dialogue », et actualisent les informations sur lesquelles reposait leur article de 1997. Pour conclure, ils affirment que le phénomène du dialogue est bel et bien vivant, et que la critique du premier article constitue amplement « beaucoup de bruit pour des metaphores ».

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I. PURPOSE OF ARTICLE

In 1997, we published an article in the Osgoode Hall Law Journal entitled "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such a Bad Thing After All)."[1] The purpose of the article was to challenge the anti-majoritarian objection to the legitimacy of judicial review under the *Canadian Charter of Rights and Freedoms*.[2] The objection is that it is undemocratic for judges, who are neither elected to their offices nor accountable for their actions, to be vested with the power to strike down laws that have been enacted by the duly elected representatives of the

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[1] Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75 ["*Charter* Dialogue"].

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

people. This is the reason why majoritarian critics say that the *Charter* is a "bad thing."

In the 1997 article, "*Charter* Dialogue," we reviewed the structural features of the *Charter* that enabled legislatures to limit, modify, or override the *Charter* guarantees. The most important features we noted were the reasonable limits justification of section 1 and the similar justifications built into the qualified rights in sections 7, 8, 9, and 12. We also pointed out that the guarantee of equality in section 15 could normally (but admittedly not always) be complied with in a variety of ways. And, of course, we discussed section 33, the override clause, which allows most holdings of invalidity to be overridden simply by the inclusion of a notwithstanding clause in the new law. These features of the *Charter* ensured that after a law was found to be invalid by the courts, legislatures would normally be left with a range of choices as to the design of corrective legislation—legislation that would accomplish the same objective, or nearly the same objective, as the law that was struck down by the courts. Our hypothesis was that, while the *Charter* would often influence the design of legislation that encroached on a guaranteed right, it would "rarely [raise] an absolute barrier to the wishes of the democratic institutions."[3] Legislatures would retain the primary responsibility for social and economic policy, and would usually be able to accomplish what they wanted to do while respecting the requirements of the *Charter*.

To test our hypothesis, we examined the aftermath of every court case in which a law had been declared contrary to the *Charter* by the Supreme Court of Canada (as well as most of those few lower court decisions that had not been appealed to the Supreme Court). The results were surprising. There were 66 cases in which a law was held to be invalid for breach of the *Charter*. Of those 66 cases, all but 13 had elicited some response from the competent legislative body. In seven cases, the response was simply to repeal the offending law. In the remaining 46 cases—more than two-thirds of the total—a new law was substituted for the old one. In two cases, the decisions were effectively overruled because the new law essentially re-enacted the law that had been held to be invalid—once through the use of section 33[4] and once

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[3] *Supra* note 1 at 81.

[4] *Ford v. Quebec*, [1988] 2 S.C.R. 712 (striking down French-only requirement for commercial signs in Quebec) was followed by *An Act to Amend the Charter of the French*

through the use of section 1.[5] In the other cases, however, the legislature respected the judicial decision by adding some civil libertarian safeguards in the new version of the law, but maintained the legislative purpose. A schedule to the 1997 article details the specific legislative action in each case.[6] The numbers made clear, to an extent far greater than we expected, that judicial review was not "the last word" on legislation that had been successfully challenged on *Charter* grounds. In most instances, the judicial decision did not preclude legislation that continued to pursue the objectives of the original law. We concluded that, while the *Charter* had given judges considerable authority to curtail legislative actions that impinged on protected rights and freedoms, it had by no means ousted majoritarian will.

In 1997, the literature on judicial review was predominantly American, and the Canadian contributions naturally drew inspiration from the American literature. Most Canadian writers assumed a "strong form" of judicial review, under which courts usually have the last word. Our study made clear that in Canada we had a weaker form of judicial review that rarely had the effect of actually defeating the purpose of the legislative body. We perhaps went too far in suggesting that our study was "an answer" to the anti-majoritarian objection to judicial review,[7] but the findings certainly made the anti-majoritarian objection difficult to sustain.

In "*Charter* Dialogue," we referred to the sequence of new laws following *Charter* decisions as a "*Charter* dialogue" between the courts and legislatures. By this, we did not mean that the courts and legislatures were literally "talking" to each other. We made it clear that all that we meant by the dialogue metaphor was that the court decisions in *Charter* cases usually left room for a legislative response, and usually received a legislative response.[8] In other words, the *Charter*'s influence

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Language, S.Q. 1988, c. 54 (essentially re-enacting the pre-existing law, using a notwithstanding clause under section 33).

[5] *R. v. Daviault*, [1994] 3 S.C.R. 63 (striking down the common law rule denying self-induced intoxication as defence to crimes of general intent) was followed by *An Act to amend the Criminal Code*, S.C. 1995, c. 32 (essentially re-enacting the common law rule, not using a notwithstanding clause).

[6] *Supra* note 1 at 107-24.

[7] *Ibid.* at 105.

[8] *Ibid.* at 82.

was much less direct than the simple rule by judicial decree that was assumed by the critics of judicial review. Metaphorically speaking, there were at least two "voices" translating *Charter* requirements into laws, but the most important of those voices was the competent legislature.

We could not possibly have anticipated back in 1997 that the article, and in particular our use of the dialogue metaphor, would become the subject of so much discussion, debate, and deconstruction by judges, law professors, and political scientists. By 2006, a total of 27 reported decisions (ten Supreme Court of Canada decisions,[9] five provincial appellate decisions,[10] seven decisions by the superior courts of the provinces or territories,[11] one decision of the Federal Court of Appeal,[12] and one of a provincial court[13]) had referred to the concept of *Charter* dialogue. *Charter* dialogue has been the subject of speeches by members of Parliament and members of the judiciary,[14] and has been a topic for academic discussion in numerous courses in law and political science. Scholarly critique has ranged from articles that suggest that

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[9] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 566-67, 578 [*Vriend*]; *R. v. Mills*, [1999] 3 S.C.R. 668 at 689, 745 [*Mills*]; *M. v. H.*, [1999] 2 S.C.R. 3 at 181 [*M. v. H.*]; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at 283 [*Corbiere*]; *Little Sisters Book & Art Emporium v. Canada*, [2000] 2 S.C.R. 1120 at 1257-58 [*Little Sisters*]; *R. v. Hall*, [2002] 3 S.C.R. 309 at 333-34, 369-70 [*Hall*]; *Sauvé v. Canada*, [2002] 3 S.C.R. 519 at 538, 576-77 [*Sauvé*]; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at 598-99 [*Bell ExpressVu*]; *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3 at 36-37; and *Harper v. Canada*, [2004] 1 S.C.R. 827 at 848-49 [*Harper*].

[10] *Reilly v. Alberta (Provincial Court, Chief Judge)*, 2000 ABCA 241, 266 A.R. 296 at 310 (C.A.); *Harper v. Canada*, [2002] 320 A.R. 1 at 34, 52-53 (C.A.); *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 at 330 (Div. Ct.); *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)* (2004), 70 O.R. (3d) 332 at 368-69 (Div. Ct.); and *Christie v. British Columbia*, 2005 BCCA 631, 262 D.L.R. (4th) 51 at 73-74, 83.

[11] *United States of America v. Tilley*, [1996] A.J. No. 718 at para. 14 (Q.B.) (QL); *Driskell v. Manitoba (Attorney General)*, [1999] 11 W.W.R. 615 at 629; *R. v. Brenton*, (1999) 180 D.L.R. (4th) 314 at 323-24; *R. v. Manios* (1999), 67 C.R.R. (2d) 138 at 142; *Mathew v. Canada*, [2003] 1 C.T.C. 2045 at 2168; *J.T.I. Macdonald Corp. v. Canada (Attorney General)*, [2003] R.J.Q. 181 at 189, 209; and *Procureur général du Québec c. Conférence des juges du Québec* [2003] R.J.Q. 2057 at 2062.

[12] *Sauvé v. Canada (Chief Electoral Officer)*, [2000] 2 F.C. 117 at 148 (C.A.).

[13] *R. v. Masse*, [2003] B.C.J. No. 2085 at para. 51 (Prov. Ct.) (QL).

[14] See *e.g.* David Kilgour, "Whither Judicial Restraint" (Remarks to the Edmonton Legal Forum, 18 September 2003), online: <http://www.david-kilgour.com/mp/judicial/htm>; Beverley McLachlin, "The Supreme Court and the Public Interest" (2001) 64 Sask. L. Rev. 309; and Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" (2000) 38 Osgoode Hall L.J. 495.

dialogue has the potential to undermine judicial review[15] to articles that accuse it of lending a false legitimacy to the influence of an undemocratic "court party" over courts and legislatures.[16] The use of legislative sequels as a proxy for dialogue has been criticized by some as overstating the relationship between courts and legislatures, by some as understating the relationship, and by others as simultaneously doing both.[17] In short, a law journal article on "*Charter* dialogue" has precipitated its own vigorous, multi-faceted dialogue.

To date, our own participation in the "dialogue about dialogue" has been limited to short replies to the critiques of a few authors.[18] However, the din of collective voices analyzing, attacking, defending, discussing, adapting, and applying the dialogue metaphor has finally grown too lively for us to resist. This article attempts a more comprehensive review of the growth since 1997 of the phenomenon we describe as dialogue and a more considered analysis of the views of our critics. With the *Charter*'s greater maturity, and, in particular, with some of the laws that were modified in response to early *Charter* decisions now coming back to the Court for a "second look," the nature of the dialogue between the courts and legislatures has become more complex. For example, the Court has been called upon to consider several challenges to election laws under section 3 of the *Charter*, a section for which the section 33 legislative override power is unavailable; these decisions therefore provide a more restrictive scope for legislative response and a greater challenge for the notion of dialogue.[19] In

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[15] Jamie Cameron, "Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills*" (2001) 38 Alta. L. Rev. 1051 [Cameron, "Dialogue and Hierarchy"].

[16] F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).

[17] See *e.g.* Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513 [Manfredi & Kelly, "Six Degrees of Dialogue"]; Christopher P. Manfredi & James B. Kelly, "Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures" (2001) 64 Sask. L. Rev. 323 [Manfredi & Kelly, "Dialogue, Deference and Restraint"]; and F.L. Morton, "Dialogue or Monologue?" *Policy Options* (April 1999) 23.

[18] Peter W. Hogg & Allison A. Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall L.J. 529 [Hogg & Thornton, "Reply to 'Six Degrees of Dialogue'"]; Peter W. Hogg & Allison A. Thornton, "The *Charter* Dialogue Between Courts and Legislatures" (April 1999) Policy Options 19; and Peter W. Hogg, "The *Charter* Revolution: Is it Undemocratic?" (2001) 12 Const. Forum Const. 1 [Hogg, "The *Charter* Revolution"].

[19] See *e.g. Sauvé*, *supra* note 9.

addition, the Court has been called upon in many more cases to design *Charter* remedies, and, in particular, to determine whether it is appropriate to suspend a declaration of invalidity in order to give the legislature an opportunity to respond by enacting a corrective law.

In this article, we revisit the original hypothesis of "*Charter* Dialogue" in light of the developments in the Supreme Court of Canada's *Charter* jurisprudence and in the academic commentary since 1997. The article is organized into three parts. In Part II, we discuss, and comment upon, the use that the Court has made of ideas of dialogue. In Part III, we discuss, and respond to, the main academic criticisms of the notion of dialogue. And, in Part IV, we provide an update of "the numbers" since "*Charter* Dialogue" was published in 1997.

In the end, we return to our original conclusion that the notion of dialogue poses a serious challenge (although perhaps not a complete answer) to the anti-majoritarian objection to judicial review. We should make clear at the outset that we are not especially interested in debating the critics on the question of whether the word "dialogue" is an apt description of the dynamics between the legislative and judicial branches in respect of *Charter* decisions. We accept, of course, that people may reasonably disagree about whether "dialogue" is the proper word to use (although no alternative has been suggested). However, we are principally interested in considering and responding to criticisms of the substantive thesis of our article—that *Charter* decisions usually leave room for, and usually receive, a legislative response. This is why we have subtitled the article "Much Ado About Metaphors."

II. DIALOGUE IN THE SUPREME COURT OF CANADA

"*Charter* Dialogue" focused on the legislative sequels to judicial decisions. We did not anticipate that our observations of the dialogue phenomenon would be of any interest to judges, who are well and truly out of the picture by the time a legislature enacts legislation in response to one of their decisions. It came, therefore, as a considerable surprise that our article captured so much judicial attention, and to find that the Supreme Court of Canada and other courts have made frequent reference to the article. In this section, we attempt to categorize the use that the Court has made of ideas of dialogue. It has come up in a variety of contexts: in judicial reflections about the legitimacy of judicial review; in considering whether to "read down" an unconstitutional statute; in designing other remedies for unconstitutional statutes; and in

determining the appropriate level of scrutiny for a "second look" statute. Each of these references to dialogue will now be considered.

A. *Justifying Judicial Review*

The anti-majoritarian objection to judicial review and the debate it sparks is primarily an academic one. The constitution of Canada assigns judges their adjudicative role, and if that role is "undemocratic," there is little judges can do about it. Further, to the extent that the judicial role or particular decisions attract criticism (as they often do, particularly after a controversial decision), the conventional limits on judicial speech preclude judges from responding publicly. Nevertheless, it would be unrealistic to suppose that the sometimes harsh criticism of unpopular decisions does not reach the eyes and ears of judges. The judges of the Supreme Court of Canada, who now like to write in a discursive style, have occasionally taken the opportunity to weigh in on the anti-majoritarian objection to judicial review in their judgments. This is one context in which the Court has shown interest in the idea of dialogue.

The first time that the Court referred to our article, and the first time that the Court invoked the idea of "dialogue," was in *Vriend v. Alberta* (1998).[20] The issue in the case was whether Alberta's human rights code[21] violated the equality guarantee in section 15 of the *Charter* by not protecting against discrimination on the ground of sexual orientation. The Alberta code included all the grounds customarily found in Canadian human rights codes, with the exception of sexual orientation. The Court decided unanimously that the omission of sexual orientation from the legislation was a breach of the equality guarantee. The Court went on to decide, with only a single dissenting voice (Justice Major from Alberta), that the remedy for the breach was for the Court to invoke its newly assumed power of "reading in" and to add sexual orientation directly to the statutory list. This was the very thing that Alberta's legislative assembly had debated and rejected. Obviously, this decision was going to be controversial! Justice Iacobucci, writing for the majority on the issue of remedy, attempted to articulate a democratic rationale for judicial review. He made the general point that "the

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[20] *Vriend, supra* note 9.

[21] *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, as am. S.A. 1990, c. 23.

concept of democracy means more than majority rule," especially where the interests of minorities are affected.[22] But he also focused on our dialogue article, pointing out that "the work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation."[23] In Justice Iacobucci's assessment, this helped to justify the strong remedy imposed by the Court in this case. He pointed out that the remedy of reading in need not be "the end of the legislative process," because the competent legislature "can pass new legislation in response," and any new legislation could invoke the override provision of section 33 of the *Charter*, which he described as "the ultimate parliamentary safeguard."[24] The decision was in fact followed by a vigorous public debate in Alberta about the use of section 33, and in the end the government of Alberta decided not to use section 33 and not to remove the language that the Court had added to the statute.[25]

Another decision respecting same-sex relationships was *M. v. H.* (1999),[26] where the Court, by a majority of eight to one, held that Ontario's *Family Law Act*[27] was in breach of the equality guarantee of the *Charter* because it excluded same-sex couples from the mutual support obligations that the Act imposed on opposite-sex couples in common-law relationships. In this case, the Court did not directly amend the legislation, but suspended the declaration of invalidity for six months to enable the legislature to comply with the decision. This was another controversial decision, and Justice Bastarache, who wrote a concurring opinion, was moved to articulate a defence of judicial review

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[22] *Vriend*, *supra* note 9 at 577.

[23] *Ibid.* at 566. The discussion of dialogue is at 562-66, 578.

[24] *Ibid.* at 578.

[25] Premier Klein explained that "[i]t became abundantly clear that to individuals in this country the Charter of Rights and Freedoms is paramount and the use of any tool ... to undermine [it] is something that should be used only in very, very rare circumstances." See Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Toronto: Oxford University Press, 2001) at 187-88 [Manfredi, *Judicial Power*].

By coincidence, one of the authors, Peter Hogg, was in Calgary for several days before and after the release of the Court's decision. He observed the media and general public discussion of the issue, which started as soon as the date of the release of the decision was announced and continued for several days after the release of the decision, until the premier announced that the government had decided not to propose any action by the legislature.

[26] *M. v. H.*, *supra* note 9.

[27] R.S.O. 1990, c. F.3.

that relied in part on our article. Quoting the article, he said that judicial review was not "a veto over the politics of the nation," but was rather "the beginning of a dialogue" between courts and legislatures.[28] The government of Ontario was clearly unhappy with the decision, but made no attempt to escape from it: its legislature reluctantly enacted a law extending mutual support obligations to same-sex couples—but notably without describing them as "spouses."[29]

B. *Opposing Reading Down*

"Reading down" is the technique of statutory interpretation by which a court will prefer the interpretation of a statute that does not offend the constitution over an interpretation that would offend the constitution. Reading down is not to be confused with "reading in," by which a court will explicitly add new words to a statute which has been declared unconstitutional, as written, in order to bring the statute into compliance with the constitution (as occurred in *Vriend*, discussed in Part IIA).[30] Reading down is simply a canon of interpretation. It has often been employed in division of powers cases, in which context it has

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[28] *M. v. H.*, *supra* note 9 at 181.

[29] *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, 1999, S.O. 1999, c. 6. This extraordinary title is the basis for the adverb "reluctantly" in the text. The current Liberal government of Ontario recently repealed the separate category of "same-sex partner" put in place by this legislation and enacted omnibus legislation that simply included same-sex couples in the definition of "spouse." See *Spousal Relationship Statute Law Amendment Act*, 2005, S.O. 2005, c. 5.

The Supreme Court's decision in *M. v. H.* was followed by a series of court challenges to the opposite-sex definition of marriage. These decisions found, with one exception that was later overruled, that the opposite-sex definition of marriage violated section 15(1) of the *Charter* and was not saved by section 1. The key decisions are from British Columbia (*EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.), rev'g (2001) 95 B.C.L.R. (3d) 122 (S.C.)); Ontario (*Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.), rev'g in part *Halpern v. Canada (Attorney General)* (2002), 215 D.L.R. (4th) 223 (Div. Ct.)); and Quebec (*Hendricks c. Québec (Procureur Général)*, [2002] R.J.Q. 2506 (C.S.)). The Government of Canada abandoned its defence of the opposite-sex definition of marriage in July 2003, and responded to these court decisions, after a reference to the Supreme Court of Canada (*Re Same-Sex Marriage*, [2004] 3 S.C.R. 698), by securing the enactment of the *Civil Marriage Act*, S.C. 2005, c. 33, which authorized same-sex marriages across the country.

[30] *Vriend*, *supra* note 9.

been praised as a desirable policy of restraint by the courts, since the alternative interpretation would involve striking the statute down.[31]

Reading down has been used occasionally by the Court in *Charter* cases, but the technique is more controversial in that context, often dividing the Court. In *Little Sisters Book and Art Emporium v. Canada* (2000),[32] the Little Sisters bookstore, which served the gay and lesbian communities in Vancouver, challenged the applicable federal customs legislation[33] that prohibited the importation of obscene books and magazines. The bookstore complained that the books and magazines that it ordered were disproportionately withheld or delayed by customs because of their gay and lesbian content. The Court held that customs officials had breached the section 15 *Charter* guarantee of equality by discriminating against the gay and lesbian communities. However, Justice Binnie, for the majority, took the view that that the legislation itself was constitutional, and, if the customs officials applied it correctly, the discrimination would disappear. He interpreted the statutory definition of obscenity as "neutral" as between heterosexual and gay and lesbian erotica. In making that assessment, Justice Binnie employed the interpretive canon of reading down. Justice Iacobucci, with whom Justices Arbour and LeBel agreed, opposed the use of "reading down" and took the view that the Court should strike down the provision allowing customs to ban expressive materials. In their view, much clearer direction was needed by customs officials, and only a redrafted statute could provide that direction. Quoting from our article, Justice Iacobucci said that striking down the existing provision would foster a dialogue between the Court and Parliament, and require Parliament to turn its mind to the issue of discrimination by officials and enact corrective legislation.[34]

Justice Iacobucci returned to the same theme in *Bell ExpressVu v. Rex* (2002).[35] Now writing for the majority, he held that reading down in *Charter* cases should be restricted to interpreting statutory language

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[31] Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 2006), c. 15.7 [Hogg, *Constitutional Law*].

[32] *Little Sisters*, *supra* note 9.

[33] *Customs Act*, R.S.C. 1985, c. 1.

[34] *Little Sisters*, *supra* note 9 at 1257-58.

[35] *Bell ExpressVu*, *supra* note 9 at 598-99. Because this was the minority view, the legislation was not struck down.

that was genuinely ambiguous. While the common law should be brought into conformity with "*Charter* values" in order to avoid holdings of unconstitutionality, the same rule did not apply to statutes. A broader general rule, requiring the courts to stretch the plausible interpretation of a statute in order to bring it into conformity with the *Charter*, "would wrongly upset the dialogic balance." When a statute is unambiguous, courts should give effect to the clearly expressed legislative intent, even if it leads to the conclusion that the statute was unconstitutional and should be struck down for breach of the *Charter*. This would force Parliament to revisit the issue and turn its mind to the reasonable limits on the *Charter* right. In this way, "a forum for dialogue among the branches of governance" would be retained.[36]

No reference was made to these counsels, or indeed to the idea of dialogue, in *Canadian Foundation for Children, Youth and the Law v. Canada* (2004).[37] In that case, the Supreme Court of Canada was invited to strike down section 43 of the *Criminal Code*,[38] which provides a defence to a charge of assault for teachers and parents who apply "reasonable" force "by way of correction" against the children in their charge. The appellant Foundation brought a challenge to the provision, arguing that the law failed to provide meaningful standards for disciplinary action by teachers and parents, in violation of section 7 of the *Charter*. In sharp contrast to *Bell ExpressVu*, Chief Justice McLachlin, for the majority (which included Justice Iacobucci), interpreted the provision as covering "only minor corrective force of a transitory and trifling nature."[39] She elaborated by explicitly ruling that the provision would not cover corporal punishment of children under two, or corporal punishment of teenagers, or discipline involving belts or rulers or other objects, or blows or slaps to the head. So interpreted, the law did provide meaningful standards and was accordingly upheld. Justice Arbour, in dissent, pointed out that the restrictions on the law that were stipulated by the Chief Justice had "not emerged from the existing case law," and were "far from self-evident."[40] She would have

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[36] *Ibid.* (The Court did not strike down the statutory provision in this case for want of a sufficient record to indicate that it offended the *Charter*.)

[37] [2004] 1 S.C.R. 76.

[38] R.S.C. 1985, c. C-46.

[39] *Supra* note 37 at 105.

[40] *Ibid.* at 165.

struck the provision down, leaving to Parliament the task of constructing a more specific provision (or simply eliminating the defence). The other dissenting judges, Justices Binnie and Deschamps, also regarded Chief Justice McLachlin's reinterpretation of the section as tantamount to judicial amendment and as encroaching on the proper role of Parliament.[41]

There is, of course, no need to invoke the idea of dialogue in order to insist that judges not engage in reconstructive surgery on legislative provisions that would otherwise be unconstitutional. The redrafting of unconstitutional laws is a legislative, not a judicial, function. Nevertheless, the idea of dialogue is a useful way of articulating the constraint that should be felt by judges. Where, after the exercise of normal interpretation, a legislative provision is found to be contrary to the *Charter*, the advantage of striking it down (and keeping in mind that the declaration of invalidity can be suspended) is that the reconstruction of the provision is remitted to the elected legislature. The legislature will obviously have to overcome the constitutional infirmity (unless a notwithstanding clause is used), which will entail working within the guidelines established by the judicial decision that struck down the law—that is the dialogue. But the final form of the corrective law (and its section 1 justification) will be the responsibility of the legislature. Recalling the point made in our 1997 article that there is usually a variety of corrective options available to the legislature, the idea of dialogue would normally be offended by a strained "reading down" of an otherwise unconstitutional statutory text by a court.[42] The corrective law, if any, should not be designed by the court, but by the legislature.

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[41] *Ibid.* at 122, Binnie J.; *ibid.* at 177, 188, Deschamps J.

[42] Ironically, reading in, which involves the addition of words to the statute, is arguably less intrusive, because the courts are aware of the radical nature of the remedy and use it only when there is really only one practical solution to the constitutional defect—the normal range of corrective options are not available. *Vriend, supra* note 9, was such a case, although even there Justice Major preferred the suspended declaration of invalidity to the direct reading in, and certainly that would have been the more deferential approach.

C. *Guiding Remedial Discretion*

1. Justifying Suspended Declarations of Invalidity

Canadian courts used "suspended declarations of invalidity" in constitutional cases long before the concept of "dialogue" was introduced by our 1997 article. The first use seems to date from the Supreme Court of Canada's decision in *Re Manitoba Language Rights* (1985),[43] where the Court found that all of the laws enacted since 1890 by the Legislature of Manitoba were unconstitutional. Contrary to an express constitutional requirement that the laws be enacted in French as well as English, Manitoba's laws had been enacted in English only. Faced with the prospect of a vacuum of provincial laws in Manitoba, the Court assumed the power to hold that the unconstitutional laws were to be given "temporary force and effect" for sufficient time to allow the legislature time to enact, in both languages, the required corrective legislation. At the time, this was considered a novel and radical exercise of judicial power, because a body of unconstitutional law was maintained in force solely by virtue of the Court's order. This was not a *Charter* case, but, after the decision, the suspended declaration of invalidity was used in several *Charter* cases where the normal remedy of an immediate declaration of invalidity would give rise to serious consequences, such as an inability to hold an election,[44] the release from custody of people who had committed serious crimes,[45] and the destruction of a beneficial social program.[46]

For some time after the *Manitoba Language Rights* case, the suspended declaration of invalidity continued to be viewed as a radical remedy to be sparingly applied. This was the view of Chief Justice Lamer in *Schachter v. Canada* (1982).[47] Writing for the majority, he suggested "guidelines" to limit the cases where a suspended declaration of invalidity could properly be ordered. The appropriate cases were where the immediate striking down of the legislation (1) "would pose a

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[43] [1985] 1 S.C.R. 721 [*Manitoba Language Rights*].

[44] *Dixon v. B.C. (Attorney General)* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.).

[45] *R. v. Swain*, [1991] 1 S.C.R. 933.

[46] [1992] 2 S.C.R. 679 [*Schachter*].

[47] *Ibid.*

danger to the public," (2) "would threaten the rule of law," or (3) "would result in the deprivation of benefits from deserving persons."[48]

The three *Schachter* "guidelines" essentially limited the courts' use of suspended declarations of invalidity to exigent situations where danger, disorder, or deprivation would be caused by an immediate declaration of invalidity. The guidelines explained most (but not all)[49] of the suspended declarations of invalidity that had been issued by the Supreme Court of Canada before *Schachter*. More recently, however, there has been a rethinking of the place of suspended declarations of invalidity in *Charter* jurisprudence. While a few of the subsequent cases fit the guidelines,[50] Sujit Choudhry and Kent Roach are right to note that the guidelines "have largely been ignored in subsequent cases."[51] This is because a new rationale, which can be captured by the word "dialogue," now governs the discretion of the Court. The new rationale is simply that, in many cases where the Court has found a law to be unconstitutional, the Court considers the legislature to be better placed than the Court to design the appropriate remedy. "The suspended declaration of invalidity can be viewed as a form of legislative remand, whereby unconstitutional legislation is sent back for reconsideration in light of the court's judgment."[52] This is not an abdication of

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[48] *Ibid.* at 719.

[49] *R. v. Bain*, [1992] 1 S.C.R. 91 (suspended declaration of invalidity for jury selection provisions). Although decided only six months before *Schachter*, this case does not fit any of the guidelines.

[50] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (No. 2)*, [1998] 1 S.C.R. 3 at 19-20 (suspending for one year the requirement of a judicial compensation commission necessary for judicial independence so that "the orderly administration of justice is not disrupted in the interim") would come within guideline (2). *M. v. H.*, *supra* note 9 at 87 (suspending for six months a declaration of invalidity of opposite-sex definition of "spouse" because its repair was complicated and support obligations between common law spouses would be interrupted) would come within guideline (3). *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at 578-79 (suspending for six months a declaration of invalidity of chronic pain provisions of workers' compensation scheme "to preserve the limited benefits of the current program until an appropriate legislative response to chronic pain can be implemented") would come within guideline (3).

[51] Sujit Choudhry & Kent Roach, "Putting the Past Behind Us?" (2003) 21 Sup. Ct. L. Rev. (2d) 205 at 232. This article lists all the suspended declarations of invalidity that had been issued by Canadian courts up to the date of the article (see Table A at 253-54). There are forty-two of them, of which sixteen were issued by the Supreme Court of Canada. See also Bruce Ryder, "Suspending the Charter" (2003) 21 Sup. Ct. L. Rev. (2d) 267, which also has an appendix listing all the declarations of invalidity (immediate and suspended) in the Supreme Court of Canada.

[52] Choudhry & Roach, *ibid.* at 233.

responsibility by the Court because if the legislature chooses to take no action during the period of suspension, the Court's declaration of invalidity will take effect.[53] But, the period of suspension gives to the legislature the first opportunity to remedy the constitutional wrong.

For example, in *Re Eurig Estate* (1998),[54] where the Supreme Court of Canada invalidated Ontario's probate fees (admittedly, not on *Charter* grounds), the Court suspended the declaration of invalidity for six months, citing only the potential loss of revenue to the province. In *Corbiere v. Canada* (1999),[55] where the Court invalidated the on-reserve residence requirements in the *Indian Act* [56] for Indian band elections, the Court suspended the declaration of invalidity for eighteen months to enable new provisions to be drafted after consultation with Aboriginal people. In *United Food and Commercial Workers International Union, Local 1518 v. KMart Canada Ltd.* (1999),[57] where the Court invalidated an overly broad prohibition of secondary picketing, the Court suspended the declaration of invalidity for six months to allow time for a new provision to be drafted. In *Dunmore v. Ontario* (2001),[58] where the Court invalidated a provision excluding agricultural workers from Ontario's labour relations statute, the Court suspended the declaration of invalidity for eighteen months to allow time for amending legislation to be drafted and enacted. In *R. v. Guignard* (2002),[59] where the Court invalidated a bylaw restricting advertising signs in the municipality, the Court suspended the declaration of invalidity for six months to allow time to redraft the bylaw. In *Trociuk v. British Columbia (Attorney General)* (2003),[60] where the Court invalidated powers given to a mother but not a father in a provincial birth registration law, the Court suspended the declaration of invalidity for twelve months to allow time to redraft the law. In *Figueroa v. Canada (Attorney General)* (2003),[61] where the Court invalidated restrictions that disqualified small political

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[53] Ryder, *supra* note 51 at 282, suggests that it is a "partial" abdication of responsibility.

[54] [1998] 2 S.C.R. 565 at 586.

[55] *Corbiere, supra* note 9 at 226, 284-85.

[56] R.S.C. 1985, c. I-5.

[57] [1999] 2 S.C.R. 1083 at 1133.

[58] [2001] 3 S.C.R. 1016 at 1077-78.

[59] [2002] 1 S.C.R. 472 at 488-89.

[60] [2003] 1 S.C.R. 835 at 854.

[61] [2003] 1 S.C.R. 912 at 964.

parties from registration for the purpose of federal elections, the Court suspended the declaration of invalidity for twelve months "in order to enable the government to comply with these reasons."

In each of these post-*Schachter* cases, there was a variety of solutions available to the competent legislative body to correct the constitutional defect. What the court was saying was that it is better "to offer legislatures the opportunity to make the initial choice among those competing alternatives."[62] Of course, the legislative body could, and probably would, still act even if the declaration of invalidity were given immediate effect, but an immediate declaration of invalidity would leave a gap in the law for the period required to draft and enact new legislation. Obviously, the Court was implicitly acknowledging that the preservation in force of an unconstitutional law was preferable to the legal discontinuity that would otherwise result.[63] However, in none of the cases described above did the gap in the law give rise to the exigent circumstances that, according to *Schachter*, were required to justify the postponement of a declaration of invalidity. With one exception, none of the cases offered an alternative rationale for postponing the declaration of invalidity. The exception was *Corbiere*,[64] where the concurring opinion of Justice L'Heureux-Dubé articulated the dialogue rationale for the postponement of the declaration. She pointed out that there were numerous ways in which the unconstitutional on-reserve residence requirement for *Indian Act* elections could be corrected, and that the best solution would be the one determined by Parliament after consulting with the Aboriginal people who were affected by the decision. In her view, the principle of democracy should guide the exercise of the Court's remedial discretion, and that principle "encourages remedies that allow the democratic process of consultation and dialogue to occur."[65] The suspension of the declaration of invalidity for eighteen months in that case gave Parliament time to develop and enact a new voting regime, should it choose to do so. If Parliament decided not to act, the Court's declaration of invalidity of the residence

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[62] Ryder, *supra* note 51 at 275.

[63] *Ibid.* at 283. Ryder criticizes the Court for its casual approach to the suspension of declarations of invalidity, and argues that the Court should require government to demonstrate that the costs of an immediate declaration outweigh the benefits of a suspended declaration.

[64] *Corbiere*, *supra* note 9.

[65] *Ibid.* at 283.

requirement would take effect after eighteen months, enfranchising for all purposes those band members who lived off the reserve.

We conclude that the idea of dialogue has been influential in guiding the courts in their increasing use of suspended declarations of invalidity. A purpose of the suspension, and often the only purpose, is to enable the legislature to respond directly to a holding of invalidity. The court recognizes that a range of corrective laws is possible, and that the legislature is better placed than the court to select the appropriate remedy. Although the unconstitutional law is maintained in force for a short time, the *Charter* is still respected, because if no new law is enacted by the time the period of suspension ends, the declaration of invalidity takes effect. If a new law is enacted in response to the holding of invalidity, that law must comply with the *Charter.*

2. Guiding Remedial Discretion Under Section 24 of the *Charter*

The Supreme Court's allusions to dialogue in connection with suspending a declaration of invalidity in *Corbiere* can be seen as an appropriate influence in guiding other remedial discretions. Another remedial discretion, which is created by the express words of section 24 of the *Charter*, is the grant to "a court of competent jurisdiction" of the power to correct a breach of the *Charter* by granting "such remedy as the court considers appropriate and just in the circumstances."[66]

Judicial respect for the superior competence of the legislative and executive branches in matters of policy and administration underlies suspended declarations of invalidity. The same respect would argue for restraint in the crafting of orders under section 24 to compel the executive branch to rectify *Charter* breaches. For the most part, that has been the pattern of remedial discretion under section 24.[67] However, a remarkable exception to the pattern of restraint is *Doucet-Boudreau v. Nova Scotia* (2003),[68] where a trial judge, acting under section 24, issued an order requiring the province of Nova Scotia to build five French-language schools and to develop related curriculum. As a remedy for the province's breach of minority language educational rights, this was not unusual. What was unusual was the judge's supervision of the

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[66] *Supra* note 2, s. 24.

[67] The cases are described in Hogg, *Constitutional Law*, *supra* note 31, c. 37.2.

[68] [2003] 3 S.C.R. 3.

government's compliance with the order. The judge remained seized of the case: he required the government to file regular progress reports on the construction and curriculum projects and held regular "reporting hearings" at which affidavit evidence was provided and cross-examination of deponents took place. This supervisory process was upheld by the Court, despite the fact that the only possible reason for it was a fear that the province would refuse to comply with the section 24 order—something that had never yet occurred in Canada. Justices Iacobucci and Arbour, writing for the majority, were obviously troubled by their espousal of dialogue in other contexts and their affirmation of the draconian supervisory order in this case. They said that "judicial restraint and metaphors such as 'dialogue' must not be elevated to the level of strict constitutional rules to which the words of section 24 can be subordinated."[69] We would only comment that there is no need to elevate dialogue to the level of a strict constitutional rule in order for the courts to exercise their remedial discretion under section 24 with due respect for the competence and good faith of the executive branch.

D. *Justifying Judicial Discretion in "Second Look" Cases*

The Supreme Court of Canada has also reflected on the idea of dialogue in several so-called "second look" cases, which are cases where the Court reviews the validity of legislation enacted to replace a law struck down in a previous *Charter* decision. In some second look cases, the majority of the Court has invoked the notion of dialogue as a reason for deferring to the legislative judgment and upholding the second law. In other second look cases, the majority of the Court has reminded us that dialogue does not mean that the Court should automatically defer to the legislature simply because the legislature has revised and re-enacted a law previously struck down by the Court.

The first second look case in which the Court explicitly invoked the notion of dialogue[70] was *R. v. Mills* (1999).[71] At issue in *Mills* was the

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[69] *Ibid.* at 36-37.

[70] This was not the first second look case decided by the Court (it was the third), but it was the first second look case in which the Court invoked the notion of dialogue. In *Baron v. Canada*, [1993] 1 S.C.R. 416, the Court held unconstitutional (for breach of section 8 of the *Charter*) the procedure for obtaining search warrants set out in the *Income Tax Act*, R.S.C. 1985, c. 63, s. 231.3, as am. by S.C. 1986, c. 6, s. 121 (*ITA*). This procedure was enacted in response to the decisions in *M.N.R. v. Kruger*, [1984] 2 F.C. 535 (C.A.) and *Reference Re Print Three Inc.* (1985), 51 O.R. (2d)

validity of a 1997 statutory regime for the disclosure to the accused of confidential records in sexual assault cases. The Court had addressed the issue of disclosure two years earlier in *R. v. O'Connor* (1995).[72] In *O'Connor*, the Court held unanimously that access to private records in the possession of third parties could be necessary to an accused's right under section 7 to make full answer and defence. However, this did not give an accused person an automatic right of access to the records. Rather, the Court ruled that production must be governed by a procedure which would strike the proper balance between the accused's right under section 7 to make full answer and defence (which called for disclosure) and the complainant's rights under section 8 to privacy and under section 15 to equality (which called for confidentiality). The Court divided five to four on how to achieve this balance, with the minority setting down standards for judicially supervised disclosure that called for significantly more restrictive access to records than that provided for under the procedures laid down by the majority.[73]

After the decision in *O'Connor*, Parliament replaced the judicially imposed process with the 1997 statutory regime for the disclosure of confidential records in sexual assault cases.[74] The statutory regime followed the dissenting opinion of Justice L'Heureux-Dubé much more closely than the majority opinion, with the result that there was a strong likelihood that in some cases records that the majority of the Court in *O'Connor* had assumed would be needed by the accused in order to make full answer and defence would be withheld in the

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321 (C.A.). The *ITA* was amended by S.C. 1994, c. 21, s. 108. In *R. v. Pontes*, [1995] 3 S.C.R. 44, a slim 5-4 majority of the Court held that the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, was not unconstitutional (for breach of section 7 of the *Charter*), even though driving with a suspended licence remained an absolute liability offence, something that was held to be unconstitutional (for breach of section 7) in *Reference Re Section 94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, because section 4.1 of the *Offence Act*, R.S.B.C. 1979, c. 305 could be used to "read down" a penalty of imprisonment for that offence.

[71] *Mills*, *supra* note 9.

[72] [1995] 4 S.C.R. 411.

[73] The majority opinion was written by Chief Justice Lamer and Justice Sopinka, and attracted the support of Justices Cory, Iacobucci, and Major. The main dissenting opinion was written by Justice L'Heureux-Dubé, and attracted the support of Justices La Forest and Gonthier. Justice McLachlin wrote a separate dissent in which she agreed wholly with Justice L'Heureux-Dubé.

[74] S.C. 1997, c. 30, s. 278.1.

interests of the privacy and equality rights of the complainants.[75] The statute contained a lengthy preamble, reciting Parliament's concern with the prevalence of sexual violence against women and children, and the risk that the reporting of incidents of sexual violence would be deterred by the compelled production of records revealing personal information about complainants. The preamble had obviously been inserted with a view to supporting a section 1 justification in the event of a constitutional challenge.

In *Mills*, the Court upheld the 1997 statutory scheme, but the reasoning was surprising because it was not based on a section 1 analysis. Instead, the Court repeatedly invoked the concept of dialogue as a reason for deferring to Parliament's judgment—not its judgment as to legislative objective and the other elements of the section 1 justification, but its judgment *as to where to draw the line between the competing rights*. The Court, speaking through Justice McLachlin, as she then was (who had dissented in *O'Connor*), and Justice Iacobucci (who had been in the majority in *O'Connor*), said that *O'Connor* was "not necessarily the last word on the subject," and that "the law develops through a dialogue between courts and legislatures."[76] The Court pointed to a long process of consultation that had preceded the enactment of the statute, which had allowed time for Parliament to consider the constitutional standards laid down in *O'Connor* and also to consider how well they were working in practice. The Court described this process of consultation as "a notable example of the dialogue between the judicial and legislative branches."[77] What the Court in *O'Connor* had regarded as "preferable" was not a "rigid constitutional template," but a common-law interpretation of the *Charter* that "does not preclude Parliament from coming to a different conclusion ... ."[78] The Court concluded that the statute should be upheld.

In the second look cases decided since *Mills*, the Court has divided sharply on the degree of deference that a second try by

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[75] The differences between the *O'Connor* regime and the statutory regime are related in more detail in Hogg, *supra* note 31, c. 44, "Fundamental Justice," s. 44.19(f). See also Cameron, "Dialogue and Hierarchy," *supra* note 15; Manfredi & Kelly, "Dialogue, Deference and Restraint," *supra* note 17 at 331-36.

[76] *Mills*, *supra* note 9 at 689.

[77] *Ibid.* at 745.

[78] *Ibid.* at 749. For further comments on relating to dialogue, see also 711, 753-54.

Parliament or a provincial legislature should receive from the Court. In *R. v. Hall* (2002),[79] the Court reviewed a second attempt by Parliament to define the grounds for denying bail to an accused person in custody. In an earlier case, *R. v. Morales* (1992),[80] the Court had struck down a provision of the *Criminal Code* that authorized the denial of bail when the continued detention of an accused person was "necessary in the public interest." The Court held that the phrase was too vague to satisfy section 11(e) of the *Charter*, which prohibits the denial of bail without just cause. After this decision, Parliament replaced the invalid public interest ground with a new provision that authorized the denial of bail "on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice."[81] In *Hall*, the Court unanimously held that the general phrase "on any other just cause being shown" was, like its public interest predecessor, unconstitutionally vague. But the Court divided five to four on the validity of the more specific ground, which authorized the denial of bail in order to maintain confidence in the administration of justice. Chief Justice McLachlin, for the majority, upheld the provision as being sufficiently precise to pass constitutional muster under section 11(e). She pointed out that Parliament, before enacting the challenged language, had taken into account the Court's reasons in *Morales*. She described the legislative outcome as "an excellent example" of the "constitutional dialogue" between the courts and Parliament.[82] But Justice Iacobucci, for the minority, held that the "administration of justice" language was still unconstitutionally vague. In his view, the case demonstrated how "constitutional dialogue can break down."[83] Although Parliament had responded to the Court's decision in *Morales*, "it [had] not done so with due regard for the constitutional standards set out in that case."[84] In upholding the new provision, he sharply criticized the majority decision as having "transformed dialogue into abdication."[85]

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[79] *Hall*, *supra* note 9.

[80] [1992] 3 S.C.R. 711.

[81] *Supra* note 38, s. 515(10), as am. by S.C. 1997, c. 18, s. 59.

[82] *Hall*, *supra* note 9 at 333-34.

[83] *Ibid.* at 369.

[84] *Ibid.*

[85] *Ibid.* at 370.

Sauvé v. Canada (2002),[86] released just three weeks after *Hall*, reviewed a second attempt by Parliament to impose voting disqualifications on prisoners. In earlier litigation by the same litigant, the Court had struck down a provision of the *Canada Elections Act*[87] that disqualified all persons serving prison sentences from voting in federal elections.[88] The Court had held that the disqualification infringed the right to vote in section 3 of the *Charter* and was not justified under section 1. After this provision was struck down, Parliament amended the legislation to narrow the disqualification to prisoners serving a sentence of two years or more.[89] When the constitutional challenge to the new provision reached the Court, Parliament conceded that the new provision infringed section 3, and the issue before the Court was whether the infringement was justified under section 1. On that issue, the Court divided five to four, with the majority holding that the law was not justified under section 1. Justice Gonthier, writing for the four dissenters, invoked the concept of dialogue to argue that the Court should defer to Parliament's judgment as to what was a reasonable limit on the right to vote. Once Parliament had debated the issue, the dialogue metaphor suggested that the Court should not substitute its view for Parliament's reasonable choices among social and political philosophies. According to Justice Gonthier, this was a case where the Court "lets Parliament have the last word."[90] After *Hall*, one might have expected Chief Justice McLachlin to agree with this reasoning, but in *Sauvé* she took a very different line. Writing for the majority (which included Justice Iacobucci), she described the section 3 right to vote as "fundamental to our democracy" and of "special importance," and said that any limits on the right "require not deference, but careful examination."[91] Echoing the strong language of Justice Iacobucci in *Hall*, she said: "The healthy and important

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[86] *Sauvé*, *supra* note 9.

[87] R.S.C. 1985, c. E-2, s. 51(e), rep. & sub. S.C., 1993, c. 19, s. 23(2).

[88] *Sauvé v. Canada*, [1993] 2 S.C.R. 438.

[89] The amendment had been enacted by the time the first appeal reached the Supreme Court of Canada, but it was not applicable to the appeal and the Court did not comment on it. Thus, a further challenge was necessary.

[90] *Sauvé*, *supra* note 9 at 576-77.

[91] *Ibid.* at 535, 536. Notably, the right to vote is one of the rights that is not subject to the section 33 override.

promotion of a dialogue between the legislature and the courts should not be debased to a rule of 'if at first you don't succeed, try, try again.'"[92] She dismissed the parliamentary debates as offering "more fulmination than illumination."[93] She described the reasons given by government for limiting the right (enhancing civic responsibility, promoting respect for the rule of law, and strengthening the criminal sanction) as merely "symbolic," "abstract," and "rhetorical," and she concluded that there was no pressing and substantial objective that would justify limiting the right.[94] The conclusion was that all persons serving prison sentences must be given the right to vote, notwithstanding that Parliament had made a clear choice, informed by the Court's previous decision, to limit that right.

Harper v. Canada (2004)[95] reviewed a second attempt by Parliament to impose a ceiling on election expenditures by third parties (*i.e.* persons other than registered political parties and their candidates). Parliament had reformed the law in response to the Court's decision in *Libman v. Quebec (Attorney General)* (1997),[96] which struck down a prohibition on expenditures by persons who fell outside the umbrella of the "yes" or "no" side of a referendum campaign, and the Alberta Court of Appeal's decision in *Somerville v. Canada (Attorney General)* (1996),[97] which struck down a third-party election expenditure restriction of one thousand dollars. Following these decisions, Parliament amended the *Canada Elections Act*, by raising the ceiling on third-party election expenditures from the one thousand dollars that had been struck down in *Somerville* to a total of $150,000, of which no more than three thousand dollars could be incurred in a single electoral district. These restrictions, like their more draconian predecessors, essentially made election campaigns the exclusive reserve of registered political parties and their candidates, who were also subject to spending limits, but limits that were more than sixty times greater. There was no doubt that the third-party expenditure restrictions were limits on

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[92] *Ibid.* at 538.

[93] *Ibid.* at 540.

[94] *Ibid.* at 540-42.

[95] *Harper*, *supra* note 9.

[96] [1997] 3 S.C.R. 569.

[97] (1996), 184 A.R. 241 (C.A.).

freedom of expression, contrary to section 2(b) of the *Charter*. But were they saved by section 1?

In *Harper*, the Court, by a majority of six to three, said yes. Although there was no evidence that in election campaigns the voices of the wealthy drowned out those of others, the Court accepted that the prevention of that evil was the objective of the restrictions, and that the objective was sufficiently important to justify limiting freedom of expression. Where the Court divided was on the minimum impairment branch of the *Oakes* test. Did the statutory restrictions impair the right of free expression as little as reasonably possible? Justice Bastarache, writing for the majority, suggested that, given the difficulties inherent in balancing the rights and privileges of all the participants in the electoral process, it was appropriate to approach the justification analysis with deference. He held that the statutory restrictions impaired the right of free expression as little as reasonably possible, and were justified under section 1. He did not invoke the notion of dialogue to support this deferential approach. Chief Justice McLachlin and Justice Major, writing for the minority, rejected the deferential approach to the justification analysis and emphasized that limits on political speech (the type of speech in issue) "must be supported by a clear and convincing demonstration that they are necessary, do not go too far, and enhance more than harm the democratic process."[98] The argument of good faith, said to be "evidenced by the ongoing dialogue with the courts as to where the limits should be set," was rejected, on the basis that "good faith cannot remedy an impairment of the right to freedom of expression."[99]

These decisions make it clear that the Court is struggling to determine how it should approach second look cases. This is hardly surprising, since second look cases bring into stark relief issues relating to the proper boundary between elected legislatures and unelected judges. In the last section of this article, we offer our suggestions as to how the Court should approach second look cases in light of the notion of dialogue.

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[98] *Harper*, *supra* note 9 at 843-44.

[99] *Ibid.* at 848-49.

III. DIALOGUE IN THE ACADEMIC LITERATURE

In this part, we will attempt to address criticisms of our 1997 article that have been made in the academic literature. The academic literature has taken on avalanche proportions, and all that we can do is attempt to categorize and to answer the main lines of criticism. However, before doing so, we feel that it is appropriate to make several preliminary observations about the criticisms in general, in order to provide some context.

First, as previously noted, many of the criticisms focus on our use of the word "dialogue," often by analyzing what is required (at least in the view of the critics) to engage in some idealized notion of "dialogue," and then criticizing our notion of dialogue because it does not fit this idealized notion. This approach is misguided. The essential point of "*Charter* Dialogue" was that *Charter* decisions usually leave room for a legislative response, and usually receive a legislative response. We used the word "dialogue" to describe the recurring sequence of judicial decision followed by legislative amendment that we observed and documented. We never made the ridiculous suggestion that courts and legislatures were actually "talking" to each other. Whether dialogue is the proper word to use to describe the phenomenon we observed is a question upon which anyone may disagree. We would cheerfully adopt another word if we were persuaded that another word is better, but no one has so far suggested a better word. This article will therefore not agonize over the word "dialogue," but rather reiterate the substantive thesis of the 1997 article—that Canada has only a weak form of judicial review, because *Charter* decisions usually leave room for a legislative response and usually receive a legislative response.

Second, the notion of dialogue that we proposed in "*Charter* Dialogue" was descriptive rather than normative. We described how legislatures *did* behave—rather than how they *should* behave—following a court decision striking down one of their laws on *Charter* grounds. We have since come to appreciate that the notion of dialogue may also have some limited normative content, and we have also come to appreciate that dialogue may influence courts as well as legislatures—something we did not anticipate in 1997. Both of these ideas have been introduced in Part II, above, discussing dialogue in the Supreme Court of Canada. This article will continue to discuss the limited ways in which the notion

of dialogue should influence institutional behaviour following a *Charter* decision striking down a law.

Third, and finally, the notion of dialogue has encountered aggressive criticism from those critics who see a political bias embedded in the Court's decision making. This is perhaps unsurprising. The idea that legislatures can, and usually do, respond to judicial decisions invalidating a piece of legislation for inconsistency with the *Charter* poses a serious challenge to *Charter* skeptics on both the right and the left end of the political spectrum. If, for example, unpopular judicial decisions that have the effect of advancing a "progressive" social or economic agenda can be modified or overridden by the competent legislative body, it becomes much less significant whether those decisions have been achieved through the efforts of an unrepresentative, unaccountable, left-leaning "Court party" (per Morton and Knopff).[100] Similarly, if unpopular judicial decisions that have the effect of advancing a "conservative" social or economic agenda can be modified or overridden by the competent legislative body, it becomes much less significant whether those decisions reflect the social and economic assumptions of unrepresentative, unaccountable, middle-aged, affluent, conservative judges (per Petter).[101]

A. *Justifying Judicial Review*

The first, and most fundamental, line of criticism is that the 1997 article fails to justify judicial review under the *Charter*. Andrew Petter says that "dialogue theory lacks normative content, and exerts no moral claim to support judges' involvement in *Charter* decision-making."[102] Keith Ewing takes the same view, saying that "[i]f judicial review of legislation is to be justified, it must be for reasons of principle which are intrinsic to the process itself ... ."[103] Petter and Ewing are quite right. The justifications for judicial review under the *Charter* do not include

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[100] *Supra* note 16.

[101] Andrew Petter, "Twenty Years of *Charter* Justification: From Liberal Legalism to Dubious Dialogue" (2003) 52 U.N.B.L.J. 187.

[102] *Ibid.* at 196.

[103] Keith Ewing, "Human Rights" in Peter Cane & Mark Tushnet, eds., *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 298 at 309.

dialogue theory.[104] As Kent Roach has noted, "[d]ialogue theory is not a theory of judicial review," and thus it is still necessary to justify "giving the unelected judiciary [a] role in the political dialogue about rights and freedoms."[105]

The *moral* justification for judicial review is the idea that individuals have rights that must be "taken seriously," which means that they cannot be taken away simply by an appeal to the general welfare.[106] The *political* justification for judicial review is that Canada adopted the *Charter* in 1982 after extensive public debate, which included articulate objections to the idea of judicial review. Although the government of Quebec did not agree to the *Charter* in 1982, and (perhaps for that reason) no referendum was held to approve its terms, its approval was part of a democratic process that culminated in the approval of the Parliament of Canada. Moreover, since 1982, polls have consistently shown high levels of popular support both for the *Charter* and for judicial review of legislation by the Supreme Court of Canada.[107] The *legal* justification for judicial review is that the *Charter* is now part of the constitution, and the constitution provides, by section 52, that any law that is inconsistent with the constitution is "of no force or effect." That language is, in our tradition, a clear mandate for judicial review.

Reasonable people can hold the view that rights can be adequately protected by legislatures without judicial review. Reasonable

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[104] The same conclusion is reached by Luc Tremblay. See Luc B. Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures" (2005) 3 Int'l J. Const. L. 617.

[105] Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Sup. Ct. L. Rev. (2d) 49 at 51 [Roach, "Dialogic Judicial Review"].

[106] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), c. 7. The chapter was originally published in the *New York Review of Books*.

[107] Jeremy Waldron has criticized the suggestion that judicial review is democratic because it was the result of a democratic process. "[I]f the people want a regime of constitutional rights, then that is what they should have: democracy requires *that*. But we must not confuse the reason for carrying out a proposal with the character of the proposal itself. If the people wanted to experiment with dictatorship, principles of democracy might give us a reason to allow them to do so. But it would not follow that dictatorship is democratic." See "A Right-Based Critique of Constitutional Rights" (1993) Oxford J. Legal Stud. 18 at 46 [emphasis in original]. However, as Jeffrey Goldsworthy reminds us, under the *Charter*, "[t]he transfer of power to the judges is more like a delegation of power to make decisions that can be overridden by the legislature, just as it can override the exercise of powers it has delegated to the executive. The 'democratic' justification of entrenched constitutional rights then stands undefeated." See "Judicial Review, Legislative Override, and Democracy" (2003) 38 Wake Forest L. Rev. 451 at 459.

people can believe that the debate in 1982 should have gone the other way, and that it was a mistake to entrench the *Charter* into the constitution. Reasonable people can prefer a parliamentary democracy to a constitutional democracy. But those points of view were carefully considered and deliberately rejected in 1982. Canadians decided then that some rights were so important that they should be protected from the regular process of majoritarian politics. Canadians decided then to require the courts to review government laws and actions for compliance with the *Charter*. Canadians knew then, from their experience with sections 91 and 92 (the federalism provisions), as well as from their knowledge of the experience of judicial review under the U.S. Bill of Rights, that judicial review would take constitutional provisions down paths that are somewhat unpredictable. Canadians knew then that they were giving their courts a larger role in shaping the public policy of the nation than they ever had before. Nevertheless, Canadians decided to adopt a constitutional *Charter* anyway. It is not going to go away!

Dialogue theory does not provide a justification for judicial review. The justification rests on the moral, political, and legal justifications for judicial review described in the two paragraphs above. What "*Charter* Dialogue" demonstrated was not that judicial review was good, but that judicial review under the *Charter* was weaker than is generally supposed. Those who would prefer Canada to revert to a simple parliamentary democracy can take some comfort from our 1997 article. That article showed that that the combined effects of the limitation clause (section 1), the override clause (section 33), and other provisions of the *Charter* meant that a judicial decision striking down a law did not need to be the last word, and usually was not the last word. The competent legislative body usually could, and usually did, replace a law that had been struck down with a valid law that accomplished the main objectives of the original invalid law. "*Charter* Dialogue" showed that what we adopted in 1982 was a halfway house between the strong form of judicial review typified by the United States and the statutory bill of rights typified by the *Canadian Bill of Rights*[108] of 1960.[109] It is obviously much easier to justify a weak form of judicial review than a

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[108] S.C. 1960, c. 44.

[109] For a detailed discussion of these new "Commonwealth bills of rights," see Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49 Am. J. Comp. L. 707.

strong form, because the influence of the unelected courts on public policy is much less when the courts' powers to review the laws enacted by the elected legislative bodies are only of the weak Canadian kind. When judicial decisions apply the *Charter* to strike down laws that are supported by popular sentiment (whether that sentiment is consistently "progressive," as some critics assume, or consistently "conservative," as others assume), the laws can normally be restored in substance by the competent elected legislative assembly.

B. *Final Authority to Interpret the* Charter

A second major line of criticism is that dialogue does not, and cannot, exist where *final* authority to interpret the *Charter* is vested in the courts. Christopher Manfredi and James Kelly, for example, suggest that the notion of dialogue is "flawed" because dialogue supporters assume "a judicial monopoly on correct interpretation," and argue that "[g]enuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an *effective* means to assert that interpretation."[110] Manfredi criticizes the notion of

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[110] Manfredi & Kelly, "Six Degrees of Dialogue," *supra* note 17 at 523-24 [emphasis in original]; Manfredi & Kelly, "Dialogue, Deference and Restraint," *supra* note 17.

The idea that legislatures should be recognized as legitimate interpreters of the constitution is not new. The idea, known as coordinate construction, was argued, with respect to the U.S. Constitution, by Thomas Jefferson (see John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984) at 78-86), James Madison (see Robert A. Burt, *The Constitution in Conflict* (Cambridge: Harvard University Press, 1992), c. 2), Abraham Lincoln (denying that the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) was binding on the President, Congress, and the voters), and Franklin D. Roosevelt (denying that the Supreme Court's decisions striking down the New Deal legislation were binding on the President, Congress, and the voters). However, after a period of relative neglect, the idea has been making somewhat of "an academic comeback," first in the United States, with respect to the U.S. Constitution, and now in Canada, with respect to the *Charter*. The notion of coordinate construction has been revitalized, in particular, by popular constitutionalists who call for a "reassertion" of the involvement of "the People" in constitutional interpretation.

Some examples of the American academic commentary espousing coordinate construction: Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999) [Tushnet, *Taking the Constitution Away*]; Mark Tushnet, "Non-Judicial Review" (2003) 40 Harv. J. on Leg. 453 [Tushnet, "Non-Judicial Review"]; and Larry D. Kramer, "Foreword: We the Court" (2001) 115 Harv. L. Rev. 4. Some examples of the American academic commentary rejecting coordinate construction: Larry Alexander & Frederick Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110 Harv. L. Rev. 1359; Larry Alexander & Frederick Schauer, "Defending Judicial Supremacy: A Reply" (2000) 17 Const. Commentary 455; and Larry Alexander, "Constitutional Rules, Constitutional Standards, and Constitutional

dialogue because it equates judicial interpretation of the *Charter* with the *Charter* itself and, in so doing, does not give Parliament or the provincial legislatures credit for having a role in giving meaning to *Charter* values that is independent of judicial views.[111] Rainer Knopff says that "[t]he problem with contemporary Canadian dialogue theorists" is that they "want to retain judicial finality in *interpreting* the Constitution even as they deny judicial supremacy over policy outcomes."[112]

We would comment, first of all, that this is a semantic point. If "genuine dialogue" can only occur where legislatures share coordinate authority with the courts to interpret the constitution, then by definition it cannot exist in Canada, where legislatures have no such authority. Underlying the criticism, however, is a preference for a different constitutional order, and it is that preference that we will go on to discuss.

Our position is that the final authority to interpret the *Charter* rests properly with the judiciary (or, to put it differently, that judicial interpretation of the *Charter* is authoritative). In our view, societies that have a written bill of rights will require some body or institution to have the *final* authority to say what the bill of rights means, otherwise there would be a possibility for "interpretative anarchy."[113] In Canada, that task falls, and should continue to fall, to the courts. There are problems, to be sure, with giving this task to the courts, but for the reasons

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Settlement: *Marbury v. Madison* and the Case for Judicial Supremacy" (2003) 20 Const. Commentary 369.

For an account of the "academic comeback" of the idea, see Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481 at 490-93; Kent Roach *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), 241-43 [Roach, *The Supreme Court on Trial*].

[111] Manfredi, *Judicial Power*, *supra* note 25 at 178-79.

[112] Rainer Knopff, "How Democratic is the *Charter*? And Does it Matter?" (2003) 19 Sup. Ct. L. Rev. (2d) 199 at 212 [emphasis in original].

[113] Alexander & Schauer, "On Extrajudicial Constitutional Interpretation," *supra* note 110 at 1379 (describing the "protestant view" of constitutional interpretation, which entails parity of interpretive authority between the three branches of government, as leading to "interpretative anarchy").

outlined below, the judicial branch is likely the "least dangerous branch" to charge with offering a final interpretation of the *Charter*.[114]

We agree with the critics that, while assuming judicial supremacy over the interpretation of the *Charter*, we deny judicial supremacy over policy outcomes. In our view, although the legislative and executive branches are bound by judicial interpretations of the *Charter*, legislatures usually have the ability to respond, and usually do respond, to judicial decisions invalidating a legislative provision for inconsistency with the *Charter*. This was the whole point of "*Charter* Dialogue," and indeed the appendix to it (which describes the sequels to all the *Charter* decisions) demonstrates conclusively that the policy outcomes are usually not those dictated by the courts.

We disagree with the suggestion that we assume a judicial monopoly on *correct* interpretation of the *Charter*. What we assume is a judicial monopoly on *final* interpretation of the *Charter*. We do not deny that the courts sometimes get it wrong. We each have a *Charter* decision or two that we think was incorrectly decided.[115] All that was argued in "*Charter* Dialogue," and again in the 1999 response to Manfredi and Kelly, was that the *Charter* decisions of the courts, *whether right or wrong*, rarely preclude a legislative sequel, and usually receive one.[116] Collectively, we take comfort in the ability of legislative bodies to respond to those *Charter* decisions where the courts simply "get it wrong."

We also disagree that we assume a judicial *monopoly* on interpretation. In our view, there is a distinction between what Brian Slattery has called first-order duties (the duty of each branch of government—legislative, executive, and judicial—to respect the values enshrined in the *Charter*)[117] and second-order duties (the duty of one or more branches of government to review the acts of the other branches to ensure that those branches are complying with their first-order

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[114] This is the conclusion of Alexander Bickel. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed. (New Haven: Yale University Press, 1986).

[115] Indeed, many of the decisions that led to legislative sequels were vigorously criticized as wrongly decided by one author. See Hogg, *Constitutional Law*, *supra* note 31.

[116] Hogg & Thornton, "Reply to 'Six Degrees of Dialogue,'" *supra* note 18 at 535.

[117] Section 32 of the *Charter* makes it clear that the *Charter* applies "to the Parliament and government of Canada" and "to the legislature and government of each province."

duties).[118] In carrying out their first-order duties to respect the values enshrined in the *Charter*, the legislative and executive branches of government will necessarily interpret the *Charter* (and judicial decisions interpreting the *Charter*).[119] The key issue, in our view, is not whether the legislative and executive branches do, and should, interpret the *Charter* (they do and should), but whether they should *act* on an interpretation of the *Charter* that conflicts with an interpretation provided by the courts.[120] In our view, where the interpretive task does not take place against the backdrop of a prior relevant judicial decision, the legislature and the executive may act on their interpretation of the *Charter*. Why? Because, in doing so, they would not be doing (or refraining from doing) something that the courts have said would unjustifiably infringe the *Charter*. It would be strange indeed if the legislative or executive branches could not interpret the *Charter* and act on that interpretation, where a court has not yet considered what the *Charter* prohibits (or requires) in the circumstances.[121] However, where the interpretive task takes place against the backdrop of a prior relevant judicial decision, the legislature and the executive may not act on an interpretation of the *Charter* which conflicts with an interpretation provided by the courts. Why? Because, in doing so, they would be doing (or refraining from doing) something that the courts have said would unjustifiably infringe the *Charter*, and under our system of constitutional democracy, that is impermissible.

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[118] Brian Slattery, "A Theory of the *Charter*" (1987) 25 Osgoode Hall L.J. 701.

[119] In the federal jurisdiction, there is a continuing statutory obligation on the Minister of Justice to review all proposed statutes and regulations for compliance with the *Charter*, and to report instances of non-compliance to the House of Commons. See *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4.1. In fulfilling this obligation, the Minister of Justice (or, more likely, his or her staff) will necessarily interpret the *Charter*.

It is quite another issue, however, whether the other branches are actually eager to develop and to take responsibility for their *own novel* interpretations of the *Charter*. On this point, see Roach, "Dialogic Judicial Review," *supra* note 105 at 91-92.

[120] The flip side of this issue is whether the courts should seek to restrain the legislature or executive if it acts on an interpretation of a *Charter* right or freedom that conflicts with the courts' interpretation.

[121] Indeed, after the adoption of the *Charter*, all Canadian jurisdictions except for Quebec (which was protesting the adoption of the *Charter*) engaged in a review of their statute books and enacted amendments to a large number of statutes to correct perceived violations of *Charter* rights. See *e.g. Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, S.C. 1985, c. 26.

There are two exceptions to this idea. First, the legislative and executive branches may act on a conflicting interpretation of the *Charter* where, due to a material change in circumstances or the discovery of new evidence, they are convinced that a measure that did not constitute a justifiable limit on a *Charter* right at the time the judicial decision was issued now constitutes a justifiable limit on a *Charter* right. We admit this exception because, in our view, a court should always be willing to revisit a previous decision that a particular legislative or executive act or omission unjustifiably violated a *Charter* right, on the basis that the act or omission may now be justified due to a change in circumstances or new evidence which was not previously considered by the court. We caution, however, that this exception must not be reduced to a rule that "if at first you don't succeed, try, try again."[122] There must actually be a material change in circumstances or new evidence that justifies reconsideration by the courts of the original decision.

Second, the legislative branch may act on a conflicting interpretation of the *Charter* by invoking the notwithstanding clause.[123] We admit this exception because it is constitutionally enshrined. In addition, as past practice has shown, the notwithstanding clause will be used only rarely; when it is used, it remains in force for only five years, at which time it must be re-enacted or left to expire. Furthermore, its use does not extinguish the judicial interpretation of the *Charter*, which is likely to play a role in the legislature's determination as to whether or not to renew the notwithstanding clause at the end of its five-year term.[124] The use of the notwithstanding clause to override a judicial interpretation of the *Charter* is, admittedly, difficult to reconcile with the wording of the override. As Jeremy Waldron points out, section 33, by its own terms, requires legislatures to legislate "notwithstanding a

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[122] *Sauvé*, *supra* note 9 at 538, per McLachlin C.J.C.

[123] This view is shared by Peter H. Russell and Kent Roach. See Peter H. Russell, "Standing Up for Notwithstanding" (1991) 29 Alta. L. Rev. 293 at 298-99; Roach, *The Supreme Court on Trial*, *supra* note 110 at 243, 277-82.

[124] In those cases where the notwithstanding clause is available, it is perhaps correct to suggest that we assume a judicial monopoly on *penultimate* (not final) interpretation of the *Charter*. However, because the notwithstanding clause operates for only five years, the clause does not override a judicial interpretation permanently, and thus it seems inappropriate to suggest that the legislative interpretation is final. The notion of penultimate authority to interpret the *Charter* is discussed in Michael J. Perry, "Protecting Human Rights in a Democracy: What Role for the Courts?" (2003) 38 Wake Forest L. Rev. 635 at 673-78.

provision included in section 2 or sections 7 to 15 of this *Charter*," rather than notwithstanding a judicial decision interpreting a *Charter* right or freedom. According to Waldron, in so doing, it requires legislatures to misrepresent their position, by requiring legislatures to express "rights-misgivings" (misgivings about *Charter* rights and freedoms), when what they will usually have are "rights-disagreements" (disagreements about the interpretation of a particular *Charter* right or freedom).[125] Waldron makes a fair point that it might have been better if section 33 had been worded differently.[126] However, we do not think that Waldron's critique is fatal. In our view, when the override is used, it is likely that the public will realize that the legislature is, in fact, overriding a judicial interpretation of a particular *Charter* right or freedom, rather than the actual *Charter* right or freedom itself.[127] If there is still a concern that it will appear that the legislature is overriding a particular *Charter* right or freedom, it can always clarify, in a legislative preamble, that it affirms the *Charter* right or freedom in question, but is overriding a judicial interpretation of that right or freedom.

In our view, the limited interpretive role for the legislative and executive branches of government that we describe above is fully justified in our system of government. It would be inconsistent with our traditional institutional arrangements to give either the legislative or executive branch *final* authority to interpret the *Charter*. Since Confederation, the task of offering a final and binding interpretation of the constitution has fallen to the courts. Before 1982, this task was (for the most part)[128] confined to interpreting the distribution of legislative

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[125] Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislators" (2004) 23 Supreme Court L.R. (2d) 7, 34-39.

[126] See the proposals for reform made by Goldsworthy, *supra* note 107 at 468; Manfredi, *Judicial Power*, *supra* note 25 at 192-94; and M. Tushnet, "New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries" (2003) 38 Wake Forest L. Rev. 813 at 819-20 [Tushnet, "New Forms of Judicial Review"].

[127] Roach, "Dialogic Judicial Review," *supra* note 105 at 61.

[128] The task was not confined *exclusively* to division of powers matters. Prior to 1982, the courts enforced other non-division of powers restrictions on legislative power: *e.g. Constitution Act, 1867*, section 93 (guaranteeing rights and privileges of denominational schools), sections 96-100 (relating to the judiciary and guaranteeing, *e.g.* the tenure of superior court judges), section 125 (intergovernmental taxation), section 133 (guaranteeing the English and French languages in legislative and judicial proceedings in Quebec and the federal jurisdiction). There are many judicial decisions striking down laws for breach of each of these provisions. In addition, for a time, the Supreme Court of Canada also enforced an "implied bill of rights": see *Reference re Alberta*

powers between the federal Parliament and the provincial legislatures.[129] In 1982, this task was expanded to include the interpretation of the *Charter*. It would be inconsistent with over 150 years of institutional practice to "take the constitution away from the courts" by giving the legislative or executive branches final authority to interpret the *Charter*.

It would also be inconsistent with the structure of the *Charter* to give final authority over its interpretation to either the legislative or executive branch. If Parliament or the legislature could override a court's interpretation of the *Charter* by simply enacting ordinary legislation reflecting a different interpretation, without the need for the public signal of invoking the notwithstanding clause and without the five-year limit on the new law, section 33 of the *Charter* would be redundant. With its careful regulation of the override power, section 33 contemplates that judicial interpretation is authoritative—as does the supremacy clause of the constitution (section 52).

The rule of law can also be invoked to support our traditional arrangements that deny to the legislative or executive branches final authority to interpret the *Charter*.[130] The rule of law requires that government be bound by law.[131] If either the legislative or executive branch was given final authority to interpret the *Charter*, it is difficult to see how it could be said that the government (meaning the legislative and executive branches) was bound by or subject to the *Charter*. *Charter* provisions that posed a challenge to particular government goals could simply be "interpreted" so as not to apply. Without an independent arbiter, such as the judiciary, charged with the task of providing a final

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Legislation, [1938] S.C.R. 100; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Switzman v. Elbling*, [1957] S.C.R. 285.

[129] Before 1982, if a statute was inconsistent with the *British North America Act* (reproduced in R.S.C. 1985, Appendix II, No. 5, as the *Constitution Act, 1867* (U.K.)) [*B.N.A. Act*], then the *B.N.A. Act* had to prevail because it was an imperial statute. Imperial statutes extending to Canada had overriding force because the *Colonial Laws Validity Act*, 28 & 29 Vict. c. 63 (U.K.) provided that colonial legislation repugnant to an imperial statute extending to the colony was invalid. Since 1982, the doctrine of repugnancy defined by the *Colonial Laws Validity Act* has been replaced by the supremacy clause in section 52(1) of the *Constitution Act, 1982*.

[130] The rule of law figures prominently in the *Charter*. The preamble to the *Charter* provides that "Canada is founded upon principles that recognize ... the rule of law." In addition, section 1 of the *Charter* requires that any "reasonable limits" on a *Charter* right or freedom be "prescribed by law."

[131] See Peter W. Hogg & Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U.T.L.J. 715 at 718.

and binding interpretation of the *Charter*, there is a real danger that "all the reservations of particular rights or privileges would amount to nothing."[132] An important role of the rule of law is to protect minorities and civil liberties generally. That role would be jeopardized if the legislative or executive branch, which is responsible for enacting and implementing the laws, was also given final authority to interpret the scope of the constitutional restrictions on those responsibilities.

We should make clear that our support for the traditional role of the courts as the authoritative interpreters of the constitution should not be taken to suggest that the courts are more important or useful or progressive institutions than the legislative and executive branches. In a democracy, that would be a ridiculous position. Important change inevitably comes primarily from the legislative and executive branches of government, not from the courts. The courts have very limited power to cause social change. They are not accountable to public opinion (and have no way of canvassing it anyway); they have no power to order independent research or to hold public hearings on policy issues; they have no power to create many of the policy instruments that legislatures routinely use; they have no access to public funds; and, they have no capacity to administer programs. Unemployment insurance, workers' compensation, old age pensions, social assistance, food and drug standards, labour standards, public health care, public education and human rights codes are among the progressive measures initiated and implemented by the legislative and executive branches of government.

But the generally benign and progressive influence of the legislative and executive branches does not mean that they should be freed from all constitutional constraints. The interests of minorities and other human rights values will inevitably from time to time be overlooked by bodies that respond to majoritarian pressures. Judicial review under the *Charter* is the protection for those occasions, and we can see the protection at work in the cases that deal with abortion, gay and lesbian rights, Aboriginal rights, and the due process rights of persons accused of crime, to name obvious examples. The theoretical possibility that a *Charter* decision could jeopardize a progressive legislative programme, as occurred in the United States during the Lochner era from 1905 to 1937, is answered by our 1997 article. In

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[132] James Madison, Alexander Hamilton & John Jay, *The Federalist Papers*, ed. by Isaac Kramnick (Harmondsworth, England: Penguin, 1987), No. 78 at 438 (Alexander Hamilton).

Canada, unlike the United States, *Charter* decisions normally leave room for a legislative response and normally receive a legislative response—one that accomplishes the main policy objectives of the law that was struck down.

An argument from tradition cannot by itself justify the continuance of a practice. However, we say that, in light of the long history, in this country and elsewhere, of judicial finality in interpreting the constitution, the burden of justifying a departure falls properly on the advocates of "taking the constitution away from the courts." They ought to demonstrate why the judiciary should no longer have *final* authority to interpret the *Charter*, which branch (legislative or executive) should have final authority to interpret the *Charter*,[133] and how human rights are to be protected in that unfamiliar new world.[134] These issues are not addressed, often not at all and never comprehensively, in the work of the Canadian critics.

C. *Discounting the Impact of Judicial Review Under the* Charter

The third major line of criticism is that dialogue improperly discounts the extent to which judicial decision making under the *Charter* drives policy making in Canada. There are several variants of this line of criticism, which we will consider in turn below.

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[133] There appear to be two general versions of the idea of coordinate construction. The first version of the idea of coordinate construction is "departmentalism." Under this version of coordinate construction, each governmental official might follow his or her own interpretation, or each governmental branch might follow its own interpretation, with the Prime Minister's interpretation binding all other executive branch officials, the Supreme Court's interpretation binding the rest of the judiciary, and Parliament's and the provincial legislature's interpretation binding on all MPs and MPPs (or MLPs) respectively. The second variant of the idea of coordinate construction is "legislative finality." Under this version of coordinate construction, where the constitution is not completely clear, so that its interpretation is at issue and controverted, its interpretation should be settled for all government branches (not just one branch) by the legislative branch of government. It appears that the Canadian critics are drawn to some permutation of the second version—legislative finality.

[134] Mark Tushnet has been developing a body of work on how best to develop non-judicial forums for constitutional decision making, with a focus on the United States. See Tushnet, *Taking the Constitution Away*, *supra* note 110; Tushnet, "Non-Judicial Review," *supra* note 110. Janet L. Hiebert has started the task for Canada. See Janet L. Hiebert, "A Relational Approach to Constitutional Interpretation: Shared Legislative and Judicial Responsibilities" (2001) 35 J. Cdn. Studies 161; Janet L. Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy" *IRPP Choices* 5:3 (June 1999) 1; and Janet L. Hiebert, "Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?" (2004) 23 Sup. Ct. L. Rev. (2d) 169.

1. Policy Distortion

Manfredi and Kelly say that "*Charter* Dialogue" does not answer the anti-majoritarian objection to judicial review because "policy distortion" occurs "whenever a legislature must subordinate its understanding of constitutionally permissible policy to that articulated by a court."[135] We agree that even a weak form of judicial review involves a considerable judicial influence on the legislative process. But it is surely an extreme position that *any* influence by the courts on legislation is illegitimate. For example, the courts have required that search warrants be required for police searches; that "reverse onus" clauses be eliminated from criminal statutes; that *mens rea* be an element of serious criminal offences; that meaningful standards be prescribed for the censorship of movies; that absentee voting be provided for; and that limited forms of advertising be permitted to professionals. These examples, taken more or less at random from our schedule of cases in "*Charter* Dialogue," do not involve the defeat of any major democratic objective. What they require is that, in implementing their objectives, legislators pay more attention to the liberty of the individual and show more respect for minorities than they are likely to do in the absence of judicial review. Rather than defeating a desired legislative policy, the *Charter* decisions of Canadian courts usually operate at the margins of legislative policy, affecting issues of process, enforcement, and standards, all of which can accommodate most legislative objectives.

Policy distortion is, at least in theory, more of a concern where a court rules that the *objective* of a particular government policy is inconsistent with the *Charter*. The Supreme Court of Canada's conclusion that legislated imposition of the Christian Sabbath violated the *Charter* is one of the few examples.[136] Another example is *Vriend v. Alberta*,[137] discussed in Part IIA, above. In *Vriend*, the Supreme Court of Canada required that sexual orientation be added to the prohibited

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[135] Manfredi & Kelly, "Six Degrees of Dialogue," *supra* note 17 at 522.

[136] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 (striking down the federal *Lord's Day Act*). But even here, dialogue occurred, and the objective of providing Sunday as a common pause day for workers was achieved. A provincial law providing for Sunday closing of retail stores was upheld on the basis that the law had the secular objective of a day of rest, and limited freedom of religion as little as reasonably possible. *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

[137] *Supra* note 9.

grounds of discrimination in Alberta's human rights legislation. The Alberta legislature had put its collective mind to this issue, debated it, and decided not to include sexual orientation in the grounds of discrimination. The Court here was going against a deliberate policy of the legislature by reading in the unwanted phrase. But *Vriend* is an unusual case, because, as we showed in "*Charter* Dialogue,"[138] and as other scholars have concluded,[139] *Charter* decisions rarely defeat a major legislative policy. In addition, the case illustrates an important role for judicial review. As we noted above, popular legislative assemblies are not always disposed to protect the rights of an unpopular minority. Judicial review can make up for that deficiency in majoritarian decision making. However, even in *Vriend*, the Court did not have to have the last word. The Alberta legislature could have overturned the decision by the use of the notwithstanding clause. The government of Alberta considered that course of action, and, in the end, decided not to propose it. Because the decision was not followed by a legislative sequel, we have not counted it as a case of dialogue, but the dialogue-related point is that the legislature could have had the last word if the political will to restore the old law had been stronger.

2. A Judicial Change in the Status Quo

F.L. Morton and Rainer Knopff, in their book on judicial review,[140] are highly critical of the Court's *Charter* decisions, and regard the Court as unduly influenced by a "Court party" of intellectuals and

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[138] There is room for interpretation obviously, but very few of the sixty-six decisions described could plausibly be treated as defeating the legislative policy. Two cases that might have had that effect, namely, *Ford v. Quebec*, *supra* note 4 (language of signs) and *R. v. Daviault*, *supra* note 5 (common law defence of drunkenness), were simply reversed in the sequel legislation using section 33 (in the case of *Ford*) and section 1 (in the case of *Daviault*).

[139] One study of Supreme Court of Canada decisions found that the Court accepted that the legislative objective was sufficiently important to justify the limitation of a Charter right in 97 per cent of cases. See Leon E. Trakman, William Cole-Hamilton and Sean Gatien, "*R. v. Oakes* 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83. In several recent cases, the courts have expressed some serious reservations about the government's objectives, but have accepted the objectives and gone on to consider whether the limitation satisfied the remaining branches of the *Oakes* test: *Sauvé*, *supra* note 9 (denial of voting rights to prisoners to enhance civic responsibility, promote the rule of law, and punish prisoners); *Halpern v. Canada* (2003), 65 O.R. (3d) 161 (C.A.) (denial of marriage to gays and lesbians to unite the opposite sexes, promote procreation, and encourage companionship).

[140] *Supra* note 16. See also Morton, "Dialogue or Monologue?," *supra* note 17 at 24-26.

interest groups promoting left-wing causes. This influence, they argue, leads to unpopular decisions that could not survive the public scrutiny that is characteristic of democratic decision making. As explained earlier in this article, the idea of a dialogue between courts and legislatures is a serious challenge to this thesis—just as it is to the thesis that the courts make politically conservative decisions that would not be countenanced by popular assemblies. If unpopular judicial decisions can be modified or overturned by the competent legislative body, it becomes much less significant whether the decisions have been achieved through the efforts of the Court party, or for whatever other reason the decisions have been made in disregard of popular sentiment. Morton and Knopff do not ignore this problem. They acknowledge that the dialogue theory is "undoubtedly true in the abstract," but they say that it is "too simplistic"[141] because it "fails to recognize the staying power of a new, judicially created policy status quo."[142]

There is some force to Morton and Knopff's point about the staying power of this new status quo. However, we question whether it is a bad thing that some judicial decisions striking down legislation for unjustifiably infringing a *Charter* right or freedom bring about a form of legislative inertia that hinders the ability of legislatures to respond. Morton and Knopff use *Vriend* to illustrate their point. According to them, the judicial ruling that sexual orientation had to be protected under Alberta's human rights legislation "raised the political costs of saying 'no' to the winning minority," and the government concluded that "the safest thing was to do nothing."[143] This is without a doubt an accurate analysis of what happened after *Vriend.* But what does this example show? It shows that the public respects judicial interpretation of the *Charter,* making it politically difficult to reverse a decision of the Court on a *Charter* issue (particularly a divisive *Charter* issue). As one of the authors has commented elsewhere, is that not as it should be?[144] If there had been more public support for the withdrawal of the rights upheld in *Vriend,* the reversal of the decision would have been politically feasible. At bottom, legislative inertia is caused by the fact

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[141] Morton & Knopff, *ibid.* at 162.

[142] *Ibid.*

[143] *Ibid.* at 165.

[144] Hogg, "The *Charter* Revolution," *supra* note 18 at 6.

that public opinion is generally supportive of the *Charter* and of judicial review, even in polls taken after unpopular decisions. That is one reason why the relationship between judicial review and democracy is much more complicated than the straightforward contradiction sometimes assumed by *Charter* critics. In any case, the fact that a decision like *Vriend* is legally reversible by use of the notwithstanding clause remains very important, since it is a safeguard against a decision that is truly unacceptable. The existence of this legal power—however rarely it may be exercised—forces politicians to take responsibility for their decisions (including decisions to do nothing) and avoids the extreme forms of court-packing and court-bashing that occur in the United States.

Two notable occasions on which judicial decisions have been reversed illustrate this point and show that where majoritarian will is sufficient, a legislature can overcome the inertia of which Morton and Knopff complain. On the first occasion, the National Assembly of Quebec (using section 33) reversed the *Ford* decision and restored its French-only law for commercial signs.[145] On the second occasion, the Parliament of Canada (using section 1) reversed the *Daviault* decision and restored the rule that drunkenness is no defence to criminal offences of general intent.[146] Given those examples, the decision of the government of Alberta not to attempt to reverse the *Vriend* decision can be seen as based on a (likely correct) assessment by the Premier of Alberta that popular support was lacking for such a move.[147] The fact that the move was legally possible and was seriously examined by the government means that the absence of any legislative sequel to *Vriend* could just as easily be regarded as a considered response to the decision as it could be seen as an example that contradicts the dialogue idea.

A second response to the Morton and Knopff critique is that most decisions do not bring about the legislative inertia of which they complain. *Vriend*, *Ford* and *Daviault* are not typical cases. In most *Charter* cases, there is no political impulse to reverse the judicial

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[145] *Supra* note 4.

[146] *Supra* note 5.

[147] And, as Goldsworthy reminds us, "surely that is the electorate's democratic prerogative." See Goldsworthy, *supra* note 107 at 456. It would not be open to those (like Waldron) to suggest that "an ingenuous electorate is likely to be deceived by ... a naïve faith in judges' expert legal skills, superior wisdom, and impartiality," because "[t]hat objection would reflect precisely the same lack of faith in the electorate's capacity for enlightened self-government that motivates proponents of constitutionally entrenched rights" (*ibid.* at 456-57).

decision. Usually, the attitude of the government whose law was struck down is not one of hostility to the Court's civil libertarian concern; rather, the issue for the government is to craft a new law that accommodates the Court's concerns while preserving the legislative objective. This is demonstrated by the legislative sequels reported in our 1997 article: inertia did not prevent forty-six new laws from being enacted after sixty-six decisions struck down laws on *Charter* grounds. One example is provided by the Parliament of Canada's reaction to a series of decisions by the Supreme Court of Canada that ruled that surreptitious electronic surveillance by police informers wearing body packs or using hidden cameras was an unconstitutional search and seizure under section 8 of the *Charter*.[148] Parliament promptly amended the *Criminal Code*, by providing for the issue of a warrant to authorize various forms of electronic surveillance, and providing for measures to be taken without warrant in situations of emergency or danger to the police officer.[149] Inertia was not an issue. Indeed, the government recognized that the field of electronic surveillance was in need of more regulation, and moved quickly to provide it.

Our view that most judicial decisions striking down legislation for unjustifiably infringing a *Charter* right probably do not bring about legislative inertia is reinforced by the nature of parliamentary government in Canada. In Canada, power is concentrated in the federal and provincial cabinets and (increasingly) the Prime Minister and the provincial premiers. This concentration of power, coupled with strict party discipline, means that Canadian governments usually get their own way, even when their agenda includes controversial issues.[150]

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[148] *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Wiggins*, [1990] 1 S.C.R. 62; and *R. v. Wong*, [1990] 3 S.C.R. 36. One of the authors has written critically of these decisions. See Hogg, *Constitutional Law*, *supra* note 31, c. 45.5(b).

[149] S.C. 1993, c. 40, adding section 487.01 to the *Criminal Code*.

[150] The recent Parliamentary debate about same-sex marriage demonstrates the point. Prime Minister Paul Martin required all cabinet ministers to vote for the government's legislation extending legal marriage to same-sex couples. See *Civil Marriage Act*, *supra* note 29. To be sure, this decision was highly criticized, and some might argue that it came at a political cost, but the point is that the government of Canada was able to pass legislation dealing with a deeply divisive social issue, in part by disciplining part of the Liberal government to vote for the legislation.

This can be contrasted with the Parliamentary debate following the Court's decision in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, which struck down the therapeutic abortion provisions of the *Criminal Code* on the ground that they unjustifiably infringed section 7 of the *Charter*. The government of Canada introduced a new bill to re-criminalize abortion, but with less onerous

Interestingly, Morton and Knopff concede that legislatures often fail to respond to *Charter* decisions because they concern moral questions that are "not a priority for the government, the opposition parties, or the majority of voters,"[151] and that "[w]hen the policy is central to the government's program, the government should have little difficulty mustering the political will to respond effectively."[152]

We conclude that, after a court decision striking down a law on *Charter* grounds, the "staying power" of the "new, judicially created policy status quo" is not usually very strong at all, and where the staying power is strong, this is not necessarily a bad thing.

3. Placing Issues on the Legislative Agenda

Morton and Knopff also suggest that the notion of dialogue improperly discounts the ability that judges have to place issues on (or set) the legislative agenda.[153] It is certainly true that *Charter* decisions often end up on the legislative agenda. In a sense, we proved that very point in our 1997 article when we showed that *Charter* decisions usually lead to a legislative response. To make a fine distinction, however, it should be noted that it is not really the *judges* that have chosen the issue that makes its way on to the legislative agenda. Rather, that choice is made long before the Supreme Court of Canada ever renders a decision, by the individual claimant who alleges that his or her *Charter* rights are being unjustifiably infringed. If, and only if, the claimant convinces the court that his or her complaint is valid and that a statute or other enactment should be overturned will the government have to consider its options.

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requirements for legal therapeutic abortions. Anticipating the political costs of imposing party discipline, at a crucial point in the vote the government decided to allow a free vote. The new bill was eventually passed by the House of Commons and then defeated in the Senate in a tie vote.

Tushnet suggests another hidden cost: a government may survey the political terrain and decide "that it would lose more on *other* important issues if it imposed party discipline to override the courts." See Tushnet, "New Forms of Judicial Review," *supra* note 126 at 834. We say, in response, that if this is true, the government can still get its way, provided it is willing to suffer the outside cost.

[151] *Supra* note 16 at 164.

[152] *Ibid.* at 165.

[153] *Ibid.* at 157.

When a new law is one of those options (which is the typical case), the litigation does have the effect of placing an issue on the legislative agenda that the government would not have chosen of its own accord. Is this a bad thing? Surely democracy is served, not hampered, by forcing the discussion of controversial issues that otherwise might be neglected, particularly where those issues raise concerns about civil liberties. As Roach notes, "*Charter* decisions can be seen in a mature democracy as a means to manufacture disagreement and to turn complacent majoritarian monologues into democratic and, at times, divisive dialogues."[154] *Charter* values, which often include the concerns of an aggrieved minority, have their place in democratic debate.

D. *Dialogue—"Much Ado About Metaphors"*

Several critics make much of the definition of "dialogue" used in "*Charter* Dialogue." As noted in Part I, above, this is one of the reasons why we subtitled this article "Much Ado About Metaphors."

Seizing on the semantics, Manfredi and Kelly claim that "*Charter* Dialogue" adopts a "shifting" definition of dialogue.[155] They suggest that the study begins with "a relatively rigorous definition of dialogue as legislative action that reverses, modifies, or avoids judicial decisions," but then "quickly expands to encompass 'some action by the competent legislative body.'"[156] Our response is this: Manfredi and Kelly appear to have misread our suggestion that the *possibility* for dialogue exists when legislatures *can* (meaning, have the option to) reverse, modify, or avoid a judicial decision, by concluding that we meant that dialogue *can only* occur when legislatures reverse, modify, or avoid a judicial decision. In our view, dialogue occurs where a judicial decision striking down a piece of legislation for inconsistency with a *Charter* right or freedom is followed by some action by the competent legislative body. This is the definition that we set out in the section of "*Charter* Dialogue" labelled "Our Definition of Dialogue."[157]

Morton claims that the definition of dialogue adopted in "*Charter* Dialogue" is "self-serving," and suggests that it is "[n]o wonder

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[154] Roach, "Dialogic Judicial Review," *supra* note 105 at 75 [footnote omitted].

[155] Manfredi & Kelly, "Dialogue, Deference and Restraint," *supra* note 17 at 330.

[156] *Ibid.* at 330-31.

[157] *Supra* note 1 at 81-82.

[we] found a two-thirds incidence of dialogue!"[158] Manfredi suggests that true dialogue involves reversing, modifying, or avoiding a judicial decision. He then proceeds to suggest that dialogue rarely ever happens because judicial decisions are rarely reversed, modified, or avoided. (For Manfredi, decisions are reversed when there is legislative rejection of a decision's fundamental constitutional holding; modified when legislatures accept a decision's fundamental constitutional holding, but reject all or part of the decision's section 1 analysis; and avoided when legislatures leave the pre-decision status quo unchanged or produce a new status quo that differs significantly from the one approved by the court.)[159] Our response is this: reasonable people can (and obviously do) disagree about what type of legislative response is required to count as "dialogue." We have defended our definition of dialogue elsewhere, and we feel that it would serve little purpose to repeat ourselves here.[160] However, like Roach, we feel that much could be learned from case studies examining "the conditions under which legislatures have successfully revised or rejected court decisions and the conditions under which they have failed to do so ... ."[161] Such studies would be very likely to affirm the thesis of our article by showing that *Charter* decisions are carefully reviewed within government and consideration is given to a variety of legislative or executive responses that do not involve abandoning the policy that the court struck down. Anecdotally, we know that this is so. However, we expect that *Charter* skeptics on the right will continue to be troubled by the influence on government policy of the Court's "progressive" decisions, and *Charter* skeptics on the left will continue to be troubled by the influence of the Court's "conservative" decisions on government policy. In short, we expect the dialogue about "dialogue" to continue.

E. *Dialogue in the Supreme Court*

The fourth major criticism, which has been heard increasingly of late, is that the notion of dialogue is flawed because it can be used both

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[158] Morton, "Dialogue or Monologue?" *supra* note 17 at 23.

[159] Christopher P. Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003" (2004) 23 Sup. Ct. L. Rev. (2d) 105 at 122-29 [Manfredi, "The Life of a Metaphor"].

[160] Hogg & Thornton, "Reply to Six Degrees of Dialogue," *supra* note 18.

[161] Roach, "Dialogic Judicial Review," *supra* note 105 at 76.

to support a deferential approach to Parliament and the provincial legislatures and to defend decisions striking down legislation.[162]

We agree that the notion of dialogue has been referred to by the Court to a variety of different ends.[163] The decisions of the Court in the second look cases, described in Part IID, above, demonstrate the point. In some cases, dialogue has been invoked in deciding that the judiciary ought to give some deference to the legislature's reconciliation of conflicting rights and social interests following a *Charter* decision.[164] In other cases, dialogue has been treated as providing no meaningful guidance to the exercise of the judicial function.[165]

However, we think it goes too far to suggest that the notion of dialogue, as we understand it, is flawed simply because it has been used by the Court to explain or justify both deferential and non-deferential approaches to second look cases and the court's remedial discretion. In our 1997 article, it never occurred to us that the phenomenon we described (legislative action following a *Charter* decision) had any *normative* force at all, or any relevance to the *judicial* decision-making process. Indeed, the manner in which judges have used the term is not always consistent with our definition of the concept, which makes this hardly a fair critique of the article itself.

To address the Court's use of the concept (which, as noted, is not always the same as we conceived it ourselves), we do not agree that "dialogue" militates either for or against deference. In a "first look" case, it is hard to see how the prospect of a subsequent legislative response would weigh for or against upholding the legislation. The prospect of a subsequent legislative response is not one of the considerations that a court should take into account in ruling whether or not a law is valid. (Yet, as we have acknowledged above, we now see that the prospect of a subsequent legislative response may properly be considered by a court in devising the appropriate remedy for an invalid law). We believe that courts should not approach second look cases any

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[162] Cameron, "Dialogue and Hierarchy," *supra* note 15 at 1063. See also Manfredi, "The Life of a Metaphor," *supra* note 159.

[163] Roach, "Dialogic Judicial Review," *supra* note 105 at 50.

[164] Justice McLachlin, as she then was, and Justice Iacobucci, for the majority, in *Mills*; Chief Justice McLachlin, for the majority, in *Hall*; Justice Gonthier, dissenting, in *Sauvé*.

[165] Justice Iacobucci, dissenting, in *Hall*; Chief Justice McLachlin, for the majority, in *Sauvé*.

differently than they approach first look cases. In an earlier work, one of the authors suggested that "[t]he theory of dialogue, if applied to the courts, would suggest that the Court should give increased deference to the legislation in that situation, and should normally uphold the 'second try.'"[166] The thinking was that increased deference would be appropriate in second look cases because the new law would have been precipitated by the Court's earlier decision, and would have been drafted in light of the Court's reasons in that decision. But, on further reflection, it cannot be right that increased deference is appropriate solely because the case is a second look case. In the second look case, as in the first look case, the task of determining whether a *Charter* right or freedom has been unjustifiably infringed falls properly to the courts.

With this said, it is perfectly appropriate that the court, in its analysis of a second look case, should explicitly acknowledge in its reasons the fact that the legislature has engaged in "dialogue" following the initial decision. While all new laws are vetted for constitutionality by lawyers in the employ of the Crown, in a second look case there will inevitably have been a particularly focused assessment of the means chosen to accomplish a legislative objective in light of the court's decision that a prior enactment failed to give due consideration to the *Charter*. Accordingly, what may appear to be "judicial deference" by the court in a second look case may be merely an appropriate acknowledgement of the process in which the legislature has explicitly engaged, including assessment of complex social science evidence, consideration of the interests of competing groups, or allocation of scarce resources.[167] In a second look case, these considerations are not merely an *ex post facto* justification by legal counsel of a law that may actually have been driven by other considerations. Rather, the consideration of the least restrictive means of accomplishing the legislative objective will have been informed by the previous decision. The legislature's objectives and their social importance may well be recited in the preamble to the second law. The terms of the second law will almost certainly represent the legislature's actual efforts to achieve its policy objective in a manner that respects the *Charter* values identified in the previous decision. That is not to say that the courts

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[166] Peter W. Hogg, "Discovering Dialogue" (2004) 23 Sup. Ct. L. Rev. (2d) 3 at 5.

[167] *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 at 993-94.

should automatically defer to legislative policy choices; on the contrary, the government must not be relieved of its burden of proving that rights infringements are justified.[168] The mere fact of legislative deliberation does not carry a law over the section 1 barrier. However, in a second look case, the dialogic process that followed the previous decision is likely to yield a particularly strong case for section 1 justification.

Janet Hiebert has suggested that it is appropriate to "differentiate between the rights-oriented dimension of defining normative values in the *Charter* and the more policy-laden task of assessing the reasonableness of complex policy objectives" to reflect the respective expertise of courts and legislatures.[169] We do not take the idea as far as Hiebert, as we believe that the ultimate "reasonable limits" determination must be made by the courts. Yet, we agree that some degree of deference should be accorded to legislatures on section 1 matters because "[w]hen it comes to determining the best way to pursue legislative objectives that are considered important enough to restrict rights ... representative institutions have distinct advantages in their access to extensive resources and the policy expertise necessary for prudent and responsible policy decisions."[170] This distinction is valid in all *Charter* cases, but it has particular force in second look cases. However, if the second law has been enacted on the premise of a legislative disagreement with the court's interpretation of a *Charter* right or freedom (as opposed to a more convincing demonstration of section 1 justification), then the second look case will have to be decided against the legislation, unless a notwithstanding clause has been used. This disagreement may take the shape of a second law that is more restrictive of a *Charter* right or freedom than the court was prepared to accept in the first look case. And, even when the issue in the second look case is one of justification, the courts may, after according due

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[168] The issue of deference is usually raised at the "least restrictive means" stage of the section 1 justification analysis. Most laws are struck down for failure to satisfy the "least restrictive means" requirement, and thus deference is particularly relevant at that stage of the analysis.

[169] Hiebert argues that judges are best equipped to define rights because they are relatively insulated from political pressures, and thus less restricted in identifying the circumstances in which legislative goals unduly restrict rights, and because defining rights is at the core of judicial decision making since it is a task that judges regularly and deliberately perform. Hiebert argues that legislatures are best equipped to make policy decisions because they have better access to specialized expertise and relevant information and data. Janet Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002) at 51-54.

[170] *Ibid.* at xiii.

deference, still not be persuaded that the limitations on a *Charter* right in the second law pass the *Oakes* test. In that case, of course, the second look case will have to be decided against the legislation.

The mixed results in the majority of the second look cases that we described above can be understood, in large part, as a disagreement by individual judges about how due consideration of the complementary but distinct roles of courts and legislatures affects the outcome of individual cases. In *Hall*, the Court appeared to disagree, in large part, about whether the statutory response respected the principles set down by the Court in the first look decision. In *Sauvé* and *Harper*, the Court appeared to disagree, in large part, about whether the case should be seen as an attempt to limit a right "fundamental to our democracy"[171] (which would preclude deference) or the evaluation of "choices regarding social or political philosophies" and "shaping, giving expression, and giving practical application to values"[172] (which would warrant deference). Some cases are more difficult to explain than others, and even among the authors of this article, there are differences of opinion on whether the courts have always used "dialogue" in an appropriate manner. *Mills* may be the second look case in which the Court's appeal to "dialogue" is most difficult to rationalize, and we acknowledge a disagreement among ourselves on whether it can be rationalized at all.[173] Nevertheless, even if one concludes that judicial

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[171] *Sauvé*, *supra* note 9 at 535.

[172] *Ibid.* at 576-77.

[173] Another interesting example is Parliament's response to the Court's decision in *R. v. Daviault*, *supra* note 5. In that case, counsel for Daviault, who had been convicted of sexual assault, successfully argued that sections 7 and 11(d) of the *Charter* required that an accused person be permitted to advance the defence that he was in a state of "drunkenness akin to automatism" and lacked the requisite *mens rea* for the crime. Prior to *Daviault*, the common law rule had been that a drunkenness defence was not open to a person accused of a "general intent" crime such as sexual assault. The Court accepted Daviault's argument that extreme drunkenness was a defence and granted him a new trial. Parliament responded with legislation providing that self-induced intoxication would no longer be a defence to a criminal offence involving "an assault or any other interference or threat of interference by a person with the bodily integrity of another person": S.C. 1995, c. 32, c. 1. What is remarkable about the post-*Daviault* legislation is that Parliament has basically enacted without modification the very propositions of law that the Court rejected in the *Daviault* case. However, the statute also includes a lengthy preamble offering justifications for the new law, including the association between intoxication and violence against women and children. Parliament's part in the dialogue on this issue reads like a rebuttal of the majority's position in *Daviault*. The reply legislation has not yet been challenged, but if it were challenged, the courts would have to determine whether a more convincing demonstration of section 1 justification had been advanced; if not, the reply legislation would have to be struck down.

notions of dialogue have occasionally deviated from our thesis, we still maintain that the idea of dialogue, translated by the judges into explicit consideration of the respective roles of the judicial and legislative branches, has had a benign influence on the Court's jurisprudence.

IV. THE PRESENT STATE OF DIALOGUE

In this part, we provide an update of "the numbers" since the article was published in 1997,[174] using the same criteria that we used in the original article, with the exception that we have not included consideration of any lower court decisions.[175] In "*Charter* Dialogue," we found that there were 66 cases in which a law was held to be invalid for breach of the *Charter*. Of those 66 cases, all but 13 elicited some response from the competent legislative body. In seven cases, the response was simply to repeal the offending law. In the remaining 46 cases (more than two-thirds of the total), a new law was substituted for the old law. In two cases, the decisions were overruled and the new law essentially re-enacted the law that had been held to be invalid: once through the use of section 33 (*Ford*) and once through the use of section 1 (*Daviault*).

Since the 1997 article, there have been 23 cases in which a law was held to be invalid for breach of the *Charter*. Of those 23 cases, 14 (or approximately 61 per cent) elicited some response from the competent legislative body. In one case, the response was simply to repeal the offending law. In the remaining 13 cases, a new law was substituted for the offending law. In no case did the legislative sequel amount to the decision being overruled using either section 33 or

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[174] A couple of points of clarification about specific cases. First, in the case of *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, we have counted the legislative responses to the decision as three separate responses, because the case dealt with the laws of three separate provinces and was started as three separate proceedings, but was later consolidated in a reference. Second, in the case of *M. v. H.*, *supra* note 9, we have counted only the legislative response in Ontario and not the amendments that were enacted in virtually all other provinces, because the decision directly addressed only the Ontario legislation. For an account of some of the various other legislative responses to *M. v. H.*, see Jason Murphy, "Dialogic Responses to *M. v. H.*: From Compliance to Defiance" (2001) 59 U. T. Fac. L. Rev. 299.

[175] In "*Charter* Dialogue," we included some lower court decisions. Their inclusion was defensible because they were all cases that had struck down laws and, unusually, had not been appealed to the Supreme Court of Canada. However, we were criticized by Manfredi & Kelly, "Six Degrees of Dialogue," *supra* note 17 at 516-17, for being too casual about our numbers, and there was some point to the criticism.

section 1. These numbers are lower than those reported in "*Charter* Dialogue," but most of the decisions since 1997 in which the Supreme Court has struck down a law on *Charter* grounds have been followed by a legislative response. Each decision left room for a legislative response, and most decisions received a legislative response. Dialogue lives on!

The results are summarized in the table below, and, as in "*Charter* Dialogue," each case and its sequel are described in Appendix I.

In Appendix II, we have listed and described all of the second look cases, whether decided before or after 1997, since we did not perceive the importance of these cases in "*Charter* Dialogue," and thus did not treat them as a separate category.

Table 1: Legislative Sequels Since "*Charter* Dialogue"

	Fed.	BC	AB	SK	MB	ON	PQ	NB	PEI	NS	NL	Ter.
Mod. Before	0	0	0	0	0	0	0	0	0	0	0	0
Repeal	0	0	0	0	1	0	0	0	0	0	0	0
Mod. After	4[176]	1	1	0	0	2	2[177]	1	1	1	0	0
Used s. 33	0	0	0	0	0	0	0	0	0	0	0	0
No Response	6[178]	1	1	0	0	0	1	0	0	0	0	0

V. CONCLUSION

In this article, we have discussed the five ways in which the judges of the Supreme Court of Canada have used the idea of dialogue. First, some judges have invoked the idea of dialogue in seeking to justify judicial review. Second, some judges have invoked the idea of dialogue in opposing the reading down of legislation in a *Charter* case. Third, some judges have invoked the idea of dialogue as a reason for

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[176] Includes *Corbiere*, *supra* note 9, in which a new regulation was brought into force.

[177] Includes *R. v. Guignard*, [2002] 1 S.C.R. 472, which concerned the validity of a Quebec municipal bylaw.

[178] Includes *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, in which amending legislation was introduced but died on the order paper.

suspending declarations of invalidity in *Charter* cases. Fourth, some judges have invoked the idea of dialogue in the context of a case considering the exercise of remedial discretion under section 24 of the *Charter*. And finally, some judges have invoked the idea of dialogue in second look cases, at times as a reason for deferring to the legislative judgment, and at other times to remind legislatures that the courts will not automatically defer to the legislature simply because it has revised and re-enacted an invalid law.

We have also discussed the four main lines of criticism of the idea of dialogue, as we understand them. The first line of criticism is that "*Charter* Dialogue" fails to justify judicial review under the *Charter*. We agree, but we add that dialogue demonstrates that we have a weak form of judicial review in Canada, which makes judicial review easier to overcome and therefore easier to justify. The second line of criticism is that dialogue does not, and cannot, exist where final authority to interpret the *Charter* is vested in the courts. We counter that most *Charter* decisions, even though they are the final word on the meaning of the *Charter*, leave room for a range of legislative responses and generally receive a legislative response. The third line of criticism is that dialogue improperly discounts the extent to which judicial decision making under the *Charter* distorts policy, creates a new, judicially created status quo, and gives the courts the significant power to place issues on the legislative agenda. We agree that even a weak form of judicial review involves considerable judicial influence on the legislative process, but we point out that it rarely defeats a legislative objective, and we reject the extreme position that *any* influence by the courts on legislative policy-making is illegitimate. The fourth line of criticism is that the idea of dialogue is flawed because it can, and has, been used to support both the upholding of laws and the striking down of laws. We agree that ideas of dialogue have been used by the Supreme Court with mixed results, but we question whether this is because our idea of dialogue is flawed or because the Supreme Court is struggling with how it should decide second look cases. We believe it is the latter, and for this reason, we have set out some of our preliminary thoughts on how the Court should decide such cases.

Finally, we have provided an update of the numbers since "*Charter* Dialogue" was published. Although there has been a slight reduction in legislative responses, we have found that most decisions since 1997 in which the Court has struck down a law on *Charter* grounds are still followed by a legislative response. For this reason, we return to

our conclusion that, since the last word can nearly always be (and usually is) that of the legislature, the anti-majoritarian objection to judicial review is not particularly strong. And, although we do not carry a torch for the word "dialogue" as the only possible description for the phenomenon of legislative responses to judicial decisions under the *Charter*, we say that our critics should deal with the significance of the phenomenon, rather than making "much ado about metaphors."

APPENDIX I: LEGISLATIVE RESPONSES[179]

Benner v. Canada (Secretary of State), [1997] 1 S.C.R 358

Law Affected: Differential treatment of children born abroad before 15 February 1977 to a Canadian father and a non-Canadian mother, as compared to children born abroad before 15 February 1977 to a Canadian mother and a non-Canadian father: *Citizenship Act*, R.S.C. 1985, c. C-29, sections 3(1)(e), 5(2)(b), 22; *Citizenship Regulation*, C.R.C., c. 400, section 20.

Charter Section Breached: section 15(1).

Legislative Sequel: The impugned section would have been replaced by section 5(1)(b) of Bill C-18, which died on the order paper on 12 November 2003: Bill C-18, *An Act respecting Canadian citizenship*, 2nd Sess., 37th Parl. 2002. No other response to date.

Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569

Law Affected: The spending limits imposed by Quebec's referendum legislation upon groups other than the two national committees: *Referendum Act*, R.S.Q., c. C-64.1, sections 402, 403, 404, 406(3), 413, 414, 416, 417 of Appendix 2.

Charter Section Breached: sections 2(b) and (d).

Legislative Sequel: The most "problematic" section, section 404, was amended to allow for a higher spending limit, and the remaining sections were re-enacted: *An Act to Amend the Election Act, The Referendum Act and Other Legislative Provisions*, S.Q. 1998, c. 52.

Reference re Remuneration of Judges, [1997] 3 S.C.R. 3

Charter Section Breached: section 11(d).

Law Affected in Alberta: The Alberta law that permitted judges' salaries to be reduced without the involvement of an independent commission which recommends changes to judicial remuneration: *Provincial Court Judges Act*, S.A. 1981, c. P-20.1, sections 13(1)(a), 13(1)(b), 17(1); *Payment to Provincial Judges Amendment Regulation*, Alta. Reg. 116/94.

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[179] The research in this appendix is current as of 6 March 2006.

Legislative Sequel in Alberta: Alberta enacted legislation establishing an independent commission to assist in the determination of judicial compensation for provincial judges: *Justice Statutes Amendment Act, 1998*, S.A. 1998, c. 18, sections 2, 4.

Law Affected in Manitoba: The Manitoba law which permitted judges' salaries to be reduced without the involvement of an independent commission which recommends changes to judicial remuneration: *Public Sector Reduced Work Week and Compensation Management Act*, S.M. 1993, c. 21, sections 4, 9(1) ("*Public Sector Act*").

Legislative Sequel in Manitoba: The *Public Sector Act* was no longer in force by the time the Court heard the reference. However, the Court retroactively invalidated the offending portions of the *Act*. The *Public Sector Act* was repealed entirely in 2000: *The Statute Law Amendment Act, 2000*, S.M. 2000, c. 35, section 21.

Law Affected in Prince Edward Island: The P.E.I. law that permitted judges' salaries to be reduced without the involvement of an independent commission which recommends changes to judicial remuneration: *Provincial Court Act*, R.S.P.E.I. 1988, c. P-25, section 3(3), as am. by *Public Sector Pay Reduction Act*, S.P.E.I. 1994, c. 51, section 10.

Legislative Sequel in Prince Edward Island: P.E.I. enacted detailed legislation establishing a commission to assist in the determination of judicial compensation: *An Act to Amend the Provincial Court Act*, S.P.E.I. 1997, c. 68.

Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877

Law Affected: The prohibition on publication, dissemination, or broadcast of opinion polls in the last three days of an election campaign: *Canada Elections Act*, R.S.C., 1985, c. E-2, sections 213(1), 255, 256, 322.1.

Charter Section Breached: section 2(b).

Legislative Sequel: The old *Canada Elections Act* was repealed and replaced with the *Canada Elections Act*, S.C. 2000, c. 9. Section 328 of the new Act prohibits the publication of surveys related to the election only on election days.

Vriend v. Alberta, [1998] 1 S.C.R. 493

Law Affected: Failure to include "sexual orientation" as a prohibited ground of discrimination in the Alberta human rights legislation: *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, preamble and sections 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

Charter Section Breached: section 15(1); "sexual orientation" was read in by the Court as a prohibited ground of discrimination.

Legislative Sequel: None to date.

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203

Law Affected: Restriction of voting rights for band elections to band members "ordinarily resident on the reserve": *Indian Act*, R.S.C. 1985, c. I-5, section 77(1).

Charter Section Breached: section 15(1). The Court declared the phrase "and is ordinarily resident on the reserve" invalid, but suspended the declaration for eighteen months.

Legislative Sequel: The regulations were amended to provide that an elector "means a person who is qualified under section 77 of the Act to vote in that election": *Regulations Amending the Indian Band Election Regulations*, S.O.R. 2000-391; and *Regulations Amending the Indian Referendum Regulations*, S.O.R. 2000-392. However, the definition in section 77(1) has not been amended, though it would have been repealed and replaced by Bill C-61, *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts*, 1st Sess., 37th Parl., 2002, which died on the order paper on 16 September 2002, and was reintroduced as Bill C-7, *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts*, 2nd Sess., 37th Parl., 2002, which died on the order paper on 12 November 2003.

M. v. H., [1999] 2 S.C.R. 3

Law Affected: The exclusion of same-sex couples from the definition of "spouse" for the purposes of spousal support payments: *Family Law Act*, R.S.O. 1990, c. F-3, section 29 ("*FLA*").

Charter Section Breached: section 15(1). The declaration of invalidity was suspended for six months.

Legislative Sequel: Section 29 of the *FLA* was amended to include a separate category of "same-sex partner," which was defined as either of two persons of the same sex who have cohabitated either continuously for a period of not less than three years, or in a relationship of some permanence, if they are the natural or adoptive parents of a child: *Amendments because of the Supreme Court of Canada Decision in M. v. H. Act*, S.O. 1999, c. 9, section 25(2). These amendments were repealed in 2005, when the Ontario legislature repealed the category of "same-sex partner" and amended the definition of "spouse" in section 29(a) by substituting "two persons" for "a man and woman," thereby abolishing any distinction between opposite-sex and same-sex spouses: *Spousal Relationships Statute Law Amendment Act*, S.O. 2005, c. 5.

United Food and Commercial Workers International Union, Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083

Law Affected: The definition of "picketing": *British Columbia Labour Relations Code*, S.B.C. 1992, c. 82, section 1(1).

Charter Section Breached: section 2(b). The declaration of invalidity was suspended for six months.

Legislative Sequel: None. The British Columbia Labour Relations Board has, absent a statutory definition of picketing, determined that picketing issues are to be determined both in light of the *Code* and the *Charter*: see *Overwaitea Food Group, a Division of Great Pacific Industries Inc. and United Food and Commercial Workers International Union, Local 1518* (2003), BCLRB No. B361/2003 (Leave for Reconsideration of BCLRB No. B322/2002).

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016

Law Affected: The exclusion of agricultural workers from the labour relations regime: *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, section 3(b); and *Labour Relations and Employment Statute Law Amendment Act*, 1995, S.O. 1995, c. 1

Charter Section Breached: section 2(d). The declarations of invalidity were suspended for eighteen months.

Legislative Sequel: Legislation was enacted providing certain rights to agricultural employees, including the right to form or join an employees' association; the right to participate in the lawful activities of an employees' association; the right to assemble; the right to make

representations to their employers, through an employees' association, respecting the terms and conditions of their employment; and the right to protection against interference, coercion, and discrimination in the exercise of their rights: *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16.

R. v. Ruzic, [2001] 1 S.C.R. 687

Law Affected: The immediacy and presence requirements of the defence of duress: *Criminal Code*, R.S.C. 1985, c. C-46, section 17.

Charter Section Breached: section 7.

Legislative Sequel: None to date.

Mackin v. New Brunswick (Minister of Finance); *Rice v. New Brunswick*, [2002] 1 S.C.R. 405

Law Affected: The abolition by the legislature of the position of supernumerary judge of the Provincial Court of New Brunswick: *Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6.

Charter Section Breached: section 11(d).

Legislative Sequel: New Brunswick amended its *Provincial Court Act* to recreate the position of supernumerary judge, although under slightly different conditions. In addition, a separate panel of retired judges was also created: *Act to Amend the Provincial Court Act*, S.N.B. 2003, c. 18.

R. v. Hall, [2002] 3 S.C.R. 309

Law Affected: The provision which allowed bail to be denied "on any other just cause being shown": *Criminal Code*, R.S.C. 1985, c. C-46, section 515(10)(c).

Charter Section Breached: section 11(e).

Legislative Sequel: None to date.

Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519

Law Affected: The provision that prohibited all prison inmates serving sentences of more than two years from voting in federal elections: *Canada Elections Act*, R.S.C. 1985, c. E-2, section 51(e).

Charter Section Breached: section 3.

Legislative Sequel: None to date.

Lavallée, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, [2002] 3 S.C.R. 209

Law Affected: Procedures regarding seizure of documents from the office of a lawyer: *Criminal Code*, R.S.C. 1985, c. C-46, section 488.1.

Charter Section Breached: section 8.

Legislative Sequel: None to date.

R. v. Guignard, [2002] 1 S.C.R. 472

Law Affected: Prohibition on the erection of advertising signs outside an industrial zone: City of Saint-Hyacinthe, By-law No. 1200, section 14.1.5(p).

Charter Section Breached: section 2(b). The declaration of invalidity was suspended for six months.

Legislative Sequel: The City of Saint-Hyacinthe enacted a new bylaw, abolishing the impugned provision and providing for certain other regulations relating to the erection of advertising signs outside an industrial zone: City of Saint-Hyacinthe, By-law No. 1200-364.

Ruby v. Canada (Solicitor General), [2002] 4 S.C.R. 3

Law Affected: The provision for in camera and *ex parte* proceedings where the government denied an applicant's request for access to personal information on the grounds of national security or the maintenance of foreign confidences: *Privacy Act*, R.S.C. 1985, c. P-21, sections 51(2)(a), 51(3).

Charter Section Breached: section 2(b). The provision in section 51(2)(a) requiring in camera proceedings was read down to apply only to situations where the head of the government department referred to in section 51(3) elected to make his or her representations *ex parte*.

Legislative Sequel: None to date.

Figueroa v. Canada (Attorney General), [2003] 1 S.C.R. 912

Law Affected: Provisions establishing a threshold of fifty candidates in order for a party to obtain and keep registered party status: *Canada Elections Act*, R.S.C. 1985, c. E-2, sections 24(3), 24(3), 28(7).

Charter Section Breached: section 3. The declaration of invalidity was suspended for twelve months.

Legislative Sequel: The fifty-candidate threshold requirement has been replaced by a series of new registration requirements, including that the party endorse and support at least one candidate, that it provide signed declarations of support from at least 250 members, and that it have no fewer than four party officers. The definition of "political party" has been changed to a purpose-based definition and requires that parties satisfy the definition both at registration and on an ongoing basis in order to be "political parties" within the meaning of the Act: *An Act to amend the Canada Elections Act and the Income Tax Act*, S.C. 2004, c. 24.

Trociuk v. British Columbia (Attorney General), [2003] 1 S.C.R. 835

Law Affected: Provision giving biological mothers the sole discretion to include or to exclude information relating to biological fathers when registering the birth of a child and to choose the child's last name: *Vital Statistics Act*, R.S.B.C. 1996, c. 479, sections 3(1)(b), 3(6)(b).

Charter Section Breached: section 15(1). The declaration of invalidity was suspended for twelve months.

Legislative Sequel: New legislation was enacted which provides that a father's particulars must be included on his child's registration of birth if an application is accompanied by a paternity order: *Health Planning Statistics Amendment Act*, S.B.C. 2002, c. 15. In addition, the *Vital Statistics Act* was also amended to allow a court to make an order declaring a child's parentage or changing a child's name: *Vital Statistics Amendment Act, 2004*, S.B.C. 2004, c. 55.

Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, [2003] 2 S.C.R. 504

Law Affected: Exclusion of chronic pain from the workers' compensation regime, and provision of four-week functional restoration program beyond which no further benefits were available: *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, section 10B; *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96.

Charter Section Breached: section 15(1). The declaration of invalidity was suspended for six months.

Legislative Sequel: Clause 4 of Bill 20, *An Act to Amend the Workers' Compensation Act and, the Occupational Health and Safety*

Act, 1st Sess., 59th Leg., repeals the impugned section of the *Workers' Compensation Act* and makes chronic pain a personal injury that must be individually assessed. Bill 20 received second reading on 24 October 2003 and was being examined by the Law Amendments Committee as recently as 23 January 2004, but has not yet progressed any further toward enactment.

R. v. Demers, [2004] 2 S.C.R. 489

Law Affected: The power to detain accused persons found permanently unfit to stand trial: *Criminal Code*, R.S.C. 1985, c. C-46, sections 672.33, 672.54, 672.81(1).

Charter Section Breached: section 7.

Legislative Sequel: Parliament has enacted new provisions providing for a means of obtaining a stay of proceedings against accused persons found permanently unfit to stand trial: *An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, S.C. 2005, c. 22, s. 33, section 672.851.

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201

Law Affected: The requirement, as a condition of eligibility for English public schools in Québec, that a child have completed the "major part" of his or her previous education in English: *Charter of the French language*, R.S.Q. c. C-11, section 73(2).

Charter Section Breached: section 23(2).

Legislative Sequel: None to date.

APPENDIX II: "SECOND LOOK" CASES

Baron v. Canada, [1993] 1 S.C.R. 416

Law Affected: The procedure for obtaining search warrants which appeared to give judges no discretion in deciding whether to grant or deny them: *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 231.3, as am. 1986, c. 6, s. 121. The 1986 amendments followed *M.N.R. v. Kruger*, [1984] 2 F.C. 535 (C.A.) and *Reference Re Print Three Inc.* (1985), 51 O.R. (2d) 321 (C.A.).

Charter Section Breached: section 8.

Legislative Sequel: The impugned provision was amended to stipulate that judges "may," rather than "shall," grant a search warrant: *An Act to Amend the Income Tax Act*: S.C. 1994, c. 21, s. 107.

R. v. Pontes, [1995] 3 S.C.R. 44

Law Affected: A 5-4 majority of the Court held that despite the 1986 repeal of the *Motor Vehicle Act* subsection impugned in *Reference Re Section 94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, driving with a suspended licence remained an absolute liability offence. However, section 4.1 of the *Offence Act* could be used by the Court to read down a penalty of imprisonment for that offence. Without the penalty of imprisonment, section 7 of the *Charter* was not breached.

R. v. Mills, [1999] 3 S.C.R. 668

Law Affected: Bill C-46 (S.C. 1997, c. 30) was enacted to amend the *Criminal Code*, R.S.C. 1985, c. C-46, following the Court's decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411. In *Mills*, the Court held that Bill C-46 was a constitutional response to the problem of production of records of complainants or witnesses in sexual assault proceedings. The Court held that sections 7 and 11(d) of the *Charter* were not breached despite the fact that the Bill differed from the regime that the majority of the Court approved in *O'Connor*.

R. v. Darrach, [2000] 2 S.C.R. 443

Law Affected: Parliament enacted the current section 276 of the *Criminal Code* in Bill C-49 in 1992 (now S.C. 1992, c. 38) following the Court's decision in *R. v. Seaboyer*, [1991] 2 S.C.R. 577. The Court in

Darrach found that the new section 276 essentially codified the decision in *Seaboyer* and provided a mechanism for the trial judge to determine the admissibility of evidence of prior sexual activity. The Court found that section 276 did not violate sections 7, 11(c), and 11(d) of the *Charter*.

R. v. Hall, [2002] 3 S.C.R. 309

Law Affected: The provision which allowed bail to be denied "on any other just cause being shown": *Criminal Code*, R.S.C. 1985, c. C-46, section 515(10)(c). Section 515(10)(c) was enacted after its predecessor was struck down in *R. v. Morales*, [1992] 3 S.C.R. 711. In *Morales*, the Court held that the predecessor section, which allowed bail to be denied where it was in the public interest to do so, was impermissibly vague, imprecise, and "allowed a standardless sweep" that would permit "a court to order imprisonment wherever it sees fit." Section 515(10)(c) allowed bail to be denied "on any other just cause being shown." This portion of paragraph 515(10)(c) was struck down but the four specific factors enumerated in that paragraph were upheld. The Court also struck the words "without limiting the generality of the foregoing."

Charter Section Breached: section 11(e).

Legislative Sequel: None to date.

Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519

Law Affected: The provision that prohibited all prison inmates serving sentences of more than two years from voting in federal elections: *Canada Elections Act*, R.S.C. 1985, c. E-2, section 51(e). In the predecessor to this decision, *Sauvé v. Canada (Attorney General)* [1993] 2 S.C.R. 438 ("*Sauvé No. 1*"), Sauvé challenged the predecessor to section 51(e), which prohibited all prison inmates from voting in federal elections. Parliament responded by replacing the old section with a new section 51(e). The new section 51(e), which was continued in substantially the same form in section 4(c) of the *Canada Elections Act* S.C. 2000, c. 9, limited the prohibition on voting to prison inmates serving sentences of more than two years. In this case (*Sauvé No. 2*), the Court struck down the new section 51(e), which means that all prison inmates can now vote.

Charter Section Breached: section 3.

Legislative Sequel: None to date.

R. v. Demers, [2004] 2 S.C.R. 489

Law Affected: The power to detain accused persons found permanently unfit to stand trial: *Criminal Code*, R.S.C. 1985, c. C-46, sections 672.33, 672.54, 672.81(1).

Charter Section Breached: section 7.

Legislative Sequel: Parliament has enacted new provisions providing for a means of obtaining a stay of proceedings against permanently unfit accused: *An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, S.C. 2005, c. 22, s. 33, section 672.851.

Penetanguishene Mental Health Centre v. Ontario (Attorney General), [2004] 1 S.C.R. 498 and *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528

Law Affected: The Court was asked to consider whether the "least onerous and least restrictive" requirement in section 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46 applies only to the bare choice among the three potential dispositions of the case (absolute discharge, conditional discharge, or continued detention), or whether this requirement applies also to the particular conditions forming part of that disposition. This provision was enacted in response to the Court's decision in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. The Court held that the new provision did not violate section 7 of the *Charter*.

Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827

Law Affected: Certain provisions regarding third-party advertising in the *Canada Elections Act*, enacted in response to *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569: *Canada Elections Act*, S.C. 2000, c. 9, sections 323(1), 323(3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360, 362. The majority of the Court held that the new provisions violated section 2(b) but were saved by section 1.