


1-1-1997

## The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)

Peter W. Hogg  
*Osgoode Hall Law School of York University*

Allison A. Bushell

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Constitutional Law Commons](#), [Courts Commons](#), and the [Legislation Commons](#)  
Article



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

### Citation Information

Hogg, Peter W. and Bushell, Allison A.. "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)." *Osgoode Hall Law Journal* 35.1 (1997) : 75-124.

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol35/iss1/2>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

---

# The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)

## Abstract

This article responds to the argument that judicial review of legislation under the Canadian Charter of Rights and Freedoms is illegitimate because it is undemocratic. The authors show that Charter cases nearly always can be, and often are, followed by new legislation that still accomplishes the same objectives as the legislation that was struck down. The effect of the Charter is rarely to block a legislative objective, but rather to influence the design of implementing legislation. Charter cases cause a public debate in which Charter-protected rights have a more prominent role than they would have if there had been no judicial decision. The process is best regarded as a "dialogue" between courts and legislatures.

## Keywords

Canada. Canadian Charter of Rights and Freedoms; Judicial review; Legislation; Canada

## Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

# THE *CHARTER* DIALOGUE BETWEEN COURTS AND LEGISLATURES<sup>©</sup> (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)

BY PETER W. HOGG\*\* AND ALLISON A. BUSHELL\*\*\*

This article responds to the argument that judicial review of legislation under the Canadian *Charter of Rights and Freedoms* is illegitimate because it is undemocratic. The authors show that *Charter* cases nearly always can be, and often are, followed by new legislation that still accomplishes the same objectives as the legislation that was struck down. The effect of the *Charter* is rarely to block a legislative objective, but rather to influence the design of implementing legislation. *Charter* cases cause a public debate in which *Charter*-protected rights have a more prominent role than they would have if there had been no judicial decision. The process is best regarded as a "dialogue" between courts and legislatures.

Cet article répond à l'argument que la révision judiciaire d'une loi en vertu la *Charte canadienne des droits et libertés* est illégitime car elle est non démocratique. Les auteurs soutiennent que les causes rendues en vertu de la *Charte* peuvent presque toujours être, et le sont souvent d'ailleurs, suivies par une nouvelle législation accomplissant les mêmes objectifs que celle rendue invalide. L'effet de la *Charte* est rarement de contrecarrer l'objectif visé par une loi, mais plutôt d'influencer la conception d'une loi qui donne suite à une décision judiciaire. Les arrêts rendus en vertu de la *Charte* provoquent un débat public dans lequel les droits protégés par celle-ci jouent un rôle plus prédominant que dans l'hypothèse où aucune décision judiciaire ne serait rendue. Cette approche doit être vue comme un « dialogue » entre les tribunaux et la législature.

## I. INTRODUCTION: THE *CHARTER OF RIGHTS*

AS A "BAD THING?" .....	76
A. <i>The Legitimacy of Judicial Review</i> .....	76
B. <i>The American Experience</i> .....	77

## II. DIALOGUE: WHY THE *CHARTER* MAY NOT

BE SUCH A "BAD THING" .....	79
A. <i>The Concept of Dialogue</i> .....	79

---

© 1997, P.W. Hogg & A.A. Bushell. An earlier version of this article was delivered as a lecture to the Osgoode Club on 22 January 1996, at the University of Toronto on 13 September 1996, and at the University of British Columbia on 30 October 1996. We benefitted from the comments that were made by members of the audience on those occasions, as well as from comments on an earlier draft by Professor Allan Hutchinson. We are also grateful for research assistance provided by Eliza Erskine, LL.B. 1996, in the summer and fall of 1995.

\*\* University Professor, Osgoode Hall Law School, York University.

\*\*\* Member of the 1998 graduating class, Osgoode Hall Law School, York University.

B. <i>How Dialogue Works</i> .....	80
C. <i>Our Definition of Dialogue</i> .....	81
III. FEATURES OF THE CHARTER THAT FACILITATE DIALOGUE .....	
FACILITATE DIALOGUE .....	82
A. <i>The Four Features That Facilitate Dialogue</i> .....	82
1. Section 33 of the <i>Charter</i> .....	83
2. Section 1 of the <i>Charter</i> .....	84
3. Qualified <i>Charter</i> rights .....	87
4. Equality rights .....	90
IV. BARRIERS TO DIALOGUE: SOME <i>CHARTER</i> DECISIONS MAY NOT BE "OPEN FOR DISCUSSION" .....	
MAY NOT BE "OPEN FOR DISCUSSION" .....	92
A. <i>Three Situations Where Dialogue is Precluded</i> .....	92
1. Where section 1 does not apply .....	92
2. Where the objective of the law is unconstitutional .....	93
3. Where political forces produce legislative action .....	95
V. THE NATURE OF DIALOGUE BETWEEN CANADIAN COURTS AND LEGISLATURES .....	
COURTS AND LEGISLATURES .....	96
A. <i>Most Decisions Have Legislative Sequels</i> .....	96
B. <i>Legislative Response to Decisions is Generally Prompt</i> .....	99
C. <i>Legislators Are Engaging in "Charter-Speak"</i> .....	101
D. <i>Dialogue May Occur Even When Laws Are Upheld</i> .....	104
VI. CONCLUSION .....	105
APPENDIX .....	107

## I. INTRODUCTION: THE *CHARTER OF RIGHTS* AS A "BAD THING?"

### A. *The Legitimacy of Judicial Review*

The subtitle of this article is "Perhaps the *Charter of Rights*<sup>1</sup> Isn't Such a Bad Thing After All." The view that the *Charter* is a "bad thing"

---

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

is commonly based on an objection to the legitimacy of judicial review in a democratic society.<sup>2</sup> Under the *Charter*, judges, who are neither elected to their offices nor accountable for their actions, are vested with the power to strike down laws that have been made by the duly elected representatives of the people.<sup>3</sup>

The conventional answer to this objection is that all of the institutions of our society must abide by the rule of law, and judicial review simply requires obedience by legislative bodies to the law of the constitution. However, there is something a bit hollow and unsatisfactory in that answer. The fact is that the law of the constitution is for the most part couched in broad, vague language that rarely speaks definitively to the cases that come before the courts. Accordingly, judges have a great deal of discretion in “interpreting” the law of the constitution, and the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges. This problem has been captured in a famous American aphorism: “We are under a Constitution, but the Constitution is what the judges say it is.”<sup>4</sup>

### B. *The American Experience*

In the United States, the anti-majoritarian objection to judicial review could not be ignored. The long history of the American Bill of Rights revealed massive shifts in the judicial view of the meaning of the Bill—shifts that could not be explained except as changes in the attitudes of the judges to social and economic policies. The decisions of the Warren Court<sup>5</sup> (1953-1969), starting in 1954 with *Brown v. Board of*

---

<sup>2</sup> Of course, this is not the only criticism that can be levelled at the *Charter*. The *Charter's* individualistic values, its reliance on lawyers and courts, and its bias against state action are often invoked as well.

<sup>3</sup> See, for example, A.C. Hutchinson & A. Petter, “Private Rights/ Public Wrongs: The Liberal Lie of the Charter” (1988) 38 U.T.L.J. 278; R. Knopff & F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992); and M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational, 1994). The *Charter* is also criticized, but with less emphasis on the argument for democracy, by J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

<sup>4</sup> The quotation is attributed to Governor Hughes of New York, who subsequently became Hughes C.J. of the Supreme Court of the United States.

<sup>5</sup> Earl Warren was the fourteenth Chief Justice of the United States. For more on the Warren Court, see B. Schwartz, ed., *The Warren Court: A Retrospective* (New York: Oxford University Press, 1996).

*Education*<sup>6</sup> and ending in 1973 with *Roe v. Wade*<sup>7</sup> (a case that was actually decided after Warren C.J.'s retirement), wrote a whole new chapter of American constitutional law, and one that was openly a departure from earlier jurisprudence. There had been similar shifts in judicial interpretation before, especially the overruling of *Lochner v. New York* in 1937,<sup>8</sup> but the decisions of the Warren Court coincided with the existence of a large class of full-time law professors whose academic duties required that they provide thoughtful analysis of new developments in the Supreme Court of the United States. Most law professors shared the civil libertarian values of the Warren Court and approved of the outcomes, but they could not ignore the widespread unpopularity of the decisions, and they had to face up to the anti-majoritarian objection to judicial review.

A small beleaguered minority of professors simply said that the Warren Court had departed from the original meaning of the constitutional text, and that the Court was wrong to do so.<sup>9</sup> This was a courageous solution to the theoretical problem, but it was not particularly helpful, since it did not make the decisions go away. The great bulk of the academic commentary was devoted to advancing ingenious theories to justify judicial review, and each new theory provoked a further round of criticism and new theories until the literature reached avalanche proportions.<sup>10</sup> Most of the ideas are somewhat relevant to Canada as well as the United States, and some Canadian law professors joined the debate and attempted to apply the ideas to judicial review in Canada.<sup>11</sup>

---

<sup>6</sup> 347 U.S. 483 (1954).

<sup>7</sup> 410 U.S. 113 (1973).

<sup>8</sup> *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), overruling *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>9</sup> See R.H. Bork, "Neutral Principles and Some First Amendment Problems" (1971-72) 47 *Ind. L.J.* 1; and R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977).

<sup>10</sup> The numerous suggestions are catalogued and discussed in J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980) c. 3; see also P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982); and M.J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven, Conn.: Yale University Press, 1982).

<sup>11</sup> For example, H.S. Fairley, "Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review" (1982) 4 *Supreme Court L.R.* 217; P.J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 *U.B.C. L. Rev.* 87; and P.W. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 *Osgoode Hall L.J.* 87.

## II. DIALOGUE: WHY THE *CHARTER* MAY NOT BE SUCH A "BAD THING"

### A. *The Concept of Dialogue*

The uninitiated might be excused for believing that, given the deluge of writing on the topic, everything useful that could possibly be said about the legitimacy of judicial review has now been said. However, one intriguing idea that has been raised in the literature seems to have been left largely unexplored. That is the notion that judicial review is part of a "dialogue" between the judges and the legislatures.<sup>12</sup>

At first blush the word "dialogue" may not seem particularly apt to describe the relationship between the Supreme Court of Canada and the legislative bodies.<sup>13</sup> After all, when the Court says what the Constitution requires, legislative bodies have to obey.<sup>14</sup> Is it possible to have a dialogue between two institutions when one is so clearly subordinate to the other? Does dialogue not require a relationship between equals?

The answer, we suggest, is this. Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which

---

<sup>12</sup> Some conceptions of "dialogue" as an interplay between the courts and the legislators or the people, are explored in the American literature by G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass.: Harvard University Press, 1982) c. 11; P.R. Dimond, *The Supreme Court and Judicial Choice: The Role of Provisional Review in Democracy* (Ann Arbor, Mich.: University of Michigan Press, 1989) at 4-5; E. Keynes & R.K. Miller, *The Court vs. Congress: Prayer, Busing, and Abortion* (Durham, N.C.: Duke University Press, 1989) at xvi-xvii; and Perry, *supra* note 10 at 112-113. Judicial-legislative interplay is discussed in the Canadian context by B. Slattery, "A Theory of the *Charter*" (1987) 25 Osgoode Hall L.J. 701; and J. Jai, "Policy, Politics and Law: Changing Relationships in Light of the *Charter*" (1997-98) 8 N.J.C.L. [forthcoming].

<sup>13</sup> See, for example, the criticism of the idea of "dialogue" by A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 170.

<sup>14</sup> This is the case, of course, by virtue of the supremacy clause in s. 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, which states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

accomplishes the social or economic objectives that the judicial decision has impeded. Examples of this will be given later in this article.

### B. *How Dialogue Works*

Where a judicial decision striking down a law on *Charter* grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished.<sup>15</sup> To be sure, the Court may have forced a topic onto the legislative agenda that the legislative body would have preferred not to have to deal with. And, of course, the precise terms of any new law would have been powerfully influenced by the Court's decision. The legislative body would have been forced to give greater weight to the *Charter* values identified by the Court in devising the means of carrying out the objectives, or the legislative body might have been forced to modify its objectives to some extent to accommodate the Court's concerns. These are constraints on the democratic process, no doubt, but the final decision is the democratic one.

The dialogue that culminates in a democratic decision can only take place if the judicial decision to strike down a law can be reversed, modified, or avoided by the ordinary legislative process. Later in this article we will show that this is the normal situation. There is usually an alternative law that is available to the legislative body and that enables the legislative purpose to be substantially carried out, albeit by somewhat different means. Moreover, when the Court strikes down a law, it frequently offers a suggestion as to how the law could be modified to solve the constitutional problems. The legislative body often follows that suggestion, or devises a different law that also skirts the constitutional barriers. Indeed, our research, which surveyed sixty-five cases where legislation was invalidated for a breach of the *Charter*, found that in forty-four cases (two-thirds), the competent legislative body

---

<sup>15</sup> *Charter* challenges to the actions of police officers and other officials do not result in the striking down of a law, and often will not give rise to any dialogue with the competent legislative body. In some cases, however, a successful *Charter* challenge to the action of a police officer or other official will expose a deficiency in the law that the competent legislative body will want to correct. This happened, for example, after several cases reviewing surreptitious electronic surveillance: see Part III(D), esp. note 49, *infra*. For example, when the Supreme Court of Canada held that surreptitious electronic searches by police were "unreasonable," *infra* notes 56-58 and accompanying text, Parliament enacted provisions to provide for the issuing of warrants, and for warrantless searches in exigent circumstances: *An Act to Amend the Criminal Code*, S.C. 1993, c. 40, s. 15, adding s. 487.01 to the *Criminal Code*.



amended the impugned law.<sup>16</sup> In most cases, relatively minor amendments were all that was required in order to respect the *Charter*, without compromising the objective of the original legislation.

Sometimes an invalid law is more restrictive of individual liberty than it needs to be to accomplish its purpose, and what is required is a narrower law.<sup>17</sup> Sometimes a broader law is needed, because an invalid law confers a benefit, but excludes people who have a constitutional equality right to be included.<sup>18</sup> Sometimes what is needed is a fairer procedure.<sup>19</sup> But it is rare indeed that the constitutional defect cannot be remedied. Hence, as the subtitle of this article suggests, “perhaps the *Charter of Rights* isn’t such a bad thing after all.” The *Charter* can act as a catalyst for a two-way exchange between the judiciary and legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of the democratic institutions.

### C. Our Definition of Dialogue

In order to examine how the dialogue between Canadian courts and legislatures has unfolded, we surveyed a total of sixty-five cases in which a law was struck down for a breach of the *Charter*. These include all of the decisions of the Supreme Court of Canada in which a law was struck down, as well as several important decisions of trial courts and

---

<sup>16</sup> The cases upon which this research is based are detailed in the Appendix to this article.

<sup>17</sup> For example, *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 (advertising regulations for dentists too restrictive, now amended); *Ramsden v. Peterborough (City of)*, [1993] 2 S.C.R. 1084 (municipal by-law prohibiting posterage too restrictive, now amended); and *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 (tobacco packaging and advertising laws too restrictive, now amended). See Appendix for full details on legislative amendments.

<sup>18</sup> Some examples are: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (non-citizens improperly excluded from legal profession, restriction now repealed); *Haig v. Canada* (1992), 9 O.R. (3d) 495 (C.A.) (sexual orientation improperly left unprotected by *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3, now added to protected grounds); and *Miron v. Trudel*, [1995] 2 S.C.R. 418 (common-law partners improperly excluded from statutory accident benefits under the *Insurance Act*, R.S.O. 1980, c. 218, now included). See Appendix for full legislative details.

<sup>19</sup> Some examples are: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 [hereinafter *Hunter*] (unreasonable search and seizure provisions under the *Combines Investigation Act*, R.S.C. 1970, c. C-23, ss. 10(1), (3), now amended); *R. v. Swain*, [1991] 1 S.C.R. 933 (unfair procedures for allegedly insane accused, *Criminal Code*, R.S.C. 1970, c. C-34, s. 542(2), now amended); and *R. v. Bain*, [1992] 1 S.C.R. 91 (unfair jury selection procedures, *Criminal Code*, R.S.C. 1970, c. C-34, s. 562, now amended). See Appendix for full details of legislative amendments.

courts of appeal which were never appealed to the Supreme Court of Canada.<sup>20</sup> The breakdown of the cases we looked at is depicted below.

For each case, we searched the regulations and statute books for evidence of a response to the declaration by a court that a law was of no force or effect. These "legislative sequels" are the basis for the discussion of dialogue which follows.

Accordingly, the "dialogue" to which this article refers consists of those cases in which a judicial decision striking down a law on *Charter* grounds is followed by some action by the competent legislative body. In all of these cases, there must have been consideration of the judicial decision by government, and a decision must have been made as to how to react to it. This may also have occurred in cases where a decision was not followed by any action by the competent legislative body. However, we have not essayed the difficult task of documenting all of the occasions when *Charter* cases were discussed within government but were not followed by legislative action.<sup>21</sup>

### III. FEATURES OF THE *CHARTER* THAT FACILITATE DIALOGUE

#### A. *The Four Features That Facilitate Dialogue*

Why is it usually possible for a legislature to overcome a judicial decision striking down a law for breach of the *Charter*? The answer lies in four features of the *Charter*: (1) section 33, which is the power of legislative override; (2) section 1, which allows for "reasonable limits" on guaranteed *Charter* rights; (3) the "qualified rights," in sections 7, 8, 9 and 12, which allow for action that satisfies standards of fairness and reasonableness; and (4) the guarantee of equality rights under section 15(1), which can be satisfied through a variety of remedial measures. Each of these features usually offers the competent legislative body room to advance its objectives, while at the same time respecting the requirements of the *Charter* as articulated by the courts.

---

<sup>20</sup> Our criterion for selection was to examine every case referred to in P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), in which a law was struck down for breach of the *Charter*. A few recent cases which do not appear in the text have also been added. All of the cases we selected are listed in the Appendix to this article. We believe that the list includes all of the decisions of the Supreme Court of Canada and most important decisions by the lower courts.

<sup>21</sup> The role of the *Charter*, and of judicial decisions under the *Charter*, in the formulation of government policy is discussed in Jai, *supra* note 12.

## 1. Section 33 of the *Charter*

Section 33<sup>22</sup> of the *Charter* is commonly referred to as the power of legislative override. Under section 33, Parliament or a legislature need only insert an express notwithstanding clause into a statute and this will liberate the statute from the provisions of section 2 and sections 7-15 of the *Charter*.<sup>23</sup> The legislative override is the most obvious and direct way of overcoming a judicial decision striking down a law for an infringement of *Charter* rights. Section 33 allows the competent legislative body to re-enact the original law without interference from the courts.<sup>24</sup>

In practice, section 33 has become relatively unimportant, because of the development of a political climate of resistance to its use. Only in Quebec does the use of section 33 seem to be politically acceptable.<sup>25</sup> And even in Quebec there is only one example of the use of section 33 to overcome the effect of a judicial decision.<sup>26</sup> This was a

---

<sup>22</sup> The full text of s. 33 reads:

(1) Parliament or the legislature of a province may expressly declare in an Act of the Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier dates as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

<sup>23</sup> The power of legislative override is not available with respect to the rights guaranteed under ss. 3-6 (voting and mobility), 16-23 (language), and 28 (sexual equality).

<sup>24</sup> As is explained in the text below, s. 33(3) provides that a declaration made under s. 33(1) of the *Charter* is only effective for five years. It is, however, possible to re-enact a declaration made under s. 33(1) once the initial five years have elapsed.

<sup>25</sup> Outside of Quebec, the power of override under s. 33 has been utilized just once, in Saskatchewan, to uphold back-to-work legislation which the Saskatchewan Court of Appeal had declared to be a violation of s. 2(d) of the *Charter*: *RWDSU v. Saskatchewan* (1985), 39 Sask. R. 193 (C.A.). However, the use of s. 33 turned out to be unnecessary as the Supreme Court of Canada overturned the decision of the Saskatchewan court and upheld the original law: [1987] 1 S.C.R. 460.

<sup>26</sup> Immediately after the *Charter* came into force in 1982, Quebec enacted an omnibus statute that added a standard-form notwithstanding clause to all of that province's statutes: *An Act Respecting the Constitution Act, 1982*, S.Q. 1982, c. 21. This was done, not in response to any *Charter* case, but as a protest to the fact that the *Constitution Act, 1982*, *supra* note 14, including the *Charter*, had been enacted without the consent of Quebec. However, when the blanket override came to the end of its five-year life, no attempt was made to re-enact it for another five-year term.

response to the decision of the Supreme Court of Canada in 1988 in *Ford v. Quebec (A.G.)*,<sup>27</sup> which struck down Quebec's law banning the use of languages other than French in commercial signs. After that decision, Quebec enacted a new law that continued to ban the use of any language but French in all outdoor signs (while allowing bilingual indoor signs), and the province protected the new law with a section 33 notwithstanding clause.<sup>28</sup>

A restriction on the use of section 33 is that, by virtue of subsection (3), the effect of a notwithstanding clause expires at the end of five years, and has to be re-enacted in order to be continued in force. This restriction forces a periodic review of the use of section 33. The five-year period will always include an election, and will often yield a change of government. Quebec's language-of-signs law, with its notwithstanding clause, was enacted in 1988, so that the effect of the notwithstanding clause expired in 1993. By that time, although there had been no change of government in the province (it was still the Liberal government of Premier Robert Bourassa), the passions that supported Quebec's draconian French-language policies had died down enough that the government felt able to abandon the notwithstanding clause. In 1993, the Quebec National Assembly enacted a new law which permitted the use of languages other than French on all outdoor signs as long as French was also used and was "predominant."<sup>29</sup> The 1993 law did not contain a notwithstanding clause.

## 2. Section 1 of the *Charter*

Section 1<sup>30</sup> of the *Charter* subjects the rights guaranteed by the *Charter* to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In principle, all the guaranteed rights, and certainly all those couched in unqualified terms, can be limited by a law that meets the standards judicially prescribed for section 1 justification. Those standards, which were laid down in 1986 in *R. v. Oakes*,<sup>31</sup> are as follows: (1) the law must pursue an

---

<sup>27</sup> [1988] 2 S.C.R. 712 [hereinafter *Ford*].

<sup>28</sup> *An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54, s. 10.

<sup>29</sup> *An Act to Amend the Charter of the French Language*, S.Q. 1993, c. 40, s. 18.

<sup>30</sup> The full text of s. 1 reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

<sup>31</sup> [1986] 1 S.C.R. 103 at 138-39 [hereinafter *Oakes*].

important objective; (2) the law must be rationally connected with the objective; (3) the law must impair the objective no more than necessary to accomplish the objective; and (4) the law must not have a disproportionately severe effect on the persons to whom it applies. Experience with section 1 indicates that nearly all laws meet standards (1), (2), and (4). The dispute nearly always centres on standard (3)—the minimal impairment or least restrictive means requirement. Therefore, when a law is struck down for breach of the *Charter*, it nearly always means only that the law did not pursue its objective by the means that would be the least restrictive of a *Charter* right. If it had done so, then the breach of the *Charter* right would have been justified under section 1.

When a law that impairs a *Charter* right fails to satisfy the least restrictive means standard of section 1 justification, the law is, of course, struck down. But the reviewing court will explain why the section 1 standard was not met, which will involve explaining the less restrictive alternative law that *would* have satisfied the section 1 standard. That alternative law is available to the enacting body and will generally be upheld. Even if the court has a weak grasp of the practicalities of the particular field of regulation, so that the court's alternative is not really workable, it will usually be possible for the policymakers to devise a less restrictive alternative that is practicable. With appropriate recitals in the legislation, and with appropriate evidence available if necessary to support the legislative choice, one can usually be confident that a carefully drafted "second attempt" will be upheld against any future *Charter* challenges.<sup>32</sup>

Once again, the *Ford* case can be offered as an example. In that case, the Supreme Court of Canada acknowledged that the protection of the French language was a sufficiently important purpose to justify a limit on freedom of expression. But the Court held that the absolute prohibition of the use of other languages in commercial signs impaired the rights of English-speakers more severely than was necessary to accomplish the purpose. The Court said that a requirement that French be used, even a requirement that French be predominant, would accomplish the purpose by a means less restrictive of freedom of

---

<sup>32</sup> There are, however, cases where second attempts have not successfully weathered a new *Charter* challenge: amendments to the search and seizure provisions in the *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 231, enacted after *M.N.R. v. Kruger*, [1984] 2 F.C. 535 (C.A.) [hereinafter *Kruger*], and *Reference Re Print Three Inc.* (1985), 51 O.R. (2d) 321 (C.A.) [hereinafter *Re Print Three*], were struck down in *Baron v. Canada*, [1993] 1 S.C.R. 416; and amendments to the *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 51(e), enacted after *Sauvé v. Canada (A.G.)*, [1993] 2 S.C.R. 438, were struck down by the Federal Court (Trial Division) in *Sauvé v. Canada (A.G.) (Chief Electoral Officer)*, [1996] 1 F.C. 857 (this case is being appealed to the Federal Court of Appeal).

expression. As we previously noted, the government of Quebec was not initially prepared to take the less restrictive route, and it used section 33 to protect a re-enactment of the absolute ban. But five years later, in 1993, after the expiry of the notwithstanding clause, the government followed the Court's suggestion.<sup>33</sup> The 1993 law has never been challenged, and if it were challenged it would be upheld under section 1.<sup>34</sup>

Other freedom of expression cases afford similar examples. In *Rocket v. Royal College of Dental Surgeons of Ontario* (1990),<sup>35</sup> the Supreme Court of Canada struck down an Ontario prohibition on advertising by dentists. However, the Court made it clear that restrictions on advertising by professionals would be upheld if they were narrower and directed to the maintenance of professional standards and the presentation of accurate information to the public. In response to the judgment, new guidelines on dental advertising were enacted. These regulations proscribe misleading advertising, advertising that is meant to "appeal to the public's fears," and advertising which suggests that one dentist is superior to others, but within the new guidelines dentists are left free to promote their practices through "factual advertisements."<sup>36</sup> The same type of advertising restrictions now apply to professionals in many different fields.<sup>37</sup>

In *RJR-MacDonald Inc. v. Canada (A.G.)* (1995),<sup>38</sup> the Supreme Court of Canada struck down a federal law that prohibited the advertising of tobacco products. In its discussion of the least restrictive means standard, the Court made clear that it would have upheld restrictions that were limited to "lifestyle advertising" or advertising directed at children. Within two years of the decision, Parliament enacted a comprehensive new *Tobacco Act*.<sup>39</sup> The new *Act* prohibits

---

<sup>33</sup> *Supra* note 29.

<sup>34</sup> In *Devine v. Quebec (A.G.)*, [1988] 2 S.C.R. 790, it was held that a non-exclusive requirement of French for various business forms was a breach of s. 2(b), but because other languages were not prohibited the requirement was upheld under s. 1.

<sup>35</sup> [1990] 1 S.C.R. 232.

<sup>36</sup> O. Reg. 220/94, s. 1 (enacted pursuant to the *Dentistry Act, 1991*, S.O. 1991, c. 24).

<sup>37</sup> See, for example, the advertising restrictions that are imposed by provincial law society rules: Law Society of Upper Can., Rule 12(2); Law Society of Man., c. 14, Rule 7; Law Society of P.E.I., Reg. 38(3); Nova Scotia Barristers Sy., Reg. 47A(3). See also the survey of post-*Rocket* professional regulations in J.A. Maciura, "Advertising by Self-Regulated Professionals: After *Rocket v. Royal College of Dental Surgeons*" (1995) 16 *Health L. Can.* 58.

<sup>38</sup> [1995] 3 S.C.R. 199.

<sup>39</sup> S.C. 1997, c. 13.

lifestyle advertising<sup>40</sup> and restricts advertising to media which is targeted at adults,<sup>41</sup> but allows tobacco manufacturers to use informational and brand-preference advertising in order to promote their products to adult smokers.<sup>42</sup>

The common elements of these cases are: (1) the law impaired a *Charter* right; (2) the law pursued an important purpose; and (3) the law was more restrictive of the *Charter* right than was necessary to accomplish the purpose. In each case, the invalidity of the law could be corrected by the enactment of a new law that was more respectful of the *Charter* right while still substantially accomplishing the important purpose. The form of the new law would have to take account of the way in which the Court analyzed the least restrictive means standard of section 1 justification. Dialogue seems an apt description of the relationship between courts and legislative bodies. Certainly, it is hard to claim that an unelected court is thwarting the wishes of the people. In each case, the democratic process has been influenced by the reviewing court, but it has not been stultified.

### 3. Qualified *Charter* rights

Several of the guaranteed rights under the *Charter* are framed in qualified terms. Section 7<sup>43</sup> guarantees the right to life, liberty, and security of the person, but only if a deprivation violates “the principles of fundamental justice.”<sup>44</sup> Section 8<sup>45</sup> guarantees the right to be secure

---

<sup>40</sup> *Ibid.*, s. 22(4). The definition of “lifestyle advertising” is as follows: “advertising which associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, excitement, vitality, risk or daring.”

<sup>41</sup> *Ibid.*, s. 22(2). The permissible media for the promotion of tobacco products are as follows:  
(a) a publication that is provided by mail and addressed to an adult who is identified by name;  
(b) a publication that has an adult readership of not less than eighty-five percent;

<sup>42</sup> Of course, the tobacco companies may still choose to attack the new law on the ground that it, too, is more restrictive of expression than necessary. Only a decision of the Supreme Court of Canada can definitively affirm that any law is justified under s. 1.

<sup>43</sup> The full text of s. 7 reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

<sup>44</sup> There is a theory that holds that s. 7 confers two rights: (1) the right to life, liberty and security of the person, and (2) the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. However, while the grammatical structure of the English (but not the French) text of the *Charter* supports such a reading, this “two

against “unreasonable” search or seizure. Section 9<sup>46</sup> guarantees the right not to be “arbitrarily” detained or imprisoned. Section 12<sup>47</sup> guarantees against “cruel and unusual” punishment. There is some uncertainty in the case law as to whether the qualified rights are subject to section 1, although the dominant view is that they are.<sup>48</sup> But, even if section 1 has no application to the qualified rights, by their own terms they admit of the possibility of corrective legislative action after a judicial decision has struck down a law for breach of one of the rights.

For example, section 8 does not prohibit search and seizure, but only “unreasonable” search and seizure. A judicial decision that a law authorizing a search and seizure is unreasonable can always be followed by a new law that satisfies the Court’s standards of reasonableness. In fact, section 8 has led to the striking down of many laws (as well as many particular searches and seizures), but each decision striking down a law (as opposed to a particular search or seizure)<sup>49</sup> has invariably been followed by legislative action to correct the constitutional defect and restore a power of search and seizure, albeit one hedged with more civil libertarian safeguards than the original invalid version. The notion of a dialogue is easy to defend in this field, as legislative bodies have reframed their search and seizure powers to build in civil libertarian safeguards that meet the requirements of the *Charter* as set out by the Supreme Court of Canada.

The first decision of the Supreme Court of Canada on section 8 was *Hunter* (1984),<sup>50</sup> in which the Court struck down the provisions of the federal *Combines Investigation Act* that authorized searches and seizures as part of the investigatory procedures of the *Act*. The

rights” theory has not been accepted in the jurisprudence, and judges and scholars seem to have accepted that “the principles of fundamental justice” always qualify the right to life, liberty and security of the person.

<sup>45</sup> The full text of s. 8 reads: “Everyone has the right to be secure against unreasonable search or seizure.”

<sup>46</sup> The full text of s. 9 reads: “Everyone has the right not to be arbitrarily detained or imprisoned.”

<sup>47</sup> The full text of s. 12 reads: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”

<sup>48</sup> Hogg, *supra* note 20 § 35.14.

<sup>49</sup> Note however that a decision striking down a particular search or seizure sometimes does lead to legislative action. For example, when the Supreme Court of Canada held that the unregulated practice of using electronic surveillance in police investigations violated s. 8 of the *Charter*, the federal government enacted provisions in the *Criminal Code* allowing electronic surveillance within prescribed limits (for example, with a warrant, or where a police officer is in danger). See *infra* notes 56-60 and accompanying text.

<sup>50</sup> *Supra* note 19.



provisions authorized the director of the Combines Investigation Branch to enter premises, conduct searches and seize evidence on the basis of a warrant issued by a member of the Restrictive Trade Practices Commission. The Court held that any searches or seizures conducted under the *Act* would be “unreasonable” within section 8, because there was no requirement that the warrant for the searches or seizures be issued by a judge, nor was there any requirement that reasonable and probable cause be established to support the issue of the warrant. Parliament immediately amended the *Combines Investigation Act* to meet the Court’s requirements.<sup>51</sup>

Shortly after the decision in *Hunter*, the search and seizure provisions of the *Income Tax Act* were also found wanting.<sup>52</sup> They called for the warrant to be issued by the Minister of National Revenue, rather than a judge, and the grounds that would justify the issuance of a warrant were not adequately spelled out. The *Act* was immediately amended to cure this and several other constitutional defects.<sup>53</sup> However, the new law was then found wanting on the ground that, although it required that a warrant be issued by a judge and stipulated the grounds upon which the judge should act, the law did not give to the judge any discretion to deny the warrant in exceptional circumstances where the statutory grounds were satisfied. The absence of any discretion invalidated the power.<sup>54</sup> The *Act* was immediately amended for a second time to cure this defect.<sup>55</sup>

The Supreme Court of Canada has also held that various forms of electronic surveillance are unreasonable searches or seizures. Even when police informers made their (admissible) observations more reliable by the use of hidden audio-visual equipment in the informer’s apartment,<sup>56</sup> or in a hotel room used for gambling,<sup>57</sup> or by the use of a body pack concealed on the police informer’s person,<sup>58</sup> the evidence thereby obtained was excluded on the grounds of unreasonable searches and seizures. These decisions have been criticized as an extravagant

---

<sup>51</sup> The changes were introduced when the *Combines Investigation Act* was repealed and a new provision was introduced in the *Competition Act*, S.C. 1986, c. 26, s. 13.

<sup>52</sup> *M.N.R. v. Kruger*, [1984] 2 F.C. 535 (C.A.); and *Re Print Three*, *supra* note 32.

<sup>53</sup> *An Act to Amend the Income Tax Act and Related Statutes*, S.C. 1986, c. 6.

<sup>54</sup> *Baron v. Canada*, [1993] 1 S.C.R. 416.

<sup>55</sup> *An Act to Amend the Income Tax Act*, S.C. 1994, c. 21, s. 107.

<sup>56</sup> *R. v. Duarte*, [1990] 1 S.C.R. 30.

<sup>57</sup> *R. v. Wong*, [1990] 3 S.C.R. 36.

<sup>58</sup> *R. v. Wiggins*, [1990] 1 S.C.R. 62.

extension of the concept of search and seizure and as an unfortunate impediment to the safety and reliability of police investigations.<sup>59</sup> What Parliament did, however, was to promptly amend the *Criminal Code* by providing for the issuing 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.<sup>60</sup> It cannot be said, therefore, that the decisions of the Court had any long-term adverse consequences, and it is arguable that the area of electronic surveillance was in need of more regulation, which has now been provided.

These examples could be multiplied, but there is not much point in doing so. The search and seizure cases have not subverted the enforcement powers in statutes or stultified police investigatory procedures. Rather, they have forced Parliament to review the investigatory powers in federal statutes and provide for more elaborate safeguards of individual privacy. There has been a productive dialogue between the Court and Parliament.

#### 4. Equality rights

Section 15(1)<sup>61</sup> of the *Charter* prohibits laws which discriminate on the basis of nine listed grounds, namely race, national or ethnic origin, colour, religion, sex, age or "mental or physical disability," or laws which discriminate on the basis of any ground that is analogous to the listed grounds. Typically, where a law is declared to be unconstitutional for a violation of section 15(1), the problem is that the law is underinclusive, such that persons in the applicant's position, who have a constitutional right to be included, suffer the disadvantage of being excluded. A judicial decision under section 15(1) does force the legislature to accommodate the individual or group that has been excluded.<sup>62</sup> Nevertheless, there are a number of different ways of

---

<sup>59</sup> Hogg, *supra* note 20 § 45.5(b).

<sup>60</sup> *Supra* note 15.

<sup>61</sup> The full text of s. 15(1) reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

<sup>62</sup> It will be very rare that a law that is found to be discriminatory under s. 15(1) can be sustained under s. 1. However it is possible: in *Egan v. Canada*, [1995] 2 S.C.R. 513, five of nine members of the Supreme Court of Canada found that provisions in Canada's *Old Age Security Act*, R.S.C. 1985, c. O-9, ss. 2, 19(1), violated s. 15(1), but Sopinka J., at 576, found that the law could be

complying with section 15(1) that allow the competent legislative bodies to set their own priorities.

The most obvious solution is to extend the benefit of the underinclusive law to the excluded group. For example, when the Nova Scotia Court of Appeal held that a law extending family benefits to single mothers, but not to single fathers, was unconstitutional,<sup>63</sup> the Family Benefits regulations of that province were promptly modified to allow equal access to family benefits for single parents of both genders.<sup>64</sup> The Nova Scotia legislature obviously considered that the provision of family benefits was of sufficient importance that the program should be extended rather than eliminated. However eliminating (or reducing) a government benefit is another option which is open to a legislature where a law has been held to be underinclusive. After all, it is not the applicant's right to a government cheque, but rather his or her right to equality, that the Court has affirmed.

Not surprisingly, legislatures generally choose to extend underinclusive laws rather than eliminate them outright.<sup>65</sup> However this reflects a policy choice on the part of the competent legislative body. If the objective of the legislation is of substantial importance, this will usually justify the added expense or administrative burden (if any) that is required to eliminate discrimination. Sometimes, the legislature may instead opt to provide somewhat reduced benefits to all of those who have a constitutional right to be included.<sup>66</sup> Section 15(1) leaves room for different legislative choices of this kind, such that democratically elected bodies are still ultimately responsible for setting their own budgetary priorities, albeit in a way that does not discriminate against disadvantaged groups. Section 15(1) decisions therefore leave a door open for dialogue between the courts and legislatures.

---

sustained under s. 1. Accordingly, the law was upheld on a five-four majority.

<sup>63</sup> *Phillips v. Social Assistance Appeal Board (N.S.)* (1986), 76 N.S.R. (2d) 240 (C.A.).

<sup>64</sup> N.S. Reg. 72/87.

<sup>65</sup> In our survey of cases where a law was struck down on *Charter* grounds, there are no cases where the competent legislative body has chosen to eliminate the benefit rather than extend it to an excluded group.

<sup>66</sup> This was the solution chosen by Parliament in response to the decision in *Schachter v. Canada*, [1992] 2 S.C.R. 679, which determined that it was unconstitutional to withhold from natural parents the benefits that were extended to adoptive parents under the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, s. 32. Parliament's solution (which was actually enacted before the Supreme Court of Canada made its final decision) was to provide a reduced benefits package to both natural and adoptive parents: *An Act to Amend the Unemployment Insurance Act*, S.C. 1990, c. 40, s. 24.

#### IV. BARRIERS TO DIALOGUE: SOME *CHARTER* DECISIONS MAY NOT BE “OPEN FOR DISCUSSION”

##### A. *Three Situations Where Dialogue is Precluded*

While it is generally the case that *Charter* decisions leave some options open to the competent legislative body, and allow a dialogue to take place between the courts and legislatures, we must acknowledge that there may be some circumstances where the court will, by necessity, have the last word. There appear to be three situations where this will be the case: (1) where section 1 of the *Charter* does not apply; (2) where a court declares that the *objective* of the impugned legislation is unconstitutional; and (3) where political forces make it impossible for the legislature to fashion a response to the court’s *Charter* decision.

##### 1. Where section 1 does not apply

It is possible that some of the rights protected under the *Charter* are framed in such specific terms that there is no room for Parliament or a provincial legislature to impose “reasonable limits” on those rights. This was the position taken by the Supreme Court of Canada, with respect to minority language education rights, in the very first *Charter* case considered by the Court. That case was *Quebec (A.G.) v. Quebec Protestant School Boards* (1984).<sup>67</sup> It concerned provisions in Quebec’s *Charter of the French Language*,<sup>68</sup> which restricted admission to English-language schools in Quebec to those children whose parents had been educated in the English language in *Quebec*. By the express terms of section 23(1)(b) of the *Charter*, all parents who were Canadian citizens and Quebec residents, and who had received their primary education in English *anywhere* in Canada, had the right to have their children educated in the English language in *Quebec*.<sup>69</sup> In striking down the

---

<sup>67</sup> [1984] 2 S.C.R. 66 [hereinafter *Quebec School Boards*].

<sup>68</sup> R.S.Q. 1977, c. C-11, ss. 72-88.

<sup>69</sup> Section 23(1)(b) of the *Charter* reads:

(1) Citizens of Canada: ... (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

Quebec law, the Court refused to consider the argument, advanced by the attorney general of Quebec, that the Quebec law could be justified under section 1 of the *Charter* as a measure for the protection of French language and culture. According to the Court, since the law was a direct contradiction of the terms of the *Charter*, section 1 justification was not a possibility.

The *Quebec School Boards* case is somewhat of an anomaly, and the Supreme Court of Canada's decision that section 1 did not apply rested on the somewhat dubious proposition that the Quebec law was a "denial of" rather than a "limit on" a *Charter* right.<sup>70</sup> The Court has not refused to consider the possibility of section 1 justification in any other case,<sup>71</sup> and it may be that the *Quebec School Boards* case was wrongly decided. Nevertheless, the *Quebec School Boards* case does provide an example of a situation in which it was not possible for the legislature to overcome the decision of the Court. Since neither a section 1 justification nor a section 33 override<sup>72</sup> was available, Quebec was forced to abandon its original legislative objective and to comply with the Court's directions.<sup>73</sup>

## 2. Where the objective of the law is unconstitutional

Even where a court has been willing to entertain arguments under section 1 of the *Charter*, a decision striking down a law for a breach of the *Charter* will be virtually impossible to overcome if the court determines that the law fails the first test of section 1 justification: the requirement that the law have a "pressing and substantial purpose" that

<sup>70</sup> The distinction between "denials" and "limits" is criticized in Hogg, *supra* note 20 § 35.6.

<sup>71</sup> The Supreme Court of Canada's decision in *R. v. Askov*, [1990] 2 S.C.R. 1199 [hereinafter *Askov*] is in some ways similar to the *Quebec School Boards* case. In *Askov*, the Court designated six to eight months between committal and trial as the outside time limit for the state to comply with the right of an accused, under s. 11(b) of the *Charter*, to a trial within a reasonable time. The Court refused to accept the Crown's arguments that a delay in excess of eight months should be accepted as justified, at least for the length of time it would take to remedy the backlog in the courts. While no law was struck down in *Askov*, the decision left the Crown with no options; the Crown was forced to dismiss the charges against more than 47,000 accused persons until more judges and prosecutors could be appointed to eliminate systemic delay in the courts.

<sup>72</sup> Section 33 is only available with respect to s. 2 and ss. 7-15 of the *Charter*.

<sup>73</sup> Quebec did not formally amend the *Charter of the French Language*, R.S.Q. 1977, c. C-11, to give effect to the decision in the *Quebec School Boards* case, *supra* note 67, until 1993: *supra* note 29, ss. 23-35. Of course, the decision itself had the immediate effect of forcing the province to allow the children of Canadian citizens who had been educated in English in provinces other than Quebec, to attend English-language schools.

justifies limiting a *Charter* right. In practice, the courts have rarely declared that a law does not meet this initial threshold. However, there are a few exceptions in the case law, particularly for laws in which the *purpose* of the law, as opposed to the law's *effects*, are found to violate the *Charter*.

The first example is *R. v. Big M Drug Mart Ltd.* (1985),<sup>74</sup> in which the Supreme Court of Canada struck down the federal *Lord's Day Act*.<sup>75</sup> In that case, the Court determined that the purpose of the *Act* was "to compel the observance of the Christian Sabbath."<sup>76</sup> This was a violation of the guarantee of freedom of religion under section 2(a) of the *Charter*. Moreover, because the Court held that the *Lord's Day Act's* primary objective was contrary to the *Charter*, there was no possibility of advancing the same objective through a subsequent amendment of the *Act*.<sup>77</sup> Accordingly, the Court had the last word when it struck down the *Lord's Day Act*.<sup>78</sup> The *Act* was never repealed, but was simply dropped from the next consolidation of federal statutes.<sup>79</sup>

A more recent example of legislation which failed to meet the "pressing and substantial purpose" threshold is the case of *Somerville v. Canada (A.G.)* (1996).<sup>80</sup> In that case, the Alberta Court of Appeal unanimously held that provisions in the *Canada Elections Act*,<sup>81</sup> which limited third-party election expenditures and which established advertising blackouts at the beginning and end of federal election campaigns, were unconstitutional for violating sections 2(b) (freedom of expression), 2(d) (freedom of association), and 3 (the right to vote) of the *Charter*. With respect to the third-party expenditures, the majority of the Court of Appeal held that the *Act's* purpose was "primarily aimed at preserving an electoral system which gives a privileged voice to

---

<sup>74</sup> [1985] 1 S.C.R. 295 [hereinafter *Big M Drug Mart*]. Note that this case was decided before *Oakes*, *supra* note 31, which set out the standard judicial test for s. 1 justification.

<sup>75</sup> R.S.C. 1970, c. L-13.

<sup>76</sup> *Big M Drug Mart*, *supra* note 74 at 351.

<sup>77</sup> The Attorney General of Canada had, however, suggested that the *Lord's Day Act* had other objectives, such as the secular purpose of providing a common pause day. The province of Ontario had enacted a law with the "secular" purpose of providing a common pause day (which just happened to be Sunday); this legislation was subsequently challenged under s. 2(a) of the *Charter*, and upheld under s. 1: *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713.

<sup>78</sup> Note, however, that it would have been possible, had Parliament been so inclined, for the *Lord's Day Act* to be sustained by using the s. 33 override.

<sup>79</sup> The *Lord's Day Act* was not included in the Revised Statutes of Canada 1985.

<sup>80</sup> (1996), 184 A.R. 241 (C.A.) [hereinafter *Somerville*].

<sup>81</sup> *Supra* note 32, s. 213.

political parties and official candidates within those parties.”<sup>82</sup> Conrad J.A., who wrote the majority decision, asserted that the law’s objective struck “at the core of these fundamental rights and freedoms [expression, association and ‘informed’ voting] and is arguably legislation which has as its very purpose the restriction of these rights and freedoms, which can never be justified.”<sup>83</sup> The majority judgment also dismissed the objectives behind the blackout provisions as being “illogical” and without merit.<sup>84</sup> The Alberta Court of Appeal’s condemnation of the *Canada Elections Act* provisions in *Somerville* seems to go beyond striking down the third-party spending and blackout provisions. The judgment also appears to preclude the possibility of furthering the objectives of the legislation through an amendment to the provisions. Where a judicial decision holds that a law has “objectionable objectives,” the only possible way that Parliament or a legislature may overcome the decision is by the use of the legislative override in section 33. And where, as with the *Canada Elections Act* provisions, the override is not available,<sup>85</sup> the court, by necessity, has the last word.

### 3. Where political forces preclude legislative action

A third situation that may obstruct dialogue between courts and legislatures is where an issue is so controversial that it seems to preclude a legislative response to a judicial decision striking down a law for a breach of the *Charter*. An example of this is the situation which arose after the decision in *R. v. Morgentaler* (1988).<sup>86</sup> In *Morgentaler*, the restrictions on abortion in the *Criminal Code* were struck down as unduly depriving pregnant women of liberty or security of the person, contrary to section 7 of the *Charter*. In *obiter*, the Court added that a less restrictive abortion law could possibly be upheld.<sup>87</sup> In 1990, a bill which would have implemented a less restrictive abortion law was introduced into Parliament. However that law was defeated on a tied vote in the

---

<sup>82</sup> *Somerville*, *supra* note 80 at 263.

<sup>83</sup> *Ibid.* at 266.

<sup>84</sup> *Ibid.* at 266.

<sup>85</sup> The s. 33 override was not available to resurrect the legislation struck down in *Somerville*, *supra* note 80, because the legislation was found to violate s. 3 of the *Charter* (voting rights), which is one of the guaranteed rights that is immune from the power of legislative override.

<sup>86</sup> [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*].

<sup>87</sup> *Ibid.* at 76, Lamer J.; 82-83, Beetz J.; and 183, Wilson J.

Senate, and the 'divisive issue of abortion has never been revisited, either in terms of a new law, or even in terms of the formal repeal of the law that was declared unconstitutional in 1988. While neither the *Charter* nor the Court precluded a legislative response to the *Morgentaler* decision, the abortion issue is so politically explosive that it eludes democratic consensus. Accordingly, the Court's decision, striking down Canada's old abortion law, remains the last word on this issue.

Where political forces, as opposed to the judicial decision itself, are the reason for a lack of response from the competent legislative body after a law is struck down on *Charter* grounds, it can hardly be said that unelected judges are stifling the democratic process. Quite the opposite is true, in fact; the *Charter* decision forces a difficult issue into the public arena that might otherwise have remained dormant, and compels Parliament or a legislature to address old laws that had probably lost much of their original public support. If a new law is slow to materialize, that is just one of the consequences of a democratic system of government, not a failing of judicial review under the *Charter*.

## V. THE NATURE OF DIALOGUE BETWEEN CANADIAN COURTS AND LEGISLATURES

### A. *Most Decisions Have Legislative Sequels*

The decisions which have just been discussed, in which a dialogue between the court and the competent legislative body has not been possible, are truly exceptional. As we alluded to earlier in this article, we have found that the majority of cases in which laws have been struck down on *Charter* grounds have given rise to a dialogue between the court and Parliament or the provincial legislature. This trend is reflected in the accompanying table.



Table I  
Type of Legislative Sequel

	Fed.	BC	AL	SK	ON	QUE	NS	‡Oth.	Tot.
†Mod. Before	9	1	0	0	1	0	0	0	11
Repeal	3	1	1	0	1	0	0	1	7
Mod. After	21	2	0	0	4	3*	2	1	33
Used s. 33	0	0	0	1	0	1	0	0	2
Did Nothing	10	0	0	0	1	0	1	1	13

\* There were two sequels to the case of *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712: (1) use of legislative override; and (2) modification of the original law. Both of these are reflected in this table. Thus, the total number of cases is 66. †Denotes a law that was modified before a final decision was rendered by the highest reviewing court. ‡Other denotes delegated legislation, specifically municipal by-laws and Rules of the Alberta Law Society.

Legislative action of some kind has followed all but thirteen of the sixty-five cases we surveyed; fully 80 per cent of the decisions in this survey have generated a legislative response. Of the thirteen cases without sequels, at least two have been the subject of proposed legislation,<sup>88</sup> and another three have only been decided within the last two years,<sup>89</sup> making

<sup>88</sup> *Morgentaler*, *supra* note 86 (amendments in proposed Bill C-43, *An Act Respecting Abortion*, 2d Sess., 34th Parl., 1989-90, were defeated in the Senate: Canada, Senate, *Debates*, 2d Sess., 34th Parl., 1989-90-91 (31 January 1991); and *Toronto (City of) v. Quickfall* (1994), 16 O.R. (3d) 665 (C.A.) (new by-law is in drafting phase: Municipality of Metropolitan Toronto, Planning and Transportation Committee, *Installation of Poster Signs on Metro Roads*, Report No. 12 (Toronto: Municipality of Metropolitan Toronto, 7 May 1997).

<sup>89</sup> *Reference Re K.* (1995), 23 O.R. (3d) 679 (Prov. Ct.); *Reform Party of Canada v. Canada (A.G.)* (1995), 136 A.R. 1 (Q.B.); and *Somerville*, *supra* note 80.

it premature to discount the possibility of a legislative sequel in the future.

Are all legislative sequels examples of dialogue? We have taken the position that any legislation is dialogue, because legislative action is a conscious response from the competent legislative body to the words spoken by the courts. However, there may be room for debate about exactly what counts as dialogue. For example, in seven of the cases we surveyed,<sup>90</sup> Parliament or a provincial legislature simply repealed the provision that was found to violate the *Charter*. In those cases, the competent legislative body simply acquiesced in the decision of the court, and it might be argued that no true "dialogue" took place. Similarly, in several cases where competent legislative bodies amended their laws, the remedial legislation merely implemented the changes the reviewing court had suggested.<sup>91</sup> No effort was made to avoid the result reached by the court, and in at least one case there was no possibility of doing so.<sup>92</sup> Consequently, those cases, too, might be excluded from the meaning of dialogue.

But it is probably casting the notion of dialogue too narrowly to discount those remedial measures that have merely followed the directions of the Court, either by repealing or amending an unconstitutional law. After all, it is always possible that the outcome of a dialogue will be an agreement between the participants! And even if we did exclude those cases, there would still be a significant majority of cases in which the competent legislative body has responded to a *Charter* decision by changing the outcome in a substantive way. Obviously, on any definition, dialogue is quite prevalent as between Canadian courts and legislatures.

---

<sup>90</sup> *Reference Re Section 94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Reference Re Blainey* (1986), 54 O.R. (2d) 513 (C.A.); *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.); *Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.); *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591; and *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326.

<sup>91</sup> See Appendix for descriptions of the legislative amendments that followed. For example, *Quebec School Boards*, *supra* note 67; *Reference Re Hoogbruin* (1985), 24 D.L.R. (4th) 718 (B.C.C.A.); *Haig v. Canada* (1992), 9 O.R. (3d) 495 (C.A.); and *Baron v. Canada*, [1993] 1 S.C.R. 416.

<sup>92</sup> See *Quebec School Boards*, *supra* note 67.

### B. Legislative Response To Decisions is Generally Prompt

Another finding that emerged from our survey is that Canadian legislators typically respond promptly to decisions in which a law has been struck down on *Charter* grounds. The accompanying table displays the response time for the cases we considered.

**Table II**  
**Timing of Legislative Response**

	Fed.	BC	AL	SK	ON	QUE	NS	Oth.	Tot.
Before Final Dec'n	9	1	0	0	1	0	0	0	11
<2 yrs	13	3	1	1	4	2	2	2	28
3-5 yrs	8	0	0	0	1	0	0	0	9
>5 yrs	3	0	0	0	0	1	0	0	4

Out of the fifty-two cases in which Parliament or a provincial legislature has implemented corrective legislation, in thirty-nine cases (or 75 per cent), the legislative response came within two years. In nine cases, the legislative response took more than two years, but less than five. In only four cases did a legislative response take more than five years to be enacted.

One case in which the legislative response was delayed was *Quebec School Boards* (1984).<sup>93</sup> In that case, the legislation to bring Quebec's school laws into conformity with section 23(1)(b) of the *Charter* was not enacted until nine years after the judgment of the Supreme Court of Canada.<sup>94</sup> As we previously explained, *Quebec School Boards* was one of those rare cases in which the legislature was forced to accept the direction of the Supreme Court of Canada. Of course, the

<sup>93</sup> *Ibid.*

<sup>94</sup> *Supra* note 29, ss. 23-35.

decision of the Court had to be complied with by Quebec school boards even before the corrective legislation was enacted. But perhaps the delay in formally implementing corrective legislation can be seen as somewhat of a protest by successive Quebec governments to the outcome of the case. In that sense, even the lack of legislative action following the Court's decision might be viewed as a kind of "dialogue."

All of the remaining three cases<sup>95</sup> in which a legislative response has taken longer than five years to materialize have concerned the federal legislation controlling the trade in illegal narcotics.<sup>96</sup> The affected provisions, which were struck down in the 1980s, were not the subject of legislative attention until 1996, when the old narcotic control legislation was repealed and replaced with a new *Controlled Drugs and Substances Act*.<sup>97</sup> In these three cases, Parliament's delay in addressing the constitutional flaws in the old legislation was not intended as a protest to the judicial decisions. Rather, because the laws in question (reverse onus provisions and minimum sentence provisions) were of a kind that could be complied with by prosecutors and courts without any formal amendment of the impugned laws, the need for corrective legislation could be given lower priority on the legislative agenda. In fact, it is notable that, of the nine cases in which Parliament has not enacted remedial legislation to date, five concern provisions in the *Criminal Code*.<sup>98</sup> Because the Crown and courts administer the criminal law, prosecutors and judges can be counted on to adjust their practices to comply with the *Charter* even before changes have been formally implemented through new legislation. The tendency of governments to postpone amendments to criminal justice legislation is also apparent in the accompanying table, which shows the response time of Canadian governments to judicial decisions, by reference to the *Charter* section that was found to have been violated.

---

<sup>95</sup> *R. v. Stanger* (1983), 46 A.R. 241 (C.A.); *Oakes*, *supra* note 31; and *R. v. Smith*, [1987] 1 S.C.R. 1045.

<sup>96</sup> Two statutes were involved: the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and the *Narcotic Control Act*, R.S.C. 1985, c. N-1.

<sup>97</sup> S.C. 1996, c. 19.

<sup>98</sup> These cases are: *Morgentaler*, *supra* note 86 (concerning abortion offence); *R. v. Martineau*, [1990] 2 S.C.R. 633 (concerning necessary mental element for murder in the commission of another offence); *R. v. Downey*, [1992] 2 S.C.R. 10 (concerning the offence of living off the avails of prostitution); *R. v. Zundel*, [1992] 2 S.C.R. 731 (concerning the offence of wilfully publishing false news); and *R. v. Morales*, [1992] 3 S.C.R. 711 (concerning the criteria for the denial of bail).

**Table III**  
**Legislative Response Time by *Charter* Section**

<i>Charter</i> Section	Before Final Decision	Respond Within 2 years	Respond Within 3-5 years	More Than 5 years to Respond
2 (a)	0	2	0	0
2 (b)	1	6	2	0
2 (d)	0	1	0	0
3	0	3	2	0
6 (2) (b)	0	1	0	0
7	3	4	1	0
8	2	4	3	0
9	0	1	0	0
11 (a)	0	1	0	0
11 (d)	0	4	0	2
11 (h)	0	1	0	0
12	1	0	0	1
15 (1)	4	2	1	0
23 (1) (b)	0	0	0	1

### C. Legislators Are Engaging in “Charter-Speak”

The nature of the *Charter* dialogue between Canadian courts and legislatures is not reflected in numbers alone. The language of post-*Charter* laws themselves, particularly in statutory preambles and purpose clauses, suggests that Canadian legislators are engaging in a self-conscious dialogue with the judiciary. Where laws closely skirt the boundaries of the *Charter*, and particularly where new laws are enacted to replace those that have been struck down on *Charter* grounds, it is not uncommon for the preamble to a statute to explain how the measures taken in the legislation are directed at a “pressing and substantial” objective, and are intended to “reasonably limit” rights and freedoms. Several of the legislative sequels to the cases considered in our survey provide ready examples of this trend. For instance, in *Canadian Civil Liberties Association v. Ontario (Minister of Education)* (1990),<sup>99</sup> the Ontario Court of Appeal struck down the regulations pertaining to

<sup>99</sup> (1990), 71 O.R. (2d) 341 (C.A.) [hereinafter *CCLA*].

religious education in Ontario's schools on the ground that they violated the guarantee of freedom of religion in section 2(a) of the *Charter*. Ontario had already attempted to bring its religious education regulations in line with the *Charter* after the Ontario Court of Appeal struck down the province's religious education regulations in 1988 for a breach of section 2(a) in *Zylberberg v. Sudbury Board of Education (Director)*,<sup>100</sup> two years before *CCLA*. Soon after the *CCLA* case, Ontario made another attempt to enact guidelines for religious education which could be sustained under the *Charter*. The new guidelines made religious education programs an optional part of the prescribed curriculum, and they specifically declared that the province's revised regulations were designed to "promote respect for the freedom of conscience and religion guaranteed by the *Canadian Charter of Rights and Freedoms* ... ."<sup>101</sup> Ontario legislators thereby acknowledged the obligations under the *Charter* which the Court of Appeal had pointed out to them, and signalled that the new legislation was, in their view, within the boundaries of the *Charter*. This seems to be an explicit example of dialogue.

The federal government responded in a similar way to the judgment of the Supreme Court of Canada in *Committee for the Commonwealth of Canada v. Canada* (1991).<sup>102</sup> The decision had struck down part of the *Government Airport Concession Operation Regulations (GACOR)* as being unduly restrictive of freedom of expression. The case had been brought by two members of a political movement, who were prevented by the *GACOR* from disseminating their views at Dorval Airport in Montreal. In 1995, the regulations were replaced with less restrictive limits on expression in Canada's airports.<sup>103</sup> Along with the new regulations, the federal Department of Transport also issued a Regulatory Impact Analysis Statement which explained that the vacuum left by the invalidation of the old regulations had led to chaos in the airports, and even "physical confrontations," because there had no longer been any effective regulation of vendors and service providers operating out of Canadian airports.<sup>104</sup> The Impact Analysis Statement also explicitly mentioned the *Commonwealth* case, and noted that the new federal regulations did not limit the type of (non-commercial)

---

<sup>100</sup> (1988), 65 O.R. (2d) 641 (C.A.).

<sup>101</sup> O. Reg 677/90, ss. 29, 29a.

<sup>102</sup> [1991] 1 S.C.R. 139 [hereinafter *Commonwealth*].

<sup>103</sup> SOR/95-228.

<sup>104</sup> Regulatory Impact Analysis Statement, C. Gaz. 1995.II.1467.

expression that had been the focus of that case. While the Regulatory Impact Analysis Statement did not have the force of law, it did emphasize that the government had attempted to respect its *Charter* obligations, and that the limits on expression in the new regulations were directed at “pressing and substantial” concerns.

A third example of a government engaging in “*Charter-speak*” when enacting new laws is Parliament’s response to the decision in *R. v. Daviault* (1994).<sup>105</sup> In that case, counsel for Mr. Daviault, who had been convicted of sexual assault, successfully argued in the Supreme Court of Canada that sections 7 and 11(d)<sup>106</sup> 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 the *Daviault* judgment, 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 Supreme Court of Canada accepted Mr. Daviault’s argument that extreme drunkenness was a defence, and the Court granted him a new trial.

There was a significant public outcry, particularly by victims’ groups and women’s groups, after the *Daviault* decision. 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.”<sup>107</sup> The legislation explained that criminal responsibility would attach to persons who committed violent “general intent” crimes while intoxicated, because the state of self-induced

<sup>105</sup> [1994] 3 S.C.R. 63.

<sup>106</sup> The full text of s. 7 is reproduced, *supra* note 43. The full text of s. 11(d) reads: “Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”

<sup>107</sup> S.C. 1995, c. 32, s. 1, adding a new s. 33.1 to the *Criminal Code*. The full text of the new self-induced intoxication provisions reads:

(1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference by a person with the bodily integrity of another person.

intoxication is a marked departure “from the standard of reasonable care generally recognized in Canadian society.”<sup>108</sup> What is remarkable about the post-*Daviault* legislation is that Parliament has basically enacted without modification the very propositions of law that the Supreme Court of Canada 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*, and it will be interesting to see how the courts will respond when the issue comes before them for a second time.<sup>109</sup>

#### D. Dialogue May Occur Even When Laws Are Upheld

This article has focussed primarily on the legislative changes that have followed decisions striking down laws for a breach of the *Charter*. However, it should be noted that judicial decisions can occasionally have an impact on legislation even when the court does not actually strike down any law.

An example of this is the aftermath of the 1995 judgment in *Thibaudeau v. Canada*.<sup>110</sup> The case concerned provisions in the *Income Tax Act* which allowed a non-custodial parent to deduct child-support payments from (generally his) income, and which required a custodial parent to include child support payments in (generally her) income. The applicant, a custodial parent, claimed that her obligation to pay income tax on the child-support payments she received from the non-custodial parent infringed section 15(1) (the equality guarantee) of the *Charter*. However, a majority in the Supreme Court of Canada rejected her claim, holding that there was no breach of section 15(1). Ms. Thibaudeau’s case attracted a great deal of media attention, and exposed the fact that the *Income Tax Act* could sometimes lead to hardship for custodial parents. Consequently, even though the Attorney General of Canada had prevailed in the courts, he announced shortly after the *Thibaudeau* decision that Parliament would change the

---

<sup>108</sup> *Ibid.*

<sup>109</sup> There has not yet been a direct challenge to s. 33.1 of the *Criminal Code* (the self-induced intoxication provisions), although an Ontario provincial court has held that the legislation does not apply with respect to offences committed before the provisions came into force: *R. v. McShane*, [1996] O.J. No. 361 (QL) (Prov. Ct.).

<sup>110</sup> [1995] 2 S.C.R. 627 [hereinafter *Thibaudeau*].



inclusion-deduction scheme for child support payments in the *Income Tax Act*. Amendments to the *Act* were enacted in 1997, under which child support payments are no longer deductible by the non-custodial parent, and are no longer taxable as income of the custodial parent.<sup>111</sup>

Parliament's response to the *Thibaudeau* decision emphasizes that it is a mistake to view the *Charter* as giving non-elected judges a veto over the democratic will of competent legislative bodies. Canada's legislators are not indifferent to the equality and civil liberties concerns which are raised in *Charter* cases, and do not always wait for a court to "force" them to amend their laws before they are willing to consider fairer, less restrictive, or more inclusive laws. The influence of the *Charter* extends much further than the boundaries of what judges define as compulsory. *Charter* dialogue may continue outside the courts even when the courts hold that there is no *Charter* issue to talk about.

## VI. CONCLUSION

Our conclusion is that the critique of the *Charter* based on democratic legitimacy cannot be sustained. To be sure, the Supreme Court of Canada is a non-elected, unaccountable body of middle-aged lawyers. To be sure, it does from time to time strike down statutes enacted by the elected, accountable, representative legislative bodies. But, the decisions of the Court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect individual rights and liberty. Judicial review is not "a veto over the politics of the nation,"<sup>112</sup> but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole.

---

<sup>111</sup> *Income Tax Budget Amendments Act, 1996*, S.C. 1997, c. 25. The amendments apply only to orders for child support made or varied after the enactment of the amendment. This is because the quantum of pre-1997 child support orders would have been determined with reference to the *Income Tax Act* provisions which then applied. The amendments do, however, allow parents to elect to be taxed on pre-1997 child support payments pursuant to the new scheme.

<sup>112</sup> R. Dworkin, "The Forum of Principle" (1981) 56 N.Y.U. L. Rev. 469 at 469.



# APPENDIX: LEGISLATIVE SEQUELS TO LAWS NULLIFIED FOR BREACH OF THE *CHARTER*\*

## ***R. v. Lucas***

(1983), 57 N.S.R. (2d) 159 (A.D.).

**Law Affected:** Ability to give an overly vague short form to substitute for a description of the offence with which the accused was charged: *Summary Proceedings Act*, S.N.S. 1972, c. 18, s. 5(1), as am. by S.N.S. 1977, c. 69, s. 5A.

**Charter Section Breached:** s. 11(a).

**Legislative Sequel:** A regulation was enacted to amend the section prescribing how an offence under the *Summary Proceedings Act* was to be described to an accused: N.S. Reg. 13/84.

## ***Reference Re Mitchell and the Queen***

(1983), 42 O.R. (2d) 481 (H.C.J.).

**Law Affected:** Indeterminate sentences to be imposed on “habitual criminals”: *Criminal Code*, R.S.C. 1970, c. C-34, s. 688.

**Charter Section Breached:** s. 12.

**Legislative Sequel:** The provisions themselves had already been repealed by the time of this decision: *Criminal Law Amendment Act, 1977*, S.C. 1976-77, c. 53, s. 14. Indeterminate sentences still exist for “dangerous offenders”: *Criminal Code*, R.S.C. 1985, c-46, s. 753.

## ***R. v. Stanger***

(1983), 46 A.R. 241 (C.A.).

**Law Affected:** Reverse onus clauses: *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 8, and *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 43.

**Charter Section Breached:** s. 11(d).

**Legislative Sequel:** Both the *Food and Drugs Act* and the *Narcotic Control Act* were repealed and replaced with the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, which does not contain a reverse onus clause.

## ***Reference Re Southam Inc. and the Queen (No. 1)***

(1984), 41 O.R. (2d) 113 (C.A.).

---

\* This appendix lists the sequels to laws which were struck down for breach of the Charter. In some cases, the changes to the law will have predated the case, since the unconstitutional provision was the law in force at the time that the facts of the case arose.

**Law Affected:** Closed-court provisions: *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, ss. 12, 36.

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** By the time of this decision the *Juvenile Delinquents Act* had been repealed and replaced: *Young Offenders Act*, S.C. 1980-81-82-83, c. 110. Section 39 of this *Act* allows for the trials of young persons to be held in camera at the judge's discretion. This provision was subsequently upheld in *Reference Re Southam Inc. and the Queen* (1986), 53 O.R. (2d) 663 (C.A.).

***Reference Re Ontario Film and Video Appreciation Society***  
(1984), 45 O.R. (2d) 80 (C.A.).

**Law Affected:** Ontario censorship provisions which set no legal standards for discretion: *Theatres Act*, R.S.O. 1980, c. 498, ss. 3(2)(a), (b), 35, 38.

**Charter Section Breached:** s. 2(b), and s. 1 requirement that limits be "prescribed by law."

**Legislative Sequel:** The *Theatres Act* was amended to implement an appeal procedure to Board decisions: *An Act to Amend the Theatres Act*, S.O. 1984, c. 56, ss. 35(8), (9). As well, regulations pursuant to the *Theatres Act* now set out detailed guidelines: O. Reg. 487/88 (see especially s. 14, "Board Criteria for Refusal to Approve").

***National Citizens' Coalition v. Canada (A.G.)***  
(1984), 32 Alta. L.R. (2d) 249 (Q.B.).

**Law Affected:** Restrictions on third-party campaign expenditures: *Canada Elections Act*, R.S.C. 1970 (1st Supp.), c. 14, s. 70.1(1), as am. by S.C. 1980-81-82-83, c. 164, s. 14.

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** No legislative sequel was found, but there have been two recent sequels in the Courts. Other *Canada Elections Act* provisions aimed at controlling expenses were declared of no force or effect by the Alberta Court of Appeal in *Somerville v. Canada*, below, and in *Reform Party of Canada v. Canada (A.G.)* (1995), 174 A.R. 169 (C.A.).

***Quebec (A.G.) v. Quebec Protestant School Boards***,  
[1984] 2 S.C.R. 66.

**Law Affected:** More restrictive eligibility rules for attending minority language (English) schools than provided in the *Canadian Charter: Charter of the French Language*, R.S.Q. 1977, c. C-11, ss. 72-88.

**Charter Section Breached:** s. 23(1)(b).

**Legislative Sequel:** The *Charter of the French Language* was amended to comply with the *Canadian Charter*, but not until 1993: *An Act to Amend*

*the Charter of the French Language*, S.Q. 1993, c. 40, ss. 23-35.

***Hunter v. Southam Inc.***,

[1984] 2 S.C.R. 145.

**Law Affected:** Search and seizure provisions: *Combines Investigation Act*, R.S.C. 1970, c. C-23, ss. 10(1), (3).

**Charter Section Breached:** s. 8.

**Legislative Sequel:** A new procedure for getting search warrants, issued by the Federal Court, was instituted by the *Combines Investigation Act*'s successor: *Competition Act*, S.C. 1986, c. 26, s. 13.

***M.N.R. v. Kruger***,

[1984] 2 F.C. 535 (C.A.).

**Law Affected:** Search and seizure provisions: *Income Tax Act*, S.C. 1970-71-72, c. 63, ss. 231(4), (5) (see also *Reference Re Print Three*, below).

**Charter Section Breached:** s. 8.

**Legislative Sequel:** The provisions were amended in 1986: *An Act to Amend the Income Tax Act and Related Statutes*, S.C. 1986, c. 6, s. 121, but the modifications were also found to be unconstitutional in *Baron v. Canada*, below.

***Luscher v. Revenue Canada***,

[1985] 1 F.C. 85 (C.A.).

**Law Affected:** Prohibition on importing "immoral or indecent" books: *Customs Tariff*, R.S.C. 1970, c. C-41, s. 14, Schedule C, tariff item 99201-1.

**Charter Section Breached:** s. 2(b), and s. 1 requirement that limits be "prescribed by law."

**Legislative Sequel:** In 1987, the *Customs Tariff* schedules which were in effect at the time of this case were completely repealed and replaced: *Customs Tariff*, S.C. 1987, c. 49 to R.S.C. 1985 (3d Supp.), c. 41. An item equivalent to the one struck down in this case appears in Schedule VII, as item 9956. Instead of the vague references to "immoral and indecent character" which were impugned in *Luscher*, item 9956 prohibits books and other media which offend s. 159(8) (obscenity) and/or s. 281.3(8) (hate propaganda) of the *Criminal Code* R.S.C. 1970, C-34 as am. by R.S.C. 1970 (1st Supp.), c. 11, s. 1.

***Singh v. Canada (Minister of Employment and Immigration)***,

[1985] 1 S.C.R. 177.

**Law Affected:** Refugee determination provisions: *Immigration Act*, 1976,

S.C. 1976-77, c. 52, ss. 2, 45, 55, 70, 71.

**Charter Section Breached:** s. 7 (and s. 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44).

**Legislative Sequel:** New procedures for hearing claims were implemented in 1986: *An Act to Amend the Immigration Act, 1976*, S.C. 1986, c. 13, s. 5.

***R. v. Big M Drug Mart Ltd.***,

[1985] 1 S.C.R. 295.

**Law Affected:** Sunday closing: *Lord's Day Act*, R.S.C. 1970, c. L-13, in its entirety.

**Charter Section Breached:** s. 2(a).

**Legislative Sequel:** Although there is no Act or order repealing the *Lord's Day Act* to be found on the books, the Act was not recorded in the R.S.C. 1985, and stops appearing in the Table of Statutes for the Statutes of Canada as of 1990.

***RWDSU v. Saskatchewan***

(1985), 39 Sask. R. 193 (C.A.).

**Law Affected:** A Saskatchewan back-to-work law affecting the plaintiffs in this case: *Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, ss. 2(a), (b), (d), (e), (f), 3(a), 6, 7(b), (c), 8.

**Charter Section Breached:** s. 2(d) (as held by the Sask. C.A.).

**Legislative Sequel:** Saskatchewan re-enacted the law by invoking s. 33 of the *Charter* with an explanatory preamble: *The SGEU Dispute Settlement Act*, S.S. 1984-85-86, c. 111. This proved unnecessary when the S.C.C. reversed the decision of the Court of Appeal and held that the original enactment had been constitutional: *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

***Reference Re Print Three Inc.***

(1985), 51 O.R. (2d) 321 (C.A.).

**Law Affected:** Search and seizure provisions: *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 231, (see also *M.N.R. v. Kruger*, above).

**Charter Section Breached:** s. 8.

**Legislative Sequel:** The impugned provisions were modified in 1986: *An Act to Amend the Income Tax Act and Related Statutes*, S.C. 1986, c. 6, s. 121, but the modifications were also found to be unconstitutional in *Baron v. Canada*, below.

***Reference Re Hoogbruin***

(1985), 24 D.L.R. (4th) 718 (B.C.C.A.).

**Law Affected:** No provisions for absentee voters: *Election Act*, R.S.B.C. 1979, c. 103, s. 2(1).

**Charter Section Breached:** s. 3.

**Legislative Sequel:** British Columbia amended s. 2(1) to include absentee voting provisions in 1987: *Election Amendment Act, 1987*, S.B.C. 1988, c. 2. The federal *Election Act* was similarly amended in 1993: *An Act to Amend the Canada Elections Act*, S.C. 1993, c. 19, Schedule II, Part III.

***Reference Re Section 94(2) of the B.C. Motor Vehicle Act***

[1985] 2 S.C.R. 486.

**Law Affected:** Absolute liability offence which was subject to a minimum term of imprisonment: *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 94(2), as am. by S.B.C. 1982, c. 36, s. 19.

**Charter Section Breached:** s. 7.

**Legislative Sequel:** British Columbia repealed the impugned subsection in 1986: *Motor Vehicle Amendments Act, 1986*, S.B.C. 1986, c. 19, s. 5. The province also enacted a new provision to the *Offence Act*, stipulating that “Notwithstanding section 4 (the general penalty clause) or the provisions of any other Act, no person is liable to imprisonment with respect to an absolute liability offence”: R.S.B.C. 1979, c. 305, s. 4.1 as am. by *Attorney General Statute Amendment Act (No. 2), 1990*, S.B.C. 1990, c. 34, s. 10. In *R. v. Pontes*, [1995] 3 S.C.R. 44, a 5-4 majority of the Supreme Court of Canada 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*, driving with a suspended licence remained an absolute liability offence. Section 4.1 of the *Offence Act* was therefore used by the Court to read down a penalty of imprisonment for that offence.

***R. v. Oakes***

[1986] 1 S.C.R. 103.

**Law Affected:** Reverse onus clause in the *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 8.

**Charter Section Breached:** s. 11(d).

**Legislative Sequel:** The *Narcotic Control Act* was repealed and replaced with the *Controlled Drugs and Substances Act*: S.C. 1996, c. 19, which does not contain a reverse onus clause.

***Reference Re Blainey***

(1986), 54 O.R. (2d) 513 (C.A.).

**Law Affected:** An exemption for same-sex sports from gender equality provisions: *Human Rights Code*, S.O. 1981, c. 53, s. 19(2).

**Charter Section Breached:** s. 15(1).

**Legislative Sequel:** The impugned subsection was repealed in 1986: *An Act to Amend Certain Ontario Statutes to Conform to Section 15 of the Canadian Charter of Rights and Freedoms*, S.O. 1986, c. 64, s. 18(12).

***Phillips v. Social Assistance Appeal Board (N.S.)***

(1986), 76 N.S.R. (2d) 240 (C.A.).

**Law Affected:** Provisions which gave single mothers more liberal access to benefits than that afforded to single fathers in Nova Scotia: *Family Benefits Act*, S.N.S. 1977, c. 8, s. 5(4).

**Charter Section Breached:** s. 15(1).

**Legislative Sequel:** Alterations were made to the regulations passed pursuant to the *Family Benefits Act* which amended the impugned provisions to allow equal access to family benefits to single parents of both genders: N.S. Reg. 72/87.

***R. v. Sieben,***

[1987] 1 S.C.R. 295.

**Law Affected:** Writs of assistance: *Narcotic Control Act*, R.S.C. 1970, c. N-1, ss. 10(1)(a), (2), (3).

**Charter Section Breached:** s. 8.

**Legislative Sequel:** Writs of assistance were repealed prior to the S.C.C. case: *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 200.

***R. v. Hamill,***

[1987] 1 S.C.R. 301.

**Law Affected:** Writs of assistance: *Narcotic Control Act*, R.S.C. 1970, c. N-1, ss. 10(1)(a), (2), (3).

**Charter Section Breached:** s. 8.

**Legislative Sequel:** Writs of assistance were repealed prior to the S.C.C. case: *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 200.

***MacLean v. Nova Scotia (A.G.)***

(1987), 76 N.S.R. (2d) 296 (T.D.).

**Law Affected:** Statute making those convicted and sentenced to imprisonment for five or more years ineligible to become candidates for the Nova Scotia House of Assembly for a five-year period: Ironically (since it was struck down) the impugned statute was entitled *An Act*



respecting reasonable limits for membership in the House of Assembly, S.N.S. 1986, c. 104, s. 1 (bound in S.N.S. 1987) [our emphasis].

**Charter Section Breached:** s. 3.

**Legislative Sequel:** No sequel found.

***R. v. Smith,***

[1987] 1 S.C.R. 1045.

**Law Affected:** Minimum term of imprisonment for importing narcotics: *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 5(2).

**Charter Section Breached:** s. 12.

**Legislative Sequel:** The *Narcotic Control Act* was repealed and replaced with the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, which does not prescribe a minimum sentence for importing listed substances.

***R. v. Vaillancourt,***

[1987] 2 S.C.R. 636.

**Law Affected:** “Felony murder” or “constructive murder” offence (murder offence for causing death in the course of committing another crime with no *mens rea* requirement, subjective or objective, with respect to death): *Criminal Code*, R.S.C. 1970, c. C-34, s. 213(d) as am. by *Criminal Law Amendment, 1975*, S.C. 1974-75-76, c. 93, s. 13.

**Charter Section Breached:** s. 7.

**Legislative Sequel:** The subsection creating this offence was repealed from the *Criminal Code: An Act to Amend the Criminal Code*, S.C. 1991, c. 4, s. 1.

***R. v. Morgentaler,***

[1988] 1 S.C.R. 30.

**Law Affected:** Abortion offence: *Criminal Code*, R.S.C. 1970, c. C-34, s. 251.

**Charter Section Breached:** s. 7.

**Legislative Sequel:** In 1991, Bill C-43, *An Act Respecting Abortion*, 2d Sess., 34th Parl., 1989-90, which would have enacted a less restrictive abortion law, was defeated in the Senate: Canada, Senate, *Debates*, 2d Sess., 34th Parl., 1989-90-91 (31 January 1991) at 5307. The old abortion laws remain “on the books” although being of no force or effect.

***Corporation Professionnelle des Médecins du Québec v. Thibault,***

[1988] 1 S.C.R. 1033.

**Law Affected:** Provisions which, in practice, allowed for an acquittal to be appealed by way of a trial *de novo*: *Summary Convictions Act*, R.S.Q.

1977, c. P-15, ss. 75, 78.

**Charter Section Breached:** s. 11(h).

**Legislative Sequel:** The *Summary Convictions Act* was repealed and replaced in 1990: *Code of Penal Procedure*, S.Q. 1990, c. 4.

***Zylberberg v. Sudbury Board of Education (Director)***

(1988), 65 O.R. (2d) 641 (C.A.).

**Law Affected:** Regulations pursuant to Ontario's *Education Act*, R.S.O. 1980, c. 129, s. 50, authorizing and prescribing the form of religious instruction in public schools: R.R.O. 1980, Reg. 262, s. 28(1).

**Charter Section Breached:** s. 2(a).

**Legislative Sequel:** The subsection which was specifically impugned was revoked in 1989 and modifications to related provisions were made in response to other criticisms raised in this case: O. Reg 6/89, s. 2(2). The modifications were not enough to prevent another *Charter* challenge to Ontario's religious education regulations, however (see *Canadian Civil Liberties Association v. Ontario (Minister of Education)*, below).

***Canadian Disability Rights Council v. Canada***,

[1988] 3 F.C. 622 (T.D.).

**Law Affected:** Denying voting rights to persons with "mental disease": *Canada Elections Act*, R.S.C. 1970 (1st Supp.), c. 14, s. 14(4)(f).

**Charter Section Breached:** s. 3.

**Legislative Sequel:** Mental disease was repealed as a ground for disenfranchisement in 1993: *An Act to Amend the Canada Elections Act*, S.C. 1993, c. 19, s. 23(3).

***Muldoon v. Canada***,

[1988] 3 F.C. 628 (T.D.).

**Law Affected:** Provisions disqualifying federally-appointed judges from voting in federal elections: *Canada Elections Act*, R.S.C. 1970 (1st Supp.), c. 14, s. 14(4)(d), as am. by *An Act Respecting Citizenship*, S.C. 1974-75-76, c. 108, s. 42.

**Charter Section Breached:** s. 3.

**Legislative Sequel:** By 1993 amendment, judges may now vote in federal elections: *An Act to Amend the Canada Elections Act*, S.C. 1993, c. 19, s. 23(1).

***Ford v. Quebec (A.G.)***,

[1988] 2 S.C.R. 712.

**Law Affected:** Provisions stipulating that public signs in Quebec be in French only: *Charter of the French Language*, R.S.Q. 1977, c. C-11, ss. 58,

69, 214.

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** The ban on English language signs was initially preserved by operation of an Act invoking s. 33 of the Canadian *Charter: An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54, s. 10. In 1993, the legislation was modified to permit other languages on public signs as long as French was present and “predominant”: *An Act to Amend the Charter of the French Language*, S.Q. 1993, c. 40, s. 18.

***Andrews v. Law Society of British Columbia,***

[1989] 1 S.C.R. 143.

**Law Affected:** Canadian citizenship requirement for membership in the Bar of British Columbia: *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 42.

**Charter Section Breached:** s. 15(1).

**Legislative Sequel:** British Columbia repealed the *Barristers and Solicitors Act* in 1987 and replaced it: *Legal Profession Act*, S.B.C. 1987, c. 25, s. 28(1)(a). The text of that *Act* also makes Canadian citizenship a bar membership requirement. However, the Order in Council bringing the new *Act* into effect *excluded* those provisions which were ultimately declared of no force and effect by *Andrews*: B.C. Reg. 172/88. In 1993, the unenforced sections were done away with by regulation: B.C. Reg. 325/93, and the definition of “Canadian citizen” in the *Legal Profession Act* (which had been brought into force but obviously served no purpose) was repealed: *Legal Profession Amendment Act, 1993*, S.B.C. 1993, c. 31, s. 1.

***Dixon v. British Columbia (A.G.)***

(1989), 59 D.L.R. (4th) 247 (B.C.S.C.).

**Law Affected:** Statutorily created provincial voting districts with marked disparities in their respective populations: *Constitution Act*, R.S.B.C. 1979, c. 62, s. 19.

**Charter Section Breached:** s. 3.

**Legislative Sequel:** British Columbia amended its voting districts in 1990: *Electoral Districts Act*, S.B.C. 1990, c. 39. The amending statute made note of the population of each defined district in parentheses; these ranged from approximately 29,500 to approximately 45,000.

***Black v. Law Society of Alberta,***

[1989] 1 S.C.R. 591.

**Law Affected:** Rules which purported to restrict the entry of out-of-province law firms to the legal profession in Alberta: *Rules of the Law*

*Society of Alberta*, ss. 75B, 154.

**Charter Section Breached:** s. 6(2)(b).

**Legislative Sequel:** In June of 1989, the Benchers of the Law Society of Alberta rescinded the impugned rules. They have not been replaced. Alberta completely revised its rules in 1995 but out-of-province access to the legal profession was not restricted.

***Edmonton Journal v. Alberta (A.G.),***

[1989] 2 S.C.R. 1326.

**Law Affected:** Alberta prohibition on publishing material on matrimonial litigation except within narrowly defined parameters: *Judicature Act*, R.S.A. 1980, c. J-1, s. 30.

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** Alberta repealed the impugned section and its associated provisions in 1991: *Miscellaneous Statutes Amendment Act, 1991*, S.A. 1991, c. 21, s. 15(3). A prohibition in the *Criminal Code*, R.S.C. 1985, c-46, s. 166, which resembled the Alberta statute was repealed in 1994: *Criminal Law Amendment Act, 1994*, S.C. 1994, c. 44, s. 9.

***Canadian Civil Liberties Association v. Ontario (Minister of Education)***

(1990), 71 O.R. (2d) 341 (C.A.).

**Law Affected:** Regulations pursuant to Ontario's *Education Act*, R.S.O. 1980, c. 129, ss. 10(1), para. 18, 50, prescribing content and form requirements for religious education in the public schools: R.R.O. 1980, Reg. 262, s. 28.

**Charter Section Breached:** s. 2(a).

**Legislative Sequel:** In 1990 (the same year as the decision), Ontario's religious education regulations were significantly altered. Religious education is optional to school boards and may involve the study of different religions, but a programme of religion must not "indoctrinate" students and shall, according to the regulations, "promote respect for the freedom of conscience and religion guaranteed by the Canadian *Charter of Rights and Freedoms...*": O. Reg 677/90, ss. 29, 29a.

***Rocket v. Royal College of Dental Surgeons of Ontario,***

[1990] 2 S.C.R. 232.

**Law Affected:** Regulations pursuant to Ontario's *Health Disciplines Act*, R.S.O. 1980, c. 196, which made advertising by dentists, with very restricted exceptions, "professional misconduct": R.R.O. 1980, Reg. 447, ss. 37(39), (41).

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** The regulations were altered in 1994. Now made pursuant to the *Dentistry Act, 1991*, S.O. 1991, c. 24, the new regulations provide that advertising by dentists only constitutes misconduct where the advertising is deceptive, non-factual in nature, suggests superiority over other members of the profession, is “likely to create expectations of favourable results or to appeal to the public’s fears,” or discloses specific areas of practice without also indicating whether the dentist is a general practitioner or a specialist in that field: O. Reg 220/94, s. 1.

**R. v. Martineau,**

[1990] 2 S.C.R. 633.

**Law Affected:** Provision which defined as murder the causing of death during the commission of another offence if an *objective* mental element with respect to death (“ought to have known”) could also be attributed to the perpetrator: *Criminal Code*, R.S.C. 1970, c. C-34, s. 213(a).

**Charter Section Breached:** s. 7.

**Legislative Sequel:** No sequel found.

**R. v. Hess; R. v. Nguyen,**

[1990] 2 S.C.R. 906.

**Law Affected:** “Statutory rape” crime (having sexual intercourse with a female under 14) in which there was no *mens rea* requirement with respect to the victim’s age: *Criminal Code*, R.S.C. 1970, C-34, s. 146(1).

**Charter Section Breached:** s. 7.

**Legislative Sequel:** “Rape” is no longer referred to in the *Criminal Code* (replaced with “sexual assault” in R.S.C. 1985, C-46, s. 271). However, some offences such as sexual interference (s. 151), and sexual exploitation (s. 153) in the *Criminal Code* are specifically directed at acts involving a youth. With respect to these provisions, the current legislation provides that “it is not a defence ... that the accused believed that the complainant was fourteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant”: *An Act to Amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 (3d Supp.), c. 19, s. 1.

**Committee for the Commonwealth of Canada v. Canada,**

[1991] 1 S.C.R. 139.

**Law Affected:** Regulations which prohibited unauthorized “solicitation” in federal airports: *Government Airport Concession Operations Regulations*, SOR/79-373, ss. 7(a), (b) [hereinafter *GACOR*].

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** In 1995 the Federal Government amended the *GACOR: SOR/95-228*. Non-commercial solicitation is no longer mentioned; the new regulations are concerned only with businesses and commercial undertakings, which are prohibited without a permit. Along with the new regulations, the Department of Transport issued a Regulatory Impact Analysis Statement explaining that the invalidation of the old regulations, in their commercial context, by the *Commonwealth* case had led to “physical confrontations between unauthorized taxi and limousine operators and limousine and taxi operators who hold airport permits at Lester B. Pearson International Airport”: Regulatory Impact Analysis Statement, C. Gaz. 1995.II.1467. The impact statement is similar to the statutory preambles to several of these legislative sequels in the sense that it anticipates challenges to the enactment and offers “s. 1 justifications” for its provisions.

***R. v. Swain,***

[1991] 1 S.C.R. 933.

**Law Affected:** Automatic committal of persons acquitted for insanity: *Criminal Code*, R.S.C. 1970, c. C-34, s. 542(2), along with a rule of common law which allowed the Crown to adduce evidence of an accused’s insanity against the wishes of the accused.

**Charter Section Breached:** ss. 7, 9.

**Legislative Sequel:** 1991 amendments to the *Criminal Code* provide for review boards and disposition hearings and allow the court to order a mental assessment if it is either raised by the accused, or if the prosecutor satisfies the court that there is reasonable doubt as to the accused’s fitness to stand trial: *An Act to Amend the Criminal Code (mental disorder)*, S.C. 1991, c. 43, s. 672.12.

***Osborne v. Canada (Treasury Board),***

[1991] 2 S.C.R. 69.

**Law Affected:** Limits on political activity of federal civil servants: *Public Service Employment Act*, R.S.C. 1985, c. P-33, s. 33.

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** No sequel found.

***Tétreault-Gadoury v. Canada (Employment and Immigration Commission),***

[1991] 2 S.C.R. 22.

**Law Affected:** Provisions which called for unemployment insurance benefits to cease at age 65: *Unemployment Insurance Act, 1971*, S.C.

1970-71-72, c. 48, s. 31(1), (2) (4), as am. by S.C. 1974-75-76, c. 80, s. 10.

**Charter Section Breached:** s. 15(1).

**Legislative Sequel:** The impugned provisions had already been amended by the time of the S.C.C. decision: *An Act to Amend the Unemployment Insurance Act*, S.C. 1990, c. 40, s. 22.

***R. v. Seaboyer,***

[1991] 2 S.C.R. 577.

**Law Affected:** “Rape shield” provisions restricting the use of a complainant’s sexual history as evidence by the accused: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 276, 277.

**Charter Section Breached:** ss. 7, 11(d).

**Legislative Sequel:** Parliament resurrected the “rape shield” by amending its provisions in 1992, and adding procedures for a closed court judicial examination of whether evidence will be admissible (ss. 276.1-276.5): *An Act to Amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2.

***R. v. Bain,***

[1992] 1 S.C.R. 91.

**Law Affected:** Provision which allowed the prosecution (but not the defence) to “stand-by” jurors: *Criminal Code*, R.S.C. 1970, c. C-34, s. 56, 3.

**Charter Section Breached:** s. 11(d).

**Legislative Sequel:** 1992 amendments repealed the provisions invalidated by this case: *An Act to Amend the Criminal Code (jury)*, S.C. 1992, c. 41, s. 2.

***R. v. Généreux,***

[1992] 1 S.C.R. 259.

**Law Affected:** Provisions and corresponding regulations which did not adequately guard against executive interference with the judge advocate in a General Court Martial: *National Defence Act*, R.S.C. 1985, c. N-5, ss. 166-170.

**Charter Section Breached:** s. 11(d).

**Legislative Sequel:** The *National Defence Act* was amended to ensure greater independence for the judge advocate: *An Act to Amend the National Defence Act*, S.C. 1992, c. 16. Many of the offending regulations had already been amended prior to the S.C.C. case.

***R. v. Downey,***  
[1992] 2 S.C.R. 10.

**Law Affected:** Offence of living off the avails of prostitution which placed an evidentiary burden on the accused to raise a reasonable doubt if he was demonstrated to be living with, or habitually in the company of, prostitutes: *Criminal Code*, R.S.C. 1970, c. C-34, s. 195(2).

**Charter Section Breached:** s. 11(d).

**Legislative Sequel:** No sequel found.

***Schachter v. Canada,***  
[1992] 2 S.C.R. 679.

**Law Affected:** Benefits which were available to adoptive but not to natural parents: *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, s. 32(1), as am. by S.C. 1980-81-82-83, c. 150, s. 5.

**Charter Section Breached:** s. 15(1).

**Legislative Sequel:** The impugned provisions had already been amended by the time of the S.C.C. decision: *An Act to Amend the Unemployment Insurance Act*, S.C. 1990, c. 40, s. 24.

***Haig v. Canada***  
(1992), 9 O.R. (3d) 495 (C.A.).

**Law Affected:** Omission of sexual orientation as a prohibited ground of discrimination: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3.<sup>1</sup>

**Charter Section Breached:** s. 15(1).

**Legislative Sequel:** The *Canadian Human Rights Act* was amended to add sexual orientation as a prohibited ground of discrimination: *An Act to Amend the Canadian Human Rights Act*, S.C. 1996, c. 14, s. 1.

***R. v. Zundel,***  
[1992] 2 S.C.R. 731.

**Law Affected:** Offence of wilfully publishing false news: *Criminal Code*, R.S.C. 1985, c. C-46, s. 181.

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** No sequel found.

---

<sup>1</sup> Note that the Alberta Court of Appeal reached the opposite conclusion as did the Ontario Court of Appeal, with respect to the Alberta *Individual Rights Protection Act*, S.A. 1980, c. I-2, ss. 2(1), 4, 7(1), (2), (3), 8(1), 10, in *Vriend v. Alberta* (1996), 181 A.R. 16. The Alberta statute, like the *Canadian Human Rights Act*, did not protect discrimination on the ground of sexual orientation; the Alberta Court of Appeal held that this lack of protection did not constitute discrimination within the meaning of s. 15(1) of the *Charter*, and upheld the validity of the *Individual Rights Protection Act*. The *Vriend* decision has been given leave to appeal to the Supreme Court of Canada, which will provide a final determination of whether *Haig* or *Vriend* was correctly decided.



***R. v. Morales,***

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

**Law Affected:** Provision that allowed denial of bail by criteria which did not meaningfully guide judicial discretion: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 515(6)(a), (d).

**Charter Section Breached:** s. 11(e).

**Legislative Sequel:** No sequel found.

***Baron v. Canada,***

[1993] 1 S.C.R. 416.

**Law Affected:** Specifically challenged was 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. by S.C. 1986, c. 6, s. 121. These amendments followed *M.N.R. v. Kruger*, and *Reference Re Print Three Inc.*, above.

**Charter Section Breached:** s. 8.

**Legislative Sequel:** 1994 amendments changed the impugned provision to stipulate that judges “may” rather than “shall” grant a search warrant under conditions set out in the *An Act to Amend the Income Tax Act*: S.C. 1994, c. 21, s. 107.

***Sauvé v. Canada (A.G.),***

[1993] 2 S.C.R. 438.

**Law Affected:** Disqualifying prison inmates from voting in federal elections: *Canada Election Act*, R.S.C. 1985, c. E-2, s. 51(e).

**Charter Section Breached:** s. 3.

**Legislative Sequel:** The disqualification of all inmates from voting, which was questioned in *Sauvé*, had already been altered by the time of the decision, pursuant to the same statute which removed the voting rights barrier from federally-appointed judges (see *Muldoon v. Canada*, above) and from those with mental disease (see *Canadian Disability Rights Council v. Canada*, above). As amended, the *Canada Election Act* barred from voting only those inmates who are serving a sentence of two years or more: *An Act to Amend the Canada Elections Act*, S.C. 1993, c. 19, s. 23(2). However, in 1995, the Federal Court Trial Division held that the amended law was also unconstitutional, and struck it down: *Sauvé v. Canada (Chief Electoral Officer) (T.D.)*, [1996] 1 F.C. 857. The Federal Court disallowed an application by the Attorney General of Canada to stay the declaration in this case: [1997] F.C.J. No. 594 (QL), and all federal inmates were therefore eligible to vote in the June 2, 1997 elections. The judgment is currently under appeal to the Federal Court of Appeal.

***Ramsden v. Peterborough (City of),***

[1993] 2 S.C.R. 1084.

**Law Affected:** Prohibiting postering on municipal public property: City of Peterborough, By-law No. 3270, ss. 1, 2, as am. by By-law No. 1982-147.

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** Peterborough amended its Municipal Code in 1994 by providing for community bulletin boards within a specified zone and by prohibiting other postering on municipal public property within that area. The City, in enacting the by-law, notably included a four-paragraph long justificatory preamble explaining the reasonableness of its procedures and objectives: City of Peterborough, By-Law No. 94-108 (4 July 1994), amending articles 1-4 of Chapter 446 of the Peterborough Municipal Code.

***R. v. Grant; R. v. Wiley; R. v. Plant,***

[1993] 3 S.C.R. 223; 263; 281.

**Law Affected:** Provision authorizing warrantless searches of places other than dwelling houses: *Narcotic Control Act*, R.S.C. 1985, c. N-1, s. 10.

**Charter Section Breached:** s. 8.

**Legislative Sequel:** The *Narcotics Control Act* was repealed and replaced: *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Under Part II of the new *Act*, all such searches are to be conducted pursuant to a warrant.

***Toronto (City of) v. Quickfall***

(1994), 16 O.R. (3d) 665 (C.A.)

**Law Affected:** By-laws collectively prohibiting postering on utility poles, public buildings, and roads in Toronto: City of Toronto, By-law No. 12519, *A By-Law Respecting Streets* (10 March 1930), as am., s. 8; and Municipality of Metropolitan Toronto, By-law No. 211-74, *A By-Law To regulate the use of Metropolitan Roads* (5 November 1974), s. 12(8).

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** Metropolitan Toronto and its constituent municipalities are currently working to design by-laws which would regulate rather than prohibit postering. Neither Metro nor the City of Toronto have enacted new by-laws, but a pilot project in Scarborough has studied the merits of restricting postering on municipal property to designated areas. The results were synthesized by the Area Sign Committee in the spring of 1997, and new by-laws are now in the drafting phase. See Municipality of Metropolitan Toronto, Planning and Transportation Committee, *Installation of Poster Signs on Metro Roads*, Report No. 12 (Toronto: Municipality of Metropolitan Toronto, 7 May

1997).

***R. v. Daviault,***

[1994] 3 S.C.R. 63.

**Law Affected:** Common-law rule that self-induced intoxication is not a valid defence to a crime of general intent, specifically sexual assault.

**Charter Section Breached:** s. 11(d).

**Legislative Sequel:** In 1995 a new s. 33.1 was introduced to the *Criminal Code*. The enacting statute has a lengthy preamble explaining its social motivations and grounding it in *Charter* principles such as equality. In essence it directly overturns the *Daviault* decision, establishing (s. 33.1(2)) that a person who has induced his own intoxication has the requisite criminal fault for actions taken while intoxicated, *whether voluntary or involuntary*, which interfere or threaten to interfere with another person's bodily integrity: *An Act to Amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32, s. 1.

***R. v. Heywood,***

[1994] 3 S.C.R. 761.

**Law Affected:** Making it a crime of vagrancy for a person previously convicted of certain crimes (for example, sexual assault) to be found loitering in specified public places (playgrounds, bathing areas, etc.): *Criminal Code*, R.S.C. 1985, c. C-46, s. 179(1)(b).

**Charter Section Breached:** s. 7.

**Legislative Sequel:** By the time of the S.C.C. ruling, Parliament had enacted s. 161 of the *Criminal Code* which provides for orders of prohibition for persons convicted of certain crimes which serve the same purpose as did the vagrancy offence. A prohibition order may be for life, but there is a procedure by which there can be a reconsideration of the order where desirable because of changed circumstances: *Criminal Code*, R.S.C. 1985, C-46, s. 161, as am. by S.C. 1993, c. 45, s. 1.

***Reference Re K.***

(1995), 23 O.R. (3d) 679 (Prov. Ct.).

**Law Affected:** Definition of spouse which had the effect of preventing homosexual couples from jointly adopting a child in Ontario: *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 136(1).

**Charter Section Breached:** s. 15(1).

**Legislative Sequel:** None to date.

***Miron v. Trudel,***

[1995] 2 S.C.R. 418.

**Law Affected:** Exclusion of a common-law spouse as a beneficiary of compulsory automobile insurance policies due to limited definition of "spouse" in Schedule C: *Insurance Act*, R.S.O. 1980, c. 218.

**Charter Section Breached:** s. 15(1).

**Legislative Sequel:** Ontario's automobile insurance laws were changed significantly in 1990 and again in 1993 and are now substantially different from those which were considered in this case. Current provisions include a definition of "spouse" which contemplates the inclusion of common-law spouses: *Insurance Statute Law Amendment Act, 1993*, S.O. 1993, c. 10.

***Reform Party of Canada v. Canada (A.G.)***

(1995), 136 A.R. 1 (Q.B.).

**Law Affected:** Provision which prevented political parties from negotiating for the purchase of extra broadcast time in excess of a fixed allotment based on the party's popular support: *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 310(1).

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** None to date.

***RJR-MacDonald Inc. v. Canada (A.G.),***

[1995] 3 S.C.R. 199.

**Statute Affected:** Ban on cigarette advertising and mandated unattributed warnings on all cigarette packages: *Tobacco Products Control Act*, S.C. 1988, c. 20, ss. 4, 5, 6, 8, 9.

**Charter Section Breached:** s. 2(b).

**Legislative Sequel:** A comprehensive package of amendments including new packaging and advertising restrictions was enacted in 1997: *Tobacco Act*, S.C. 1997, c. 13, Part IV.

***Somerville v. Canada (A.G.)***

(1996), 184 A.R. 241 (C.A.).

**Statute Affected:** Advertising "black outs" at the beginning and end of election campaigns: *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 213.

**Charter Sections Breached:** ss. 2(b), 2(d), 3.

**Legislative Sequel:** None to date.