THE LAW-MAKING ROLE OF THE SUPREME COURT OF CANADA: RAPPORTEUR'S SYNTHESIS

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The adoption of the Charter of Rights in 1982 thrust a new role on the Supreme Court of Canada. The Court was required to resolve issues that would formerly have been regarded as matters of policy for the legislative bodies. This article shows that the new policy-making role of the Court has carried over into non-Charter fields, such as federalism, evidence, administrative law, torts, and family law.

L'adoption en 1982 de la Charte des droits a brusquement imposé un nouveau rôle à la Cour suprême du Canada. La Cour a dû résoudre des questions qui auparavant étaient considérées comme des enjeux politiques relevant des corps législatifs. Cet article montre que ce nouveau rôle politique de la Cour s'est étendu à des domaines hors de la Charte, tels que le fédéralisme, la preuve, le droit administratif, la responsabilité délictuelle, et le droit de la famille.

I. *Introduction*

This paper is a written and somewhat expanded version of the Rapporteur's summary which was delivered orally at the end of the Supreme Court of Canada's 125th Anniversary Conference.

This Conference celebrated the 125th anniversary of the Supreme Court of Canada. The big events in that history are: the establishment of the Court in 1875; the abolition of appeals to the Privy Council in 1949; the abolition of most "as of right" appeals in civil cases in 1975; and the adoption of the Canadian Charter of Rights and Freedoms in 1982. It is the last event that has dominated the recent history of the Court. The adoption of the Charter of Rights thrust on the Court a new role, namely, that of judicial review in the service of civil

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liberties. The Court entered on that new role with zeal, although it required a more policy-based style of decision-making than has been traditional for courts in Canada. And that new style of decision-making has spilled over into the Court's work in non-constitutional fields as well.

The theme that underlies the Conference, and is the topic of this paper, is the new law-making power of the Court. By law-making power, I do not refer to the fact that judges make new law whenever they decide a novel case. That has always been true (although not always acknowledged). What I refer to is decision-making that has two characteristics: (1) explicit reliance by the Court on considerations that are not legal rules, legal principles or legal policies; and (2) explicit acknowledgment by the Court that the Court does on occasion have to design and apply a new law.

II. *The Charter of Rights*

The adoption of the Charter of Rights required the Supreme Court of Canada (and the lower courts) to interpret a new constitutional instrument.[1] The Charter used language that was unfamiliar to Canadian judges and that was difficult to interpret, requiring consideration of the jurisprudence and literature of the United States and other countries with bills of rights, as well as the decisions of international tribunals and the theoretical literature on the nature of rights. This was a much wider range of sources than the Court was accustomed to consult, and it did not carry any easy answers for the Court because of the unique structure of the Canadian Charter, the unique circumstances of Canadian society, and the unsatisfactory state of the jurisprudence of other jurisdictions. For all these reasons, the definition of equality has proved the most intractable.[2]

If the Charter of Rights had called for no more than the interpretation of the new guaranteed rights, it would have been a considerable new enterprise. But section 1 of the Charter authorized the limitation of rights by legislation that qualified as a "reasonable" limit that could be "demonstrably justified in a free and democratic society". This limitation clause also had to be applied, and of course it was relied on by government in nearly every case where a violation of a guaranteed right was found. The Court developed a structure for the application of section 1,[3] but that structure inevitably called for the balancing of policy

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[1] In this symposium, see L.E. Weinrib, "The Influence of the Charter on Supreme Court Thinking and Methodology" *infra* 699; S.L. Martin, "Equality and the Balance between Individual Rights and Social Goals" *infra* 299; K. Roach, "Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures" *infra* 481; P.J. Monahan, "The Supreme Court of Canada in the 21st Century" *infra* 374.

[2] The latest iteration of the definition of equality is to be found in *Law* v. *Canada*, [1999] 1 S.C.R. 497. It attempts to synthesize a number of conflicting judicial approaches to the topic, resulting in a test that is so complicated, vague and confusing that it is unlikely to be the last word.

[3] The seminal decision is *R.* v. *Oakes*, [1986] 1 S.C.R. 103, which lays down a four-part test, of which the dispositive elements are the assessment of the legislative objective and the assessment of whether the objective could have been accomplished by less drastic means.

considerations that had previously been seen as exclusively the province of the legislative branch. After determining that a statute infringed a guaranteed right, the Court had to weigh the importance of the objective of the statute, and determine whether in principle that objective could justify the limiting of the right. Then the Court had to consider the availability of other legislative instruments that could achieve the same objective, but with less impairment of the right. The Supreme Court of Canada had never before had such an explicitly legislative role to weigh and balance competing policies.

In thinking about the changes wrought by the Charter of Rights, we must not forget that section 35 of the Constitution Act, 1982, a provision that is technically outside the Charter (which ends at section 34), "recognized and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada". This vague language has also proved extraordinarily difficult to interpret, requiring the Court to give definition to aboriginal rights, including aboriginal title to land, as well as to treaty rights.[4] The pre-1982 jurisprudence on these topics was scanty and undeveloped. Moreover, after the Court decided that section 35 did indeed constitute a constitutional guarantee of aboriginal and treaty rights (which was not perfectly clear from the phrase "recognized and affirmed in section 35), the Court had to decide whether those rights should on occasion have to yield to other values, for example, the conservation of natural resources. The Court answered this question yes, and went on to develop tests of justification that were similar to the tests developed for section 1 of the Charter.[5] Once again, an explicit weighing and balancing of legislative policies was called for.

The role of judicial review under the Charter of Rights was not one that the Supreme Court of Canada could have avoided. The text and the legislative history of the Constitution Act, 1982 clearly contemplated its supremacy over ordinary statute law, and gave the task of application to the courts. What was rather surprising was the enthusiasm with which the Court embraced its new role. In the 18 years since the adoption of the Charter, 64 statutory provisions have been struck down and a much larger number of actions by police officers or government officials have been annulled.[6] Moreover, the Court has not adhered to those counsels of procedural restraint that Alexander Bickel famously described as the "passive virtues".[7] The Court has developed no doctrine of

[4] In this symposium, see J. Borrows, "Uncertain Citizens: Aborigginal Peoples and the Supreme Court" *supra* 15.

[5] The seminal decision is *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, which establishes the framework for the application of s. 35 and elaborates the justificatory test for laws that limit aboriginal or treaty rights.

[6] P.J. Monahan, *supra* note 2.

[7] A. Bickel, *The Least Dangerous Branch* (Yale U.P. New Haven, 2nd ed., 1986). K. Roach, *supra* note 2, urges the Court to adopt the passive virtues, as does Monahan, *supra* note 2, above, although he does not directly refer to Bickel.

ripeness;[8] mootness rarely defeats proceedings;[9] lack of standing also rarely defeats proceedings (because of generous discretionary public interest standing);[10] public interest intervenors are often admitted to appeals (even when they are antagonistic to a criminal defendant);[11] statutes are occasionally struck down on the basis of hypothetical facts that bear no resemblance to the facts before the Court;[12] sweeping constitutional rulings are occasionally issued in obiter dicta;[13] and statutes are occasionally directly amended by the Court simply "severing" words that create a constitutional defect or even "reading in" new language that would cure the constitutional defect.[14]

A review of the Supreme Court of Canada's Charter jurisprudence reveals an eagerness to seize and decide constitutional issues. This is the opposite of the passive virtues advocated by Professor Bickel. The Court's active approach can be justified on the ground that it is wasteful of judicial time not to decide constitutional issues once they have been fully argued before the Court. No doubt as well, the Court is anxious to settle controverted issues, rather than leaving the law uncertain, which is the effect of adherence to the passive virtues. Of course, Bickel's point is that the law is ultimately settled more carefully, and the settlement is likely to be more acceptable and more stable if the Court waits until its intervention cannot be avoided. It is not the purpose of this paper to debate the wisdom of the passive virtues, but simply to report that the Court's practice gives little weight to them. The Court has assumed an active law-making role rather than the more limited adjudicatory role that would have been taken for granted thirty years ago.

III. *Federalism*

The constitutional law of federalism, or division of powers,[15] did not undergo an upheaval in 1982, when the Charter of Rights was adopted.[16] For the Supreme Court of Canada, the most important event was the abolition of appeals

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[8] P.W. Hogg, *Constitutional Law of Canada* (Carswell, Toronto, 4th ed., 1997), sec. 56.4.

[9] *Ibid.*, sec. 56.3.

[10] *Ibid.*, sec. 56.2(d).

[11] *Ibid.*, sec. 56.6.

[12] E.g., *R.* v. *Smith*, [1987] 1 S.C.R. 1045 (striking down minimum sentence for importing drugs); *R.* v. *Heywood*, [1994] 3 S.C.R. 761 (striking down prohibition of previously convicted sexual offenders from loitering in playgrounds).

[13] E.g., *R.* v. *Brydges*, [1990] 1 S.C.R. 190 (instructing police officers to warn arrested persons of the availability of free duty counsel and legal aid); *Delgamuukw* v. *B.C.*, [1997] 3 S.C.R. 1010 (defining aboriginal title).

[14] Hogg, *supra* note 7, above, secs. 37.1(e) and (f) provide examples of severance and reading in.

[15] In this symposium, see A.W. MacKay, "The Supreme Court of Canada and Federalism: Does\Should Anyone Care Anymore?" *infra* 241; M. Trebilcock, "The Court and Economic Regulation" *infra* 542.

[16] The Constitution Act, 1982, by Part V, provided new amending procedures, and, by ss.50 and 51, added a new s. 92A and Sixth Schedule to the Constitution Act, 1867.

to the Privy Council in 1949. The Privy Council had drawn very narrow boundaries around the principal powers of the federal Parliament—the powers to legislate in relation to peace, order, and good government, trade and commerce and criminal law. The Supreme Court of Canada has expanded those powers, the most important effects of which are to allow the federal Parliament a role in the regulation of the environment[17] and the regulation of competition.[18] These are hardly surprising or revolutionary outcomes.[19] On the whole, balance has been the watchword of the Court's federalism cases, and balance means preserving the main elements of the federal division of powers that were inherited in 1949. Even the *Labour Conventions* case[20] has so far survived, although it denies to the Parliament the power to implement international treaties.

But the Supreme Court is still capable of extraordinary law-making in federalism cases - provided it is in the service of balance. The *Patriation Reference* of 1981[21] invented a new constitutional convention to regulate the amendment of the constitution in order to give a role to the provinces that was at that time (before the Constitution Act, 1982) denied them by law. And the *Secession Reference* of 1998[22] invented a constitutional duty to negotiate secession with a province that had held a referendum in favour of secession in order to soften the ruling that Québec had no right to secede unilaterally. Both of these decisions established new rules to govern the federation in times of crisis. The first forced the federal government of Prime Minister Trudeau to negotiate a compromise with the provinces who were opposed to his plan to patriate the constitution and introduce a new Charter of Rights and amending procedures.[23] The second has not yet been put to the test, because no referendum on Québec separation has received a majority vote, but if a majority were to be secured in a future referendum, the *Secession Reference* would drastically limit the options legally open to the Government of Canada.

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17 See *R.* v. *Crown Zellerbach*, [1988] 1 S.C.R. 401 (peace, order, and good government); *R.* v. *Hydro-Québec*, [1997] 3 S.C.R. 213 (criminal law power).

18 *General Motors* v. *City National Leasing*, [1989] 1 S.C.R. 641 (trade and commerce).

19 Perhaps the most innovative of the federalism decisions are *De Savoye* v. *Morguard Investments*, [1990] 3 S.C.R. 1077 and *Hunt* v. *T & N*, [1993] 4 S.C.R. 289, which (despite the absence of a full faith and credit clause in the Canadian constitution) require provinces to give full faith and credit to the judicial decisions of other provinces. The holdings are important, and in addition the cases probably also presage a larger federal role in guaranteeing mobility of persons and economic factors throughout the country.

20 *A.G. Can.* v. *A.G.Ont.(Labour Conventions)*, [1937] A.C. 326.

21 *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

22 *Re Secession of Québec*, [1998] 2 S.C.R. 217.

23 The story is told in Hogg, *supra* note 9, above, ch. 4.

IV. *Evidence*

The Charter of Rights, by section 24(2), authorizes the exclusion of evidence obtained in breach of the Charter where the admission of the evidence would bring the administration of justice into disrepute. This remedy has been applied by the Supreme Court of Canada in many cases, and the Court has even developed a rigid rule of exclusion for what the Court describes as "conscriptive" evidence. Despite the adjective "conscriptive", most of the cases have concerned confessions or other evidence offered voluntarily by the accused, and in all the cases the evidence was utterly reliable and could not have produced a miscarriage of justice. This particular rule of exclusion is another example of the Court's activism in enforcement of the Charter of Rights.[24] In criminal cases, the Charter has caused other modifications of the law of evidence in service of the accused's right to full answer and defence,[25] a right which has to be balanced with the complainant's right to privacy and to the equality concerns of female victims of crime.[26]

Of course, evidentiary issues in criminal cases do not always implicate the Charter of Rights, and in civil cases, the Charter is usually inapplicable.[27] The interesting point for the purpose of this paper is the degree to which the Supreme Court of Canada has transformed the law of evidence when no Charter issue arises. For example, the Court has abolished ancient rules respecting hearsay evidence, similar fact evidence and collateral facts evidence and substituted guidelines for the use of discretion by trial judges.[28] Such sweeping reforms of common law rules would have called for a statute twenty years ago. Now the Court can just do it!

V. *Administrative Law*

The Charter of Rights has not had much direct influence on administrative law,[29] because the Charter does not protect property rights and most administrative tribunals or officials do not dispose of the "life, liberty and

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[24] In this symposium, see D.M. Paciocco, "Balancing the Rights of the Individual and Society in matters of Truth and Proof" *infra* 426.

[25] E.g., *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 (striking down rape-shield provisions restricting right of accused to question complainant about past sexual activity); *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326 (holding that accused entitled to full disclosure from Crown).

[26] E.g., *R.* v. *O'Connor*, [1995] 4 S.C.R. 411; *R.* v. *Mills*, [1999] 3 S.C.R. 668 (regulating access by accused to complainants' therapeutic records).

[27] *RWDSU* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573.

[28] The story is told by Paciocco, *supra* note 25.

[29] In this symposium, see H.W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada *infra* 281; D.J. Mullan, "The Court and Tribunals" *infra* 399.

security of the person" that is guaranteed by section 7. And yet, even if outcomes have not changed markedly, the rules of administrative law—like the rules of evidence—have been transformed by the Supreme Court of Canada. With respect to substantive review, the concept of jurisdiction, once the centrepiece of judicial review of administrative discretion, has been virtually replaced by three standards of review—patent unreasonableness, unreasonableness and correctness—with the Court using a "functional and pragmatic" approach to determine which standard to apply. With respect to procedural review, the concepts of the duty to act judicially and the rules of natural justice, which were the centerpieces of judicial review for procedural error, have been virtually replaced by a duty of fairness, a concept which is also applied in a "functional and pragmatic" manner.[30]

VI. *Torts*

The Charter of Rights has had very little direct influence on the law of torts, because the Supreme Court of Canada held in the *Dolphin Delivery* case (1986)[31] that the element of governmental action was absent from a tort action between private parties (despite the role of the state in administering sanctions for non-compliance with court orders). Even where "Charter values" such as freedom of expression are implicated, the Court has been reluctant to apply the Charter to the law of torts. Even the law of defamation, which limits freedom of expression, has not been modified by the Court, not even to protect the right of the media to criticize public officials.[32] This is one area where the general tendency of the Court to active and expansive application of the Charter is not evident.

Nevertheless, as with the law of evidence and administrative law, the Supreme Court of Canada, without explicitly invoking the Charter or its values, has moved boldly to reshape the law of torts. In the law of negligence, the Court adopted the expansive duty of care stipulated in *Anns* v. *Merton London Borough Council* (1978),[33] and continued to apply the rule after its rejection by the House of Lords and the High Court of Australia. The rule in *Anns* explicitly required the Court to extend the duty of care to everyone at risk of harm in the reasonable contemplation of the defendant, and to limit that broad duty on the basis of "considerations" that may be applicable in a particular setting or context. The explicit reference to considerations, which could only mean considerations of policy, invited a law-making role for the Court. With that self-

[30] The story is told by MacLauchlan, *supra* note 30, above, and Mullan, *supra* note 30, above, who differ on how radical is the difference in outcomes (as opposed to articulated rules).

[31] *Supra* note 28, above.

[32] *Hill* v. *Church of Scientology*, [1995] 2 S.C.R. 1130, rejecting arguments based on judicial modifications of the common law rules in the United States and Australia. (I disclose that I was one of the counsel urging such a modification on the Court.)

[33] [1978] A.C. 728 (H.L.).

assumed mandate, the Court has expanded the categories of recoverable economic loss; has held that parties to a contract may be concurrently liable to each other in tort; has held that builders of defective buildings, bridges or other structures owe duties to subsequent purchasers and users for the costs of repairs; and has held government liable for economic loss that could have been avoided by the more diligent use of statutory powers.[34]

These and other developments in the law of torts[35] have taken place with explicit reference to policy considerations that would traditionally have been seen as outside the proper scope of judicial reasoning, and indeed outside the scope of judicial competence. The ability of the parties to insure, the ability to pass on costs to customers, the likely deterrent effect of tort liability on behaviour and the potential extent of liability are among the factors now routinely reviewed by the Court in deciding tort cases. Whether judges have the information and training to pass judgment on these complex issues is open to question. No doubt, factors of these kinds have always influenced the development of tort doctrine by judges, but the frankness with which they are now acknowledged and the readiness to develop new doctrine are certainly new.

In *Ordon Estate* v. *Grail* (1998),[36] two boating accidents that resulted in death and injury gave rise to four negligence actions. Although the accidents concerned pleasure boats on lakes in Ontario, because the accidents occurred in navigable waters, the governing law was federal maritime law. However, the plaintiffs in the actions attempted to rely on several Ontario statutes, which permitted negligence claims to be brought by the siblings of a deceased or injured victim, which permitted the recovery of damages for the loss of guidance, care and companionship of a deceased or injured victim, and which permitted apportionment of damages in cases of contributory negligence (rather than barring the plaintiff's action). These causes of action were unavailable under federal maritime law. The Supreme Court of Canada held that, as a matter of constitutional law, none of the Ontario statutes could apply to a maritime negligence case. Did this mean that the unfortunate plaintiffs were denied causes of action in tort that had been generally adopted into provincial law, but had never been adopted in the Canada Shipping Act or other federal legislation? No, said the Court, and, in an extraordinary display of judicial activism, the Court "reformed" the maritime law to bring it into line with the provincial law. In that way, reforms to the law of torts that had required legislation in every other jurisdiction that had adopted them, were simply adopted into federal maritime law by the Court.[37] .

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[34] The story is told by L. Klar, "Judicial Activism in Private Law" *infra* 215.

[35] E.g., the vicarious liability of employers for unauthorized sexual wrongdoing by employees: Klar, *supra* note 35, above, Ibid.

[36] [1998] 3 S.C.R. 437.

[37] The one "reform" that the Court refused to adopt into maritime law was the expansion of eligible dependants in fatal accident claims to include siblings. Parliament had spoken on this issue, because the Canada Shipping Act contained a list of eligible dependants that did not include siblings. "For this Court to reform the law to expand the class would be to effect a legislative and not a judicial change in the law": para. 106. This reasoning did not deter the Court from the other reforms, all of which had required legislation for their accomplishment in other jurisdictions.

VII. *Family Law*

It is a similar story with family law. The Charter of Rights has had some influence, to be sure, especially the equality guarantee, which has enlarged the family to include common-law relationships[38] and same-sex relationships.[39] And, of course, the de-criminalization of abortion was dictated by a decision based on the Charter.[40] But most of the conflict within or about families is not touched by the Charter at all, and indeed the Court has refused to decide custody issues on the basis of the "right" of a parent, taking the view that it is the best interests of the child that should always be dispositive. And yet, family law, like evidence, administrative law and torts, has been transformed by the post-Charter Supreme Court of Canada.[41] Dean Harvison Young, in her paper for this symposium, quotes from an article by L'Heureux-Dubé J., who says:[42]

> In Canada, since the advent of the Charter, it is no longer possible to deny that, in deciding questions of law or policy, judges essentially perform an active law and policy-making role rather than passively recognizing or discovering law that is dictated by precedent or principle.

As Dean Harvison Young comments, this statement would seem unsurprising if it concerned law to which the Charter applies. But L'Heureux-Dubé J. was talking about issues of family law that are outside the ambit of the Charter.

VIII. *Conclusion*

The Supreme Court of Canada has become a powerful lawmaker, not just in constitutional law, but in public law generally and in private law. That is a fact of political life that Canadians have been slow to recognize, although any attentive reader of the newspapers would have noticed that there are very few controversial issues in Canadian politics upon which the Court has not had to rule. Conflicts of interests now tend to be framed as conflicts of rights, and the Court is expected to adjudicate.[43] In a democratic society, the exercise of such power by non-elected judges raises issues of legitimacy even for those who generally agree with the Court's outcomes. But for critics of the left[44] and the right,[45] who (interestingly enough) both regard the Court's outcomes as

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38 *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

39 *M* v. *H*, [1999] 2 S.C.R. 203.

40 *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30.

41 The story is told by A. Harvison Young, *infra* 749.

42 *Ibid.*

43 M. Ignatieff, "Challenges for the Future" *infra* 209.

44 E.g., M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994); A. Petter and A. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989) 23 U.B.C.L. Rev. 531.

45 E.g., F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

frequently (or even systemically) adverse, the problem of legitimacy is even more acute.

As this is written, there seems to be no general public concern about the legitimacy of the Supreme Court of Canada and its decisions. Public polling usually reports a high degree of satisfaction with the Supreme Court of Canada. The legitimacy debate is mainly confined to academic circles, and only occasionally spills over into the media or is taken up by politicians. That does not make the concern a trivial one, because public perceptions can change. What can be done to reinforce the legitimacy of the Supreme Court of Canada? At the political level, legitimacy is a powerful argument for a more transparent and public appointing process for the judges of the Court. At the level of the Court itself, clear writing and helpful communication with the media is obviously essential to reduce the level of journalistic misunderstandings.

The Court should also do its best to write opinions that leave room for the competent legislative body to enact remedial legislation, so that the democratic process, admittedly influenced by the Court, has the last word. This is not a problem in dealing with non-constitutional issues, where the competent legislative body always has the choice of replacing judicially-created doctrine of which it disapproves, but even when the Court rules that a particular outcome is required by the constitution there are often choices available to the competent legislative body, including in many cases (for example, through sections 1 or 33 of the Charter) the avoidance or reversal of the decision.[46] Indeed, the idea that the Court, although issuing decisions that bind governments and legislatures, is in practice engaged in a kind of "dialogue" with governments and legislatures is one that is supported by empirical evidence.[47] Where elected legislative bodies retain an important and often decisive role, the burden of (and blame for) decision-making is shared between the Supreme Court of Canada and the legislative bodies, and there is no way that judicial decisions can get too far out of step with public opinion. That may be the best safeguard of the Court's legitimacy.

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[46] See P.W. Hogg and A.A. Bushell, "The Charter Dialogue between Courts and Legislatures" (1997) 35 *Osg. Hall L.J.* 75. In this symposium, the idea of dialogue as a partial answer to concerns about legitimacy is explored in Monahan, *supra* note 2, above and Roach, *supra* note 2, above.

[47] *Ibid.*