

## THE SUPREME COURT OF CANADA IN THE 21<sup>ST</sup> CENTURY

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*This paper reviews the evolution in the role and functions of the Supreme Court of Canada over the past 25 years, and attempts to identify certain major challenges facing the institution in the decades ahead. In the past 25 years, the Supreme Court has moved from a traditional appellate tribunal to a body exercising a broader supervisory function in the interpretation and the application of Canadian law. Professor Monahan describes the nature of this evolution, and compares certain key aspects of the Court's current caseload and performance with that of the English House of Lords and the U.S. Supreme Court. He also reviews the continuing debate over the legitimacy of judicial review under the Charter and argues that, contrary to the claims of certain critics, the Court has been largely successful in striking an appropriate balance between its own role and that of the legislative and executive branches.*

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*Cet article passe en revue l'évolution du rôle et des fonctions de la Cour suprême du Canada durant les 25 dernières années, et tente d'identifier certains défis majeurs qui attendent cette institution dans les décennies à venir. Au cours du dernier quart de siècle, le rôle de la Cour suprême est passé de celui d'un tribunal d'appel traditionnel à celui d'un organisme exerçant une fonction plus large de surveillance dans l'interprétation et l'application du droit canadien. Le professeur Monahan décrit la nature de cette évolution; il compare sa performance et certains aspects clés des affaires venant devant elle présentement à ceux de la Chambre des Lords d'Angleterre et de la Cour suprême des États-Unis. Il fait aussi un tour d'horizon du débat qui se poursuit concernant le contrôle judiciaire exercé en vertu de la Charte; il soutient que, contrairement aux prétentions de certains critiques, la Cour a réussi en grande partie à atteindre un juste équilibre entre son propre rôle et celui des branches législative et exécutive de l'État.*

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### I. Introduction

For most of its 125 year history, the Supreme Court of Canada has laboured in relative obscurity. Indeed, when members of the judicial and legal community gathered in Ottawa 25 years ago this week at a symposium marking the

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centennial of the Court's establishment, the recurring lament was that the Court had played such a minor, almost inconsequential role on the national political stage.<sup>1</sup> The Supreme Court was criticized for being unduly timid in reviewing legislation and regulation and urged to assume a more activist role, particularly in the defense of civil liberties.<sup>2</sup> Political scientist Peter Russell, who described the Court's performance since becoming the country's final appellate tribunal in 1949 as "somewhat anti-climactic", nevertheless claimed to detect in recent changes to the Court's work the beginnings of a more significant role for the institution. Russell focussed in particular on the 1974 amendments to the Supreme Court Act which abolished leave as of right in civil cases and provided that leave was to be granted only in cases of national importance.<sup>3</sup> Even the late Chief Justice Bora Laskin, although noting that different judges might have different views as to the appropriate institutional role of the Court vis-a-vis the other branches of government, emphasized in his remarks to the symposium that controversy had ceased on the law-making role of judges.<sup>4</sup> The issue for Chief Justice Laskin was not whether judicial discretion existed, but how and when it ought to be exercised. "Law is not some known and defined entity secreted in Aladdin's cave and revealed if one uses the right password", Laskin C.J. observed. "We do not believe in fairy tales any more..."<sup>5</sup>

Yet whatever enlarged role might have been urged upon the Court in the mid-1970's, it is evident that no-one anticipated the growth in the Court's policy-making function that has actually occurred over the past quarter century. Of course, in 1975 no-one foresaw the subsequent enactment of the *Canadian Charter of Rights and Freedoms*, a constitutional change which former Chief Justice Lamer has described as drawing the judiciary "into the political arena to a degree that was unknown prior to 1982."<sup>6</sup> Along with the abolition of civil appeals to the Privy Council in 1949, the enactment of the *Charter* represents one of the two most significant developments in the Court's institutional history during the twentieth century.

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<sup>1</sup> The papers from the Supreme Court Centennial Symposium, held in Ottawa on September 27, 1975, were published in a special issue in Volume 53 of the *Canadian Bar Review*.

<sup>2</sup> See D. Gibson, "And One Step Backward: The Supreme Court and Constitutional Law in the Sixties" (1975) 53 *Can. Bar Rev.* 621.

<sup>3</sup> See P.H. Russell, "The Political Role of the Supreme Court of Canada in its First Century" (1975) 53 *Can. Bar Rev.* 576.

<sup>4</sup> B. Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975) 53 *Can. Bar Rev.* 469.

<sup>5</sup> *Ibid.* at 478 (quoting from Lord Reid's article "The Judge as Lawmaker" (1972) 12 *J.S.P.T.L.* 22).

<sup>6</sup> Rt. Hon. Antonio Lamer (Canadian Bar Association, St. John's, Nfld., 23 August 1998) [unpublished].

This paper will review the evolution in the role and functions of the Supreme Court of Canada over the past 25 years, and attempt to identify the major challenges facing the institution in the decades ahead. Inevitably, a key element of the analysis is the definition of the proper relationship between the courts and the other branches of government in the *Charter* era. The *Charter* requires the courts to scrutinize the work of legislatures and governments in a wide variety of contested and controversial policy areas, ranging from abortion, to the rights of gays and lesbians, to the meaning of racial and ethnic discrimination, to the merits of affirmative action programs and employment equity, and so on. Having been thrust into the midst of these boiling political controversies, the Court has itself becoming the object of increased scrutiny and criticism. Whereas 25 years ago commentators were urging the Court to abandon what was regarded as an attitude of undue deference to legislatures and governments, contemporary critics now take exception to the fact that the Court has apparently accepted and acted upon this advice. Two of the more prominent of the current critics of the judiciary, Professors Ted Morton and Rainer Knopff of the University of Calgary, complain that the Supreme Court functions “more like a *de facto* third chamber of the legislature rather than a court” and that Supreme Court justices have more influence on how Canada is governed than do all the parliamentarians who sit outside of the cabinet.<sup>7</sup>

As Chief Justice Laskin observed twenty-five years ago, the fact that judges on our highest court perform a creative law-making function as opposed to merely ‘discovering’ the law is hardly novel. What has changed in the past twenty-five years is not the fact of judicial discretion but the frequency of its exercise and impact. Yet if the range of circumstances and occasions on which the Supreme Court is called upon to review the decisions of legislatures has expanded, this is attributable to the decision by the country’s political branches in 1982 to entrench fundamental rights in our Constitution. Moreover, an expanded role for the judiciary in defense of individual and collective rights is by no means unique to Canada, but represents the Canadian manifestation of a global trend towards the constitutional entrenchment of judicially-enforceable rights guarantees.<sup>8</sup> The challenge for the courts, then, is not to ignore their new political responsibilities but to come to terms with them in a manner that strikes an appropriate and fair balance between the role of the judiciary and that of the other branches of government.

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<sup>7</sup> F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000) at 58.

<sup>8</sup> See C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: Univ. of Chicago Press, 1998); K. Malleon, “A British Bill of Rights: Incorporating the European Convention on Human Rights” *Choices*, 5:1 (June 1999) 21.

In my view, despite the claims of the critics, the Supreme Court of Canada has been highly sensitive to the importance of striking such a fair balance and has been largely successful in achieving it. In short, the enactment of the *Charter* has been a positive development for Canadian democracy, an assessment the vast majority of Canadians seem to share.<sup>9</sup> But the debate over the proper judicial role in an era of increased activism remains in its relative infancy, with the Supreme Court having only just begun to meaningfully redefine the appropriate role of the judiciary as distinct from that of legislatures and governments. In this paper I will offer a number of modest suggestions as to how this ongoing effort at definition can be constructively advanced in the years ahead.

## II. *The Role and Functions of a Final Appellate Court*

At this Court's centennial symposium, Chief Justice Laskin distinguished and contrasted the Court's traditional appellate function from what he described as its "supervisory role".<sup>10</sup> The traditional appellate function is one of 'error correction', in which the appeal court reviews the findings of lower courts in order to determine if a legal error has occurred. The primary purpose of such error correction is to ensure that the resolution of a dispute has occurred in accordance with established legal principles. As such, the traditional appellate function is primarily for the benefit of the particular litigants as opposed to for the good of the legal system as a whole.

In contrast, Chief Justice Laskin identified the 'supervisory role' of the Court as requiring the Court to "oversee the development of the law in the courts of Canada, to give guidance to the provincial courts and to the Federal Court of Canada on issues of national concern..."<sup>11</sup> Thus the supervisory function involved deciding cases with a view to the impact of the reasoning and result on the legal system and Canadian law generally. Laskin C.J. had little doubt as to which of these two roles was more significant: in his view, the supervisory role represented "the paramount obligation of an ultimate appellate court with national authority".

Bora Laskin was surely right in placing greater weight on the supervisory function as opposed to the traditional appellate function of the Supreme Court. Given the fact that the Supreme Court of Canada is a second level appeal court, by the time litigants reach this level they will already have had at least one

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<sup>9</sup> See J. Fletcher & P. Howe, "Public Opinion and the Courts", *Choices* 6:3, (May 2000) 6 (reporting that 80 per cent of Canadians who have heard of the *Charter* say it is a "good thing for Canada"); and P. Howe & D. Northrup, "Strengthening Canadian Democracy: The View of Canadians", *Policy Matters* 1:5 (July 2000) 40-42 (reporting that Canadians by a 2-1 margin believe it is legitimate for the courts to overrule legislatures when statutes are found to be inconsistent with the *Charter*).

<sup>10</sup> Laskin, *supra* note 4 at 474.

<sup>11</sup> *Ibid.* at 475.

opportunity to have the reasoning and conclusions of the court of first instance reviewed for correctness. Indeed, the thrust of the 1974 amendments to the Supreme Court Act, which abolished the previous right of appeal in civil cases above a monetary threshold and instructed the Court to grant leave in cases of "public importance", seems premised on the idea that the task of error correction is primarily the responsibility of provincial and federal Courts of Appeal, with the Supreme Court dealing only with the limited class of cases raising issues of broader public significance.<sup>12</sup>

It is evident that in the past 25 years the Court has moved fairly decisively in the direction envisaged by the 1974 amendments. First, the Court now exercises considerable care in choosing its docket, granting leave in only about 12 per cent of the applications for leave to appeal filed annually.<sup>13</sup> This represents a significant tightening of the Court's leave-granting discretion from as recently as a decade ago, when the Court was granting leave in about 18 per cent of applications filed.<sup>14</sup> Recent amendments to the *Criminal Code* have also slightly narrowed the circumstances in which there is an automatic right of appeal to the Supreme Court in criminal cases.<sup>15</sup> The number of cases in which there is an automatic right of appeal to the Supreme Court has declined over the past decade, to the point where there is now just a handful of such cases each year.<sup>16</sup> Thus for the first time in its history, the Court has now achieved meaningful control over virtually its entire docket.

In my view, these developments reinforcing the Supreme Court's role as a supervisory body overseeing the development of Canadian law generally, as opposed to a traditional appellate tribunal attempting to ensure the 'correct' result is obtained in individual cases, are appropriate and welcome. In fact, as judges in a number of different jurisdictions have pointed out, there are inherent limits on the ability of second-level appellate tribunals to

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<sup>12</sup> The enactment of the 1974 amendments had been preceded by a report by the Canadian Bar Association which had emphasized that the Court's decisions did more than simply resolve disputes between litigants, in that they also provided "vital leadership to the country in the interpretation and development of the law on all subjects." See *Report of the Special Committee of the Canadian Bar Association on the Caseload of the Supreme Court of Canada*, vol. 1 (Ottawa: The Canadian Bar Association, 1974) at 34.

<sup>13</sup> See Supreme Court of Canada, "Bulletin of Proceedings: Special Edition: Statistics 1989 to 1999" (Ottawa: Supreme Court of Canada, 2000), which indicates that in 1998, the Court granted leave in 70 of the 572 applications for leave submitted.

<sup>14</sup> *Ibid.* at 4 (indicating that in 1989 the Court granted leave in 83 of the 465 applications submitted).

<sup>15</sup> S.C. 1997, c.18, enacting a new section 691(2) of the *Criminal Code*, which now requires a dissent on a question of law in the Court of Appeal for an automatic right to appeal to the Supreme Court of Canada even where the Court of Appeal has reversed an acquittal at trial.

<sup>16</sup> In 1999, for example, there were just 15 notices of appeal as of right filed with the Court. From 1990-98 the average number of notices filed annually was approximately 47. See *Supreme Court Bulletin*, *supra* note 13 at 4.

serve an error-correction function effectively. For example, 75 years ago Lord Atkin expressed the view that providing additional levels of appeal was unlikely to increase the tendency of courts to ascertain the 'correct result' in particular cases:

I will end with a statement of the proportion between successful and unsuccessful appeals, which may be of some interest. This proportion seems to be remarkably stable at about 33 per cent. The number of successful appeals from the lower courts to the Court of Appeal is about 33 per cent of the whole number, and the number of successful appeals from the Court of Appeal to the House of Lords is about 33 per cent. There is no reason for believing that if there was a higher tribunal still the proportion of successful appeals to it would not reach at least that figure.<sup>17</sup>

If there is a 'natural' rate of successful appeals to the Supreme Court, it is clearly somewhat higher today than it was in the English House of Lords in the 1920's: appeals are successful in approximately 45 per cent of cases heard by the Supreme Court of Canada<sup>18</sup> (this success rate is likely attributable to the fact that, with control over its docket, the Supreme Court is able to select for hearing only those appeals with reasonable prospects of success<sup>19</sup>). Interestingly enough, the proportion of successful appeals in the Supreme Court of Canada is broadly similar to that in both the contemporary House of Lords as well as the Judicial Committee of the Privy Council.<sup>20</sup> Yet, as Lord Atkin suggests, this success rate for appeals does not necessarily indicate that justice as between individual litigants requires access to a country's highest judicial tribunal. In most cases, the task of achieving the 'correct' result as between individual litigants primarily involves issues of fact or of mixed fact and law, namely, the application of the law to the facts of the case. There is no reason to assume that multiplying the opportunities for appeal (in the form of second or even third-level appeals) will lead to greater precision or 'correctness' as between litigants, since such additional appellate tribunals are no better placed than is the initial trier of fact and the first level appeal court to apply the law to the facts of the case. Thus the Attorneys General of Canada and the provinces have in all likelihood been correct in resisting the call that has been issued from time to time to establish an additional or 'intermediate court of appeal' to hear

<sup>17</sup> A. Atkin, "Appeal in English Law" (1927) 3 *Camb. L. J.* 1.

<sup>18</sup> Of the 1294 appeals disposed of by the Supreme Court of Canada from 1989 to 1999, the appeal was allowed in 571 cases. See *supra* note 13 at 4.

<sup>19</sup> For example, over the past five years the Supreme Court has granted leave to appeal in about 25 per cent of the constitutional cases in which leave is sought, but only about 10 per cent of civil cases. See H.S. Brown, B.A. Crane and Chantal Leonard, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada 1998-99" (Gowling, Strathy & Henderson, 1999) at 16-17.

<sup>20</sup> Over the 1996-99 period, the rate of successful appeals to the House of Lords stands at 47 per cent, and to the Judicial Committee of the Privy Council at 40 per cent: see A. Le Sueur and R. Cornes, "What do the Top Courts Do?", 53 *Current Legal Problems* [forthcoming] Appendix, Table 1.

appeals from provincial courts of appeal before a matter could proceed to the Supreme Court of Canada.<sup>21</sup>

The Supreme Court hears and decides significantly fewer cases today than it did a generation ago. Whereas in the mid-1970's it was common for the Court to hand down 150 judgments in a year,<sup>22</sup> throughout the 1990's the court has disposed of an average of 115 appeals annually.<sup>23</sup> These numbers might suggest to the casual observer that there has somehow been a decline in the productivity or output of the Supreme Court over this time frame. But in my view such a conclusion would not merely be unwarranted, but wrong. The United States Supreme Court hears oral argument in between 90 to 95 cases per year,<sup>24</sup> while in the United Kingdom the twelve Lords of Appeal in Ordinary (who comprise the permanent membership of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council) hear approximately 110 cases annually.<sup>25</sup> These comparisons suggest that the Canadian Supreme Court may well be hearing *too many* cases rather than too few, given the importance of the legal issues raised and the need to ensure adequate time for careful deliberation and reflection by the members of the Court.

It might also be noted that in the past three calendar years there has been a slight decline in the number of cases disposed of by the Supreme Court.<sup>26</sup> It is not clear whether this most recent decline is attributable to a conscious decision on the part of the Court to reduce its volume of cases or whether other factors (such as the resignations of two members of the Court in 1999) were at play. Regardless, it is clear that observers of the Court must be careful not to

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<sup>21</sup> This is not to deny that if such an intermediate court of appeal were created, it would stimulate litigants with the necessary financial resources to take advantage of the additional appeal rights provided (this prediction is based on the theory that 'if you build it they will come'). Moreover, since there is always room for disagreement amongst jurists in difficult or marginal cases a certain 'natural' proportion of such further appeals would no doubt be successful. Yet for the reasons outlined above, there is no necessary reason to assume that the result generally will be greater fairness as between litigants in particular cases.

<sup>22</sup> The statistics for the 1970's and 1980's are set out in P. Monahan, *Politics and the Constitution: the Charter, Federalism, and the Supreme Court of Canada* (Toronto: Carswell, 1987) ch. 2. See also B. Laskin, "The Supreme Court of Canada: The First One Hundred Years A Capsule Institutional History" (1975) 53 *Can Bar Rev.* 459 at 466.

<sup>23</sup> Between 1990 and 1999 the Court disposed of 1146 cases. See Supreme Court Bulletin, *supra* note 13 at 4.

<sup>24</sup> See "Federal Judicial Caseload: A Five-Year Retrospective", Table A-1, available at <<http://www.uscourts.gov/publications>> (providing figures on the U.S. Supreme Court caseload for 1993-97). It should also be noted that the U.S. Supreme Court disposes of an additional 90 to 100 cases on the merits annually without oral argument.

<sup>25</sup> In 1998-99 the House of Lords heard 54 appeals, while the Judicial Committee heard 52. The House of Lords disposed of an additional 17 cases without issuing a judgment. It should also be noted that judges other than the permanent salaried Lords of Appeal in Ordinary participate in the judicial functions of both top courts. See Le Sueur & Cornes, *supra* note 20 at Appendix.

<sup>26</sup> In the 1998-2000 period the Court disposed of 285 cases, an average of 78 per year.

draw any necessary correlation between productivity and sheer numbers of cases decided, and that there is a real danger in the Court spreading its limited resources too thinly over a unduly large number of cases. In this sense, a target of 90 cases per year, which would be comparable to the number of cases argued before the United States Supreme Court annually, might well be an appropriate benchmark for our Court in the future.

It is clear that one of the significant challenges facing the Court is the need for vigilance and prudence in managing its docket. In that regard, one issue that merits consideration is whether the full court (as opposed to a panel of three judges only) should be involved in decisions on leave to appeal applications. The practice of having leave applications determined by panels of three judges seems a holdover from the period when there were oral hearings in such matters. With leave applications now determined on the basis of a written record, there would seem to be no reason not to move to the United States practice, where all nine judges participate in decisions to grant leave.<sup>27</sup>

As might be expected, the granting of greater control to the Court over its own docket has resulted in a significant shift in the nature of the cases it hears. Table 1 below sets out in summary form the evolution in the Court's caseload during three distinct periods in its history. During the first period, from the establishment of the Court in 1875 until the abolition of appeals to the Privy Council in 1949, private law matters dominated the court's docket: almost a third of the approximately 4000 cases decided during this era raised issues of tort, contract or real property. An additional 235 cases decided by the Court during this early period involved railways, an indication of the importance of this mode of transportation to the economic life of the country at the time. Issues of criminal law and constitutional law were near the bottom of the list in terms of the Court's caseload. Indeed, during the first 75 years of the Court's existence there were almost as many wills cases as there were constitutional cases to reach the Dominion's highest domestic judicial tribunal.<sup>28</sup> Overall, approximately two-thirds of the cases reaching the Court did so based on the automatic right of appeal in civil cases over a defined monetary limit.<sup>29</sup>

During the second period, following the abolition of appeals to the Privy Council but while there was still a right of appeal in certain civil cases, the Court's docket swung significantly in the direction of public law. The number of criminal and tax cases, which together had accounted for about 9 per cent of the Court's cases prior to 1950, increased dramatically and comprised about 27 per cent of the approximately 1500 decisions of the Court between 1950 and 1969. Still, private law matters continued to occupy a significant

<sup>27</sup> The concurrence of four of the nine members of the United States Supreme Court is required in order to grant *certiorari*.

<sup>28</sup> Also of interest is the fact that there were 75 cases involving controverted federal elections, an indication of the important role played by the Court in nurturing and reinforcing democratic political institutions during the early years of the country.

<sup>29</sup> See Russell, *supra* note 3 at 588.

**TABLE 1: CASELOAD OF THE SUPREME COURT OF CANADA 1875-1999**

<u>1875 - 1949</u>		<u>1950 - 1969</u>		<u>APPEALS HEARD 1999</u>	
	% of cases in which issue arose		% of cases in which issue arose		% of cases in which issue arose
Tort	12.0	Criminal	14.4	Criminal Law	43
Jurisdiction	11.4	Taxation	13.1	Charter (civil and criminal)	12
Contract	10.5	Tort	9.1	Commercial Law	9
Real Property	10.0	Contract	7.2	Family Law	5
Procedure (Public)	6.7	Procedure (Public)	6.9	Administrative Law	4
Railways	5.7	Real Property	6.8	Civil Rights	4
Insurance	5.2	Motor Vehicles	5.5	Constitutional Law	4
Municipalities	5.2	Jurisdiction	5.2	Labour Law	4
Taxation	4.9	Evidence	4.2	Property Law	4
Criminal	4.7	Constitutional	3.9	Taxation	4
Constitutional	4.3	Labour	3.9	Torts	3
Wills	3.8	Municipalities	3.7	Others	4

Source: The data for the first two periods is reproduced from Russell, *supra* note 3 at 582. The data for 1999 is found in the

portion of the Court's time, with tort, contract, and real property cases comprising about 23 per cent of the caseload. Railway litigation was replaced by motor vehicle cases, while a new area of law, labour law, emerged as a distinct and significant category.

The comparable figures for the 1999 calendar year indicate the fairly dramatic nature of the shifts that have occurred in the Court's docket over the past 25 years following the abolition of appeals as of right in civil cases. Although often depicted in media commentary as primarily a constitutional court, in reality non-constitutional criminal law matters now represent by far the largest single category of case reaching the Court. *Charter*, constitutional and civil rights issues form the second largest group of cases, comprising between 20 and 25 per cent of the Court's docket.<sup>30</sup> Tort and property law cases, which topped the caseload list prior to 1949, have now fallen to the bottom. The frequency of tax cases has declined significantly from the 1950-69 period, no doubt due to the establishment of a specialized tax court in 1970 devoted exclusively to dealing with tax matters, with appeals to the Federal Court of Appeal.

Another criticism that is sometimes made of the Court is that there are too many dissenting or concurring opinions, with the result that lower courts, lawyers and litigants are unable to determine the correct application of the law in future cases. As I will suggest later, it is sometimes desirable for the Court to deliberately leave difficult issues undecided or somewhat obscure, so as to provide scope for further debate and reflection on a matter prior to a final resolution. In any event, the claim that the justices of the Court are unduly divided or fractious is simply unsupported by the empirical evidence. Over the past ten years, the Court has been unanimous in just over 70 per cent of its judgments.<sup>31</sup> This is comparable to the rate of unanimity in the House of Lords<sup>32</sup> and is far higher than the rate of unanimity in the U.S. Supreme Court.<sup>33</sup>

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<sup>30</sup> Although *Charter* and other constitutional cases comprised less than 20 per cent of the Court's docket in 1999, over the past decade constitutional cases have represented between 20 and 25 per cent of the Court's caseload. For the relevant figures see: P. Monahan, "The Supreme Court of Canada in 1999: The Year in Review", *Canada Watch* 8:1 (October 2000) 3.

<sup>31</sup> See Supreme Court Bulletin, *supra* note 13 at 4.

<sup>32</sup> In 1998-99, the House of Lords was unanimous in 46 out of 63 decisions, a unanimity rate of 73 per cent. It should also be noted that the House of Lords sits in panels of five, as opposed to seven or nine; arguably it should be easier to attain unanimous agreement amongst a smaller number of justices.

<sup>33</sup> The U.S. Supreme Court is unanimous in approximately 40% of its decisions in cases argued on the merits. See H.J. Abraham, *The Judiciary: The Supreme Court in the Governmental Process*, 10th ed. (Dubuque, IA: Wn. C. Brown, 1996) at 37; S. Brenner & T.S. Arrington, "Unanimous Decision Making on the U.S. Supreme Court: Case Stimuli and Judicial Attitudes", in H.J. Spaeth & S. Brenner, eds., *Studies in U.S. Supreme Court Behaviour* (New York: Garland Publishing, 1990) at 207-20 and "The Supreme Court in the Nineties: A Statistical Retrospective", (2000) 114 *Harv. L.R.* 402 at 408

Intervenors have come to play an increasingly important role in Supreme Court of Canada litigation, particularly in constitutional cases: over one-half of the constitutional cases decided between 1996 and 1999 have featured intervenors.<sup>34</sup> This is in stark contrast to the situation as recently as the late 1980's, when the Supreme Court was criticized for being overly restrictive in granting third parties the right to make submissions. While Attorneys General remain the most frequent intervenors (which is unsurprising, given their automatic right to intervene in constitutional cases), non-profit organizations, including registered charities, law-related organizations, industry associations and other non-profits, have become frequent intervenors at the Supreme Court level.<sup>35</sup>

Before 1987 it was generally not possible to intervene in a criminal case, with the Supreme Court taking the position that criminal cases involve the state as the 'singular antagonist' of the individual accused.<sup>36</sup> In the 1990's, however, it became common to permit interventions in criminal cases. For example, there were intervenors in 28 of the criminal law constitutional cases decided between 1996 and 1999. Moreover, in such cases there were typically intervenors on both sides of the issue. For example, in the recent *Mills* case,<sup>37</sup> dealing with the right of an accused person to obtain psychiatric records of a complainant in a sexual assault case, there were a total of 18 intervenors, including 8 Attorneys General and 10 non-governmental bodies or persons. Although it is not clear from the Court's opinion precisely what position was taken by the various intervenors, most of them appear to have intervened in support of the constitutionality of the legislation and against the position taken by the accused, whose liberty was at stake in the proceeding.

It is not obvious why an individual accused in a criminal case should be required to confront not only the Crown but also an array of other groups and organizations. This is particularly so when these other organizations are typically far better funded than the individual accused and may in fact be receiving government funding in the form of grants, subsidies or tax credits.

In August of 1999 the Supreme Court announced that, in future, it would strictly enforce the 60-day time limit for the filing of interventions and stated that intervenors should not normally expect the right to make oral submissions

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<sup>34</sup> See Monahan, *supra* note 30 at 5.

<sup>35</sup> For example, in the 1996-99 period, there were a total of 127 intervention appearances by public interest organizations (including registered charities and other non-profits) as intervenors in Supreme Court cases. This compares with just 8 intervention appearances by corporations, 6 by trade unions and 17 by individuals during this time frame. See *ibid.* at 6.

<sup>36</sup> The use of the 'singular antagonist' terminology to describe criminal litigation has never been employed in the context of applications for intervenor status (since such decisions are never accompanied by reasons). However, the Supreme Court has utilized this terminology in applying the section 1 *Oakes* test in the context of criminal litigation. See, for example, *Irwin Toy v. Québec (Attorney General)*, [1989] 1 S.C.R. 927.

<sup>37</sup> *R. v. Mills*, [1999] 3 S.C.R. 668.

to the court.<sup>38</sup> This decision to more rigorously enforce the existing Supreme Court rules on interventions seems appropriate, particularly in criminal cases. Moreover, while the Court has a clear interest in obtaining all relevant information and viewpoints on important issues of public policy, there is no guarantee that the organizations who happen to seek intervention status in a particular case will provide either a balanced or comprehensive analysis of such information. Indeed, the Court may be led to believe that it has canvassed all relevant viewpoints by virtue of a liberal or flexible policy on interventions, when such is not the case. Restricting intervenors to written submissions seems to strike a more appropriate balance between the interest in obtaining relevant information, on the one hand, and the fact that the actual parties to the litigation, whose interests are directly at stake, should remain the primary focus of the proceeding, on the other.

In summary, it is clear that the Court has significantly redefined its role over the past 25 years, moving decisively in the direction suggested by Chief Justice Laskin in his remarks to the Court's centennial symposium in 1975. Having finally been granted control over virtually its entire docket, the Court is no longer merely concerned with correcting legal errors, but with the broader supervisory function of giving direction to lower courts and Canadians generally on the interpretation and development of the law.

The question that has been raised, of course, is whether the Court has moved too far in assuming such a supervisory role, particularly in its interpretation of the *Canadian Charter of Rights and Freedoms*. It is to this debate over the Court's *Charter* 'activism' that I now turn.

### III. *Courts and Legislatures*

While the *Charter* remains remarkably popular in all regions of the country, and while Canadians by a wide margin continue to support judicial nullification of statutes that violate the *Charter*,<sup>39</sup> the legitimacy of judicial review under the *Charter* has come under increasing scrutiny in the media and amongst some academics. The most articulate and developed criticism of the Court in this regard has come from Professors Morton and Knopff.<sup>40</sup> They argue that a long tradition of parliamentary supremacy has been replaced by a regime of "constitutional supremacy verging on judicial supremacy." They maintain that unelected judges interpreting the *Charter* have abandoned the canons of self-restraint that guided the judiciary in this country for over one hundred years, and are now inappropriately substituting their views of policy for that of the elected representatives of the people.

<sup>38</sup> See "Notice to the Profession, August 26, 1999", in Supreme Court of Canada, *Bulletin of Proceedings* (Ottawa: Supreme Court of Canada, 10 September 1999) at 1313.

<sup>39</sup> See Fletcher, *supra* note 9.

<sup>40</sup> *Supra* note 7.

It is important to place these claims of undue judicial activism in context. First, the majority of *Charter* litigation involves a challenge to executive or police action, as opposed to the validity of a statute.<sup>41</sup> If the courts rule that a search of a suspect's home was carried out improperly, or that an individual who was arrested was denied his or her right to counsel, there has been no threat to the proper functioning of our legislative institutions for the simple and obvious reason that the legislature did not authorize or carry out the particular activity that was the subject of constitutional challenge. Moreover, in cases where the courts find that government or police officials have engaged in activities that have violated an individual's rights, it is typically on the basis that the proper procedure was not followed. In such cases, it is usually a relatively straightforward matter for the legislature to cure the procedural defect through the enactment of remedial legislation. For example, in *R. v. Feeney*<sup>42</sup> the Court ruled that a search warrant was required before entering a private residence in order to make an arrest. There was at the time no *Criminal Code* procedure for obtaining such a warrant. Since police officers had entered Feeney's home without a warrant, the evidence they obtained was excluded and his conviction was overturned. However, within six months of the decision, Parliament amended the *Code* to establish a procedure for obtaining search warrants to enter private residences to make an arrest and, in certain exceptional cases, to undertake a warrantless search.<sup>43</sup>

It seems clear that *Feeney* cannot be characterized as a judicial usurpation of Parliamentary authority since, prior to the litigation, Parliament had not even turned its mind to the issue raised by the case. In fact, the effect of the Supreme Court's decision was to require Parliament (rather than the judiciary) to determine an appropriate set of rules to govern searches of private residences. Moreover, there is no evidence to suggest that the requirement to follow the new procedure mandated by Parliament has impaired the ability of police to apprehend and prosecute suspects who take refuge in private residences.<sup>44</sup> In the result, the public interest in effectively investigating and prosecuting crime has been shown to be entirely compatible with the need to respect individual rights protected by the *Charter*.

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<sup>41</sup> Approximately 55 per cent of Supreme Court of Canada *Charter* cases involve challenges to executive or police action as opposed to the validity of statutes or regulations. See P. Monahan, "The Supreme Court of Canada's 1998 Constitutional Cases: The debate over judicial activism heats up", *Canada Watch* 7:4-5 (October 1999); J.B. Kelly, "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1997) 37 *Osg. Hall L.J.* 625 at 654.

<sup>42</sup> [1997] 2 S.C.R. 13.

<sup>43</sup> S.C. 1997, c. 39, s. 2 (adding sections 529-529.5 to the *Criminal Code*).

<sup>44</sup> It should also be noted the Mr. Feeney himself was tried a second time following the Supreme Court decision overturning his first conviction. Even though the police were prevented from introducing the illegally obtained evidence, he was convicted at the second trial.

What of those cases in which the Supreme Court does rule statutory provisions or regulations invalid due to inconsistency with the *Charter* or with section 35 of the *Constitution Act, 1982*? As of December 31, 1999, there were 64 such instances, involving 34 federal and 30 provincial statutes.<sup>45</sup> One factor to keep in mind in assessing the impact of these statutory or regulatory nullifications is that 20 of the 34 federal provisions that were declared invalid involved procedural matters.<sup>46</sup> In such cases it is typically a relatively straightforward matter for Parliament to cure the defect by enacting a remedial statute with more appropriate procedural protections. For example, in *Hunter v. Southam*<sup>47</sup> the Supreme Court struck down the search and seizure provisions in the *Combines Investigation Act* on grounds that there was no provision for prior independent review by a judicial officer of the appropriateness of the search. Parliament subsequently amended the legislation to provide that searches could not be conducted without the prior issuance of a search warrant approved by a judge.<sup>48</sup> Another example is *R. v. Swain*,<sup>49</sup> in which the Supreme Court struck down provisions in the *Criminal Code* providing for automatic committal of persons acquitted for insanity. Soon after the decision, Parliament amended the *Code* to provide a procedure involving review boards and disposition hearings in such cases.<sup>50</sup> As Kent Roach suggests in his review of Parliament's response to the Court's decisions in this area:<sup>51</sup>

Instead of police officers exercising their own discretion to conduct warrantless searches, Parliament has explicitly authorized such searches in prescribed and limited contexts. This imposes legal limits and accountability on police powers and hopefully has promoted democratic debate that has made society more aware of police powers.

Overall, however, slightly more than half (38/64) of the statutory or regulatory provisions that have been declared invalid by the Supreme Court of Canada since 1984 have involved substantive rather than procedural provisions. It is this relatively limited but not insignificant group of cases that has given rise to the criticism that the Court has improperly assumed a legislature as opposed to judicial role in its constitutional decisions.

<sup>45</sup> The data for 1998 and 1999 is based on data compiled by the Centre for Public Law and Public Policy of Osgoode Hall Law School and reported in Monahan, *supra* note 30.

<sup>46</sup> While the majority of federal statutes declared invalid involved procedural issues, the overwhelming majority of provincial statutes found to be invalid (24 of 30) involved substantive rather than procedural provisions. As such, the commentary in this paragraph has less force in relation to provincial statutes.

<sup>47</sup> [1984] 2 S.C.R. 145.

<sup>48</sup> See the *Competition Act*, S.C. 1986, c. 26, s. 124.

<sup>49</sup> [1991] 1 S.C.R. 933.

<sup>50</sup> See S.C. 1991, c. 43, s. 672.12.

<sup>51</sup> K. Roach, "Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures" (September 2000) [unpublished, prepared for Supreme Court Symposium] at 59-60.

<sup>52</sup> P. Hogg & A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 *Osg. Hall L.J.* 75.

Dean Peter Hogg and Allison Bushell, in their important and widely-cited 1997 article,<sup>52</sup> argue that the potentially anti-majoritarian character of judicial review under the *Charter* is avoided by conceiving of judicial review as part of a “dialogue” between the courts and legislatures. Hogg and Bushell point out that those judicial decisions striking down a law on *Charter* grounds have nearly always left room for an alternative or substitute law to be re-enacted in a form that still accomplishes the objectives of the original invalid law.<sup>53</sup> After reviewing 65 different instances in which courts ruled legislation to be invalid due to conflict with the *Charter*, Hogg and Bushell find that subsequent legislative action of some kind occurred in 53 of the cases examined.

An indication of the influential nature of the Hogg-Bushell article is the fact that this ‘dialogue theory’ was almost immediately adopted by the Supreme Court of Canada. In *Vriend*, Justice Iacobucci, writing on behalf of 8 of the 9 members of the Court, referred with approval to the Hogg-Bushell article, stating that the “dynamic interaction among the branches of governance...has been aptly described as a ‘dialogue’...”<sup>54</sup> Iacobucci J. pointed out that the *Charter* dialogue between courts and legislatures promotes accountability and enhances democratic values, since “[t]he work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*)”.<sup>55</sup>

The influential character of the Hogg/Bushell thesis reflects its empirical accuracy: a review of the evidence they have marshalled clearly demonstrates that a court decision on a constitutional issue is rarely the final word on the matter.<sup>56</sup> Nor should this conclusion come as a surprise, since it is entirely consistent with findings that have become widely accepted amongst scholars

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<sup>53</sup> The authors point to four features of judicial review under the *Charter* which in their view facilitate such a dialogue: (i) section 33 of the *Charter*, which permits legislative bodies to override the effect of a court decision in certain cases by inserting a ‘notwithstanding’ clause in the impugned legislation; (ii) the *Oakes* test under section 1 of the *Charter*, which requires the Court to evaluate possible alternatives to the impugned legislation (and which usually results in the Court suggesting a less restrictive measure which would satisfy the *Charter* concerns); (iii) certain *Charter* rights, such as the guarantee against unreasonable search and seizure in section 8, which are framed in qualified terms and which therefore usually admit of a corrective legislative response; and (iv) equality rights claims which, while requiring the legislature to accommodate an excluded individual or group, usually do not prevent the legislature from achieving its original goal provided it is prepared to extend the benefits of the law to the previously excluded class. See generally *ibid.* at 82-91.

<sup>54</sup> *Vriend v. Alberta (Attorney General)*, [1998] 1 S.C.R. 493 at para. 138.

<sup>55</sup> *Ibid.* at para. 139. Hogg and Bushell were also cited by the Supreme Court in *Mills*, *supra* note 37, at para. 57 (per McLachlin and Iacobucci JJ., writing on behalf of 7 members of the Court).

<sup>56</sup> A critique of the Hogg/Bushell analysis is set out in C. Manfredi & J. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37 *Osg. Hall L.J.* 513. However, these criticisms are largely answered in P. Hogg & A. Thornton, “Reply to ‘Six Degrees of Dialogue’” (1999) 37 *Osg. Hall L.J.* 529.

studying in other fields of law. Indeed, the proposition that judicial decisions rarely determine the distribution of social, political and economic entitlements in society was the key insight of Ronald Coase in his classic 1961 article "The Problem of Social Cost",<sup>57</sup> in which he demonstrated that individuals will seek to bargain around legal rules in order to achieve more efficient results. Coase argued that, in the absence of transactions costs, parties will bargain to the efficient result regardless of the liability rule announced by the court.<sup>58</sup> What was radical about this thesis was the idea that a judicial determination of liability might not conclusively dictate the allocation of resources between parties.

The concept of governments (as opposed to private parties) bargaining around adverse court decisions may seem somewhat more applicable in the federalism context (where a judicial finding of invalidity merely involves a determination that the 'wrong' level of government has enacted a law, leaving the field open for a substitute law enacted by another government)<sup>59</sup>, than in the context of *Charter* litigation (where a finding of invalidity precludes the enactment of a particular law by either level of government). What is common in both the federalism and *Charter* contexts, however, is the phenomenon of substitution of alternative legislative and regulatory instruments for those ruled invalid by the courts. This substitution process occurs because governments, through control of the legislature, can cause the enactment of a law that pursues the same objective but in a slightly different fashion.<sup>60</sup>

How is such substitution legally feasible in the face of a court ruling that a legislative measure offends the *Charter* and cannot be justified under section 1? In addition to the factors identified by Hogg and Bushell, of central importance is the fact that common law decision-making, including constitutional decision-making, is generally particularistic rather than universal. Common law courts will generally only adjudicate in relation to a specific factual dispute, as opposed to offering generalized advice as to the scope of governmental regulatory authority.<sup>61</sup> What is legally binding on future courts and legislatures is the court-announced rule that was necessary in order to resolve the concrete factual

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<sup>57</sup> Coase, "The Problem of Social Cost" (1961) 3 *J. of Law and Econ.* 1.

<sup>58</sup> Of course, Coase also recognized that in the real world transactions costs are always greater than zero, which means that parties will often fail to bargain to the efficient result.

<sup>59</sup> Elsewhere I have explored these questions in the context of federalism litigation: see Monahan, *Politics and the Constitution*, *supra* note 22 at c. 10.

<sup>60</sup> In this sense governments are in a better position than private parties who generally cannot cause the enactment of remedial legislation. Thus private parties are generally forced to accept the law as declared by the courts. It is for this reason that they must resort to bargaining in order to achieve an efficient result, notwithstanding the liability rule announced by the court.

<sup>61</sup> The exception, of course, the Court's advisory function on a reference. However, only the Governor in Council has jurisdiction to order a Reference and the Court retains the discretion to refuse to answer a question with an insufficient factual record or foundation. See *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 at paras. 25-26 & 105; *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at 545.

dispute before the court.<sup>62</sup> In a constitutional case, the decision focuses on the validity and application of a particular statutory provision to a specific set of facts and parties. As such, the validity of alternative legislative mechanisms not before the court is generally not authoritatively determined by a court decision on the validity and application of a particular statutory provision.<sup>63</sup>

The concrete, fact-specific nature of the common law decision-making process is illustrated and emphasized by the recent Supreme Court decisions in *Marshall*.<sup>64</sup> In *Marshall No.1*, the Supreme Court acquitted Donald Marshall Jr. of charges laid for alleged violation of federal fisheries regulations. The majority reasons of the Court, written by Binnie J.<sup>65</sup>, found that Mr. Marshall had a treaty right to fish and trade for sustenance, that the fisheries regulations failed to respect that right, and that Mr. Marshall had been acting within the scope of his treaty right when engaged in the activity that gave rise to the charges. Thus enforcement of the fisheries regulations in the circumstances of the case would have been inconsistent with the constitutional recognition and affirmation of treaty rights in section 35 of the *Constitution Act, 1982*.

The Court's decision in *Marshall No. 1*, issued on September 17, 1999, provoked widespread confusion and even incidents of violence involving aboriginal and non-aboriginal fishers and officials of the Department of Fisheries and Oceans. It also led to claims that the treaty right to fish for "necessaries" recognized in *Marshall No.1* extended to a broad range of other natural resources, including trade in logging or minerals or the exploitation of off-shore natural gas deposits.<sup>66</sup> As a result, one of the intervenors in the case sought a rehearing before the Supreme Court, asking the Court to issue a stay of the original decision acquitting Mr. Marshall and to "address the regulatory authority of the Government of Canada over the east coast fisheries".<sup>67</sup>

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<sup>62</sup> This is what is known as the 'ratio decidendi' of the case: see "Judicial Decisions as Authorities", *Halsbury's Laws of England*, vol. 26, 4th ed. (London: Butterworths, 1979) at para. 573.

<sup>63</sup> Of course, while a decision on the validity of a particular set of statutory provisions does not determine the validity of alternative provisions not before the court, such a decision may be relevant to the validity of alternative provisions. However, this will depend on a process of reasoning by analogy and on whether there are relevant similarities between the statutory provisions in question. In this context, 'relevance' will depend on the nature and scope of the rule announced by the court in reaching its initial decision. As I discuss below, to the extent that a court frames its decision rule in narrow or specific terms, tied closely to the facts before it, there will be a wider opportunity for legislatures and future courts to continue a genuine dialogue on the issue.

<sup>64</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456 ("Marshall No.1") and *R. v. Marshall*, [1999] 3 S.C.R. 533 ("Marshall No.2").

<sup>65</sup> Binnie J. wrote reasons concurred in by Lamer C.J., L'Heureux-Dubé, Cory and Iacobucci J.J.; McLachlin J. (as she then was) wrote dissenting reasons concurred in by Gonthier J.

<sup>66</sup> See the discussion of these various extrapolations based on the result in *Marshall No.1*, as described in *Marshall No.2* at paras. 19-20.

<sup>67</sup> See *Marshall No. 2*, *supra* note 64 at para. 1.

On November 17, 1999, a unanimous ruling issued in the name of “The Court” dismissed the application for a rehearing, stating that the application was founded upon a basic misunderstanding of the scope of the Court’s original decision.<sup>68</sup> The Court pointed out that the litigation had involved a prosecution of a private citizen and had required the Court to determine “whether precise charges relating to the appellant’s participation in the eel fishery could be sustained.” However, the legal effect of the decision to acquit Mr. Marshall “was limited to the issues necessary to dispose of the appellant’s guilt or innocence” and did not address other issues not specifically before the Court on the appeal.<sup>69</sup> The Court went on to emphasize that its role is to resolve particular disputes that arise between parties to litigation, and that a court decision “is authority only for the matters adjudicated upon.” In asking the Court to provide general advice as to the scope of government’s regulatory authority over the east coast fishery, the application for a rehearing “seeks to transform a prosecution on specific facts into a general reference seeking an advisory opinion of the Court on a broad range of regulatory issues relating to the east coast fisheries.”<sup>70</sup> The Court went on to clarify what the decision in *Marshall No.1* actually decided and what it did not decide.<sup>71</sup> Thus, for example, whether the same fisheries regulations could validly be applied to a different set of facts, or whether the treaty right recognized by the Court extended to other natural resources, had not been determined. Moreover, the Court made it clear that it would only address these other matters in the future to the extent that they were raised in the context of concrete factual disputes.

The particularistic nature of common law adjudication is a key element in promoting the possibility of a dialogue between courts and legislatures, in the constitutional as well as non-constitutional context.<sup>72</sup> Because court decisions are fact-specific and address the validity of a particular set of statutory provisions, they leave open the possibility that a different result would follow if a different set of statutory provisions were being applied in a different factual context. As such, particularistic court decisions that are fact-sensitive and context-specific will leave more room for dialogue with the legislature than would a court decision announcing a broad or sweeping new rule of law that went far beyond the facts of the case.

Of course, it would be a mistake to overemphasize the particularistic character of constitutional decisions of the Supreme Court of Canada. Courts resolve disputes in accordance with a rule or reason. Moreover, as discussed in

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<sup>68</sup> *Ibid.* at para. 11.

<sup>69</sup> *Ibid.* at para. 11.

<sup>70</sup> *Ibid.* at paras. 23 and 31.

<sup>71</sup> The Court emphasized that most of the matters raised on the motion for a rehearing had not been before the Court in *Marshall No.1* and thus had not been dealt with in the case.

<sup>72</sup> As K. Roach, *supra* note 51, cogently points out, the concept of a ‘dialogue’ between courts and legislatures is applicable to the non-constitutional as well as the constitutional context.

the previous section of this paper, the role of the Supreme Court of Canada is not limited to the resolution of particular factual disputes. The Court has, in addition, an important supervisory function under which it must frame its resolution of the dispute in accordance with rules that contribute to the development of Canadian law. Thus, as Cass Sunstein has pointed out in his recent important book *One Case at a Time*,<sup>73</sup> courts generally have considerable discretion in deciding how broadly or narrowly they wish to frame the rule which will serve as the basis for deciding a case.

Consider the *Marshall* case as an illustration. *Marshall* is what Sunstein would describe as a ‘minimalist’ ruling<sup>74</sup>: the Court decided no more than was strictly necessary to resolve the case before it, namely, that Mr. Marshall could not be convicted for the particular activity that gave rise to the prosecution in his case. The Court expressly refrained from a broader finding that the fisheries regulations themselves were invalid, since the Attorney General had not tendered any evidence or argument indicating whether the regulations could be justified on the basis of the so-called ‘*Sparrow* test’.<sup>75</sup> Of course, it would certainly have been open to the Court to have achieved the same result — an acquittal for Mr. Marshall — on the basis of a much broader rule, such as that the fisheries regulations under consideration were necessarily inconsistent with the treaty right to fish and were therefore invalid. But the Court preferred a narrower rule, one that spoke only to the facts of the particular case, leaving other issues not strictly necessary to the resolution of the case at hand to be decided on another day.

Minimalist rulings are attractive in that they decide only a limited range of issues, thereby leaving the greatest scope possible for potential responses by the legislative and executive branches. As Sunstein argues, not only do such decisions reduce the likelihood of large or permanent errors arising from judicial rulings, they are also democracy-enhancing since they “increase the space for further reflection and debate at the local, state and national levels, simply because they do not foreclose subsequent decisions.”<sup>76</sup> This does not mean that judges should always or necessarily seek to frame their decisions in the narrowest possible terms, since there will undoubtedly be cases where there

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<sup>73</sup> Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Boston: Harvard U. Press, 1999).

<sup>74</sup> According to Sunstein, ‘minimalist’ judges are ones who “seek to avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to resolve particular disputes... They pay close attention to the particulars of individual cases. They also tend to think analogically and by close reference to actual and hypothetical problems.” Sunstein, *ibid.* at 9.

<sup>75</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, sets out the test that must be satisfied in cases where laws or regulations infringe protected aboriginal or treaty rights. It would appear that the government chose not to tender evidence on the *Sparrow* test since it was of the view that there was no treaty right relevant to the activities giving rise to the charge against Mr. Marshall.

<sup>76</sup> Sunstein, *supra* note 73 at 4.

is a need for the courts to announce a broad rule that will categorically resolve in advance a wide range of potential litigation. But Sunstein argues, convincingly in my view, that judges ought to “indulge a presumption in favour of minimalism”.<sup>77</sup> This is in keeping with Alexander Bickel’s counsel that the presence of the ‘least dangerous branch’, while important, ought not to overwhelm the role of the other branches of government in national political life.<sup>78</sup>

There are a variety of constitutional doctrines or presumptions which have been developed by the courts over the years which reflect or favour a minimalist philosophy, in that they require the court to focus its analysis on concrete factual disputes arising in a litigation context. One such doctrine is the principle emphasized by the Court in *Marshall No.2* to the effect that a court decision is authority only for the matters actually adjudicated upon. But other important principles reinforcing this same minimalist philosophy, particularly in the constitutional context, include the “general rule in constitutional cases not to engage issues which do not squarely arise for decision”<sup>79</sup>; the doctrine that, where a constitutional issue does arise for decision, courts “should not, as a rule, go any farther than is necessary to determine the main issue before them”<sup>80</sup>; the rule that courts will not deal with a constitutional issue in the absence of a proper factual basis and context<sup>81</sup>; the rule that courts will not decide a constitutional issue where the dispute giving rise to the litigation has become moot<sup>82</sup>; and the rule that one person cannot base a *Charter* challenge on the basis of violation of another person’s rights.<sup>83</sup>

It is important to recognize that the courts have by no means been entirely consistent in applying these counsels of restraint in their constitutional decisions. As early as 1902, Lord Macnaghten described Sir Montague Smith’s advice in

<sup>77</sup> *Ibid.* at 6.

<sup>78</sup> See A. Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1962), in which Bickel develops the idea of the ‘passive virtues’, according to which the judiciary’s willingness to decline jurisdiction is sometimes the wisest and best course of action.

<sup>79</sup> *The Queen in right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303 at 320 (per Laskin, C.J.C.). This doctrine has its origins in the Sir Montague Smith’s well-known statement in *Citizens Insurance Co. v. Parsons* (1881), 7 A.C. 96 at 109, to the effect that “it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute [the *British North America Act*] than is necessary for the decision of the particular case in hand.”

<sup>80</sup> *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 419 (per Laskin C.J.C.).

<sup>81</sup> *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 at 139-40 (per Dickson J. (as he then was)).

<sup>82</sup> *Borowski v. Attorney General for Canada*, [1989] 1 S.C.R. 342 at 358-63.

<sup>83</sup> *Irwin Toy*, *supra* note 36. Note, however, the exception in cases where a person is charged with an offence under a law that is alleged to be unconstitutional due to breach of a *Charter* provision. In such instances, a person may raise the *Charter* issue as a defence to the criminal charge on the basis that no-one can be convicted under an invalid law: see *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

the *Parsons* case to the effect that courts should go no further than was necessary to decide the particular question at hand as “often quoted but not perhaps always followed.”<sup>84</sup> Thus advisory opinions have always been permissible under Canadian law.<sup>85</sup> More recently, despite the general rule against deciding moot cases, the Supreme Court has often exercised its discretion and proceeded to decide cases that were moot by the time they reached the Supreme Court level.<sup>86</sup> The Court has also significantly liberalized the law of standing, establishing what Dean Hogg describes as a “very liberal rule for public interest standing”.<sup>87</sup> Nor, indeed, is it wise or appropriate for the Court to always attempt to frame its decisions in the narrowest terms possible, since there are often powerful countervailing considerations which argue in favour of a broader ruling.<sup>88</sup>

Nevertheless, the empirical evidence gathered by Hogg and Bushell indicates that the Court has generally been mindful of the need to frame its *Charter* analysis in such a way as to leave appropriate scope for a subsequent legislative response. Consider the manner in which the Court has approached the analysis under the two-part section 1 *Oakes* test, in which the courts consider whether a law that limits a *Charter*-protected right can be demonstrably justified in a free and democratic society. The first part of the *Oakes* test asks whether the purpose underlying the law is sufficiently important to justify limiting a *Charter* right, while the second part of the test asks whether the limit is proportionate to the objective pursued. It is evident that a ruling striking down a law on the basis that it fails the first stage of the test is far broader (and therefore more constraining on future legislative action) than a ruling based on the second stage of the test. This is because a ruling based on a finding that the law does not pursue a “pressing and substantial purpose” prevents the re-enactment of any subsequent law based on the same purpose. In contrast, where the ruling is based on a lack of proportionality (the second stage of *Oakes*) the focus is on the fit between the purpose of the law and the means chosen to give effect to that purpose. As such, the ruling does not preclude an alternative law which pursues the identical purpose, as long as there is a better or closer ‘fit’ between the purpose and the

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<sup>84</sup> *A.G. Manitoba v. Manitoba License Holders Assoc.*, [1902] A.C. 73 at 77.

<sup>85</sup> *A.G. Ont. v. A.G. Can. (Reference Appeal)*, [1912] A.C. 571.

<sup>86</sup> The cases are referred to and discussed by P.W. Hogg in *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1992) at s. 56.3(c).

<sup>87</sup> *Ibid.* at s. 56.2(d).

<sup>88</sup> See the helpful discussion in Sunstein, *supra* note 73 at 262-63, where he points out that “the case for minimalism is strongest when courts lack information that would justify confidence in a comprehensive ruling; when the need for planning is not especially insistent; when the decision costs, for later courts, of a minimalist approach do not seem high; and when minimalist judgments do not create a serious risk of unequal treatment.”

means. Thus a Court committed to promoting the greatest scope for democratic dialogue would prefer that any determinations of invalidity be founded on the second part of the test rather than the first.

This is precisely the manner in which the Court has applied the *Oakes* test. The Court has rarely rejected the legislature's judgment that the objective of a law is sufficiently important to justify limiting a *Charter* right.<sup>89</sup> In the vast majority of cases where the Court has ruled a law to be unconstitutional, it has been on the basis that there were less restrictive alternatives that could have been employed to achieve the same legislative objective. Although the Court has not expressly attributed this focus on this aspect of the *Oakes* test as proceeding on the basis of a concern for promoting democratic dialogue, the result is entirely consistent with such a concern.

There are certainly counter-examples where it might be asked whether the Court has been sufficiently mindful of the need to frame its rulings in a manner that is tied to the facts of the case before it. Consider the important aboriginal rights decision in *Delgamuukw*.<sup>90</sup> The Supreme Court was unanimously of the view that a new trial had to be ordered in that the trial judge had applied an incorrect test in assessing evidence of oral history. However there were two separate judgments setting out somewhat different approaches to the issues raised. The reasons of La Forest J., concurred in by L'Heureux-Dubé and McLachlin JJ., were framed narrowly. La Forest J. emphasized that the definition of aboriginal title and occupancy of land must be context-specific and must fit within the framework established by the Court in its earlier decision in *Van der Peet*.<sup>91</sup> In contrast, Chief Justice Lamer's reasons, concurred in by Cory, Major and McLachlin JJ., go somewhat further, attempting to set out a general, theoretical framework for the analysis of aboriginal title. A general definition of the content of aboriginal title is provided,<sup>92</sup> and it is also posited that there is an "inherent limit" on the manner in which lands held pursuant to aboriginal title can be used.<sup>93</sup>

The Court's willingness to provide this kind of generalized guidance on the scope of constitutional language is entirely natural and understandable. The Court had devoted two days of argument to the appeal, had heard from counsel for ten parties and/or intervenors, and pored through a mountain of written material. Moreover, having ordered

<sup>89</sup> See Hogg, *supra* note 86 at s. 35.9.

<sup>90</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

<sup>91</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, which required that tests of precision, specificity, continuity and centrality must be met before an activity could said to be a protected aboriginal right under section 35 of the *Constitution Act, 1982*.

<sup>92</sup> See *Delgamuukw*, *supra* note 90 at 1083.

<sup>93</sup> *Ibid.* at 1088.

a new trial, it may have seemed incumbent on the Supreme Court to provide guidance to the trial judge as to the nature of the legal principles to be applied. At the same time, the abstract and generalized nature of the advice that was offered takes the Court into dangerous waters. Certainly the principles announced by Chief Justice Lamer went significantly beyond what was necessary to dispose of the appeal. Moreover, given their highly abstract nature, it is difficult to predict whether these principles will provide clear benchmarks for litigants or judges in future aboriginal rights litigation. At the same time, by announcing these principles in advance of a specific factual dispute which would make such principles necessary to the decision, the Court runs the risk of later having to revise or reformulate the principles.

A second situation in which it might be asked whether the Court is going beyond what is strictly necessary to decide the particular case before it is the practice of “reading in” words to a statute in order to remedy a constitutional defect.<sup>94</sup> Faced with a declaration of invalidity, there may be a variety of ways in which a legislature may wish to amend its law in order to conform with the court’s ruling. If the court ‘reads in’ specific words to a statute in order to remedy the defect it has found, it effectively selects the appropriate legislative remedy rather than leaving that task to the elected legislatures. While the Court has stated that the practice of ‘reading in’ is to be employed only in “exceptional circumstances”, and while the practice of ‘reading in’ can be justified on the basis that in some cases it may well be less intrusive than a declaration of invalidity, the difficult question is whether it involves the Court in an essentially legislative as opposed to a judicial task.

Yet these counterexamples are in my view exceptions to the Court’s overall approach in constitutional cases, which has generally been a cautious and measured one, sensitive to the need to avoid sweeping or large statements that will bind future courts and legislatures alike. Indeed, this assessment is confirmed by the widespread phenomenon of legislatures enacting substitute legislation that achieves similar objectives to that of legislation previously ruled invalid, as documented by Hogg and Bushell.

If the Court wishes to enhance the possibility of a *Charter* dialogue with the other branches of government in the years ahead, it must frame its opinions in a manner designed to create the space needed to permit such dialogue to occur. This means paying particular attention to the various counsels of restraint described above<sup>95</sup> and ensuring that, where the Court chooses to disregard them and decide a case in accordance with a broader rule than is necessary on the facts of a case,

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<sup>94</sup> See, for example, *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Vriend*, *supra* note 54.

<sup>95</sup> See authorities cited *supra* notes 79-83.

it proceeds with a full awareness of the broader implications of this approach for its relationship with the other branches of government.

A clear example of the kind of careful analysis that is appropriate and necessary is the judgment of Sopinka J. in *Borowski*,<sup>96</sup> where Justice Sopinka sets out a series of factors that must be taken into account in assessing whether to decide a case where the factual dispute which generated the litigation has become moot. As Justice Sopinka points out, the Court in such cases “must be sensitive to its role as the adjudicative branch in our political framework.” Where the Court pronounces judgment in the absence of a dispute affecting the rights of the parties, this may be viewed as “intruding into the role of the legislative branch.” This does not mean, according to Sopinka J., that the Court should never decide moot cases, but merely that “it must be sensitive to the extent that it may be departing from its traditional role.”<sup>97</sup>

It is this kind of context-specific analysis, in which the Court carefully considers its own institutional role in relation to the other branches of government, that is called for in future cases. As Sunstein has emphasized, whether to frame the decision in a particular case as narrowly as possible cannot be decided in the abstract. While in my view there should certainly be a presumption that narrowness is to be preferred over width, the law in a particular area may have developed sufficiently, or the costs of leaving issues undecided may be unduly high, such that a more comprehensive ruling is needed. The overall result of such a context-specific approach will be to ensure that an appropriate balance between the role of courts and legislatures is maintained.

#### IV. Conclusion

The past twenty-five years has been a period of unprecedented challenge for the Supreme Court of Canada. Not only has the Court been granted control over virtually its entire docket, it has also been assigned the weighty responsibility of measuring legislative and executive action against the broadly-worded guarantees of individual and collective rights set out in the *Charter*.

In my view, the Court has responded remarkably well to these challenges. It has assumed its new *Charter* mandate in a serious but measured manner, attempting to balance the need to protect rights vigorously with a recognition

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<sup>96</sup> *Supra* note 82, above. In this case, Joseph Borowski was challenging provisions in the *Criminal Code* which permitted abortions in certain circumstances on the basis that these provisions violated the right to life of the foetus. However, prior to the case reaching the Supreme Court, the *Code* provisions had been ruled unconstitutional on the basis that they violated women’s right to security of the person. The issue raised by Mr. Borowski had therefore become moot.

<sup>97</sup> *Ibid.* at 362-63.

that legislative bodies must continue to govern in the public interest. The continuing broad public support for the Court and the *Charter* amongst Canadians is an indication that the balance achieved by Court has been very close to the mark.

The Supreme Court of Canada has emerged as one of our most important national public institutions. It also has a strong and growing international reputation, with its opinions being cited and followed by other national courts around the world. The challenge in the years ahead is clearly to build incrementally on these achievements, ensuring that the traditions and practices that have worked in the past are modernized to fit changing conditions, such that the Court's important role in national governance continues to be exercised in a meaningful yet balanced manner.