STRATEGIC ISSUES SERIES

rp02-7e

ENRICHING CONSTITUTIONAL DIALOGUE: Viewing Parliament's Role as Both Proactive and Reactive

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2000

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Biography

Janet Hiebert is an Associate Professor in the Department of Political Studies at Queen's University. She is author of *Limiting Rights: The Dilemma of Judicial Review* (1996: McGill Queen's University Press), co-editor of *Canada: The State of the Federation* (1994), editor of *Political Ethics* (1991), and author of numerous papers and chapters on the politics of rights. She has a research interest in the role of the Charter of Rights and Freedoms on governing in Canada.

1.0 The Dialogue Model

One explanation of the Charter's influence – that it facilitates parliamentary/judicial dialogue - has gained rapid acceptance by legal commentators and Supreme Court judges. This explanation was first put forth by Peter Hogg and Allison Bushell in the 1997 article "The Charter Dialogue Between Courts and Legislatures: (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)." [1]

> *…(J)udicial concerns tend to focus on the reasonableness of the legislative means used to pursue legislative objectives. Further, the structure of the Charter … (and) judicial review provide parliament the opportunity to revise legislation to respond to judicial concerns.*

According to this dialogue model, the Charter need not frustrate legislative agendas. This is because the Supreme Court rarely rules that a legislative objective itself is inconsistent with the Charter. Instead, judicial concerns tend to focus on the reasonableness of the legislative means used to pursue legislative objectives. Further, the structure of the Charter is said to be conducive to dialogue; in particular ss. 1 and 33 and clause-based references to reasonableness. Together, the structure and method of judicial review provide parliament the opportunity to revise legislation to respond to judicial concerns. Thus, parliament is not impeded from pursuing its legislative initiatives; it simply has to give more sensitivity and thought to how it proposes to accomplish them. This view, then, suggests that the Charter will facilitate healthy constitutional dialogue between parliament and courts.

> *The discussion paper will argue that the concept of inter-institutional dialogue is potentially far richer than is portrayed by Hogg/Bushell. Their characterization of parliament's role understates the contribution that parliament does, and can, make to dialogue.*

The notion of constitutional dialogue represents an attractive ideal for viewing the parliamentary/judicial relationship. A principal virtue is that it avoids institutional stalemates and reconciles tensions between judicial review and democratic principles.

[1] Peter W. Hogg & Allison A. Bushell, The Charter dialogue between courts and legislatures (or Perhaps the Charter of Rights isn't such a bad thing after all), (1997, Spring), 35(1), *Osgoode Hall Law Journal*, 75-124.

The discussion paper will argue that the concept of inter-institutional dialogue is potentially far richer than is portrayed by Hogg/Bushell. Their characterization of parliament's role understates the contribution that parliament does, and can, make to dialogue. The paper will also argue that meaningful dialogue does not preclude parliament from disagreeing with judicial interpretations of the Charter.

1.1 Who initiates dialogue?

A core claim in the Hogg/Bushell dialogue explanation is that judicial review is not a veto over the politics of the nation, but "...the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole."[2]

Clearly, the judiciary plays an essential role in any dialogue. By defining the scope of rights, courts help to establish their parameters as well as the constitutional limits of state powers. However, an important assumption in this explanation, that dialogue begins with judicial review, needs to be re-examined.

The point of focussing on this claim is to ask two questions: Is the judiciary the only institution that can legitimately initiate dialogue? And, what role does and should parliament play in generating constitutional dialogue around the meaning, or reconciliation, of rights?

Although Hogg and Bushell do not develop in depth their argument about what constitutes dialogue, in essence they interpret parliament's contribution to dialogue as primarily reactive: parliament either addresses judicial concerns or deliberately overrides them. Parliament has, according to their model, the following methods of engaging in dialogue:

1) Parliament can revise legislation to satisfy section 1 concerns (unless the Court, in a rare move, actually rules that the legislative objective is not pressing and substantial and therefore is not worthy of being saved);
2) Parliament can respond through inaction, by pursuing no legislative response if the Court nullifies legislation;
3) Parliament can specifically disagree with the Court by enacting the controversial override clause (where it applies).

But in the first two of these responses, parliament is not a significant partner in dialogue. Granted, the government in Charter litigation may try to influence the Court in its arguments about why parliament's legislation is justified. But parliament is not seen as anything more than a junior partner in constitutional dialogue. Its role is largely to react to judicial decisions. Thus, in light of how parliament's role is

[2] Ibid. at p. 105.

conceived, it is not surprising that critics of the Hogg/Bushell portrayal of dialogue argue that what is being advocated is not dialogue but monologue (judicial rather parliamentary). As Ted Morton argues, "[o]beying [judicial] orders is not exactly what most of us consider a dialogue."[3]

Moreover, if parliament were to play a more active role, by enacting the override and thereby insisting on the primacy of its legislation, this would represent a contribution to dialogue that many consider undesirable or unlikely. This raises a central criticism that some have of the dialogue model. Charter skeptics argue that proponents of dialogue have a self-serving view of dialogue. On the one hand they portray the legislative override as an essential element of this dialogue model. Yet, on the other hand, they treat the override as a form of dialogue that will be generally dormant. This leads Charter skeptics to question whether those who champion this explanation of how the Charter works would still be as enthusiastic if the override were used more often. It seems unlikely that many dialogue proponents would embrace Morton's view of what constitutes full and robust dialogue. From his perspective, parliament should actively use the override, as its contribution to dialogue, whenever it disagrees with judicial rulings.[4]

While parliament may be required to react to judicial decisions, its contribution to Charter dialogue should also reflect its obligation to ensure that legislation, when first enacted and before being subject to judicial review, is considered by parliament to be consistent with and justified under the Charter.

2.0 The Argument

This paper is arguing that to conceive of parliament's role in dialogue, almost exclusively in reactive terms, represents an under-nourished view of dialogue.

While parliament may be required to react to judicial decisions, its contribution to Charter dialogue should also reflect its obligation to ensure that legislation, when first enacted and before being subject to judicial review, is considered by parliament to be consistent with and justified under the Charter. The emphasis is on proactive rather than reactive responses to the Charter. In this sense, parliament's role will be to initiate dialogue and/or seek to influence existing dialogue when it believes that an alternative interpretation of the Charter is appropriate.

[3] F.L. Morton, "Dialogue or monologue?", (1999, April). *Policy Options*, p. 23.
[4] Interpretation of Ted Morton's discussion at IRPP round table, at "Guiding the Rule of Law into the 21st Century", University of Ottawa, April 15-17 1999.

Rather than assume that courts speak and parliament reacts, it would be more appropriate to conceive of dialogue in terms of parliament and courts sharing responsibility for interpreting the Charter. Too often political and academic commentators assume that the Charter's guidance for policy conflicts is a matter for judges alone to determine.

In light of the subjective and philosophical nature of the task of interpreting how these normative values of the Charter should constrain or influence state actions, this should not be construed exclusively as a legal exercise. There is little reason to presume that judges are the only institutional actors whose opinions are legitimate or whose voices are authoritative when interpreting and resolving conflicts around rights.

Thus, the Charter can be envisaged as facilitating an ongoing and multi-layered constitutional dialogue. A dialogue-inspired view of the Charter need not accept the view that a single or correct answer always exists for a principled resolution of rights conflicts or that this answer need be derived exclusively from courts. Rather, it should accept the proposition that a range of acceptable answers for rights conflicts may exist and view their resolution as a joint responsibility of parliament and courts. While differences of opinion may exist, the parties should engage in dialogue to explain their assumptions and concerns, to try to convince the other party of the justification for their views, and to reflect upon the others' reasoned judgement. Dialogue should not be viewed as static but as dynamic. Both judicial and parliamentary views may change, in reflection of the concerns and assumptions of the other. After all, dialogue presumes listening to the other parties' concerns. It is not simply about acting on orders or disagreeing with those orders. Dialogue is fluid and ongoing.

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2.1 Legislation not beginning from a position of Charter ignorance

One reason for not assuming that courts initiate Charter dialogue is that it might lead to a false impression that the initial legislative decisions have not been influenced by Charter considerations.

The common interest of Canadian provincial and federal governments to consider Charter concerns before bills are introduced into parliament has increased the role in the policy process of the Departments of Justice and Attorneys General and their legal advisors. The processes adopted by provincial and federal governments for evaluating bills from a Charter perspective share important similarities. Many jurisdictions use

various forms of risk analysis (defined in terms of the level of risk associated with a policy in terms of possible judicial nullification) and encourage departments to articulate the reasons for pursuing a legislative objective and to identify alternative, less restrictive policy means where the associated risk is too high. A common view is the importance of consulting with other departments as early as possible in the policy process. This is beneficial because it makes it easier to identify problematic aspects of proposed legislation and to identify alternative means that will more likely survive a Charter challenge. Early assessment also makes it easier to revise the proposed legislation with less disruption to the likely attainment of policy goals.

2.2 Parliament initiating dialogue

In an important sense parliament initiates Charter dialogue, or attempts to change the tone or direction of an earlier one, whenever it consciously and deliberately adopts legislation that deviates significantly from relevant majority Supreme Court judgements and where parliament has satisfied itself that its view is defensible and justified under the Charter.

> *Parliament's response should be understood as its normative opinion about how the Charter should be interpreted in these particular contexts. Parliament, in other words, is deliberately and consciously initiating dialogue in the hope of establishing an alternative legal / constitutional paradigm to govern sexual assault trials under the Charter.*

Take, for example, the following federal legislative enactments: Bill C-49 (rape shield); Bill C-46 (access to medical records); and Bill C-72 (the response to the *Daviault* decision). These legislative enactments, and the judicial rulings that preceded them, reveal that the federal Parliament and a majority of the Supreme Court have substantive differences with regard to how the Charter should apply to sexual assault offences. Although in each case parliament has responded to judicial rulings that have either struck down legislation or changed a common law rule, it is misleading to view parliament's response as fitting the Hogg/Bushell portrayal of parliament's contribution to dialogue: of reacting to the Court's definition of the Charter problem by "fine tuning" earlier legislation to satisfy s.1 objections.

Instead, Parliament has actively promoted an alternative view about how the Charter should apply in the context of sexual assault. This alternative view starts from the proposition that the relevant Charter rights are not confined to one rights stakeholder, the accused, as initially characterized by the Court in *R. v. Seaboyer*. Instead, it views

the issue as involving plural Charter rights-holders, the accused and victims of sexual assault. Thus, parliament has promoted the view that the right to a fair trial must exist along side of women's and children's rights to equality, privacy, and security of the person.

Just as parliament's actions are not characterized as simply falling into line, by satisfying the Court's specific s.1 concerns, they are also not characterized by disagreement about the sanctity of Charter values. Parliament's response should be understood as its normative opinion about how the Charter should be interpreted in these particular contexts. Parliament, in other words, is deliberately and consciously initiating dialogue in the hope of establishing an alternative legal/constitutional paradigm to govern sexual assault trials under the Charter.

Parliament's awareness of its role in constitutional dialogue is indicated by the increased reliance on legislative preambles, often used to state its philosophy and reasoning in relation to the legislation. However, a preamble might be even more valuable if incorporated into body of the legislation where it would serve as a permanent reminder of the concerns and assumptions that animated the legislative decision. Otherwise, preambles risk being forgotten in the day-to-day interpretation of the law.

This use of a legislative preamble is beneficial should the legislation be subject to Charter challenge. It will form an important element in a subsequent dialogue about reasonableness and justification. What is attractive about the use of the legislative preamble is that it makes explicit the concerns and intents animating legislative decisions and leaves less room for courts to ascribe objectives to parliament. This statement of objective and principle represents a more honest and forthright way of attempting to justify a legislative objective than relying on government lawyers to speculate, after the fact, about the reasons behind a legislative decision.

Equally important, from the perspective of dialogue, a preamble is often intended to educate courts about parliament's reasons for preferring an alternative interpretation of the Charter (in this context, by challenging judicial assumptions about the way sexual assault trials are viewed because of parliament's concerns of an unfair and gendered interpretation of the law that harms victims who are predominately women).

2.3 Dialogue around Section 1

The most important place where parliamentary/judicial dialogue is expected to take place is around section 1. It is argued that since the Court rarely concludes that a legislative objective is not "pressing and substantial", parliament has ample opportunity to revise legislation to correspond to judicial concerns. However, at times the distinction between means and ends is problematic. The Court may rule that the policy means were too extreme. But if there isn't a practical way of attaining the policy

objective, it may make little difference that the objective was deemed to be worthwhile. Hogg/Bushell do not give adequate attention to the possibility that the real choice facing parliament may be to choose between accepting a judicial decision, that does not improve legislation but results in less effective policy, or to explicitly disagree with the Court, via the override.

A good example of the potential problem with this distinction can be seen in the context of election finance laws; particularly the issue of restrictions on election expenditures for non-candidates. Low spending restrictions for individuals and interest groups are necessary if the integrity of candidate/party spending limits is to be maintained and if the normative goal of fairness is to be preserved. However, even if the judiciary concludes that the legislative objective is pressing and substantial, its decision that the spending limits impose too severe a restriction on speech may be fatal to successful pursuit of the objective. This is because it may be difficult to design alternative means that would still achieve the objective. In short, not all legislation is necessarily amenable to "fine tuning" because it may not always be possible to identify alternative policy means that will be effective and practical and, at the same time, impose a less intrusive infringement on a protected right.

3.0 Are judicial suggestions necessarily helpful?

The Supreme Court often raises important principles that result in salutary changes to legislation, particularly where these address unwarranted distinctions or unintended consequences.

To evaluate the reasonableness of how policy objectives are translated into legislation involves skills that are quite different from those provided by legal training. It is, in essence, a task akin to policy. Policy making, by its very nature, is a process where those responsible often must address multiple objectives, make distinctions about who will benefit or be affected, and anticipate circumstances that may undermine or influence the realization of objectives.

However, the Court's reluctance to rule that a legislative objective is not pressing and substantial, and therefore does not warrant Charter accommodation, means that substantial focus is on that aspect of judicial review which poses the most difficulty for judges. To evaluate the reasonableness of how policy objectives are translated into legislation involves skills that are quite different from those provided by legal training. It is, in essence, a task akin to policy. Policy making, by its very nature, is a process where those responsible often must address multiple objectives, make distinctions

about who will benefit or be affected, and anticipate circumstances that may undermine or influence the realization of objectives. It is necessarily subject to discretionary judgments based on a combination of relevant expertise, comparative experience and informed best estimates.[5]

The Court often has shown appreciation for the complexity of policy development when determining whether legislation has been carefully enough designed, especially where the evaluation of conflicting social science data is required.

However, this is not always the case as was evident in *RJR MacDonald*. A majority of the Court rejected parliament's choice of legislative means for failing the proportionality criteria and offered, instead, an alternative legislative strategy. Yet the issue of how best to discourage tobacco consumption is not at all relevant to judicial expertise. It involves policy analysis, more properly undertaken by those with expertise in marketing research, behavioural and health studies.

Less than a year after the Court's decision, the federal government introduced new legislation (Bill C-71) with similar purposes but different legislative means. What is significant about the new legislation was the centrality of the majority's suggestion that a restriction on lifestyle advertising would be a more reasonable way to pursue the legislative objective.

Parliament's willingness to revise the legislation has been suggested as a good example of Charter dialogue at work and, as a result, culminated in better, more sensitive legislation.

However, from a policy perspective, the prudence of framing this policy around the majority's suggestion is questionable. Critics argue that little if any empirical or social science evidence indicates that restrictions on lifestyle advertising will influence tobacco consumption. They also suggest that the revised legislation will not only be less effective than the previous legislation but amounts to little more than cosmetic measures to give the appearance that the government is doing something effective.

The question that arises is: Should parliament be more discriminating about whether and how to incorporate judicial suggestions that are made in the context of complex social policy choices for which the Court may not have much background?

If a renewed legislative initiative is designed to correspond to a judicial suggestion about complex policy options, it is entirely possible that what will be forsaken is more appropriate guidance that draws upon previous trials and errors, comparative experiences and informed best estimates. A consequence may be impractical or less effective legislation in which the purported benefits of this version of constitutional dialogue become suspect.

[5] This argument is developed more fully by the author in chapter 4 of *Limiting Rights: The Dilemma of Judicial Review*. McGill-Queen's University Press, 1996.

3.1 Can risk assessment be given too much emphasis?

Arguably, parliament's revised legislation to restrict tobacco advertising is one example where parliament, the executive, and/or its legal advisors were unduly influenced by aversion to Charter risk.

Tobacco advertising does not constitute a compelling social or political value and is hardly the kind of circumstance intended to be protected by a bill of rights.[6]

Parliament accepted the Court's suggestion about how to frame subsequent legislation, even though this suggestion had little to do with judicial expertise. This approach was preferred to overtly challenging the judicial decision by enacting more comprehensive measures that, if unsuccessful before the Court, may have required the controversial enactment of the legislative override.

An alternative and more comprehensive legislative scheme would certainly have required careful documentation to demonstrate why parliament was not following the Court's suggested approach. It would have benefited from a preamble stating the policy reasons for the choice of legislative means. It would also have required very careful argument by government litigators, and the introduction of as much supporting evidence as possible to support the choice of more comprehensive legislative means. It is by no means certain that the government would succeed in defending the legislation. Yet judicial defeat would not have been inevitable, particularly in light of the changing composition of the Court and given the dissenting judges' strong expression of concern about the dangers of the Court substituting its opinion for that of parliament on these kinds of issues. Had this version of revised legislation again been nullified, considerable public support would likely have rallied around proposals to enact the override.

4.0 Does dialogue embrace the override?

This aspect of the dialogue model is its most controversial element. Dialogue does not presume consensus. Nevertheless, as was suggested earlier, it remains to be seen whether the dialogue model will be viewed as favourably if parliament starts disagreeing with judicial decisions by enacting the override.

In the past year or two, public and political criticisms of judicial decisions indicate that there is less reluctance to publicly contemplate use of the override, particularly after controversial rulings. Alberta Premier Ralph Klein has acknowledge the possibility of using the override in the context of responding to judicial decisions about sexual orientation. The Reform Party has advocated a federal parliamentary committee to

[6] In light of the marginal nature of the speech claim in *RJR MacDonald*, it is unfortunate that government litigators conceded the speech issue without arguing that tobacco advertising is far removed from the reasons why the Court considered speech to be so important, as discussed in *Irwin Toy*.

review all negative judicial decisions, of which recommendations to use the override would be a central consideration. This willingness of political leaders to talk frankly and publicly about the possibility of responding to judicial rulings via the override indicate that it is far too soon to conclude that use of the override will remain such a dormant issue in Canadian political life.

From the perspective of providing Charter advice, this increased political discussion of the override raises these questions: Should government lawyers refer to the override in their risk assessment of policy? And, if so, should they develop guidelines to address the circumstances under which its consideration should become part of the Charter advice given?

At present, the jurisdictions vary in their reticence or willingness to discuss the override in the context of risk assessments. Federal justice lawyers are particularly reluctant to address the override and view it largely as a political issue. However, some of their provincial counterparts consider the override as part of the range of constitutional policy options and, therefore, an issue they are willing to discuss with their clients.

A different issue for consideration is whether the Departments of Justice or Attorneys General should take any part in facilitating public discussion around the override. This may become particularly important if a government is seriously considering its use. At some point in the political evolution of the Charter, it will be worthwhile to encourage a more reasoned public and political understanding of the override than is reflected in the two polar views that currently exist: i) that the override is fundamentally inappropriate, or alternatively ii) it is a democratic tool that should be readily available for parliament whenever it disagrees with a judicial ruling.

5.0 Is reliance on Charter analysis on behalf of the government sufficient? Problems with lack of transparency

An important first element in any eventual parliamentary/judicial dialogue is the Charter analysis undertaken on behalf of the government.

An important first element in any eventual parliamentary/judicial dialogue is the Charter analysis undertaken on behalf of the government. The practice of executive-based Charter scrutiny at both levels of government is important for responsible governance, to ensure that government introduces legislation that it considers to be constitutionally legitimate. For public officials in departments and agencies and ministers who bear ultimate accountability, it provides necessary advice about specific

legal difficulties that can be anticipated and enables ministers to revisit policy objectives, assess alternative means, and ultimately make more responsible decisions about whether to recommend that legislation be introduced.

This reliance on executive based scrutiny, however valuable to the policy process and important from government's perspective, is nevertheless vulnerable to criticisms that arise from its lack of transparency. Specifically, it is vulnerable to questions of uncertainty, in terms of the degree of rigour to which Charter concerns have been addressed, and to questions about political accountability.

A difficulty both courts and parliament incur when assessing the reasonableness of legislation or bills is that beyond cabinet and the departments involved, little is known about what role federal and provincial government lawyers play, the nature of their advice, or its influence on legislative decisions. Consequently, neither courts, nor parliament nor the public have knowledge of the assumptions or considerations about the Charter that have affected political decision making.

Parliamentarians have objected to the lack of information to explain the rationale for legislative choices that conflict with protected rights, either in terms of why legislation that restricts Charter rights is warranted or whether it has designed in a way that is justifiable. Often parliamentary committees studying legislation have requested, without success, to gain access to reports or assessments done for the government that explain the Charter concerns and whether and how these have influenced the proposed legislation. These committees have expressed the opinion that this absence of information compromises their ability to perform their parliamentary duty to assess the legal and constitutional ramifications of proposed legislation.

Judges are placed in a particularly difficult position. Often, relevant data may be lacking to justify a legislative decision. In these circumstances, judges are largely dependent upon assurances of reasonableness or justification that may be made by the government through its Charter litigators. Often Departments of Justice or the Attorney General have consciously sought to construct a public record at the time of consideration of a bill, which can later be relied upon if legislation is challenged. However, this is not an adequate substitute for a transparent parliamentary debate showing how Charter issues were addressed specifically and where the terms and reasons for legislation were debated explicitly within a Charter context.

The Supreme Court has, on occasion, expressed unease with the lack of information at its disposal to evaluate the justification and reasonableness of legislation. A telling incident of the implications of this judicial unease was *RJR MacDonald*. The majority was critical of the use in the legislation of a ban on all advertising and promotion, particularly in light of the government's failure to introduce evidence about the utility of less intrusive measures despite its knowing of relevant studies. This failure to

introduce evidence to support its ban on advertising led to the majority's conjecture "that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result."[7]

If parliament were to receive a summary of the kind of risk assessment undertaken for the government, this would go a long way towards addressing both its and the judiciary's concerns. Although governments may not wish to share confidential information, there is little reason for denying parliament basic information that addresses relevant Charter issues, such as: what is the harm or social concern that the legislation is intended to address and why are alternative, and less restrictive measures, not being utilized? This would help focus parliament's attention on the Charter dimensions of policy and facilitate a more transparent and public debate about the justification of legislation, on Charter grounds, which will be an important source of information for judges when reviewing legislation.

5.1 Changes to the Common Law: Another venue for dialogue

The dialogue model of the Charter focuses on legislation as the principal locus for dialogue. However, another important venue for dialogue is the common law; specifically changes to common law rules that are inspired by the Charter and which have significant implications for policy. Good examples arise in *R.* v *Daviault* and *R.* v. *Feeney*.

> *This lack of governmental input at this stage of the dialogue can be troublesome. It means that the political component of the dialogue can only occur after the fact, by which time the judicial decision may already have had a significant effect on legal policy.*

Changes to common law principles pose interesting questions for the relationship between courts and parliament. The Court has stated that as custodians of the common law deference is not owed to parliament. Courts are simply changing judge made laws; the implication being that since the legislature has not spoken by codifying these rules, courts are not interfering with the will of parliament.

But this claim raises important issues for the model of parliamentary/judicial dialogue. Parliament is not a disinterested party to changes in common law rules. Parliament may not have provided a statutory basis to a common law rule precisely because it supports the assumptions and values that underlie this rule. Thus, parliamentary

[7] *RJR MacDonald Inc. v. Canada* [1995] 3 S.C.R. 199 at pp. 344-345.

inaction does not reflect a lack of interest or concern about the status of these rules. Furthermore, the Court has indicated that when changing the common law rule, judges need not consider whether the old common law rule is reasonable under section 1. In light of the significant policy implications that may arise from changes to a common law rule, the government may have arguments that are relevant to both of these issues: whether the old rule violates the Charter and whether or not it is reasonable.

However, since the Supreme Court does not have an obligation to notify provincial or federal Attorneys General of pending changes to common law rules, government litigators may not have an opportunity to develop Charter arguments or argue section 1 issues in any extensive or detailed manner. This lack of governmental input at this stage of the dialogue can be troublesome. It means that the political component of the dialogue can only occur after the fact, by which time the judicial decision may already have had a significant effect on legal policy. Pending judicial review by the Supreme Court of any parliamentary response, a long period of uncertainty may arise over the constitutional validity of parliament's new legislation, particularly where it is different from the Court's approach, as was the case with Bill C-72 (response to *Daviault*).

The significance of this lack of opportunity to influence judicial changes in the common law was apparent both in *Daviault* and in *Feeney*. In neither case did the federal Attorney General intervene. Yet both decisions were viewed as establishing rules that required a swift parliamentary response. The *Feeney* decision took the federal government by surprise. The Department of Justice had not expected the Court to either find the existing rules unconstitutional or to "read in" the Criminal Code a requirement to obtain a warrant before entering private dwellings. The decision, with its suggestion that police should have a warrant for arrest prior to entering a private dwelling, presented special difficulties for those provinces that required a Crown prosecutor approve of charges. The new Feeney rule would have the effect of delaying, substantially, the ability of police to enter private dwellings.

The timing of the *Feeney* judgement compounded the difficulty of responding to this decision, as it was rendered while parliament was dissolved for a federal election. The Court granted a six-month transition period. Nevertheless, the federal parliamentary response was extremely rushed. After consultations with the provincial and territorial governments and other stakeholders, little time was left for parliamentary deliberation. Both parliamentary committees studying the bill expressed extreme frustration with the limited opportunities and resources available to scrutinize the legislation. Parliamentarians also expressed concern about parliament's lack of opportunity to satisfy itself that the legislation was consistent with the Charter.

Under these circumstances, it is difficult to take seriously the claim that parliament's input to this policy represents meaningful dialogue.

Out of this frustration came a recommendation that the government work with the Court to establish a protocol so that in the future the Court will inform the relevant Attorneys General when significant changes to common law rules are to occur. An alternative suggestion was that parliament consider a process to temporarily exempt

the application of the Court's decision, perhaps by a temporary and short-term application of the override, until parliament has had sufficient opportunity to reflect on legislation before passing it. From parliament's perspective, the dangers of having only days to consider such a complex issue, apart from undermining parliament's role, are that Charter concerns may not be duly addressed and that there may be policy difficulties arising from unexamined and unanticipated consequences.

6.0 Conclusion: Suggestion to improve Parliament's contribution to dialogue

If parliament is going to be viewed as a serious partner in constitutional dialogue, it is necessary to make legislative decisions that restrict rights more accountable and the reasoning more transparent.

Parliament's contribution to dialogue would be enhanced if it viewed itself more self-consciously, and was treated by the executive, as a meaningful partner in dialogue. What follows is a recommendation that will appear in a forthcoming book of mine, which will engage more fully in this debate about dialogue.

If parliament is going to be viewed as a serious partner in constitutional dialogue, it is necessary to make legislative decisions that restrict rights more accountable and the reasoning more transparent. A transparent parliamentary record of debate, where legislative choices are justified specifically on Charter grounds, will provide government litigators a far richer record to draw upon when defending legislation. Furthermore, from more careful parliamentary scrutiny will come more reasonable legislation. From a more conscious and transparent parliamentary Charter debate, the reasonableness of legislative decisions will also become more apparent. For both reasons, courts will have less cause to set aside legislation. Yet if parliament is seemingly cavalier about Charter obligations, the judiciary will have little incentive to defer to parliament's legislative intent. This perception of indifference may arise even in light of extensive behind-the-scenes Charter analysis, because this is not subject to parliamentary, public or judicial purview.

Three possible ways to strengthen the quality of parliament's supervisory role, from the perspective of the Charter, are the following. One is to have the Justice Minister speak to parliament when bills are introduced about the specific Charter concerns associated with the bill and to articulate the rationale, merits and effects of a particular legislative proposal. A second is to have government lawyers or the Minister of Justice/Attorney General produce a document for parliamentary and public consumption that would be based on the kind of risk assessment performed on the government's behalf. This document could be circulated to the relevant committees studying the issue or, if not

applicable, during second reading speeches. A third is to establish a specific parliamentary Charter committee to study those bills that the government designates as raising serious Charter issues. This idea is borrowed in large part from Australia.[8] The object of a Charter Committee would be to focus parliamentary deliberation on whether the legislative objective is warranted, given the seriousness of the rights infringement and the importance of the policy objective and, if so, whether the legislative objective(s) is being pursued in a manner that respects rights as much as is reasonably and practically possible.

[8] For more discussion of this, see J.L. Hiebert, "A hybrid-approach to protect rights?" (1998), *Federal Law Review*, 26(1), 115-138. An argument in favour of supplementing Canadian judicial review with Australia's model of parliamentary scrutiny.