Delayed Declarations of Invalidity:

Deferential Dialogue or Justice Deferred?

Mary Liston
PhD Candidate, University of Toronto
m.liston@utoronto.ca

Paper prepared for the 2005 Canadian Political Science Association Conference (June 4, 2005)
University of Western Ontario, London, Ontario
Panel L-9: Institutionalist Approaches to Law & Public Policy

Abstract

Political science often overlooks legal remedies as a site of inquiry—an unfortunate development since remedies constitute a crucial nexus between law and politics. Using both a historically-informed institutionalist perspective and a legal perspective to explore this nexus, I examine current developments in the judicial use public law remedies and, in particular, the delayed declaration of invalidity, a remedy which shares the sobriquet of the 'workhorse' of the Canadian public law order with the general declaration of invalidity. Remedies in the Canadian system are generally attentive to the institutional role and capacity of the courts and respectful of other governing institutions' roles and capacities. Delayed declarations of invalidity typify institutional dialogue because they rely on institutional practices of good faith consultation and collaboration. This type of remedy shows that the relationship between courts and legislatures can be complementary and functionally dynamic. Despite these positive aspects, increased use raises troubling questions. This remedy tolerates a temporary extension of constitutionally invalid laws and one can ask how a rule of law society can allow such a condition to become both normal and ordinary. The potential for legislative non-compliance and the toleration of minimal justification given by governments introduces doubts about the viability of the trust relationship between courts, parliaments, and executives and therefore implicates the consequent legitimacy of the remedial process. There also exists an unresolved remedial problem about judicial interference in government budgeting. Despite the benefits of remedial flexibility, I argue that the coordinate status of courts in relation to legislatures must be emphasized—meaning that courts should rarely give unquestioning deference to governments and should ensure that the justificatory onus is met. Greater use of delayed declarations indicates that Canada currently faces the risk that constitutional norms may be under-enforced or ignored.

1. Introduction

Political science often overlooks remedies as a site of inquiry—an unfortunate development since remedies constitute a crucial nexus between law and politics.[1] Indeed, judicial policy-making often reveals itself most clearly in remedial content. Moreover, a historically-informed institutional perspective on judicial remedies tells us that common law courts have always engaged in such forms of policy-making.[2] In modern public law, equitably-informed practices

[1] For an exception to this rule, see Christopher Manfredi, "'Appropriate and Just in the Circumstances': Public Policy and the Enforcement of Rights under the Canadian Charter of Right and Freedoms," (1994) 27 Can. J. Pol. Sci. 435.

[2] That is, a historical perspective which takes into account the traditional role of equity and the institutional role of the chancery courts in developing remedies in particular and judicial review of administrative decision-making in general.

continue to influence statutory interpretation and the crafting of remedies. From this perspective, remedies—like the principles and practices of statutory interpretation—unite pre- and post-Charter jurisprudence.

A large literature exists on equitable remedies in public law—injunctions, for example[3]—as well as the role of equity in complex public and private litigation such as class actions, toxic torts, and reparations. There also exists a smaller but growing literature concerning the role of equitable private law remedies used in public law in constitutional torts, fiduciary duties, and government liability. But only a handful of scholars have examined the structural role of equity in public law. This paper will consider the role and capacity of equity within institutional relations by examining equitably-informed remedies in public law.[4] More specifically, I will examine the declaration of suspended invalidity (or temporary declaration of validity) of an unconstitutional

[3] For an analysis of injunctions in the American context, see Owin Fiss, *The Civil Rights Injunction* (Bloomington, Ind.: Indiana University Press, 1978). In the Canadian context, see Chapter 13 "Injunctions" in Kent Roach, *Constitutional Remedies in Canada* (Aurora, ON: Canada Law Books, 2001a).

[4] For example, the remedial power in section 24(1) of the Charter suggests that constitutional remedies cannot be strictly limited by statutes or rules of the common law, although these instruments may be relevant to determining the remedy in accordance with what is "appropriate and just in the circumstances". For the purposes of this paper, I am considering declarations of invalidity invoked under either s. 24(1) of the Charter or s.52(1) of the *Constitution Act, 1982*. Section 52(1) of the *Constitution Act, 1982* formally constitutionalizes the declaratory remedy: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, is to the extent of the inconsistency, of no force or effect." I will explore in more detail the nature of the relationship between s. 24 and s. 52 in the thesis chapter of which this paper is a part. On this point, see the discussion in s. 37.1(b) in Peter W. Hogg, *Constitutional Law of Canada: 2001 Student Edition* (Toronto: Carswell, 2001).

statute, a remedy which came into its own on the Canadian public law stage in 1985 with the *Reference re Manitoba Language Rights*.[5] The courts no longer require the threat of legal chaos to justify this remarkable remedy and its use has grown in tandem with the rise of (often controversial) public law litigation.[6]

Section 2 of this paper provides a brief historical outline of the role of equity in Anglo-American legal institutions and then focuses on the role of equity in public law remedies in Canadian law. Canadian public law remedies are surveyed in section 3 with emphasis on the particular history and use of delayed declarations of invalidity. Three specific cases are discussed and assessed in section 4 which probes the utility of delayed declarations in terms of institutional dialogue and assesses the rise of institutional deference. Section 5 takes up the themes laid down in section 4

[5] *Reference re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitutional Act, 1867, [1985]* 1 S.C.R. 721 [*Reference re Manitoba Language Rights*]. Briefly, the Supreme Court found that Manitoba's failure to enact and publish all of its statutes bilingually violated s. 23 of the Manitoba Act, 1870, the province's constitution. The province enacted the Official Language Act in 1890 which provided that statutes need only be printed and published in English, an attempt to repeal s. 23. This Act was held invalid by county courts in 1892 and 1909 but these decisions were not appealed or reported and were ignored by the Manitoba authorities. The Supreme Court therefore found that most of the statutes enacted between 1890 and 1985 were invalid and of no force or effect. Chaos would reign if all laws were suspended, so the legislation was declared temporarily valid for the minimum period of time required for the translation and re-enactment of the laws. See section 53.4(c) in Hogg (2001).

[6] My analysis differs from the complementary project undertaken by Janet Hiebert (2002) who examines the impact of judicial decisions, including remedies, on policy-making—particularly the ability of legislatures to respond to *Charter* decisions. I note that—save the chapter on the equality claims of gays and lesbians—her examples of regulatory and legislative responses tend to originate in criminal law and often focus on law enforcement issues such as evidence, the control of police powers, and criminal defenses.

and pursues them in the troubling context of several recent cases. The paper concludes by suggesting that regular use of delayed declarations without other remedial options and without meeting justificatory demands indicates that judicial deference has increased[7] and that Canada faces the risk that constitutional norms may be under-enforced or ignored.

2. Equitable Remedies for the Body Politic

a. The Chancellor's foot

The essence of equity is conscience.[8] Or, more precisely, equity regulates the normative legal order, an order that sustains the entire legal system, through a system of moral imperatives or principles in order to redress the effects of unconscionable conduct at both the public and private, as well as the collective and individual levels. On an individual level, the concern for conscience

[7] Or, conversely, that judicial activism has decreased.

[8] Donovan Waters writes that "[e]quity is often described as the principles of conscientious conduct applied across the span of private law" as well as in public law. See "The Reception of Equity in the Supreme Court of Canada (1875-2000)," (2001) 80 Can. Bar. Rev. 620 at p. 627. Appeals to conscience implicitly import into a judicially-crafted standard general ideas concerning fairness though a community or reasonable person standard which the courts will present as their own 'objective' institutional conscience. See for example the public law holdings in *Baker* and *Suresh*. In *Baker* v. *Canada*, (MEI) [1999] 2 S.C.R. 817, where the Court enforced a reasonable person standard to access the values underlying the duty of fairness in the context of a discretionary decision on humanitarian grounds; this standard was taken from the set of guidelines issued by Citizenship and Immigration Canada for immigration officers (at para. 16). However, the standard was also used to determine whether a particular immigration officer's notes were biased: "the well-informed member of the community would perceive bias when reading Officer Lorenz's comments" (at para. 48). In *Suresh* v. *Canada (MCI)*, 2002 SCC 1, the Court used a "shock the Canadian conscience" equity standard to determine if returning a refugee to the risk of torture would be found unconscionable (at paras. 49-58).

marked early equitable jurisprudence in its attempt to mitigate the wrong committed by an individual whose soul was therefore threatened with eternal damnation.[9] On the public level, equity entailed fundamental justice since the sovereign could not, without violating natural justice, countenance an unremedied injury. On a less fundamental ground, the functional or structural premise of equity was to ameliorate common law rigidity concerning procedure and substance, rigidity which favoured certainty and universality over equality, fairness, impartiality, and compassion. In addition to substance and procedure in common law, equity however, also encompassed legislation and statutory interpretation and could therefore be said to inform the entire legal system.[10]

---

[9] Or as I.C.F. Spry writes, until the defendant could "purge his conscience by acting in obedience". See *The Principles of Equitable Remedies: Specific performance, Injunctions, Rectification and Equitable Damage*, 6th ed. (Pyrmont, NSW: LBC Information Services, 2001) at 31. With respect to the individual, modern equity's private law concerns for conscience focus on fiduciary duties, protection or disclosure of confidential information, and enforcement of contracts through specific performance. Jeffrey Berryman, *The Law of Equitable Remedies* (Toronto: Irwin, 2000), p. 2.

[10] Aaron Kirschenbaum argues this point using Aristotle. See Chapter 1 "Formality and Equity" in *Equity and Jewish Law: Halakhic Perspectives in Law: Formality and Flexibility in Jewish Law* (New York: Yeshiva University Press, 1991). Aristotle says: "The puzzle arises because what is decent is just, but is not what is legally just, but a rectification of it.…Hence whenever the law makes a universal rule, but in this particular case what happens violates the [intended scope of] the universal rule, here the legislator falls short, and has made an error by making an unconditional rule. Then it is correct to rectify the deficiency: this is what the legislator would have said himself if he had been present there, and what he would have prescribed had he known, in his legislation. For on some matters legislation is impossible, and so a decree is needed." Book V:Ch.11:§5.105:1137b of *Nicomachean Ethics*, trans. Terence Irwin (Indianapolis, Ind.: Hackett, 1985).

In the early middle ages, dissatisfied litigants, unhappy with common law justice, petitioned the monarch (and later king in council) asking for dispensation of the king's justice—the frequency of which caused the monarch to pass these petitions on to his or her chancellor for resolution. Chancellors, coming from the ecclesiastical courts, brought canon law doctrine and practices to the common law. The methodology employed by the chancellor did not cleanly distinguish between fact and law resulting in an approach characterized as "pragmatic, robust, and highly contextualized."[11]

Though equity's role was distinct and substantive, common law purists viewed equity as ancillary to the common where common law was found deficient, harsh or inadequate, a view invoking the concepts of formalism[12], positivism[13], and corrective justice[14]. Indeed, during the English Civil War, the common law courts aligned themselves with the cause of Parliament and ensured the reduction of equity's role.[15] Although common law courts and courts of chancery

[11] Berryman, p. 2.

[12] Formalism here means the law's adherence to external characteristics such as fixed formulae and meanings as well as logical consistency at the expense of attention to the outcomes or implications of legal decisions.

[13] Positivism understood here as accepting law as an end in itself—that is to say, the statement of the law is always the law—rather than law as a means to achieve either a robust rule of law state or a more comprehensive form of justice.

[14] Corrective justice notionally understood as the ordered relations within singular transactions between particular persons in law. Generally, corrective justice structures private law while distributive justice informs public law.

[15] Berryman notes that after a decade of schematizing and otherwise mitigating equity in the eighteenth and early nineteenth centuries, the Judicature Acts at the end of the nineteenth century fused common law and chancery courts and enabled concurrent jurisdictions. Berryman, p. 3. In Canada, the development of equity in a separate chancery court came in the middle of nineteenth century in some provinces and was relatively short-lived as fusion occurred

both derived their authority from the Crown, and the institution of the chancellor survived the Civil War, one legacy of the conflict was that chancery courts became aligned with the executive arm of the sovereign (that is, the Crown) nurturing the image of judicial decision-making as discretionary, idiosyncratic, and arbitrary.[16]

Early equity played a crucial role in the attempt to obtain redress from public authorities whose actions had harmed individuals or classes within the general public. For proceedings normally characterized as private law matters between an individual and the Crown—breach of contract, expropriation of property interests, debts owed by the Crown—this was done in the chancery courts through a petition of right, the original equitable remedy. The "garland of prerogatives", however, choked the promise of this procedure due to the privileges in pleading and procedure through which the sovereign could avoid legal proceedings; the petition of right was later

---

in 1881. Ibid. at 4-5. And, although Canadian courts received the bifurcated case law of England, the early Supreme Court would have conceptualized law and equity as two bodies of doctrine rather than two separate administrations. See Waters, p. 624. Finally, Spry surmises that "in jurisdictions where Judicature Act provisions are in force that the greatest extensions of the powers of enforcing equitable rights are found…". Spry, p. 35.

[16] Contrast the English and the French experiences with equity. Vernon Valentine Palmer reflects on the constitutional power struggles that occurred around the power to dispense equity where the chancellor's court retained the power to correct common law deficiencies as a supplementary jurisdiction in a bicameral system whereas in France, equitable decision-making was taken from the ordinary courts (and *Ancien Régime* judges) after the French Revolution and reserved exclusively to the legislature. Despite the relocation, equity of the parlements was subject to the same charges. See Vernon Valentine Palmer, "'May God Protect Us from the Equity of Parlements': Comparative Reflections on English and French Equity Power," (1999) 73 Tul. L. Rev. 1287 at 1296.

replaced by other remedies which were "less dilatory".[17] Nevertheless, in British common law, although neither the King nor the Queen was regarded as above the law, they remained under binding but unenforceable duties to give redress to wronged subjects.

Unlike the "ordinary" and "essential remedy" of damages by way of compensation for injury at common law, the conscientious jurisdiction of equity is mainly concerned with the liable party *acting* to redress the wrong that she or he caused.[18] In this sense, equitable remedies were considered "extraordinary".[19] In other public law matters such as in administrative law, later prerogative or extraordinary writs such as *certiorari*, prohibition, *mandamus*, *habeas corpus*, and *quo warranto* were used to launch judicial review.[20] In the administrative law context, these

[17] Equitable relief was made available against the Crown *qua* Attorney General in 1668 in the holding from *Pawlett* v. *A.G.* (1668) 145 E.R. 550. Peter Hogg and Patrick Monahan write that such equitable jurisdiction, originally held by the Court of Exchequer, was transferred to the Court of Chancery in 1841. The practice of suing the Attorney General for equitable relief fell into disuse until the decision in *Dyson* v. *Attorney General* [1911] 1 K.B. 410 (C.A.) which held that the power continued to exist though dormant and could have been used through a petition of right. See Peter Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 4-5. In Canada, the petition of right was abolished as a suit in 1971 by Parliament and common law procedures covered the field. Ibid. at 9.

[18] Waters, p. 637. In private law, equitable remedies included specific performance, injunctions, accounting, constructive trusts, rescission, and restitution.

[19] Stephen Yeazell suggests that "Chancery acted more like a legislature than a judicial body in that it made rules to govern the prospective legal obligations of the parties, somewhat like declaratory judgments." "Group Litigation and Social Context: Toward a History of the Class Action," (1977) 77 Colum. L.R. 866 at 888.

[20] David Mullan characterizes these remedies as supplementing the prerogative forms of relief, use of which dates back to the nineteenth century. David Mullan, *Administrative Law* (Toronto: Irwin, 2001) at 412.

writs suffered from deficiencies such as standing requirements, lack of enforcement, and other technical limitations. Supplementing these equitable writs were the private civil law equitable remedies of injunctions and declarations, available if the applicant could establish an infringement of private right or the infliction of special damage.[21] Even today, however, *mandamus* and injunctive relief are still subject to Crown immunity but, in lieu of this remedy, courts may issue a declaration.

Equity is no longer a distinct institution or jurisprudence in modern common law legal systems.[22] As Douglas Laycock writes, "Equity is ordinary, not extraordinary, in remedies, procedure, and substance. Perhaps most important, the discretion once associated with equity now pervades the legal system. To the extent that debate persists over the discretion or other features associated with equity, it is a general debate about the best way to run a legal system."[23] In Canada, superior courts as courts of equity not only enjoy broad remedial discretion because of this Anglo-American institutional history, but because of the combined effect of remedial provisions

[21] In Canada under various statues for judicial review, these prerogative, injunctive and declaratory remedies are part of a one process launched by application for judicial review rather than by way of either writ or action. Berryman, p. 147.

[22] Like many writers on equity, Berryman discusses the convergence or syncretization of common law and equity doctrines in modern jurisprudence, both private law and public law. Moreover, this trend also attests to the significant 'cross-over' or hybridization of public and private law, particularly in legislation but also in judge-made law. See also David Wright, "The Role of Equitable Remedies in the Merging of Private and Public Law," (2001) 12 Pub. Law. Rev. 40.

[23] Douglas Laycock, "The Triumph of Equity," (1993) 56:3 Law & Contemp. Probs. 53 at 54.

contained in the *Constitution Act, 1982* and public law precedents such as the *Reference re Manitoba Language Rights*.

b. The Canadian conscience

Modern equity in Canada, Jeffrey Berryman argues, has five specific developments. The first is that the notion of "'conscience is no longer a protection of an individual or subjective conscience; rather it is an expression of normative behaviour expected of a party in a particular relationship that is amenable to legal scrutiny."[24] This expression of conscience has expanded greatly in the substantive areas of equitable jurisdictions such as trusts and fiduciary duties and has assisted the development of common law doctrines such as promissory estoppel and unjust enrichment/restitution. Such an approach entails a focus on substantive outcomes more than procedural fairness. Secondly, Canadian courts have been willing to mix equitable and common law remedies and to contemplate outcomes "informed by the remedial goal being pursued rather than…[being] historically awarded based on the particular cause of action commenced."[25] Thirdly, equitable remedies remain highly contextualized and novel in order to respond to profound social change.[26] Fourthly and following, Canada is a complex society with an elaborate legal regime topped by the Charter—a combination of factors causing the courts to use and expand the traditional equitable remedies of injunctions[27] and declarations in order to respond to litigated social issues. Although guidance is found in statutory materials and jurisprudence, the

[24] Berryman, p. 6.

[25] Ibid.

[26] Ibid. at 2.

[27] For a good discussion of interlocutory injunctions in Canadian constitutional litigation, see Berryman ibid. at 48-55 and Chapter 9 "Injunctions to Enforce Public Rights".

courts have been constitutionally mandated to fashion remedies that are "appropriate and just in the circumstances."[28] Lastly, Canada as a federal, bilingual, bijural country, in combination with openness to outside jurisprudential influences from the United States, Europe and the Commonwealth, treats *stare decisis* differently—that is, more flexibly—than do unitary states.[29] Equity, then, necessary involves public law to the extent that what is contrary to public policy may be contrary to equity based on a complex balancing of norms and principles, institutional competencies and procedures, majoritarianism, and pluralism, *stare decisis*, radical breaks and novel progressions.[30]

Regarding influences from the United States, one need only look to Mr. Chief Justice Warren in *Brown v. Board of Education of Topeka (Brown II)* for a compelling statement on the remedial power of equity and its role in furthering novel solutions:

> In fashioning and effectuating decrees, the courts will be guided by equitable principles. Traditionally equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and

[28] Section 24(1) of the *Charter*.

[29] Berryman, p. 8.

[30] Dawn Oliver observes that prerogative writs controlled both public and private exercises of power and "did not develop, essentially, as means to control exercises of public or governmental functions, or judicial functions, or state or public bodies, or the exercise of public functions, but as methods of doing justice by controlling exercises of public and private power on specific public policy grounds, notably to remedy injustice, to prevent disorder and to promote public policies expressed in Acts of Parliament." "Public Law Procedures and Remedies—Do We Need Them?" (2002) Pub. Law 91 at 104.

> private needs.…Courts of equity may properly take into account the public interest in the elimination of [segregated schools]…in a systemic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[31]

Part of the remedy of a structural injunction in *Brown* was that the court would demand "good faith compliance at the earliest practicable date." Balancing in that context was captured in the ideas of gradualism and minimizing the growth of unwarranted and unwanted supervisory role by the judiciary. As is well known, the States and the local courts found themselves confronted with a morass of non-legal minutiae and decision-making in overseeing the process. They also faced vitriolic charges of judicial activism because of the injunctive remedy.[32]

Considering the relationship between rights and remedies, Berryman proposes three views.[33] First is the view that remedies are inseparable from rights such that their sole goal is to maximize the right in question. Second, that rights and remedies are distinguishable to the extent that rights are certain, principled and aspirational while remedies are pragmatic and discretionary. Finally, there is the view that rights and remedies are highly integrated and mutually inform the judicial interpretation and application of each. Thus, in the example of trespass, an injunction would be the preferred remedy in view one on the ground that the trespasser has no legitimate competing

---

[31] 349 U.S. 294 (1955).

[32] This critique has unfortunately travelled and been wholly and inappropriately applied to the Canadian legal context. See F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000). They reject the entire institutional dialogue approach discussed in section 3b below.

[33] Berryman, p. 9.

interest. Similarly, with the *Brown II* example, equality rights were maximized in an attempt to restructure an unconscionable race-based social order. Damages, on the other hand, would be favoured in view two of the trespass example based on the difficulty in enforcing an injunction—but note that damages are not usually a remedial option in public law litigation unless a public official has acted in bad faith or has abused their power.[34] And, in view three, a varied injunction constructs a balance between competing legitimate interests—motivated by the fear that damages may amount to a private right of expropriation by the trespasser—and the preferred solution might be a compensatory injunction where the property owner compensates the trespasser who is prevented from engaging in trespass and who may have a competing legitimate interest.

Transferring and translating this framework to the public law setting, it is safe to conclude that Canadian jurisprudence rarely takes rights-maximizing approaches such as structural

[34] For a recent confirmation of this line of jurisprudence, see *Mackin* v. *New Brunswick*, [2002] 1 S.C.R. 405 [*Mackin*]. In this case, the litigants wished to combine damages under s. 24(1) with a declaration under s. 52(1). They were denied this route for the reasons stated by Gonthier J. for the majority: "Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter*…: An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with an action under s. 52 of the Constitution Act, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, <u>that will be the end of the matter</u>. No retroactive s. 24 remedy will be available. [Emphasis added.]…In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the Charter cannot be combined with an action for a declaration of invalidity based on s. 52 of the Constitution Act, 1982." (at paras. 80-81)

injunctions.[35] However, one might conceive of the reading-in remedy in *Vriend*[36] as comparable to a judicial decree to prohibit discrimination and maximize recognition of particular rights. A constitutional exemption might also be thought of maximizing in this way. Considering the second view, often a court will issue a simple declaration of invalidity or read down a provision, all of which constitute less intrusive and more ordinary approaches to unconstitutional legislation. And, finally, I would place delayed declarations of invalidity in the third category as the most illustrative of the judiciary's attempt to balance institutional roles rather than simply recognize competing rights in the creation of a remedy. The temporary nature of the declaration connects with the usual 'trust' relationship that the courts have with the legislatures in that compliance is expected and usually met. However, the temporary character acts as an incentive for the executive and legislature to consult with affected parties and outside experts in order to craft an appropriate remedy, whether this be quickly revising existing or enacting new legislation. Underneath the soft glove, however, exists the latent ability of the courts, if they have maintained jurisdiction over the matter, to issue more intrusive commands if compliance is not met or if the government unreasonably delays the remedy. Rarely has such an underlying threat been carried through in Canada in contradistinction to the American constitutional experience. The Canadian experience reluctantly acknowledges the use of remedies to induce changes in government behaviour. According to one commentator, "[e]ven in those cases where we most

[35] See Roach, *Constitutional Remedies*, on this point at ¶3.680-3.690 and ¶3.740. Roach cites *Reference re Manitoba Language Rights* as an example of the rejection of a rights maximizing approach and the courts' recognition of compelling interests that would be adversely affected by an immediate grant of a remedy.

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

expect courts to lay down the law and issue final remedies, the courts have often deferred to governments with gentle, patient, and flexible remedies."[37]

The attenuated separation of right and remedy in order to balance interests and the need to combine the second and third views outlined above in order to craft what is believed to be an appropriate remedy drives many public law remedies. For example, in *Blencoe* v. *British Columbia (Human Rights Commission*),[38] LeBel J. (dissenting, in part, with 3 others but not on the issue of remedy) invoked the Court's equitable jurisdiction to ensure "due and speedy justice" and to redress "'misgovernment'"[39]. The administrative remedy for this instance of excessive procedural delay would rest on the courts' "discretion on orders of remedies founded on the old prerogative writs", a power which they have always had.[40] The remedy involved consideration of the stay of proceedings, an expedited hearing, and costs in order to delicately balance competing interests such as the interest of the respondent, the complainants, and the "public interest of the community itself which wants basic rights enforced efficiently but

[37] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001b), p. 152.

[38] [2000] 2 S.C.R. 307 [*Blencoe*].

[39] Reviewing the history of the supervisory power of the courts over administrative processes, the Court looked to the origins of the prerogative writ of *mandamus* and noted that "there was always the possibility of something much greater in the writ"—which had been used originally to prevent the procedurally illegitimate exclusion of citizens who were members of certain disliked groups from municipal offices—and that it could be used, citing Lord Mansfield, "'upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.'" Ibid.

[40] Ibid. at para. 148.

fairly."[41] The Court considered the stay an extraordinary remedy which would be appropriate only for "an abuse that has already occurred…[and] must rise to a level such that the mere carrying forward of the case will offend society's sense of justice…i.e., in my analysis, where there is a gross or shocking abuse, or where the societal interest in proceeding does not outweigh the considerations I have enumerated." [42] The stay was lifted, LeBel J. recommended an order for an expedited hearing which the majority had not considered[43], and he agreed with the award of costs as compensation since Blencoe had "brought to the attention of the courts the grave deficiency of the administrative processes of the Commission. He should at least not be penalized for this mixture of success and failure".[44]

Equitably-informed public law remedies, particularly under s. 24(1) of the Charter, focus on the need to redress the strained or injured relationship between the state and affected citizens. Such injury is the result of government conduct characterized by improper motives, bad faith, abuse of power, breach of public duty, arbitrary decision-making, the failure to provide reasons, and what might be labelled unconscionable acts such as unreasonable delay in procedure. Judges retain the discretion to determine the exact nature of the remedy though it will usually be informed by the

[41] Ibid. at para. 178.

[42] Ibid. at para. 181.

[43] Ibid. at para. 185. LeBel J. suggested wryly that "[t]here will be some irony in granting such a remedy more than five years after the proceedings began. Such an outcome offers the respondent little solace. Nevertheless, in spite of its rather symbolic value, at the present stage of proceedings, it appears as a *critically important remedy that should have used at an earlier stage to prod the Commission along and to control the inefficiency of the process.*" [Emphasis added.]

[44] Ibid. at para. 186.

claimant's request considered in light of the effects on the defendant government. A factor that receives considerable weight, then, is how the remedy affects the institutional, functional relationship between courts, parliament and the executive; however, the court also factors in the polycentric relationship between the citizen as representative of a class of claimants and the state.[45]

3. Declaratory parameters

Robust, equitably-informed public law remedies remain the exception. Instead, public law remedies pay greater attention to the appropriate institutional limits on the courts, the functional strengths of other branches of government, and the assessment of complementary institutional roles. Canadian courts tend to strike constitutional laws down rather than reading in terms or granting constitutional exemptions and exhibit a general preference for declaratory over specific

[45] Since the particular issue usually affects a large number of people despite the find that only one or several claimants litigate the matter. Public law suits in general, then, are analogous to class actions. As H. Scott Fairley writes, "[b]y definition, most constitutional declarations, at least pursuant to our public law model, necessarily transcend the immediate interests of the parties who originally sought relief." The effect is an "*in rem* vindication of an individual's or group's *Charter* claims which can apply equally for and to the community at large." Fairley provides a further provocative insight that "the forces of legal change in the law of remedies may be flowing from a developing public law model fueled by *Charter* litigation into the private law sphere." See "Private Law Remedial Principles and the Charter: Can the Old Dog Wag this New Tail?" in *Remedies: Issues and Perspectives*, ed. Jeffrey Berryman (Scarborough, Ont.: Carswell, 1991) 313 at 323.

or mandatory remedies.[46] The suspended declaration of invalidity seems an even more dialogic approach since it invites a legislative reply before the court's judgement takes effect.

a. Declarations, injunctions, and suspensions

The general consensus in the literature is that a declaration is and has been "just as effective" as an injunction since few governments or Crown actors will risk public opprobrium for disobeying a court order.[47] Because of this binding normative relationship, the declaration has become the "ubiquitous work-horse for most constitutional legislation".[48] Indeed, the "remedial consensus" appears to confirm general declarations as the preferred choice.[49] Underlying this normative

---

[46] Manfredi characterizes this approach as process-based in contrast to remedies appealing to performance standards and specific performance, as with more robust equitable remedies such as injunctions. "'Appropriate and Just,'" p. 459.

[47] Berryman, p. 151.

[48] Fairley, *supra* note 37 at 322. In his article on remedies, Manfredi reports that declaratory judgments accounted for close to fifty per cent of *Charter* remedies in the early to mid-1990s. "'Appropriate and Just,'" p. 451.

[49] Roach suggests that this consensus emerged first in the 1990 minority language case of *Mahe* v. *Alberta*, [1990] 1 S.C.R. 342 [*Mahe*]. The 'consensus' is, of course, mostly judicial since neither governments nor the general public have formally weighed in with their opinions. Although there had been some experimentation with structural injunctions in earlier minority language cases, in this case the Supreme Court expressed its preference for general declarations: "Such a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right…" (*Mahe* at para. 106) See Kent Roach, "Remedial Consensus and Dialogue

practice is the maxim that the Crown can do no wrong, meaning that the Crown is not privileged to commit illegal acts.[50] For government to ignore a Charter decree demanding the correction of government behaviour, statutory reform or other reparative measures, let alone a regular administrative, human rights, or common law order, would signify a severe disruption of the constitutional normative order—that is, the institutional integrity and the relationship of trust between the state and the citizenry. Within Canada's constitutional architecture, the only means through which governments can legitimately *not* comply is by invoking the notwithstanding clause, thereby reasserting the principle of parliamentary supremacy. The declaration, unlike other remedies, crucially relies on the proper functioning of the constitutional order because it is less intrusive and is highly symbolic. Moreover, under declaratory remedies, the court does not remain seized of the constitutional issue which prevents the applicant from returning to court to demand the use of the contempt-of-court power or to seek further mandatory orders.[51]

One early example of the declaratory jurisdiction of the Supreme Court in this manner would be the *Singh* decision.[52] The Court was able to rely on the equitable rule that no one should be deprived of his or her rights without a fair hearing. But, because an express statement superseded this rule, Wilson J. for the Court had to rely on the supremacy of the Charter to declare that the

---

Under the Charter – General Declarations and Delayed Declarations of Invalidity," (2002) 35(2) U.B.C. Law Rev. 211 at 215.

[50] Hogg and Monahan (6) discuss the distinction between this version from the middle ages and the nineteenth century interpretation holding that the King can neither commit nor authorize the commission of a tort and was therefore immune from petitions of right in tort.

[51] Berryman, p. 154.

[52] *Singh* v. *Canada (MEI)*, [1985] 1 S.C.R. 177 [*Singh*].

procedures for the determination of refugee status were invalid.[53] Wilson J., in constructing the remedy, stated that utilitarian considerations and administrative convenience could not override Charter principles: "Even if the cost of compliance with fundamental justice is a factor to which the courts would give considerable weight, I am not satisfied that the Minister has demonstrated that this cost would be so prohibitive as to constitute a justification within the meaning of s. 1."[54] The particular appellants were entitled to a fair oral rehearing of their refugee claims and the decision prompted an expensive re-ordering of the refugee determination system to create a just hearing procedure.[55]

A comparison with constitutional injunctions is illustrative of the normative force of the declaratory remedy. Berryman, following Owen Fiss, discusses the structure for constitutional injunctions.[56] A *prohibitive injunction* prevents the enforcement of unconstitutional laws and actions. A *mandatory* or *reparative injunction* is issued by the court when it believes invalidity should be restrained until reparative steps have taken place in order to minimize disruption and the court takes it upon itself to define those reparative steps. When the court cannot define these steps and the matter requires further investigation or where the court must engage in ongoing supervision of the decree, then the court issues a *structural injunction*. And, where the court specifically addresses the reparative steps to the legislature thereby requiring legislative action, a

[53] Ibid. at paras. 31-33.

[54] Ibid. at para. 73.

[55] One could speculate that, given the controversy this case caused, if it had occurred later, the delayed declaration of invalidity might have been used to quell specific fears concerning administrative disruption and general fears concerning political chaos.

[56] Berryman, p. 153-54.

legislative injunction is found. Structural injunctions remain rare in Canada[57] as do prohibitive injunctions.[58]

However, a declaration of invalidity under s. 24(1) or s. 52(1) functions somewhat analogously to a prohibitive injunction so long as the government responds willingly and appropriately. Contra Fiss, declarations are better suited to modern governance than structural injunctions since they invite and incorporate expertise of other branches of government and, unlike damages and injunctions, are applicable to situations with limited adjudicative facts if a reasonably provable connection exists between the impugned conduct and a past or future violation.[59] Moreover, instead of heavy-handed coercion, declaratory relief is more curative and preventive in its attempt to clarify and affirm legal relations as well as institutional relations so long as compliance is voluntary, prompt and in good faith.[60] If advisory guidelines are issued in conjunction with a declaration of invalidity, the Court assumes the role of counsel providing advice with legal import (counsel being from the courts of equity) or a council-like body (and a council such as Privy Council is an executive function) who, after deliberation, provides more

[57] As of the year 2000, there were no reported cases in Canada of structural or legislative injunctions. Berryman endorses the "cautious application" of structural injunctions if the government non-compliance arises in the future. (159).

[58] Kent Roach notes that the American experience with remedies is "frequently misunderstood" because governments helped negotiate remedial decrees and intrusive injunctive supervisory powers were directly derived from courts of equity in the United States. (2001b: 152)

[59] Kent Roach, *Constitutional Remedies*, at ¶12.170.

[60] Ibid. at ¶12.60, 12.70 and 12.100. Roach characterizes declarations as "uniquely suited" to public law litigation. Ibid. at ¶12.100.

general policy advice in order to advance a particular policy direction. Both roles seek to conciliate and their authoritative value comes from a relationship built on discretion, prudence, confidence, and trust. Though the corrective function of declarations takes a back seat to the prudential and prospective, redress of past injury cannot be neglected or else a significant facet of its meaning will be lost.[61]

The delayed declaration of invalidity provides an interesting twist. From the categories immediately above, it seems that this kind of declaration functions like a hybrid of mandatory and legislative injunctions—albeit lacking coercive force—since the court can take upon itself the formulation guidelines or articulation or reparative steps which it specifically addresses to the legislature for further action. Another way of characterization is to say that the remedy is both 'defensive' in that it nullifies or stops a law and affirmative in that it contemplates and sanctions positive action.[62] The direction government ought take to comply is left open and the proposed guidelines or steps are not enforceable.[63] But because there is a legitimate perception and expectation that government will comply with a declaration, inaction could provoke the court

[61] This is why Sujit Choudhry and Kent Roach take issue with cases which create rights without remedies if remedial legislation has only prospective effect and does not retroactively benefit others who are in the successful litigant's position. They argue for a presumption that remedial legislation has retroactive effect. This is also why they are in favour of exempting the successful litigant from the period during which the declaration of invalidity is delayed. See Sujit Choudhry and Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies," (2003) 21 Sup. Ct. Law Rev. 2nd ser. 205 at 252-53.

[62] Hogg (2001) s. 37.2(g) at p. 814.

[63] Therefore a typical hybrid example is *Mahe* where the Court issued a declaration outlining the constitutional requirements to meet section 23 of the *Charter* regarding management and control over minority language education but the legislature was free to implement or vary these court-created policy guidelines.

into adopting the structural injunction thereby putting aside concerns about intrusiveness and usurpation of traditional government functions. Nevertheless, though declarations are not binding, the normative effect is "as if the court had actually quashed the relevant decision" as with *certiorari* in the administrative law context.[64] Thus the "mere" declaration has great normative force with the threat of injunction or *mandamus* behind it.[65]

The remedial affinity between the declaration and mandatory injunction is most apparent in *Re Manitoba Language Rights* where the declaration of temporary validity was devised and first employed.[66] According to Berryman, the *Manitoba Language* case stands as an example of an intrusive reparative injunction which sought to correct wrongs wrought by past constitutional violations, violations which threatened the very notion of the rule of law.[67] The actual remedy,

---

[64] Mullan, p. 413.

[65] See Berryman: "By and large, the impugned agencies have complied with the courts' orders even where they have been issued as mere declarations." (156)

[66] Note that the *Reference re Manitoba Language Rights* case was not a Charter case and invalidity resulted from a failure to comply with a non-Charter constitutional rule.

[67] Berryman argues that the closest example of a legislative injunction in Canada are the electoral boundaries cases like *Dixon* v. *British Columbia (A.G.)*, (1989) 59 D.L.R. (4th) 247 (B.C.S.C.). The form this remedy took was a declaration of suspended invalidity in order to control a constitutional crisis of the same magnitude as in *Reference re Manitoba Language Rights*. McLachlin C.J. (then of the Supreme Court of British Columbia), declined to specify the length of the suspension and left the legislation in force as "may be reasonably required to remedy the legislation" and the period could be fixed later in an order of the court. In the later order sought before another judge, no deadline was imposed on the Legislature who was left "to do what is right in its own time." (1989) 60 D.L.R. (4th) 247 (B.C.S.C.). New legislation was enacted before the next provincial election which took place two years later.

however, takes the form of a declaration of temporary validity. In order to contain the legal effects of this crisis, the Court ruled that unconstitutional laws could be given temporary force and effect to give the legislature time to enact corrective or curative legislation and avoid a "vacuum" of law since the failure to enact laws in both languages according to a pre-confederation statute invalidated all of Manitoba's statutes. The remedy has been used numerous times since[68] and often outside of the three grounds outlined in *Schachter*: rule of law, public safety, and under-inclusive benefits.[69]

---

[68] Other cases include: *R.* v. *Mercure*, [1988] 1 S.C.R. 234 (unconstitutional English-only statutes in Saskatchewan); *R.* v. *Paquette*, [1990] 2 S.C.R. 1103 (unconstitutional English-only statutes in Alberta); *R.* v. *Swain*, [1991] 1 S.C.R. 933 (six-month period of validity to criminal provisions requiring detention in a psychiatric facility of persons acquitted on the grounds of insanity); *R.* v. *Bain*, [1992] 1 S.C.R. 91 (six-month period of validity to unconstitutional criminal provisions allowing Crown prosecutor, but not the accused, to 'stand by' prospective jurors); *Sinclair* v. *Quebec*, [1992] 1 S.C.R. 579 (invalidly incorporated but functioning Quebec municipal by-laws); *Re Remuneration of Judges (No. 2)*, [1998] 1 S.C.R. 4 (requirement of judicial compensation commission for judicial independent suspended for one year); *Re Eurig Estate*, [1998] 2 S.C.R. 656 (six-month suspension of invalidity of provincial probate fees); *M.* v. *H.*, [1999] 2 S.C.R. 3 (six-month suspension of invalidity of definition of spouse); *U.F.C.W.* v. *KMart Canada*, [1999] 2 S.C.R. 1083 (six-month declaration of temporary validity of prohibition on secondary picketing); *Mackin* v. *New Brunswick*, [2002] 1 S.C.R. 405 (six-month delayed declaration); *Figueroa* v. *Canada (Attorney General)*, [2003] 1 S.C.R. 912 (twelve-month delayed declaration of invalidity for reform manner in which parties obtain status for federal elections). For a recent list of judgements issuing suspended declarations of invalidity at all levels across the country, see Table A in Choudhry and Roach, "Putting the Past Behind Us?" at 253-56. See also in the same article, Table B indicated the reply legislation enacted in response to suspended declarations of invalidity. Ibid. at 257-66.

[69] Roach, *Constitutional Remedies*, at ¶14.160. Roach cautions against a categorical approach to remedies though he also does recommend that courts should be cautious in using delayed declarations.

b. Delayed declarations as deliberative deference

It is tempting to read the new role of the Court as fitting under the general thesis of the decline of deference in society. Respect for authority is not automatic but rather must be earned and its source comes from citizens not intrinsically from status. Though still respectful, the declaration of suspended invalidity signals another step in the dismantling of the feudal legacy in our legal architecture.[70] With the Charter, the possibility of achieving a more equitable and accountable relationship between citizen and public officials seems viable.[71] Courts, therefore should be less likely to give absolute defer to the principles of parliamentary sovereignty or Crown immunity and privilege. Regarding Crown immunity and privilege, the courts will determine if such a power exists, its limits, whether or not these limits have been complied with, and whether a statute has displaced the power.[72] Moreover, prerogative powers under the principle of

---

[70] With respect to the executive power, Hogg and Monahan write that "[m]ost of the Crown's remaining privileges and immunities are vestiges or outdated notions of kingship or sovereignty and could be eliminated without injury to the task of government." Hogg and Monahan, 9. For example, the requirement of the royal fiat—government must consent to be sued—was abolished in 1951. Ibid.

[71] Though not, as Hogg and Monahan conclude, through s. 15 application. They cite *Rudolf Wolff & Co.* v. *Canada*, [1990] 1 S.C.R. 695 for the proposition that equality-based attacks on Crown privileges or immunities (or other public bodies) will fail. Thus, the Crown has been subject to the equalizing effects of the ordinary law of the land (common law proprietary, contractual and tortious rights and duties) but not to the 'extraordinary' constitutional law. Ibid. at 9-10. According to British constitutional theorist Albert Venn Dicey, prerogative was the "residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown." Ibid. at 15.

[72] For the most recent judgement confirming this approach to the scope of Parliamentary privilege, see *Canada (House of Commons)* v. *Vaid*, 2005 SCC 30 which held that Parliamentary privilege does not extend to all employment relations in the legislative branch of government and that the conduct under dispute must be closely connected with the legislative and deliberative functions in order to invoke privilege: "Legislative bodies created by

constitutionalism must be exercised in conformity with the Charter[73] and other norms both constitutional and administrative. Such an approach entails the diminution of categorical reasoning—that is, deference accorded because of the form of power, such as Crown privilege—with a principled, purposive, and contextual approach to determining rights and remedies.[74] There are three foci then: 1) how does a decision affect the fundamental interests of citizens; 2) how does a decision induce and ensure institutional compliance; and 3) how does a court construct a remedy that reflects institutional competence and capacity. These concerns are forward-looking in two ways: to secure institutional compliance and to ensure that the situation is not likely to happen again.[75]

---

the *Constitution Act, 1867* do not constitute enclaves shielded from the ordinary law of the law…Privilege 'does not embrace and protect activities of *individuals*, whether members or non-members, simply because they take place within the precincts of Parliament.' (U.K., Joint Committee on Parliamentary Privilege, vol. 1, *Report and Proceedings of the Committee* (1999)…' (at para. 242, emphasis in original). In this case, Gilbert Parent, the past speaker of the House of Commons, could not shield himself from a human rights complaint made by his former chauffeur, Satnam Vaid. However, the Supreme Court directed the complaint away from the statutory regime governed by the *Canadian Human Rights Act* to the grievance procedures found under the *Parliamentary Employment and Staff Relations Act.*

[73] See *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441 and *Black* v. *Chrétien et al.*, (2001) 54 O.R. (3d) (O.C.A.).

[74] Concerning prerogative powers, Hogg and Monahan confirm that the "position emerging in England, where recent cases have held that the reviewability of a decision depends not so much on the source of the power invoked but, rather, on the nature and character of the decision in question." (20-21).

[75] See Abraham Chayes, "The Role of the Judge in Public Law Litigation," (1976) 89 Harv. L. Rev. 1281 at 1302.

Though the applicant(s) may be exempted from the delay, the effects of deferring redress and satisfaction for other similarly situated individuals should not be underestimated.[76] Lamer C.J. was right to recognize the radical nature of the suspended declaration of invalidity in *Schachter*[77] because it maintains in force an unconstitutional situation. In addition to encumbering the affected class, the remedy constitutes "serious interference" with the normal legislative process since the delay forces the issue back on the legislative agenda at a time not of the legislature's choosing and with imposed time limits. Lamer C.J. would have limited the remedy to cases where striking down legislation would immediately pose a danger to the public, threaten the rule of law, or deprive benefits from deserving persons because of under-inclusive legislation.[78]

Though I take Lamer C.J.'s admonitions seriously, I suggest that broadening the terms of application of this remedy—making it a little more ordinary than extraordinary—would not infuse the constitutional order with illegitimacy.[79] However, it is also true that not every case merits this remedy and so it should be reserved for situations, in addition to the three listed above, which implicate significant change to the political or legal order, though not necessarily at

[76] Kent Roach phrases the concern as follows: "'Congratulations, you have won the case. Even though it has taken many years and your savings, you will not receive an immediate remedy because we are going to give the government a year to decide what to do.'" (2001b: 201).

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

[78] Ibid. at 719. He preferred redress through severance or reading in, where appropriate. See also Marilyn Pilkington, "Damages as Remedy for Infringement of the Canadian Charter of Rights and Freedoms," (1984) 62 Can. Bar. Rev. 517.

[79] Although I acknowledge the rhetorical value of Kent Roach's claim that "the use of delayed or suspended declarations of invalidity has grown by leaps and bounds so that they now verge on the routine", I questions its empirical basis. (2001b: 201).

the level of a crisis.[80] In fact, where a remedy (or a variety of remedies) to cover a particular situation needs to be constructed through wide consultation with multilateral interests, a declaration of temporary validity will facilitate democratic consultation, better crafting, and minimize risk of political instability and legal illegitimacy.[81] A useful and workable equitable delayed declaration of invalidity, then, will show that the Court has turned its mind to general guidelines, informed by the remedy/remedies brought forward by the parties, considered in light of the larger and multilateral context, and with an eye to providing a degree of specificity (though considerably short of a detailed map), to reduce uncertainty about the extent of the remedial consequences of the declaration.

Underlying this analysis of the remedial structures is the question of what means are reasonably justifiable to govern. The suspended declaration of invalidity has evoked concerns about the separation of powers in a constitutional order. By adopting the Charter, Canada has mandated greater power in the hands of the judiciary in order to police the exercise of public power.[82] As

[80] One might argue that remedial deference is to be preferred to deference in interpreting rights or engaging in section 1 analysis.

[81] Or, as L'Heureux-Dubé J. states: "It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe: a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system." See *R.* v. *O'Connor*, [1995] 4 S.C.R. 411 at para. 69.

[82] For trenchant critiques of this power shift and consequent rise in 'judicial activism' by both (self-identified) conservative and progressive critics, see: Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto, New York and London: Oxford University Press, 1994); Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany, NY: State University of New

articulated in the *Secession Reference*, constitutionalism—one entailment of the rule of law—equalizes Parliamentary supremacy and constitutional supremacy, thereby binding all governments and all branches (that is federal, provincial, and the executive) and compelling compliance with constitutional provisions so that "their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source."[83] Curiously, the Supreme Court leaves itself out of this discussion of constitutionalism,[84] though we can infer that the Court too must comply with the order and not, despite constitutional supremacy, usurp the roles of the other institutions of governance. There exists (or ought to exist), then, no judicial exclusivity, no interpretive monopoly, and no absolute remedial superiority.[85] Looking again to the *Secession Reference,* the Court states that

---

York Press, 2002); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Allan C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thomson Educational, 1994); Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Toronto: Oxford University Press, 2001); Robert Martin, *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined Our Law and Our Democracy* (Kingston & Montreal: McGill-Queen's University Press, 2003); and, F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).

[83] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 72 [*Secession Reference*]. For a discussion of this rule of law entailment in the context of a critique of current formulations of the theory of institutional dialogue, see Mary Liston, "Willis, 'Theology,' and the Rule of Law," 2005 55 University of Toronto Law Journal, 768-95.

[84] Although since it finds itself competent to answer the questions it finds justiciable, discussion concerning the legitimacy of the Court's role in the *Secession Reference* is taken (perhaps wrongly) as proved and self-evident.

[85] Palmer discussing the settlement of 1616 between the Chancellor Lord Ellesmere, and the Chief Justice Lord Coke during the reign of James 1 where the King's dismissal of Coke entailed success for Lord Ellesmere suggests

constitutional values will not trump each other but will be reconciled with or balanced against each other. Considering the competing principles of judicial and parliamentary supremacy, then, either branch can have the final word but neither can have the only word on a constitutional matter.[86] And, finally, by reflecting on the *Secession Reference* as *itself* one of the most extraordinary remedies in Canadian constitutional history, we can glean that one crucial function of remedies in polycentric, highly politicized, controversial matters is to encourage the obligation and use of good faith negotiation between government and affected parties.[87] The temporary declaration of validity, from this perspective, may function as one of the best guarantees for the separation of powers since it avoids more intrusive injunctive remedies.

As with earlier constraints on equity, the declaration of suspended invalidity contains its own limits which aim to prevent the abuse of discretionary power by the judiciary. Recall that equitable constraints include the following: precedent, supplementing common law, invoking an

---

that this battle was not about principle but was a competitive gambit on the part of common law and equity lawyers to obtain a monopoly position for their respective courts. In France, therefore, legislative equity reigned supreme over the judiciary who were re-assigned as administrators. Palmer, 1290-91n.26.

[86] Proponents of the notion of democratic institutional dialogue between courts and legislatures include: Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Kingston & Montreal: McGill-Queen's University Press, 2002); Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); Lorraine E. Weinrib, 'The Activist Constitution,' in *Judicial Power and Canadian Democracy*, eds. Paul Howe and Peter H. Russell, (Montreal & Kingston: McGill-Queen's University Press, 2001); P.W. Hogg, 'The *Charter* Revolution: Is it Undemocratic?' (2001-02) 12:1 Const. Forum 1; and, P.W. Hogg and A.A. Thornton, 'The Charter Dialogue between Courts and Legislatures' (2000) 3 Can. Watch 1.

[87] See also *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 which suggests that governments may have a legally enforceable duty to negotiate in good faith once they have entered into negotiations with Aboriginal groups.

objectified conscience from the larger and public normative order, and respecting the separation of powers. Canada has seen several constitutional battles, but so far the role of the courts has retained their general legitimacy. As the country moves into more complex areas of public law, the potential is present for democratic dialogue to become argument, as for example over aboriginal sovereignty, funding access to justice, or recognizing substantive social and economic rights. The equitable role of the courts in these situations, then, will be to craft a remedy alive to the need to reconcile the parties without compromising on the duty to ensure that legally recognized rights and responsibilities are properly exercised.

4. Deferential dialogue or justice deferred?

Despite its creation twenty years ago, the delayed declaration of invalidity has only recently 'come into its own' within the last ten years. Indeed, remedies may come to pre-occupy the courts as a jurisprudential concern after many years grappling with sections, 1, 7, 15 and 25 of the Charter and section 35 of the *Constitution Act, 1982*. This section discusses three Supreme Court cases—*Eldridge*, *Corbiere*, and *Dunmore*—which used the delayed declaration of invalidity in order to explore concerns about whether this remedy lives up to the dialogic goals of effectiveness, legitimacy, and institutional complementarity. Lastly, the section will advert to several weaknesses of this remedial route in preparation for the assessment of current developments and future trends in section 5.

a. Demanding dialogue?: Eldridge, Corbiere, and Dunmore

The *Eldridge*[88] decision concerned whether British Columbia should publicly fund sign language interpreters for deaf users of medical services. In addition to the significant equality rights analysis in relation to healthcare, *Eldridge* also involved a novel remedial development. The Supreme Court found in favour of the deaf litigants and issued a declaration in their favour but suspended it for six months.[89] Instead of invoking s. 52(1), the declaration was issued under s. 24(1) and the remedial direction to the provincial government therefore considered appropriate and just in the circumstances. It is open to question whether the Court believed that this approached contained the scope of the remedial action to these particular circumstances, whether using this form was thought to further legitimize the demand for positive action, and how exactly it conceived of the relationship between s. 52(1) and s. 24(1).[90]

---

[88] *Eldridge* v. *B.C.*, [1997] 3 S.C.R. 624 [*Eldridge*].

[89] Roach suggests that *Eldridge* "confirms the status of the declaration, as opposed to the injunction, as the Canadian courts' remedy of first choice in dealing with institutional non-compliance with Charter requirements. It allows the court to direct quite extensive, drastic and costly remedies without usurping the ability of governments to make choices about the precise means of implementation." *Constitutional Remedies*, at ¶12.475.

[90] Sujit Choudhry and Kent Roach in "Putting the Past Behind Us?" suggest that s. 24(1) remedies properly concern correcting past injustice and often are personal in nature while s. 52(1) remedies attach to the legislation not the person, are prospective and therefore seek to ensure justice in the future. (223) These can be combined as, for example, when a s. 52(1) declaratory remedy of suspended invalidity is paired with an individual remedy under s.24(1) which exempts the successful litigant(s) from the period of delay. The Court is reluctant to combine these remedies alluding to concerns about horizontal equity between similarly situated persons and the litigants. (246) Another key problem for litigants is to select the proper route to the right remedy as courts have sometimes concluded that litigants who have chosen s. 24 should have chosen s. 52 and vice versa.

The Court held that, unlike an injunction, a six-month declaration of temporary validity allowed the Court to "direct quite extensive, drastic and costly remedies without usurping the ability of governments to make choices about the precise means of implementation."[91] Moreover and quite pointedly, the Court wrote that is "assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with the Court's directive".[92] Thirdly, the Court directed the government to ensure that sign language interpreters would be provided where necessary and that in delivering this remedy, the government would act in good faith to consider the role of hospitals in the delivery of medical services and the involvement of other bodies such as the Medical Services Commission and the Ministry of Health. B.C. responded by implementing a 24 hour toll free line and instituted the option for a deaf or hearing impaired person to request interpreters to attend physician and hospital visits (an option which does not extend to dental, physiotherapy or chiropractor appointments). Country-wide compliance with the *Eldridge* decision has been inconsistent[93] and it seems from the Court's unusually pointed directions that they suspected such a result and attempted to create a stern instruction to avoid disruption to the health care system because of non-observation of such a "keystone tenet of

[91] Roach, *Constitution Remedies*, at ¶12.475. See also *Eldridge* at para. 96.

[92] *Eldridge* at para. 96.

[93] Roach notes that there are no reported cases of follow-up litigation in other provinces. (Roach 2002: 230) See the article "Deaf bombard hospitals wit rights grievances" detailing the need to resort to Human Rights Commission proceedings in order to enforce equal services. Available at www.nvrc.org/news. In a very informal survey undertaken by the Ontario Association of the Deaf, 80 out of 240 hospitals which responded indicated that 16 had teletypewriters in emergency rooms, 33 had a certified interpreter's list available to emergency room staff, and 18 provided TV sets with closed-captioning. Available at: www.deafontario.org/info/access/feb04_02.htm .

governmental policy".[94] But, as Kent Roach points out, even an injunction would not solve the compliance issue since other provinces would not be bound as defendants by an injunction obtained in British Columbia. The result is that national standards for equitable access to health service for hearing impaired people would have to re-litigated on a province-by-province basis. Re-litigation, however, would ground more intrusive forms of relief in the form such as injunctions and damages under s. 24(1). In this instance, criticisms concerning the effectiveness of constitutional litigation when faced with government non-compliance seem particularly apt and underscore the conclusion that courts cannot function as "engine[s] of social reform".[95]

Corbiere,[96] the off-reserve aboriginal voting rights case, provides another modification on the remedy. Here the Court declared provisions of the *Indian Act* invalid but suspended the declaration for a lengthy time of eighteen months.[97] The second interesting modification is that the Court did not grant a constitutional exemption to the Batchewana Band, the successful applicant, during the period of suspension.[98] The reason for this change was that "in the particular circumstances of this case, it would appear to be preferable to develop an electoral process that will balance the rights of off-reserve and on-reserve band members."[99] To do this,

---

[94] *Eldridge* at paras. 40 and 50.

[95] See Manfredi (2001), p. 167. See also his discussion of remedies, p. 164-68.

[96] *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203 [*Corbiere*].

[97] Both *Corbiere* and *Dunmore*, each with eighteen month suspensions of invalidity, stand as two of the longest remedial delays.

[98] Kent Roach acted as counsel for Aboriginal Legal Services of Toronto and argued that the litigant should have an immediate remedy and be exempted. See Roach, *Constitutional Remedies*, at ¶14.1856.

[99] *Corbiere* at para. 23.

the government would be obliged to engage in extensive consultations with the 610 affected Bands in order to co-operatively craft an appropriate remedy for each Band situation. One can see that, as with the health care example above, the Court was engaged in 'high politics' mediation either with respect to federalism or with the *sui generis* realm of Aboriginal rights. Certainly with Aboriginal issues, the Court was sensitive to the fact that the 'honour of the Crown' is always implicated and attempts to ensure here that rule of law norms are injected into the consultation process to secure transparency and certainty in the negotiations with each Band about voting schemes and to encourage good faith dealings and respect for minority rights. The Court concluded by warning that "[w]e have not overlooked the possibility that legislative inaction may create new problems. Such claims will fall to be dealt with on their merits should they arise."[100]

The preference for declarations and the necessity of negotiations especially when aboriginal rights are at play make the delayed declaration of invalidity particularly appropriate for aboriginal cases so long as governments maintain the trust-like and non-adversarial character of their fiduciary duties toward aboriginal peoples. In addition, aboriginal peoples should have greater participation in the formulation of remedies. Whether or not this declaratory remedies should remain the "minimum remedy"[101] for legislation that unjustifiably violates aboriginal rights and whether or not courts should retain jurisdiction over these issues in order to ensure final and satisfactory remedies if a solution does not emerge during the transition period, or whether or not the courts should issue more intrusive remedies such as injunctions during the

[100] Ibid. at para. 23.

[101] Roach, *Constitutional Remedies*, at para.¶15.700-15.710 in Chapter 15 on remedies and aboriginal rights.

transition period in order to prevent further encroachments on rights remain 'live' and uncertain issues.

Dunmore[102] involved the suspension of the declaration of invalidity of provisions excluding agricultural workers from Ontario's labour relations regime. As in *Corbiere*, the suspension was for eighteen months in order for the legislature to amend over-inclusive legislation with broad exclusions and therefore not have to deprive other workers of the statutory benefit. The Court was careful to specify minimum requirements for the remedy so that here, in accordance with Charter principles, agricultural workers ought to have the statutory freedom to organize as well as the associated protections necessary for the exercise of this right (e.g., freedom of assembly, freedom from interference and coercion, freedom to participate in the lawful activities of the association, etc.).[103] The Court abstained from requiring or forbidding more controversial rights in the agricultural context such as inclusion in a full collective bargaining regime and the right to strike.[104]

---

[102] *Dunmore* v. *Ontario*, [2001] SCC 94 [*Dunmore*]. Note that this is the first time the court reviewed the total exclusion of a non-governmental occupation group from a labour relations regime. Agricultural workers, because of characteristics such as immigration status, itinerancy, and low socio-economic status, generally demonstrate no independent ability to organize. A contrasting group would be RCMP officers in the case *Delisle* v. *Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989.

[103] *Dunmore* at para. 67.

[104] However, the Court considered the threshold question should a claim for inclusion arise in the future: "whether the provision relates to an activity falling with the framework established by the labour trilogy or that otherwise furthers the purpose of s.2(d) of the *Charter*." Ibid. at para. 69.

In contrast to *Eldridge* which fuels critiques of judicial involvement finances and positive obligations on governments,[105] the remedial path taken in *Dunmore* nurtures the progressive critique of dialogue theory.[106] Because the Court's decision did not extend the full scope of labour relations rights to agricultural workers and basically suggested a 'floor' rather than a 'ceiling', they were left vulnerable to the Ontario government's legislative response. The legislative response, as will be discussed further in section 5 below, ignored much of the *Dunmore* dicta such that the *Agricultural Employees Protection Act*[107] notably constrained the ability of agricultural workers to unionize. Indeed, the Court considered the possibility of future legal challenges in its decision based on the claim for inclusion in a full collective bargaining regime. The question therefore arises whether institutional dialogue in the form of legislating legal minimums will prove to be more expensive and inefficient than if legislatures attempt to meet constitutional obligations in the first place.[108]

[105] See, *e.g.*, Manfredi (2001), p. 156-57.

[106] See, *e.g.*, Jonathan Carson and Charles W. Smith, "Waiting for the Revolution: Democracy, Dialogue and *Dunmore*," Draft paper prepared for the 2003 CPSA Meeting, Halifax NS.

[107] R.S.O. 2002, c. 16.

[108] Carson and Smith state: "Dialogue, as we have seen, was included in the *Charter* in order to bolster its democratic attributes. In *Dunmore*, though, this democracy amounts to little more than the legislature doing the absolute minimum it is legally required to do.…the ideal of dialogue can serve to deliver the worst aspects of judicial review and legislative action by allowing each side to do only the minimum with regard to progressive causes." (p. 27-28)

b. Profound withdrawal or principled approach?: an assessment

There are two kinds of assessments one could make based on the jurisprudential history of the delayed declaration of invalidity. The first concerns whether or not the courts have properly used the delayed declaration. Both Peter Hogg and W.H. Hurlburt take issue with the increased use of suspended declarations of invalidity. As Hurlburt points out, if the King could not suspend laws without the consent of Parliament, how can the Court?[109] Hurlburt reserves the remedy for crisis situations only.[110] Peter Hogg, on the other hand, contemplates appropriate use of this remedy in situations demanding crisis-stemming and gap-filling, both of which he argues are consistent with the framework set out in the *Reference re Manitoba Language Rights*.[111] He suggests that *Corbiere* is an incorrect application since he does not perceive the need to engage in broad consultation to implement appropriate electoral systems as a threshold issue. As is clear from my discussion of the case, I disagree with him and think he underestimates the far-reaching effects of the decision on aboriginal democratic representation, band governance, and aboriginal citizenship.[112] The one case that both Hurlburt and Hogg believe to be patently incorrect is *Re:*

---

[109] Hurlburt quotes the *Bill of Rights of 1689* (U.K. 1 Will.3, c.2): "That the pretended power of suspending of laws, or the execution of laws, by regal authority, without the consent of parliament, is illegal." See "Fairy Tales and Living Trees: Observations on Some Recent Constitutional Decisions of the Supreme Court," (1999) 26:2 Man. L.J. 181 at 202.

[110] He argues that "[i]f the suspension of the Constitution is necessary to preserve the essential interests of the body politic in democratic government and the rule of law, and if nothing else can do so, it may be permissible to suspend the Constitution, but…nothing but the avoidance of a desperate and otherwise irreparable situation does so." Ibid. at 201.

[111] Hogg (2001) s. 37.1(d).

[112] Indeed, thinking about *Corbiere* in this way leads me to reflect that the *Marshall* decision could have benefited from the same remedy given the resulting political uproar and social conflict.

Eurig Estate[113] where a six-month suspension of the declaration of invalidity was justified on the basis that an immediate declaration would deprive the province of revenues fees in the vicinity of $50 million a year derived from probate. The Court accepted the argument that the province's lack of access to these moneys, revenue which defrayed the costs of provincial court administration, would have "harmful consequences for the administration of justice in the province."[114] I reserve final judgment on this case since I am least familiar with the legal issues involved here. Though I suspect Hogg and Hurlburt might be right on this one, I see no *prima facie* inconsistency with the 'crisis' framework if a declaration entails consideration of extreme financial loss or expense. On this principle, a delayed declaration in retrospect might have been appropriate in *Singh*.

The second line of criticism takes a rights-based approach. From this perspective, problems with delayed declarations of invalidity concern both the nature of the delay and the nature of the policy room the remedy entails.[115] With respect to the nature of the delay, concerns arise about the risks of continued delay for the enforcement of constitutional rights, whether the delay is too short and therefore government cannot properly response, whether the delay is too long thereby denying affected persons a satisfactory resolution, and how arguments concerning fiscal constraints continue to structure legal remedies. Concerns about the room for policy response include the lack of guarantees for consultation with affected parties and being kept informed about the progress of policy responses. There also exists the risk that the legislative response to

[113] [1998] 2 S.C.R. 565.

[114] Ibid. at para. 44.

[115] See Roach (2002) for discussion of these problems (p. 224-25).

under-inclusive legislation will be to expand the scope of benefits but at the expense of lowering the benefit level for all eligible persons. Finally, in the event that there is either no or an unsatisfactory legislative response, current use of delayed declarations offers little in the way of retaining jurisdiction via injunctions to compel standards and performance; it is up to the unhappy litigants to commence, if they are willing and financially able, new litigation.[116]

Despite the evident problems within each of the three cases discussed above, I would conclude that each is a valid example of the use of the suspended declaration of invalidity remedy to promote good governance and to further reconciliation within highly politicized and contentious matters among a wide range of affected interests. What each case signals, however, is that the Court consideration of more intrusive remedial intervention looms very soon on the horizon.

5. End runs and show downs: further trends

When one considers several recent developments in caselaw, it seems clear that the trust relationship upon which the delayed declaration of invalidity is on less than solid grounds. It is also inevitable that a collision will occur in the very near future either in the area of government non-compliance or on the issue of costs. Lastly, and despite this inevitable collision, it is far from certain that the courts will "become impatient with legislative indecision and more active in proffering remedies."[117]

[116] This is why Roach recommends that if re-litigation occurs, repeat litigants are entitled to receive advance costs to cover litigation expenses. Ibid. at 231.

[117] Hiebert, p. 199.

a. Non-compliance and re-litigation

The *Dunmore* decision is in the process of being re-litigated because the legislative response by the Ontario government, as discussed above, proved less than satisfactory for the litigants.[118] Despite the fact that the farm workers and the United Food and Commercial Workers Union (UFCWU) Canada won the right to meaningful association, lawyers for the Ontario government have argued that the Supreme Court did not expressly order the Ontario government to extend the rights contained in the Ontario *Labour Relations Act* to the agricultural sector. Alberta and Ontario continue to be the outliers concerning agricultural workers' rights.[119] The new legal challenge concerns employees represented by the UFCWU on a mushroom farm whose certification vote cannot be granted by the Ontario Labour Relations Board because of the structure of the *Agricultural Employees Protection Act* which currently regulates agricultural workers.

Two gay bookstores have also experienced government non-compliance in battles over censorship. After winning an appeal challenging the powers of the Ontario Film Review Board

---

[118] Kirk Makin, "Farm workers take issue with 'useless' law: Labour measure in Ontario offers no rights, protections, union lawyer says," *Globe and Mail*, 15 March 2005, A9. Paul Cavalluzo, the lawyer representing the claimants, described the situation as follows: "I believe the Supreme Court was talking about a meaningful right to association…but the government did a complete end run on it.…They came up with what I consider to be an illusory right." Ibid.

[119] The legislation denies agricultural workers the same rights to freely associate as workers in other industries do, imposes no requirements on employers to bargain in good faith and reach collective agreements, creates a separate panel for dispute adjudication which has lesser powers than the OLRB, and provides no mechanism for workers to choose a union based on a free vote.

to censor films but facing continuing battles with new legislation,[120] Toronto's Glad Day Bookshops Inc. announced that it is surrendering its role as a legal fighter for gay and lesbian rights in Canada.[121] In response to the ruling, the Ontario government tabled the *Film Classification Act*[122] which repealed the older act but the new bill actually expanded the OFRB's power to classify and censor film.[123] The second bookstore, Little Sisters Book and Art Emporium, was denied public funding in its second challenge against the censorship powers of Canada Customs.[124] In the first challenge, the Supreme Court did not strike down Customs' power to seize and censor but crafted suggested policy guidelines for Customs to follow. The litigants charge that Customs has not cleaned up its act at all.[125] In this second challenge, the

[120] Mr. Justice Russell Juriansz of the Ontario Superior Court found the *Theatres Act* inconsistent with the Charter. *R.* v. *Glad Day Bookshops Inc.*, 2004 CanLII 16104 (ON S.C.). Glad Day and its owner were convicted of distributing a gay adult film that had not been approved by the review board. The declaration of invalidity was suspended for 12 months to allow the Ontario government time to disentangle the classification system from the unconstitutional censorship scheme.

[121] Katie Rook, "Gay bookshop gives up the fight: Repeated legal battles have cost business more than $1-million over 30 years," *Globe and Mail*, 25 January 2005.

[122] R.S.O. 2004, c. 19, s. 22.

[123] Frank Addario, the lawyer who represented Glad Day, describes the response as follows: "…the Liberals have basically slapped a new coat of paint on the old powers and presented it as new legislation.…It is neither progressive nor courageous." Ibid.

[124] *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 [*Little Sisters*]. Kirk Makin, "Gay bookstore denied funds in battle over censorship," *Globe and Mail*, 23 February 2005, A7.

[125] Little Sisters claims that Customs seized more than 5,000 titles of expressive material each year. Their lawyer, Joseph Arvay, describes the situation as follows: "I don't have a proper term for it, but some linguist might aptly coin the phrase 'bibliocide' to describe what is happening at Canada Customs—given their propensity to ban and destroy literally thousands of titles of expressive material each year." Ibid.

B.C. Court of Appeal found that the trial judge was wrong to order Customs to fund a challenge against itself, saying that Little Sisters cannot claim to be the publicly appointed watchdog over Customs.[126] The reality of re-litigation to ensure compliance speaks directly to Iacobucci J.'s dissenting view concerning remedial relief in the earlier *Little Sisters* case:

> Given Smith J.'s finding that there were "grave systemic problems" in the administration of the law -- a conclusion with which I whole-heartedly agree -- the primarily declaratory remedy relied on by Binnie J. is simply inadequate. Systemic problems call for systemic solutions. I believe that Customs' history of improper censorship, coupled with its inadequate response to the declarations of the courts below, confirms that only striking down the legislation in question will guarantee vindication of the appellants' constitutional rights. (at para. 253)

Iacobucci J. concluded that one could no longer "take it on faith" that Canada Customs would reform its ways.[127] Instead of a simple declaration, he would have used a suspended declaration of invalidity in order to induce legislative reform and the possible introduction of more comprehensive remedial options.[128] Indeed, this is the sort of case where the courts might

---

[126] The trial judge had extended a 2003 Supreme Court ruling, *British Columbia (Minister of Forests)* v. *Okanagan Indian Band*, [2003] 3 S.C.R. 371, which ordered the B.C. government to finance the Okanagan Indian band in a forestry dispute. She granted Little Sisters advance costs, the first such order outside of the aboriginal rights context, because the case raised issues of public interest in the constitutional arena.

[127] *Little Sisters* at para. 282.

[128] His underlying rationale was to ensure the government satisfied its justificatory onus thereby preventing prevent re-litigation: "A final reason that declaratory relief is inappropriate in this case is the difficulties the appellants face in enforcing it. This case has been a massive undertaking for the appellants. Proving the constitutional violations

modify the remedial consensus and retain jurisdiction once they have issued a general or a delayed declaration in order to obtain a satisfactory result and therefore avoid re-litigation.[129] According to Kent Roach, this type of remedial approach would "represent a distinctively Canadian innovation on the American experience of public law litigation."[130]

The *Dunmore* and *Little Sisters* outcomes point toward the path recently taken in *Doucet-Boudreau*.[131] In this minority language case, the dispute centred on whether the trial judge, LeBlanc J., could retain jurisdiction as a continuing part of his docket.[132] In the original remedy, the trial judge issued a declaration of entitlement to primary instruction in French language and then blended it with injunctive relief through a request for continued mediation. According to the Supreme Court, this novel and creative remedy accorded with s. 24 and did "not represent a radical break with the past practices of courts".[133] Again, a slightly renovated form of

---

recognized by Smith J. required the production of an enormous record. Unfortunately, if the appellants are unsatisfied with the government's compliance with the declaration affirmed by this Court, they have little choice but to try to assemble a similar record documenting the enforcement of the Customs regime since the declaration was made. This is obviously a heavy burden, and indeed unfair. A stronger remedy is necessary to vindicate the appellants' rights." (Ibid. at para. 261)

[129] Roach (2002) p. 256. Retention of jurisdiction would also enable further clarification of the ruling, if necessary, and the return for an extension or termination of the delay approved by the court.

[130] Ibid. at p. 258.

[131] *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 [*Doucet-Boudreau*].

[132] The legal issue centred on whether he made a complete ruling on the merits when he granted the declaration—and therefore could not retain jurisdiction—or rather whether he left an issue outstanding. This is an example of a rather technical and formalistic approach to deciding whether jurisdiction has been retained.

[133] *Doucet-Boudreau* at para. 73.

declaratory relief may counter legislative end runs around rights, prevent new litigation, and still maintain the legitimacy and appropriateness of judicial functions and competencies. On the other hand, some may see this route as yet another enhancement of judicial power, a further ability to impose policy preferences, and an inappropriate blending of the separation of powers in a constitutional order.

b. Disabling rights

The other key and growing areas of conflict concern whether or not the courts will direct public spending and/or attempt to prioritize funding decisions. Three recent cases attest to the either the looming showdown about the costs of rights or realization of the harsh reality that fiscal concerns are the real trumps in the current constitutional game. The pay-equity case, *Newfoundland (Treasury Board) v. N.A.P.E.*[134] illustrates that an existing contractual legal obligation, in contrast to a mere policy options, will be postponed or rendered inoperative in the face of severe fiscal crises. By emphasizing scepticism toward justification of violations based on general budgetary constraints and balancing pressing government priorities, the Supreme Court was careful not to 'devalue' Charter rights; however, the evidentiary threshold for the determination of periodic financial emergencies remains factually unclear and subject to cabinet confidence[135] and therefore deference to government's reasonable room to manoeuvre as a feature of the separation of powers presents serious risks, as noted by Mr. Justice Binnie in the ruling: "Ordinarily, such a casually introduced s. 1 record would be a matter of serious

[134] *Newfoundland (Treasury Board)* v. *N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66.

[135] Newfoundland presented only Hansard proceedings and some budget documents and called no witness to defend the crisis rationale.

concern.…I agree with the Board that the government ought to have called witnesses who were better placed to explain the government accounts and ministerial observations. However, in the context of this particular subject matter, I do not agree that failure to do so was fatal to the government's s. 1 case." (at para. 56 and para. 58) If the government is not held up to its justificatory onus in s. 1 of the Charter, then the onus shifts to the litigants to prove not only an unconstitutional infringement but are denied the dignity of hearing a proper policy rationale. As already discussed in relation to the *Little Sisters* case above, allowing limits on rights without accompanying substantive justifications involving evidence and policy rationales does subvert not only the purposive methodology of s. 1 but also the legitimation processes underlying the Charter.

A second case concerning the denial of survivor pension benefits in same-sex relationships provides a nice contrast.[136] The same-sex class action case *Hislop* illustrates the principle that when the costs of benefits are not excessive, the courts (here the Ontario Court of Appeal) are more likely to reject the kinds of funding and budget arguments that governments usually advance. Up to 1,500 surviving gay and lesbian spouses will benefit and they will share around $100 million in retroactive benefits. The federal government is appealing the judgement, arguing that the case is not really about same-sex rights but about the question of federal benefits programs and policy and the right to choose the effective date of legislation.

[136] *Hislop* v. *Canada (Attorney General),* 2004 CanLII 43774 (ON C.A.). See Kirk Makin, "Same-sex couples win pension fight: Ottawa violated rights in denying CPP benefits, Ontario Court of Appeal rules," *Globe and Mail,* 27 November 2004, A10.

Finally, the autism cases[137] bring together concerns about costs and fears of end runs around rights and re-litigation. The legal quest for funding for behavioural treatment for autism failed at the Supreme Court which held in *Auton* that such treatment was not part of the core services under the Canada Health Act and that decisions about what the public health system should provide were a matter for Parliament and legislatures.[138] In the Ontario decision *Wynberg*, the court found the denial of autism treatment to children age 6 and over in the education system to be discriminatory. The parents were awarded damages in compensation and the court denied the provincial government's request for a suspended declaration of invalidity. The government is appealing, arguing that governments and not courts should decide what programmes autistic children receive in schools.[139]

The question of judicial intervention in government spending priorities and permissible discrimination in allocating funds has become *the* central remedial problem. In as much as remedies are supposed to resolve conflict efficiently and equitably as well as to induce institutional co-operation, they may fail on both counts.

---

[137] *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 [*Auton*] and *Wynberg* v. *Ontario*, 2005 CanLII 8749 (ON S.C.) [*Wynberg*]. There are, however, two class-action lawsuits and two dozen cases launched by individual parents who had won injunctions granting interim treatment for their children pending the Ontario ruling. There is at least one case in British Columbia which is targeting the education system. See Kirk Makin, "Court's decision buoys litigants," *Globe and Mail*, 5 April 2005, A6.

[138] Shortly after the *Auton* decision, Nova Scotia announced that it would fund intensive treatment for autistic preschoolers though it may take up to three years to train accredited therapists. "N.S. autism funding called a 'first step,'" *Globe and Mail*, 2 December 2004.

[139] Caroline Alphonso, "Autism ruling will be appealed: Courts should not decide which children get care, Queen's Park says," *Globe and Mail*, 5 April 2005, A6.

6. Conclusion

A constitution demands justice and attaining justice costs money; however, "[o]ur jurisprudence has never said that the Constitution mandates luxurious responses.…having no adequate response is not constitutionally acceptable."[140] Canadian courts' use of old remedies, such as declarations and injunctions, and the creation of novel remedies, such as the delayed declaration of invalidity, can be seen as institutional responses to this dilemma. Canadian courts, however, currently walking on fragile remedial ground between deference to government spending priorities and fidelity to their institutional role under the constitution. The potential for legislative non-compliance introduces doubts about the viability of the trust relationship between courts, parliaments, and executives and therefore implicates the consequent legitimacy of the remedial process. Despite the benefits of remedial flexibility, the coordinate status of courts in relation to legislatures must be emphasized—meaning that courts should rarely give unquestioning deference and should ensure that government's provide compelling justifications for infringement of rights. Otherwise our constitutional rights may take on a distinctly Benthamite character—nonsensical, illusory, and useless. Greater use of delayed declarations without other remedial options and without meeting justificatory demands indicates that judicial deference has increased and that Canada faces the risk that constitutional norms may be under-enforced or ignored.

[140] Iacobucci J. in *Little Sisters* at para. 249.

Works Cited:

Alphonso, Caroline. 2005. "Autism ruling will be appealed: Courts should not decide which children get care, Queen's Park says." *Globe and Mail*. 5 April 2005, A6.

Aristotle. 1985. *Nicomachean Ethics*. Trans. Terence Irwin. Indianapolis, Ind.: Hackett.

Bakan, Joel. 1997. *Just Words: Constitutional Rights and Social Wrongs*. Toronto: University of Toronto Press.

Berryman, Jeffrey. 2000. *The Law of Equitable Remedies.* Toronto: Irwin.

Bogart, W.A. 1994. *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada*. Toronto, New York and London: Oxford University Press.

Brodie, Ian. 2002. *Friends of the Court: The Privileging of Interest Group Litigants in Canada.* Albany, NY: State University of New York Press.

Carson, Jonathan and Charles W. Smith. 2003. "Waiting for the Revolution: Democracy, Dialogue and *Dunmore*." Draft paper prepared for the 2003 CPSA Meeting, Halifax NS.

Chayes, Abraham. 1976. "The Role of the Judge in Public Law Litigation." 89 Harv. L. Rev. 1281.

Choudhry, Sujit and Kent Roach. 2003. "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies." 21 Sup. Ct. Law Rev. 2nd ser., 205-56.

Fairley, H. Scott. 1991. "Private Law Remedial Principles and the Charter: Can the Old Dog Wag this New Tail?" In *Remedies: Issues and Perspectives*. Ed. Jeffrey Berryman. Scarborough, Ont.: Carswell, 1991, 313.

Fiss, Owen. 1978. *The Civil Rights Injunction*. Bloomington, Ind.: Indiana University Press.

Hiebert, Janet. 2002. *Charter Conflicts: What is Parliament's Role?* Kingston & Montreal: McGill-Queen's University Press.

Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New* Constitutionalism. Cambridge, MA: Harvard University Press.

Hogg, Peter W. 2001. *Constitutional Law of Canada*. Stud. ed. Toronto: Carswell.

----------. 2001-02. "The *Charter* Revolution: Is it Undemocratic?"12:1 Const. Forum 1.

Hogg, Peter W. and Patrick Monahan. 2000. *Liability of the Crown*. 3rd ed. Toronto: Carswell.

Hogg, Peter W. and A.A. Thornton. 2000. "The Charter Dialogue between Courts and Legislatures." 3 Can. Watch 1.

Hurlburt, W.H. 1999. "Fairy Tales and Living Trees: Observations on Some Recent Constitutional Decisions of the Supreme Court." 26:2 Man. L.J. 181.

Hutchinson, Allan C. 1995. *Waiting for CORAF: A Critique of Law and* Rights. Toronto: University of Toronto Press.

Kirschenbaum, Aaron. 1991. *Equity and Jewish Law: Halakhic Perspectives in Law: Formality and Flexibility in Jewish Law*. New York: Yeshiva University Press.

Laycock, Douglas. 1993. "The Triumph of Equity." 56:3 Law & Contemp. Probs. 53.

Liston, Mary. 2005. "Willis, 'Theology,' and the Rule of Law." 55 University of Toronto Law Journal, 768-95.

Makin, Kirk. 2005. "Court's decision buoys litigants." *Globe and Mail*. 5 April 2005, A6.

----------. 2005. "Farm workers take issue with 'useless' law: Labour measure in Ontario offers no rights, protections, union lawyer says." *Globe and Mail*. 15 March, 2005, A9.

----------. 2005. "Gay bookstore denied funds in battle over censorship." *Globe and Mail*. 23 February 2005, A7.

----------. 2004. "Same-sex couples win pension fight: Ottawa violated rights in denying CPP benefits, Ontario Court of Appeal rules." *Globe and Mail*. 27 November 2004, A10.

Mandel, Michael. 1994. *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. Toronto: Thomson Educational.

Manfredi, Christopher P. 2001. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. 2nd ed. Toronto: Oxford University Press.

----------. 1994. "'Appropriate and Just in the Circumstances': Public Policy and the Enforcement of Rights under the Canadian Charter of Right and Freedoms." 27 Can. J. Pol. Sci. 435.

Martin, Robert. 2003. *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined Our Law and Our Democracy*. Kingston & Montreal: McGill-Queen's University Press.

Morton, F.L. and Rainer Knopff. 2000. *The Charter Revolution and the Court Party.* Peterborough, ON: Broadview Press.

Mullan, David. 2001. *Administrative Law*. Toronto: Irwin.

Oliver, Dawn. 2002. "Public Law Procedures and Remedies—Do We Need Them?" Pub. Law 91.

Palmer, Vernon Valentine. 1999. "'May God Protect Us from the Equity of Parlements': Comparative Reflections on English and French Equity Power." 73 Tul. L. Rev. 1287.

Pilkington, Marilyn. 1984. "Damages as Remedy for Infringement of the Canadian Charter of Rights and Freedoms." 62 Can. Bar. Rev. 517.

Roach, Kent. 2002. "Remedial Consensus and Dialogue Under the *Charter* – General Declarations and Delayed Declarations of Invalidity." 35(2) U.B.C. Law Rev. 211-69.

----------. 2001a. *Constitutional Remedies in Canada*. Aurora, ON: Canada Law Books.

----------. 2001b. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. Toronto: Irwin Law.

Rook, Katie. 2005. "Gay bookshop gives up the fight: Repeated legal battles have cost business more than $1-million over 30 years." *Globe and Mail*. 25 January 2005.

Spry, I.C.F. 2001. *The Principles of Equitable Remedies: Specific performance, Injunctions, Rectification and Equitable Damage*. 6th ed. Pyrmont, NSW: LBC Information Services.

Waters, Donovan. 2001. "The Reception of Equity in the Supreme Court of Canada (1875-2000)." 80 Can. Bar. Rev. 620.

Weinrib, L.E. 2001. "The Activist Constitution." In *Judicial Power and Canadian Democracy*. Eds. P. Howe and P.H. Russell. Montreal & Kingston: McGill-Queen's University Press.

Wright, David. 2001. "The Role of Equitable Remedies in the Merging of Private and Public Law." 12 Pub. Law. Rev. 40.

Yeazell, Stephen. 1977. "Group Litigation and Social Context: Toward a History of the Class Action." 77 Colum. L.R. 866.

Cases and legislation cited:

Legislation

Agricultural Employees Protection Act, R.S.O. 2002, c. 16

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

Film Classification Act, R.S.O. 2004, c. 19, s. 22

Cases

Auton (Guardian ad litem of) v. *British Columbia (Attorney General),* [2004] 3 S.C.R. 657

Baker v. *Canada (MEI),* [1999] 2 S.C.R. 817

Black v. *Chrétien et al.*, (2001) 54 O.R. (3d) (O.C.A.)

Blencoe v. *British Columbia (Human Rights Commission*), [2000] 2 S.C.R. 307

British Columbia (Minister of Forests) v. *Okanagan Indian Band*, [2003] 3 S.C.R. 371

Brown v. Board of Education of Topeka (Brown II), 349 U.S. 294 (1955)

Canada (House of Commons) v. *Vaid*, 2005 SCC 30

Corbiere v. *Canada*, [1999] 2 S.C.R. 203

Delgamuukw v. *British Columbia*, [1997] 3 S.C.R. 1010

Delisle v. *Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989

Dixon v. *British Columbia (A.G.)*, (1989) 59 D.L.R. (4th) 247 (B.C.S.C.)

Dunmore v. *Ontario*, [2001] SCC 94

Dyson v. *Attorney General* [1911] 1 K.B. 410 (C.A.)

Eldridge v. *B.C.*, [1997] 3 S.C.R. 624

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

Hislop v. *Canada (Attorney General)*, 2004 CanLII 43774 (ON C.A.)

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

Mackin v. *New Brunswick*, [2002] 1 S.C.R. 405

Mahe v. *Alberta*, [1990] 1 S.C.R. 342

Newfoundland (Treasury Board) v. *N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66

Operation Dismantle v. *The Queen*, [1985] 1 S.C.R. 441

Pawlett v. *A.G.* (1668) 145 E.R. 550

R. v. *Bain*, [1992] 1 S.C.R. 91

R. v. *Glad Day Bookshops Inc.*, 2004 CanLII 16104 (ON S.C.)

R. v. *Mercure*, [1988] 1 S.C.R. 234

R. v. *O'Connor*, [1995] 4 S.C.R. 411

R. v. *Paquette*, [1990] 2 S.C.R. 1103

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

Reference re Eurig Estate, [1998] 2 S.C.R. 656

Reference re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitutional Act, 1867, [1985] 1 S.C.R. 721

Reference re Remuneration of Judges (No. 2), [1998] 1 S.C.R. 4

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

Rudolf Wolff & Co. v. *Canada*, [1990] 1 S.C.R. 695

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

Sinclair v. *Quebec*, [1992] 1 S.C.R. 579

Singh v. *Canada (MEI)*, [1985] 1 S.C.R. 177

Suresh v. *Canada (MCI)*, 2002 SCC 1

U.F.C.W. v. *KMart Canada*, [1999] 2 S.C.R. 1083

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

Wynberg v. *Ontario*, 2005 CanLII 8749 (ON S.C.)