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IFS AND BUTS IN *CHARTER* ADJUDICATION: THE UNRULY EMERGENCE OF CONSTITUTIONAL EXEMPTIONS IN CANADA

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The idea of “constitutional exemptions” is not new to the Canadian legal landscape. Starting with *Big M Drug Mart*¹ in 1985, the suggestion that one could claim constitutional exemption from the application of a statute has floated around and was in fact acted upon by several lower courts. But, for a number of years, the idea of constitutional exemptions was approached with great reservation by the Supreme Court of Canada, which seemed well aware of the potential implications of accepting such a remedy. In the last year and a half, however, this prudent awareness appears to have given way to some tacit acceptance of the idea that individuals may be relieved from the application of an otherwise perfectly valid law. In several recent cases, the Court has referred to constitutional exemptions using language that seems to assume the existence of such remedy, or at least language that was not accompanied by the Court’s usual reservations. This is a matter of concern given the importance of the issue not only with respect to remedies but also its implications for judicial review and the rule of law in Canada.

The Canadian jurisprudence points to two distinct types of exemptions. The first and less controversial one is a limited or, as we shall refer to it in this paper, “ancillary” exemption. This may occur when a piece of legislation is struck down, but the declaration of invalidity is suspended in order to give Parliament or the legislatures time to respond. During the period of suspension, an exemption may be granted such as to relieve the successful Charter² claimant from either the past or continued application of the statute. In a sense, this is an exemption from the effect of the suspension and is merely ancillary to that.

The second and much more controversial type of exemption is a stand alone remedy granted on a case-by-case basis where a court finds that a piece of

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The opinions expressed in this paper are those of the authors and not of the Department.

¹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [hereinafter *Big M Drug Mart*].

² *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.

legislation is generally valid but that it has an unconstitutional effect on a particular applicant. This type of exemption allows the courts to avoid invalidating or interfering with the wording of a statutory provision, while at the same time refusing to apply it in the circumstances of a particular case. We shall refer to these as “remedial” exemptions.

This paper will examine some of the ramifications of constitutional exemptions for judicial review in Canada. The first part of the paper shows how remedial exemptions reflect a particular understanding of the role of the courts as guardians of the Constitution that is more consistent with the American tradition of judicial review, but is at odds with fundamental aspects of the Canadian approach to Charter adjudication. In the second part, we argue that the recognition of constitutional exemptions in Canada would imply an important deterioration of the “rule of law” as we have come to understand it and cause significant problems, not just theoretical but also practical, particularly in the application of the criminal law.

I. CONSTITUTIONAL EXEMPTIONS AND JUDICIAL REVIEW

To cast the debate over constitutional exemptions as one that is concerned strictly with remedies is misleading. The old proposition according to which “rights follow remedies” still carries much truth. The existence or the absence of individualized Charter remedies to statutory infirmities is one that has profound implications on the manner in which Charter claims are made and adjudicated. It affects matters of standing, defines the scope of a court’s inquiry and the extent of the government’s burden to justify statutory interferences with protected rights and freedoms. Underlying the debate over constitutional exemptions is a debate over the manner and scope of judicial review under the Charter.

1. Exemptive Remedies and Judicial Review in the United States

It is fair to assume that the controversy surrounding remedial exemptions in Canada would come as somewhat of a surprise to an observing American lawyer. In the United States, “*facial invalidity*” — i.e., what we refer to in Canada as “striking down” — is the exception. Only in rare cases will U.S. courts find that a statute or a particular provision is “*facially*” invalid — that is, invalid in all of its applications, leading to a declaration of general invalidity.

The normal course in which constitutional disputes are resolved in the U.S. is through the operation of the doctrine of “*as applied invalidity*”. Under this doctrine, a statutory provision that produces unconstitutional effects “as applied” to a litigant in a particular case will simply not be enforced by the courts

in that case, but will otherwise remain in force. The doctrine of “as applied invalidity” may result in judicial pronouncements that more or less clearly suggest that a certain class of persons, beyond the litigants, will not be subject to the impugned provision. Nonetheless, this is a matter of being able to predict how the courts will respond to similar situations in the future; it is not the result of a formal remedy directed at a class of persons, as is the case when Canadian courts use “reading in” or “reading down” to remedy an offending provision. A good example is perhaps the famous case of *Wisconsin v. Yoder*,³ where a compulsory school attendance law was held by the United States Supreme Court not to apply to members of the Amish faith on the ground that this interfered with religious freedom. This effectively amounted to a remedial exemption for the Amish community.

The American preference for the case-by-case approach of “as applied invalidity” is reflected in numerous facets of judicial review, ranging from issues of standing to the manner in which court decisions are articulated.

In the U.S., strict standing rules generally prevent a litigant from invoking factual situations other than his own in order to demonstrate that a law is impermissibly vague or overbroad. According to the U.S. Supreme Court:

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [...] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. [...] These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws. [...] Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court [...].⁴

Indeed, the foundations of American judicial review, as originally articulated in *Marbury v. Madison*,⁵ are based on a pragmatic necessity for the courts to choose between conflicting norms in resolving concrete disputes. In *Marbury*, Chief Justice Marshall thus asked (somewhat rhetorically):

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disre-

³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁴ *Broadrick v. Oklahoma*, 413 U.S. 601, at 610-11 (1973).

⁵ *Marbury v. Madison*, 5 U.S. 137 (1803).

garding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act must govern the case to which they both apply.⁶

Almost two centuries later, the issue in the flag burning case of *Texas v. Johnson* was therefore not whether a statute could validly prohibit the desecration of the flag despite the First Amendment protection of free speech but, as articulated by Justice Brennan, “whether the State’s interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson’s conviction”.⁷ Having found that it could not justify Johnson’s conviction, the Court expressed no need to consider whether the statute could validly apply in other situations or whether it should be declared unconstitutional.

There is thus in the United States a clear and deeply rooted connection between the foundations of judicial review, the limitations on standing and recourse to “as applied invalidity”.

This is not to say that in the U.S. statutes are never struck down, or that the courts never look to factual situations beyond that of the litigants before them in order to resolve issues arising under the Bill of Rights. Indeed, free speech jurisprudence recognizes that a provision that restricts speech may be declared “facially invalid” if it is found substantially overbroad based on its application to hypothetical situations.⁸ Such a statute will be struck down, in whole or in part, unless it can be cured through judicial “reconstruction”.⁹ However, a statute will not be found facially overbroad where its impermissible applications “although substantial in absolute number, [are] insubstantial when com-

⁶ *Id.*, at 178.

⁷ *Texas v. Johnson*, 491 U.S. 397, at 410 (1989).

⁸ *New York v. Ferber*, 458 U.S. 747 (1982). The application of the overbreadth doctrine recently resulted in the Supreme Court’s decision to strike down portions of the *Child Pornography Prevention Act* that prohibited the possession of, *inter alia*, any visual depiction that “appears to be” of a minor engaged in sexual activity, whether or not the depiction contravenes community standards and despite the fact that the material may have serious literary, artistic, political, or scientific value: *Ashcroft v. Free Speech Coalition*, U.S. S. Ct. No. 00795 (April 16, 2002).

⁹ In *Osborne v. Ohio*, 495 U.S. 103 (1990), for example, the U.S. Supreme Court upheld a State prohibition on the possession of child pornography. The provision captured material “that shows a minor who is not the person’s child or ward in a state of nudity”, subject to specific exceptions. However, the provision had been construed by the Ohio Supreme Court as reading: “that shows a minor who is not the person’s child or ward in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals”. The U.S. Supreme Court found that the provision, as construed by the lower court, was constitutionally permissible.

pared to the law's legitimate application".¹⁰ According to the U.S. Supreme Court, facial overbreadth is "strong medicine" that is to be applied "sparingly and only as a last resort".¹¹

The First Amendment overbreadth doctrine thus provides limited exceptions to ordinary standing rules, allowing a party to rely on fact situations other than his or her own. It is worth pointing out that the rationale given for this relaxation of the standing rules — namely that sweeping legislation may have a "chilling effect" on speech — only makes full sense in light of the ordinary preference for "as applied invalidity". It is indeed largely *because* of the case-by-case aspect of judicial review under the "as applied invalidity" doctrine that overly broad legislation can have a chilling effect on speech, since under this approach individuals who are not party to the litigation lack sufficient certainty as to reassure them that their expressive activities will also receive judicial protection.

It is not surprising that, by contrast, "chilling effect" has not in Canada been much of a buzzword in freedom of expression jurisprudence. This follows naturally from the fact that Charter adjudication in Canada is a significantly different exercise, governed by different rules and premised on a different understanding of judicial review.

2. Exemptive Remedies and Judicial Review in Canada

Canadian courts have only in the last 20 years embarked on judicial review based on constitutionally protected rights and freedoms. Before the Charter came into force, however, the judicial function in Canada had already distinguished itself from its American counterpart.

Noteworthy in this regard is the recognition in 1912 that the Supreme Court of Canada could properly give opinions on abstract issues of law referred to it by the Governor General in Council.¹² The previous year, the United States Supreme Court had refused similar jurisdiction on the ground that the Constitution invested the courts only with jurisdiction over "cases" and "controversies" and that the power to pronounce on constitutional matters could only be exer-

¹⁰ Tribe, *American Constitutional Law* (2nd ed., 1988), at 1025, commenting on *Broadrick v. Oklahoma*, *supra*, note 4. The decision in *Broadrick* dealt with a rule limiting political activities of civil service employees. Despite its sweeping terms, the court refused to strike the provision. That decision stands in sharp contrast with the Supreme Court of Canada's decision in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, where a similar rule was struck down on the basis that it was over-inclusive.

¹¹ *Broadrick v. Oklahoma*, *supra*, note 4, at 613.

¹² *Re References by Governor General-in-Council* (1910), 43 S.C.R. 536; *aff'd.* [1912] A.C. 571 (*sub nom.* *Attorney General for Ontario v. Attorney General for Canada*).

cised, as expressed in *Marbury v. Madison*, in the course of “pronouncing judgment between the parties to a case”.¹³ This greater openness of Canadian courts to entertain abstract issues of law became manifest in early Charter jurisprudence. Early landmark cases like *Hunter v. Southam*,¹⁴ in 1984, and *R. v. Big M Drug Mart Ltd.*,¹⁵ in 1985, paved the way to a conception of the role of the courts as guardians of the Constitution that did not simply amount to the narrow resolution of concrete disputes, but rather had the courts pronouncing on the law in a much more general way.

In *Hunter v. Southam Inc.*,¹⁶ which remains the guiding decision on section 8 search and seizure protection, the Supreme Court departed from American Fourth Amendment jurisprudence by holding that for a search to be reasonable it must be authorized by law and the law must be reasonable. These requirements mean that Canadian courts are not simply to look at the reasonableness of a particular search, but must also pronounce on the general validity of the legal regime authorizing the search. In that case, as for example in the subsequent case of *Baron v. R.*,¹⁷ the searches themselves may have been perfectly reasonable, but the regimes were not and could, in hypothetical situations, lead to unreasonable searches. For that reason, they were struck down.

The following year, in *Big M Drug Mart*, the Court held that in a prosecution for the violation of a Sunday observance law a corporation has standing to challenge the law based on freedom of religion. The issue, according to the Court, was not whether the accused corporation could exercise the right to freedom of religion (which it arguably does not possess) but rather whether it could be convicted for violating an unconstitutional statute. The Court was concerned not with upholding the personal rights of the accused, nor did it see its role merely as the arbiter of an isolated dispute. In its view, s. 52 of the *Constitution Act, 1982*¹⁸ required that invalid laws not be given effect, and therefore that its role was to pronounce on the general validity of the impugned provision independently of the particular facts of the case.¹⁹

¹³ *Muskrat v. U. S.*, 219 U.S. 346 (1911).

¹⁴ (*sub nom. Canada (Director of Investigation & Research, Combines Investigation Branch*), [1984] 2 S.C.R. 145.

¹⁵ *Supra*, note 1.

¹⁶ *Supra*, note 14.

¹⁷ [1993] 1 S.C.R. 416.

¹⁸ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁹ A similar approach is taken by the South African Constitutional Court, as illustrated by the recent decision in *Islamic Community Convention v. Independent Broadcasting Authority*, CCT 36/01, April 11 2002. The case arose from a complaint regarding a radio broadcast that was considered to constitute hate speech contrary to clause 2(a) of the *Code of Conduct for Broadcasting Services* in that it was “likely to prejudice [...] relations between sections of the population.” The issue was whether this clause was inconsistent with freedom of expression under s. 16 of the South

Big M Drug Mart opened wide the door to the use of reasonable hypotheticals, either in the context of deciding whether a substantive Charter right is infringed — for example, regarding section 12 protection against cruel and unusual punishment, as illustrated by *R. v. Smith*²⁰ — or in the context of section 1, particularly with respect to discussions of overbreadth, as illustrated by the more recent case of *Sharpe*²¹ on child pornography.

In Canada, this extensive use of reasonable hypotheticals, unfettered by issues of standing, allows for a fulsome scrutiny of a provision's validity in light of myriad possible applications — contrasting in this regard with the much more restrained American tradition of judicial review and reducing the necessity or the appeal of exemptive remedies.

Interestingly, *Big M Drug Mart* is the first case to make any reference to the possibility of constitutional exemptions. The issue was raised by Dickson C.J. in cursory fashion in a discussion of standing. This should not come as a surprise, given the close nexus between issues of standing, the scope of judicial review and individualized remedies. Nor is it surprising that Dickson C.J. did not dwell on the matter of individual exemptions, given the direction taken by the Court on the issue of standing.

Constitutional exemptions were first given clear judicial recognition in 1987 by the Ontario Court of Appeal in *Seaboyer*,²² dealing with the “rape-shield” provision of the *Criminal Code*.²³ All five judges found the provision to violate the Charter on the ground that it could, in some cases, compromise trial fairness. A three-judge majority, however, chose not to strike down the provision but rather leave it to future judges to grant exemptions on a case-by-case basis where required to comply with the Charter. While the reasoning of the majority was based on a view that the application of the provision would be constitutionally problematic only in relatively rare circumstances and that it would be extremely

African Constitution which specifically excludes “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm” [s. 16(2)(c)]. In deciding the matter, the Constitutional Court paid no regard to the actual content of the broadcast, but merely considered the impugned provision. It stated in this regard (para. 21):

Although the matter has its origins in the complaint by the Board in respect of a specific broadcast, the function of this Court in the present proceedings is to adjudicate on the question of the constitutionality of clause 2(a) of the Code in relation to that complaint as an abstract and objective one. The contents of the particular statement in respect of which the Board complains are not relevant to the enquiry. What the Court is concerned with is whether the provision on which the complaint was based is consistent with the right to freedom of expression in section 16 of the Constitution” [emphasis added].

²⁰ [1987] 1 S.C.R. 1045.

²¹ *R. v. Sharpe*, [2001] 1 S.C.R. 45, discussed below.

²² *R. v. Seaboyer* (1987), 61 O.R. (2d) 290 (C.A.).

²³ R.S.C. 1985, c. C-46.

difficult for Parliament to devise an exhaustive list of exceptions, it is telling that the majority also relied heavily on American jurisprudence under the Bill of Rights in support of the appropriateness of constitutional exemptions.

Other Canadian courts followed thereafter. In 1989, the British Columbia Court of Appeal held in *R. v. Chief*²⁴ that the mandatory firearms prohibition of the *Criminal Code* could, in the case of trappers such as the accused, amount to a cruel and unusual punishment. Rather than striking down the provision, which the Court found to be appropriate with respect to the vast majority of the population, the majority opted for a remedial exemption in favour of the accused.

Since then, a number of lower courts have recognized the availability of remedial exemptions, although the judicial response has been far from uniform across the country.²⁵

The Supreme Court had a first real opportunity to deal with the issue of remedial exemptions in the case of *Osborne v. Canada (Treasury Board)*,²⁶ dealing with a broad prohibition on public service employees participating in partisan political activities. A majority found that the legislation violated freedom of expression and association and that it could not be justified under section 1 due to overbreadth. While all members of the majority agreed that the provision had to be struck, three suggested without deciding that remedial exemptions could be appropriate in some cases.²⁷ Wilson J., with the support of L'Heureux-Dubé J., strongly objected. In their view, having found that a provision is overbroad and cannot be justified pursuant to section 1 of the Charter:

... the Court has no alternative but to strike the legislation down or, if the unconstitutionality aspects are severable, to strike it down to the extent of its inconsistency with the Constitution. I do not believe that it is open to the Court in these circumstances to create exemptions to the legislation (which, in my view, presupposes its constitutional validity) and grant individual remedies under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. In other words, it is not, in my opinion, open to the Court to cure over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books.²⁸

²⁴ (1989), 51 C.C.C. (3d) 265 (B.C. C.A.).

²⁵ The situation in the various provinces is canvassed by Peter Sankoff in "Constitutional Exemptions: Myth or Reality?", (2000) 11 N.J.C.L. 411, at 429-31. Remedial exemptions have so far been clearly approved by the courts in British Columbia, Alberta, Saskatchewan and Newfoundland, but rejected by the New Brunswick Court of Appeal. The Courts in Quebec and Ontario have not resolved the matter in any conclusive way, although the Ontario Court of Appeal clearly did endorse ancillary exemptions in the recent case of *R. v. Parker* (2000), 49 O.R. (3d) 481.

²⁶ [1991] 2 S.C.R. 69.

²⁷ *Id.*, at 105.

²⁸ *Id.*, at 76-77.

When *Seaboyer*²⁹ reached the Supreme Court shortly thereafter, the issue was back on the table. Reversing the majority of the Court of Appeal, the Court struck down the rape-shield provision. McLachlin J., writing for a majority of seven, was highly critical of remedial exemptions. Without ruling that exemptions would never be appropriate, her reasons were less than favourable. Noting that, at least in this case, resort to remedial exemptions “would import into the provision an element which the legislature specifically chose to exclude — the discretion of the trial judge”, McLachlin J. (as she then was) added:

The doctrine, as applied in this case, delegates to the trial judge the task of determining when the legislation should not be applied. This amounts to saying that it should not be applied when it should not be applied, unless some criterion outside the *Charter* is found. On this reasoning, no law would be required to be struck down under s. 52 of the *Constitution Act, 1982*; the matter could always be resolved by the simple means of instructing trial judges not to apply laws when their effect would be violative.³⁰

While her criticism of exemptions was not an attempt to provide a fully articulated doctrine on the issue — which she clearly did not have to do — it is telling that she passingly referred to cases such as *Big M Drug Mart*,³¹ *Hunter v. Southam Inc.*³² and *R. v. Smith*³³ in support of her position, indicating at least a clear sense that remedial exemptions would not be easily reconcilable with the path in which these cases had taken judicial review in Canada.

Two years later, in the highly controversial case of *Rodriguez*³⁴ regarding assisted suicide, the issue of exemptions was again before the Court. The impugned *Criminal Code* provision was upheld by a 5-4 majority. In dissent, however, Lamer C.J. considered the possibility of constitutional exemptions. He concluded, like Wilson J. and L’Heureux-Dubé J. in *Osborne*, that remedial exemptions should not be used as an alternative to striking down overly broad statutory provisions. However, Lamer C.J. indicated that, where a Court strikes down a statutory provision pursuant to section 52 of the *Constitution Act, 1982*, but decides to suspend the declaration of invalidity, exemptions could be issued during the period of suspension.³⁵ This is what we have referred to as “ancillary” exemptions.

²⁹ *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

³⁰ *Id.*, at 628-29.

³¹ *Supra*, note 1.

³² *Supra*, note 14.

³³ *Supra*, note 20.

³⁴ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

³⁵ *Id.*, at 571-79.

Except for a brief comment by L'Heureux-Dubé J. in *Rose* (1998),³⁶ the issue of exemptions was not again discussed by the Supreme Court until *Corbiere* (1999),³⁷ where a residency requirement for voting under the *Indian Act*³⁸ was unanimously found to offend the Charter. While all agreed that the provision had to be struck down and that a constitutional exemption would not be appropriate, a majority nonetheless indicated in *obiter* that:

The remedy of constitutional exemption has been recognized in a very limited way in this Court, to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended; see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 715-17; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 577.³⁹

As for the broader use of remedial exemptions as an alternative to striking down, it was approved by a four-judge minority, the strongest endorsement of remedial exemptions by the Supreme Court to date. The majority, however, expressly refrained from deciding the matter.

In the following years, a significant number of cases again raised the issue of exemptive remedies. While the Supreme Court avoided in each case deciding or even debating the question, it sent troubling signals that we may be going down the path of remedial exemptions.

The first of these cases is *R. v. Morrisey*,⁴⁰ upholding a minimum four-year imprisonment for criminal negligence causing death with a firearm. Gonthier J., writing for five of the seven judges, found it “unnecessary to consider the availability of constitutional exemptions” given the facts of the case.⁴¹ However, Gonthier J. also restricted the use of reasonable hypotheticals in section 12 analysis to “imaginable circumstances which would commonly arise with a degree of generality appropriate to the particular offence”.⁴² Real life situations, even if taken from reported cases, would not necessarily qualify unless they reflected common occurrences. It is unclear to what extent this will lead to a departure from previous practice regarding the use of reasonable hypotheticals

³⁶ *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 66. Interestingly, L'Heureux-Dubé J. supported the use of remedial exemptions, despite her previous position in *Osborne*, *supra*, note 26.

³⁷ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

³⁸ R.S.C. 1985, c. I-5.

³⁹ *Id.*, at para. 22. As pointed out by Peter Sankoff, the Supreme Court in *Schachter* had clearly done no such thing as recognize constitutional exemptions. Sankoff, *supra*, note 25, at 429. As to the *Rodriguez* decision, Lamer C.J.'s approval of ancillary exemption was not endorsed by the majority, nor was it clearly endorsed by the other minority judges, although McLachlin J. suggests otherwise in *Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 179.

⁴⁰ [2000] 2 S.C.R. 90.

⁴¹ *Id.*, at para. 56.

⁴² *Id.*, at para. 50.

under section 12, or whether this could also affect the use of such hypotheticals under section 1. If so, however, this could well make remedial exemptions more appealing in situations where the Court has already upheld a particular provision. In concurring reasons, Arbour J. rejected what she saw as an unduly restrictive use of hypotheticals, yet nonetheless indicated that she would uphold the general validity of the mandatory four-year sentence “while declining to apply it in a future case if the minimum penalty is found to be grossly disproportionate for that future offender”⁴³ — language which indisputably points to remedial exemptions. It is noteworthy that Arbour J. was joined by McLachlin C.J., despite her previously expressed disdain for exemptions in *Seaboyer*.

Most observers expected the Court to squarely deal with the issue in the high profile case of *R. v. Latimer*, where the trial judge had granted an exemption from the mandatory term of life imprisonment without parole eligibility for 10 years.⁴⁴ The trial judge’s decision was overturned by the Saskatchewan Court of Appeal,⁴⁵ not because exemptions could never be granted, but because it had previously decided that an exemption was inappropriate on the facts of the case.⁴⁶ Having fully heard from the parties and interveners on the issue of exemptions — including a forceful objection by the Attorney General of Canada — the Supreme Court rendered its unanimous judgment in January 2001.⁴⁷ In a short and cryptic statement, it held that “[w]here there is no violation of Mr. Latimer’s s. 12 right there is no basis for granting a constitutional exemption”.⁴⁸ While it did not decide the existence of exemptive remedies, neither did the Court express the usual reservations.

Less than 10 days later, in another high profile case dealing with child pornography, *R. v. Sharpe*,⁴⁹ the same pattern emerged. The majority in *Sharpe* found that the *Criminal Code*’s definition of child pornography was overly broad in its application to the possession offence. Of particular concern was the fact that the offence captured works of the imagination created by the accused alone and kept for his or her personal use, as well as private recordings of persons under the age of 18 engaged in lawful sexual activity. In discussing possible remedies, McLachlin C.J. rejected the option of simply striking down the provision and leaving the matter to Parliament. McLachlin C.J. wrote:

⁴³ *Id.*, at para. 66.

⁴⁴ (1997), 121 C.C.C. (3d) 326 (Sask. Q.B.).

⁴⁵ [1998] S.J. No. 731 (Sask. C.A.).

⁴⁶ *R. v. Latimer* (1995), 99 C.C.C. (3d) 481 (Sask. C.A.); rev’d. on other grounds at [1997] 1 S.C.R. 217.

⁴⁷ [2001] 1 S.C.R. 3.

⁴⁸ *Id.*, at para. 87.

⁴⁹ *Supra*, note 21.

The difficulty with this remedy is that it nullifies a law that is valid in most of its applications. Until Parliament can pass another law, the evil targeted goes unremedied. Why, one might well ask, should a law that is substantially constitutional be struck down simply because the accused can point to a hypothetical application that is far removed from his own case which might not be constitutional?⁵⁰

Such a conundrum, of course, arises only if remedial exemptions are not available to cure marginal infirmities in the statute. Thus, while in that case exemptions were not argued, McLachlin C.J., for the majority, nonetheless wrote:

Yet another alternative might be to uphold the law on the basis that it is constitutionally valid in the vast majority of its applications and stipulate that if and when unconstitutional applications arise, the accused may seek a constitutional exemption. Ross, who concludes that s. 163.1(4) is constitutional in most but not all of its applications, recommends this remedy: Ross, *supra*, at p. 58.⁵¹

Again, no caution was expressed beyond the use of the conditional “might”. The majority simply decided that an exemption was not necessary in that case and that the appropriate remedy was to “read in” certain exceptions to the provision in order to cure its overbreadth.

Interestingly, however, the paragraph dealing with the possibility of remedial exemptions is preceded by one in which McLachlin C.J. states:

Another alternative might be to hold that the law as it applies to the case at bar is valid, declining to find it unconstitutional on the basis of a hypothetical scenario that has not yet arisen. In the United States, courts have frequently declined to strike out laws on the basis of hypothetical situations not before the court, although less so in First Amendment (free expression) cases. While the Canadian jurisprudence on the question is young, thus far it suggests that laws may be struck out on the basis of hypothetical situations, provided they are “reasonable”.⁵²

This paragraph is certainly awkward at this stage of the reasons in a discussion of remedies, since it suggests that the entire approach under which the case was litigated and adjudicated may not be the appropriate one at all, given that the problematic applications of the provision (i.e., works of the imagination and recordings of lawful sexual activities) had no connection to the facts of the case. Nonetheless, it is telling that this questioning of the use of reasonable hypotheticals comes into play immediately prior to the suggestion that remedial exemptions may be an available option. While the court does not make any explicit connection between the two, the juxtaposition clearly suggests the

⁵⁰ *Id.*, at para. 111.

⁵¹ *Id.*, at para. 113.

⁵² *Id.*, at para. 112.

Court's awareness of the relationship between remedial exemptions and the scope of judicial review. Indeed, the statement that "[w]hile the Canadian jurisprudence on the question is young, thus far it suggests that laws may be struck out on the basis of hypothetical situations" appears to suggest an overture towards revisiting the use of reasonable hypotheticals in Charter adjudication.

Whether the Supreme Court will want to recognize remedial exemptions in the future will depend in part on its willingness to reconsider the approach developed in the early years of the Charter regarding issues of standing, the use of reasonable hypotheticals and the scope of its mandate under section 52 of the Constitution. However, this choice should also be informed by considerations which relate to the implications of constitutional exemptions for the rule of law.

II. CONSTITUTIONAL EXEMPTIONS AND THE RULE OF LAW

The objections that we wish to formulate here reflect the belief that constitutional exemptions would imply an important deterioration of the "rule of law" as we have come to understand it and cause significant problems, not just theoretical but also practical, in particular with respect to the application of the criminal law. Our purpose here is not to attempt to formulate a coherent doctrine of the rule of law, which would be a daunting enterprise in itself, but rather to point to a "cluster" of concepts or ideals traditionally associated with the rule of law or which have become so in more recent times, and which are directly relevant to the debate on constitutional exemptions: ideas such as "equality before the law", certainty, public order and civil disobedience, or — more recently — the concept of a "constitutional dialogue" between the courts and the legislatures.

1. The Rule of Law, Certainty and the Importance of the Generic

Perhaps the main argument in support of constitutional exemptions is the flexibility that exemptions provide when courts are dealing with difficult constitutional issues in particular fact situations. While undeniable, the benefits of flexibility come at a cost. As expressed by Oonagh Fitzgerald, the recognition of constitutional exemptions:

... seems to embody an approach seriously at odds with traditional notions of the rule of law. Recognizing constitutional exemptions undermines the certainty of law, increases the need for litigation to determine their application to specific cases, and gives the courts almost unlimited discretionary power to make and unmake positive laws as they apply to different people. It is, perhaps, a remedy from Pan-

dora's box: if we reach in to take it in what seems an appropriate case, who knows what other problems will be unleashed.⁵³

According to Lon Fuller's classic *exposé*, law is "the enterprise of subjecting human conduct to the governance of rules".⁵⁴ Fuller writes:

Surely, the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing. Applying rules faithfully implies, in turn, that rules will take the form of general declarations; it would make little sense, for example, if the government were today to enact a special law whereby Jones should be put in jail and then tomorrow were "faithfully" to follow this "rule" by actually putting him in jail. Furthermore, if the law is intended to permit a man to conduct his own affairs subject to an obligation to observe certain restraints imposed by superior authority, this implies that he will not be told at each turn what to do; law furnishes a baseline for self-directed action, not a detailed set of instructions for accomplishing specific objectives.⁵⁵

It is thus broadly understood that the rule of law embodies an ideal-type legal order characterized by certain qualities, which typically include, as in Lon Fuller's *exposé*, a desire for clarity, generality and prospectivity. Yet, all three of these virtues are compromised by the use of constitutional exemptions.

Clarity and certainty in law are of course never achieved, only facilitated. The idea is not absolute certainty, as recognized by the Supreme Court in numerous instances, but a requirement that lawmakers provide as much guidance as is reasonably possible in order to permit a reasoned debate. This requirement, which applies equally to courts, is essential to sustain the claim that ours is "a government of laws and not of men." In adjudicating Charter cases, it is fundamental that courts provide citizens, governments and legislatures sufficient guidance to guide their actions. This is true not only with respect to the interpretation of the Charter's substantive protections, but also with respect to the remedies applied in curing constitutional infirmities in statutes, and the result of these remedial actions by the courts on the state of the law.

While judicial interpretation is by no means an exact science, a decision is reasonable, as opposed to capricious, if it reflects (a) the application of recognizable principles to categories of facts based on a demonstration of relevance, as well as (b) the linking of the facts of the case to the same categories. The

⁵³ Fitzgerald, *Understanding Charter Remedies: A Practitioner's Guide*, (1994), at 5-27.

⁵⁴ Fuller, *The Morality of Law* (rev. ed., 1969), at 96.

⁵⁵ *Id.*, at 209-10.

ability to convincingly abstract from the particulars of a case to generic categories that are shown to be relevant to the legal principles is essential to legitimate judicial decision-making under the rule of law. It is essential, in other words, to the judges' "interpretative claim" — the claim, which is inherent to the rule of law, that the judge is not deciding by fiat, but rather that he or she is interpreting the law as something distinct from simply exerting his or her personal will.

Competent judicial decision-making thus implies references to generic or abstract categories that serve both to ground the decision's legitimacy in law and, in cases where constitutional infirmities are identified, to forecast potential avenues for remedying those infirmities. Exemptions are problematic in that they allow the courts to alter the state of the law, yet avoid the essential task of identifying the factors and principles that provide a more or less clear "generic" sense of the law's future application. Hence McLachlin J.'s criticism of exemptions in *Seaboyer* — that exemptions delegate "to the trial judge the task of determining when the legislation should not be applied. This amounts to saying that it should not be applied when it should not be applied, unless some criterion outside the Charter is found".⁵⁶ While it may sometimes appear convenient to dispose of a case without having to sketch out a blueprint for the future, doing so creates difficulties that should not be underestimated.

These difficulties are by no means limited to remedial exemptions but also exist with respect to the more limited "ancillary" exemptions that may accompany the suspension of a declaration of invalidity.

This may be illustrated by the recent decision of the Supreme Court in *R. v. Guignard*,⁵⁷ where the Court struck down a municipal offence regarding the erection of advertising signs outside an industrial zone on the basis that it restricted freedom of expression in a manner that was overly broad. In cursory fashion, the Court suspended the declaration of invalidity and acquitted the accused. While there was no discussion of the matter, this was in effect an ancillary exemption.⁵⁸ Of particular concern to the Court in *Guignard* was the fact that the by-law defined an advertising sign as a:

⁵⁶ *Supra*, note 29.

⁵⁷ 2002 SCC 14 (February 21, 2002).

⁵⁸ In fact, *Guignard* seems to be the first case where an ancillary exemption has been granted by the Supreme Court of Canada (such an exemption was granted by the Ontario Court of Appeal in *R. v. Parker*, *supra*, note 25). It may be noted, however, that in *R. v. Feeney*, [1997] 2 S.C.R. 117, the Supreme Court suspended for six months the operation of its previous ruling in the same case ([1997] 2 S.C.R. 13) regarding the need for a warrant for entering into a dwelling place to make an arrest, while at the same time giving the accused full benefit of the ruling. However, the ruling did not implicate any existing statutory provision and, as such, does not qualify as an ancillary exemption as defined here.

Sign indicating at least the name of a company and drawing attention to a business, a product, a service or an entertainment carried on, sold or offered other than the property on which it is placed.⁵⁹

On a literal reading, this definition captured consumer “counter-advertising”, as illustrated by the accused’s posted expression of dissatisfaction with an insurance company. In striking down the provision, the Court wrote:

The only appropriate remedy in this case is a declaration that the provisions of the municipal by-law the appellant has challenged are invalid. Because of the considerable overlap between the definitions and the provision imposing the ban, the declaration of nullity must apply to both the definition and the ban itself. That is the relief that follows from the type of challenge that was brought. A solution that applied solely and personally to the appellant would not satisfactorily resolve the legal problem before us. However, given the importance of the zoning by-law in municipal land use planning and the risk of creating acquired rights, during a period in which there was a legal vacuum, which could be set up against a subsequent by-law, that relief must be tempered by suspending the declaration of invalidity for a period of six months, to give the municipality an opportunity to revise its by-law. It will no doubt be in the respondent’s interests to rethink the definition of “advertising sign”, in particular, and more clearly identify the real objectives of the bans imposed. The appellant must therefore be acquitted of the charge against him.⁶⁰

Leaving aside the Court’s passing reference to an individualized remedy, the suspension of a declaration of invalidity relating to an offence should raise an eyebrow. Not that it is entirely unprecedented. It was done at least once before in the *Manitoba Language Rights Reference*,⁶¹ but in a context where the consequences of not suspending the declaration of invalidity were clearly more dramatic than here. In that case, the failure to suspend would have led to the obliteration of all provincial offences, including offences that are essential to public safety. The concern in *Guignard* is of a different order. The concern is with the potential creation of acquired rights to commercial advertisement in Saint-Hyacinthe during the period between the decision and the adoption of a new by-law. Assuming that one can properly acquire rights in this context, there is no doubt that this is something which can be fixed by legislation. If such a concern is of sufficient importance to warrant the suspension of the declaration of invalidity, it is difficult to see when a suspension would *not* be

⁵⁹ *Supra*, note 57, at para. 12 (Supreme Court’s translation of the *Règlement d’urbanisme n° 1200 de la Ville de Saint-Hyacinthe*, s. 2.2.4).

⁶⁰ *Id.*, at para. 32.

⁶¹ *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721.

ordered, even where the constitutionally defective provision is a criminal offence.⁶²

While the power of courts to temporarily suspend the effect of a declaration of invalidity is welcome and has indeed become a critical tool in what has been described as the “dialogue” between courts and legislators (a matter which is addressed further below), suspensions in connection to invalid offences constitute a special category that require considerable caution. Granting a suspension makes it difficult to resist granting the accused an ancillary exemption with respect to the successfully challenged offence and raises the more difficult question of who, other than the accused, may benefit from such an exemption during the period of suspension. This issue was raised by McLachlin J. (as she then was) in *Miron v. Trudel*,⁶³ a non-criminal case dealing with the definition of “spouse” under the Ontario *Insurance Act*.⁶⁴ A majority of the Court found that the exclusion of unmarried couples violated section 15(1) of the Charter and held that the word “spouse” should be read as including common law spouses. In rejecting the possibility of a suspension combined with an ancillary exemption, she wrote:

Assuming the Court were inclined to grant the appellants an exemption from the 1980 legislation and insurance policy provisions, the question remains of how it could do so without creating further inequities between the appellants and others in their situation who have been denied benefits. To avoid this, any constitutional exemption would have to be extended to all similar families. This in turn would require formulation of general criteria of eligibility, thus involving the court in the very activity which would have led it to eschew “reading up” the 1980 statute in

⁶² In *Schachter v. Canada*, [1992] 2 S.C.R. 679, the issue was addressed by Lamer C.J. who indicated that (p. 719):

Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

- A. striking down the legislation without enacting something in its place would pose a danger to the public;
- B. striking down the legislation without enacting something in its place would threaten the rule of law; or,
- C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

The situation in *Guignard* clearly does not fall within any of the three situations identified in *Schachter*.

⁶³ *Supra*, note 39.

⁶⁴ R.S.O. 1980, c. 218.

conformity with the terms legislated in 1990. Yet to deny such persons a remedy would be to perpetuate the effects of a discrimination which the Court has found to violate the *Charter* when the obvious remedy — the payment of the benefits that should have been paid — remains available [emphasis added].⁶⁵

In the *Manitoba Language Rights Reference*,⁶⁶ the suspension of the declaration of invalidity operated equally for all in that, during the period of suspension, all persons continued to be subject to the province's laws, including provincial offences.⁶⁷ Here, in *Guignard*, the Court suspended the declaration of invalidity, yet acquitted the accused not only without discussion but as if this were a matter of logical or legal necessity (“The appellant must therefore be acquitted of the charge against him.”) — without inquiring as to the implications for other individuals. It may be inferred from the reasoning of the Court in *Guignard* that the by-law should not apply to anyone engaged in non-commercial expression but that it should otherwise be applicable. If so, however, one is left to wonder why the definition was not simply “read-down” in this way, leaving the provision intact for all of its permissible applications. But if this assessment of the decision's implications is wrong (and the fact that the impugned rule was struck rather than simply read down suggests that it is indeed an incorrect assessment), then what, one may ask, is the state of the law on signs during the period of suspension?

If anything is clear, it seems obvious that the preference for certainty and the generic under the rule of law requires that situations such as these should be avoided. Even if we accept that ancillary exemptions have now been recognized by the Supreme Court, their application to defective offence provisions, whether in the *Criminal Code* or in a regulatory context, requires considerable caution and should occur only exceptionally.

The use of remedial exemptions in the criminal law is equally problematic, if not more so. Remedial exemptions have most often been considered in relation to mandatory minimum sentences in the *Criminal Code*. This was the case, for example in *Chief*⁶⁸ (where an exemption was granted), regarding a firearm prohibition, as well as in *Morrissey*⁶⁹ and *Latimer*⁷⁰ (where the issue was not decided), regarding minimum terms of imprisonment. Where Parliament imposes a mandatory minimum sentence, it explicitly chooses to remove judicial discretion in favour of certainty and deterrence. In this context, the use of re-

⁶⁵ *Id.*, at 509-10.

⁶⁶ *Supra*, note 61.

⁶⁷ See *Bilodeau v. Manitoba (Attorney General)*, [1986] 1 S.C.R. 449.

⁶⁸ *Supra*, note 24.

⁶⁹ *Supra*, note 40.

⁷⁰ *Supra*, note 47.

medial exemptions on a case-by-case basis directly frustrates Parliament's intent, just as much as and arguably more so than would the use of "reading in" to exclude delineated categories. As Peter Sankoff writes:

In *Schachter*, Lamer C.J. discussed the "reading in" remedy and stated that "the purpose of [the remedy] is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature." In cases involving mandatory minimum sentences or other provisions deliberately omitting judicial discretion, it is arguable that an exemption will never be "as faithful as possible" to the scheme enacted. Obviously, one of the main purposes for enacting mandatory legislation was to establish certainty.⁷¹

By removing both certainty and deterrence, remedial exemptions from mandatory minimum sentences distort the legislative scheme and fail to satisfy the *Schachter* test for appropriate remedies.

Where the impugned provision relates to the trial process, as in *Seaboyer*⁷² or *Rose*,⁷³ the use of exemptions is equally difficult to justify. Here too, judicial deference does not support exemptions from mandatory rules of evidence or procedure. If "reading out" or "reading in" exempt categories is not appropriate because it would overly interfere with the legislative function, it is difficult to see how doing the same on a case-by-case basis is any more appropriate. The provision should be struck down. Alternatively, a court may exclude an element of evidence or even perhaps decide to simply stay the proceedings against the accused if the application of the rule compromises trial fairness.⁷⁴ Parliament can then decide whether to amend the rules to introduce an element of flexibility or whether to keep it intact, even if that means losing some cases. In a successful *Rowbotham*⁷⁵ application, failure by the government to provide funded counsel for the defence will not lead to the invalidation of the legal aid regime but, rather, to the staying of the proceedings.⁷⁶

Finally, where it is the offence itself that suffers from some constitutional infirmity, the use of remedial exemptions is even more problematic. Related to the idea of the "generic" and equally important to the rule of law is the concept that ours is not a system of "personalized law". Unless they can be crafted by reference to an abstract class of persons (in which case we cease to be in the

⁷¹ *Supra*, note 25 at 439-40.

⁷² *Supra*, note 29.

⁷³ *Supra*, note 36.

⁷⁴ See *R. v. O'Connor*, [1995] 4 S.C.R. 411, para. 73; and *R. v. Regan*, 2002 SCC 12 (February 14, 2002).

⁷⁵ *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).

⁷⁶ See, for example, *R. v. Zylstra* (1996), 28 O.R. (3d) 452 (Gen. Div.).

realm of constitutional exemptions and move towards “reading in” or “reading down”) remedial exemptions are the judicial equivalent of private Acts.

The difficult reconciliation of private Acts with the rule of law is nowhere more apparent than in the area of criminal law. The abhorrence of constitutional democracies to what has become known in the Anglo-Saxon world as “bills of attainder” requires little explanation.⁷⁷ Bills of attainder, which were used in order to single out individuals for punishment, are offensive not merely because they usurp the judicial function,⁷⁸ but because they reduce the rule of law to a purely formal process of individual designation and obviate what is ultimately the essence of law: the expression of rules governing generic categories of facts and conduct. But if remedial exemptions are little more than bills of attainder in reverse, it is unclear why exemptions should be looked at more favourably.

One may argue that bills of attainder are fundamentally unprincipled and that they reflect mere political expediency, whereas exemptions result from the application of constitutional principles. The distinction, however, is not a necessary one. Exemptions are distinguishable from “reverse bills of attainder” only to the extent that the accused’s conduct can be linked to a greater or more abstract category that is demonstrated by the court to be constitutionally significant. If such a demonstration is possible, however, constitutional exemptions arguably become unnecessary.

This is not to deny the practical convenience of remedial exemptions for the judge who is faced with a hard case and the challenges that the unavailability of remedial exemptions creates. But the experience to date demonstrates that our courts have been up to the task. Looking back at the first 20 years of the Charter, it is hard to find a compelling argument to support the recognition of remedial exemptions and the move towards an American approach of case-by-case application of the Charter.

In searching for flexible remedies, a case that is worthy of some attention is the Supreme Court’s decision in *R. v. Sharpe*⁷⁹ dealing, as previously indicated, with the *Criminal Code* offence of possessing child pornography. In crafting a Charter remedy, the majority indicated that a constitutional exemption was not appropriate and proceeded instead on the basis of what it described as “reading in” two exceptions that would operate as defences in addition to the defences

⁷⁷ U.S. Const. art I, § 9, cl. 3, provides that: “No Bill of Attainder or ex post facto Law will be passed.”

⁷⁸ See *U.S. v. Brown*, 381 U.S. 437, at 440 (1965): “The Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply — trial by legislature.”

⁷⁹ *Supra*, note 21.

already provided in the *Code*. The interesting fact about the remedy, however, is that the “read in” exceptions were not couched in statutory form or “canonical” language. Indeed, the two exceptions are described on several occasions in the judgment (five, to be precise) using different language, sometimes (but not always) accompanied by significant qualifications.

Relying on the language used in the majority’s conclusion, the second exception would cover “any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use”.⁸⁰ A literal application of this exception would suggest that an adult taking a pornographic picture of a five year old child would qualify for the exception since in this example there is no “unlawful sexual activity” taking place. Clearly, this was not the majority’s intent, as one would gather from reading paragraph 116:

The second category would protect auto-depictions, such as photographs taken by a child or adolescent of him- or herself alone, kept in strict privacy and intended for personal use only. It would also extend to protect the recording of lawful sexual activity, provided certain conditions were met. The person possessing the recording must have personally recorded or participated in the sexual activity in question. That activity must not be unlawful, thus ensuring the consent of all parties, and precluding the exploitation or abuse of children. All parties must also have consented to the creation of the record. The recording must be kept in strict privacy by the person in possession, and intended exclusively for private use by the creator and the persons depicted therein. Thus, for example, a teenage couple would not fall within the law’s purview for creating and keeping sexually explicit pictures featuring each other alone, or together engaged in lawful sexual activity, provided these pictures were created together and shared only with one another [emphasis added].

Material falling within the first exception (works of the imagination) could also raise difficult issues. For example, what about a situation where someone, using a computer, transforms an ordinary picture of a real child into a pornographic image? Is such a work “created by the accused alone”?

The possibility of such difficulties was readily acknowledged by McLachlin J. who, for the majority, wrote:

I recognize that questions may arise in the application of the excepted categories. However, the same may be said for s. 163.1 as drafted. It will be for the courts to consider precise questions of interpretation if and when they arise, bearing in mind

⁸⁰ *Id.*, at para. 129.

Parliament's fundamental object: to ban possession of child pornography which raises a reasoned apprehension of harm to children.⁸¹

The interesting aspect of the remedy in *Sharpe* is that, in the absence of fixed language, the "read in" exceptions operate in a manner that is more analogous to a common law defence, the precise meaning of which is "discovered" and evolves over time through the course of adjudication.

While allowing for flexibility, the remedy is one that provides substantial guidance (to courts, individuals and Parliament) by delineating, even if not with absolute precision, classes of persons who could benefit from the exceptions. In this way, the remedy is arguably consistent with the rule of law's requirement of generality and clarity. Although *Sharpe* is an exceptional case and the remedy not one that we would expect to see on a regular basis, it illustrates the capacity of courts to craft flexible remedies that avoid the grave problems associated with constitutional exemptions and their detrimental impact on the rule of law in Canada.

2. The Rule of Law and the Dialogue Between the Courts and the Legislatures

The ideal of a "government of laws and not of men" is as appealing as it is conceptually challenging. If there is no "god's eye view" from which the meaning of laws and constitutions can be objectively ascertained, how can we claim to live under the rule of law and not merely the rule of judges? Contemporary hermeneutics use the metaphor of a "dialogue" between the text and the reader to explain the interpretive process.⁸² This dialogical process is a never-ending one, where the meaning we give to texts is in a constant state of flux due to the ever-changing landscape that constitutes the interpretive horizon.

Perhaps not surprisingly, the idea of a "dialogue" has also gained popularity in recent years to describe the relationship between courts and legislatures. Under this model, the legal and constitutional landscape is progressively defined as each institution responds in turn to the other's view of what is permissible under the Charter.⁸³

⁸¹ *Id.*, at para. 123.

⁸² Largely under the influence of Gadamer's foundational work, *Truth and Method*, originally published in 1960. For an account of the influence of Gadamer's dialogical model on contemporary legal theory, see Campos, "That Obscure Object of Desire: Hermeneutics and the Autonomous Text" (1992-93) 77 *Minnesota Law Review* 1065.

⁸³ The scope of the "dialogue" can be conceived in narrow institutional terms, as a conversation between the legislative branch and the judiciary, or can be conceived of in a much richer way, where these institutions are themselves engaged in a dialogue with other segments of society such as the academia, unions, members of the media or the electorate in general. For the purposes of this

In the dialogue model, Parliament must turn its mind to the Constitution and provide its own interpretation of the limits imposed by the Charter. It must act in a principled way and be concerned not only with how a law may “in most cases” affect the rights of individuals, or with how the law will “usually” operate. It cannot rely on prosecutorial discretion and assume that people who should not be interfered with will simply be left alone.⁸⁴ Parliament must strive to ensure that the legislation *as drafted* complies with the Charter, giving its own view of the Constitution’s requirements and taking into account what the courts have previously said. Like the courts, it must turn its mind to the law’s possible applications and ensure that it is appropriate in all reasonably foreseeable cases. This requires vigilance. It is not an easy task and while it is a challenge well worth taking, courts will necessarily disagree in some cases with Parliament’s assessment.

The courts’ interpretation of the Charter will, in turn, be influenced not only by previous cases but also by the legislation that is brought before them. Just as they look at the laws before them in light of the Charter, their view of the Charter is informed by Parliament’s attempt to provide a legal framework for individual behavior and social interactions in response to often difficult and complex problems. Where they find that acts of Parliament are not reconcilable with the Charter, their role is to intervene and, in so doing, attempt to provide guidance while at the same time remaining deferential to the legislative function.

In almost every case there will be room for Parliament or the legislatures to respond. Parliament may follow the court’s suggestions or come up with alternative solutions. Ultimately, Parliament may decide to resort to the “notwithstanding” clause found in section 33 of the Charter.

The problem with remedial exemptions is that they thwart this constitutional dialogue at every stage.

Remedial exemptions send the message to legislatures that they need not worry all that much, provided that the laws are “generally OK”. Unless a law is fundamentally irreconcilable with the Charter it should stand, leaving for another day the task of resolving problems as they arise, on a case-by-case basis. Exemptions are, in practice, an invitation for sloppy legislation.

discussion, it is sufficient to focus on the institutional dialogue between the legislative branch and the judiciary, even though such a focus may not be entirely adequate to account for the behavior of both branches. The dialogue model seems to have emerged in both American and Canadian legal literature in the 1990’s. See, for example, Fitzgerald, *supra*, note 53, at 1-1 to 1-8.

⁸⁴ This point is well established in Charter jurisprudence. As expressed by Cory J. (for the majority) in *R. v. Nikal*, [1996] 1 S.C.R. 1013, at 1063: “It has long been recognized that the holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of the right.” Also see *R. v. Smith*, *supra*, note 20, at 1078.

Their acceptance as a Charter remedy to ill-crafted legislation leads or contributes to what has been described elsewhere as a problem of “democratic debilitation”, which “occurs when the public and their democratically elected representatives cease to formulate and discuss constitutional norms, instead relying on the courts to address constitutional problems”.⁸⁵ The occasional temptation to rely on courts to resolve controversial legal or social issues may perhaps be inevitable. However, recognizing remedial exemptions carries the risk of a much more profound change in the way legislators take into account Charter rights in developing legislation. Once this type of remedy becomes accepted, it is likely inevitable that courts will be more reluctant to strike down legislation based on hypothetical situations, as suggested by McLachlin C.J.’s comments in *Sharpe*. The legacy of early landmark cases such as *Big M Drug Mart* has been a significant disciplining effect on legislators who must provide rules that adequately take into consideration their effect on various segments of society and differently situated individuals. Perhaps this legacy is one that is more apparent to those who are involved in the inner workings of the legislative process, but it is one that the courts should be reluctant to jeopardize by opening the door to remedial exemptions.

In granting a remedial exemption but leaving the law intact, courts also send the troubling message that individuals may in certain circumstances have the right to disregard valid law and that civil disobedience may be perfectly justifiable, not just morally, but also legally under the Constitution. Remedial exemptions relieve the courts of having to engage with the legislatures in defining appropriate lines of conduct. While they conveniently satisfy the claims of the litigant in a particular case, they provide little comfort for other individuals who may (or may not) be caught by the overbreadth of the legislation, thereby creating a chilling effect. In other words, exemptions are also an invitation for sloppy adjudication.

More fundamentally, the use of remedial exemptions effectively interrupts the dialogue between the courts and legislatures. Of the four features identified by Peter Hogg and Alison Bushell in their oft-cited paper on the Charter dialogue, the first is the existence of the notwithstanding clause in section 33, which allows Parliament or the legislatures to override a court’s decision.⁸⁶ Leaving aside the issue of the legitimacy of resorting to section 33, the question raised by the use of remedial exemptions as an alternative to striking down is, what legislative form would a response based on section 33 take? In principle,

⁸⁵ Tushnet, “Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty”, (1995) 94 Mich. L. Rev. 245, at 271.

⁸⁶ Hogg & Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such A Bad Thing After All)”, (1997) 35 Osgoode Hall L.J. 75, at 82.

the law could be simply re-enacted notwithstanding the Charter so as to ensure its universal application. In practice, however, this makes for an awkward response. The law, after all, is valid.

In the vast majority of cases, however, Parliament or the legislatures will not want to use section 33 but rather fix the constitutional defect in the provision. But, by upholding the law and refusing to apply it to a particular litigant without identifying a class of situations where the rule should not operate, legislators are given little guidance that could assist in recasting the provision in a way that better complies with the Charter, and even less incentive to do so.

III. CONCLUSION

In the early years of the Charter's application, judicial review in Canada has taken a path that is significantly different than in the United States. Permissive standing rules and broad interpretation of the Charter's guarantees have allowed for rigorous judicial review, disciplined the legislative function and helped provide everyone with clearer legal guidance. There should be no ambiguity about the message of this paper: constitutional exemptions are a significant threat to this legacy and are, in many ways, detrimental to the rule of law. We have so far done without remedial exemptions and should continue to do so.

Whether the Supreme Court will stay clear of remedial exemptions and only exceptionally grant ancillary exemptions is another question. Recent jurisprudence at least suggests that it is warming up to the idea of granting constitutional exemptions. And, in fairness, the matter is hardly a simple one. On the one hand, even if we are to continue with generous rules of standing and the use of reasonable hypotheticals in Charter adjudication, how does a court deal with real fact situations that are marginal? If the law is held to be valid as it applies to reasonable hypothetical situations, should it be struck down in a subsequent "marginal" case?⁸⁷ On the other hand, can the Charter require that legislation be crafted in a way that is perfectly tailored to each and every person's unique situation?⁸⁸

⁸⁷ This issue is discussed in a forthcoming publication by Sankoff, "Constitutional Exemptions: An Ongoing Problem Requiring A Swift Resolution".

⁸⁸ As Sopinka J. indicated in *R. v. Butler*, [1992] 1 S.C.R. 452, at 504-5, "[i]n determining whether less intrusive legislation may be imagined, this Court stressed in the *Prostitution Reference*, *supra*, that it is not necessary that the legislative scheme be the 'perfect' scheme [...]". Similarly, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, McLachlin J. (as she then was) wrote in discussing s. 1 (para. 160):

Remedies are not something that can be considered separately from the rights that they serve to uphold. In searching for a perfect response to individual claims, the danger to do more harm than good is a very real one.

As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement...

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