

PUTTING THE PAST BEHIND US? PROSPECTIVE JUDICIAL AND LEGISLATIVE CONSTITUTIONAL REMEDIES

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I. INTRODUCTION

Consider the following two pairs of cases. The first, *Miron v. Trudel*¹ and *M. v. H.*,² involved constitutional challenges based on section 15 of the *Canadian Charter of Rights and Freedoms* to the definition of “spouse” in provincial legislation governing private financial obligations — accident benefits owed under an insurance contract in the former³ and spousal support obligations in the latter.⁴ The holdings on the merits were essentially the same. In both cases, the Supreme Court of Canada found that the definitions of spouse

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¹ [1995] 2 S.C.R. 418.

² [1999] 2 S.C.R. 3.

³ *Insurance Act*, R.S.O. 1980, c. I.8, ss. 231, 233, Sch. C.

⁴ *Family Law Act*, R.S.O. 1990, c. F.3, s. 29.

violated section 15 — for excluding common law spouses in *Miron*, and same sex spouses in *M. v. H.* — and could not be justified under section 1. However, the remedial outcomes were dramatically different. In *Miron*, the Court amended the under-inclusive legislation by reading common law partners into the definition of spouse. Moreover, the reading-in was retroactive so that the Charter claimant had a right to claim accident benefits for injuries sustained in 1987, eight years *before* the Court's judgment in 1995. Additionally, because the remedy altered legislation, as opposed to being strictly personal, the benefit of this change extended to similarly situated persons. Recognizing the similarity between the two cases, the Ontario Court of Appeal in *M. v. H.* followed *Miron*'s lead, and relied on a combination of severance and reading-in to alter spousal support legislation, subject to a one-year suspension.⁵ In the event of legislative inaction, the dependent spouse would have a cause of action for support,⁶ which would only have been possible if the reading-in were retroactive to 1992, the date of the dissolution of the relationship. Moreover, similarly situated persons would benefit as well. But the Supreme Court varied this remedy, issuing a suspended declaration of invalidity, and inviting the Ontario legislature to address the issue. The legislature's response was to amend the impugned provision⁷ and many others as well, but only with prospective effect from November 20, 1999.⁸ The net result is that, although she succeeded on the merits, the claimant in *M. v. H.* was denied a remedy, unlike the claimant in *Miron*.⁹ Moreover, same sex couples whose relationships dissolved before November 20, 1999

⁵ (1996), 31 O.R. (3d) 417 (C.A.).

⁶ The court stated "[i]n the event that the remedial order takes effect, M will be free to pursue her remedy under the expanded definition of 'spouse': *id.*, at 464.

⁷ *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, S.O. 1999, c. 6, s. 25(2), amending s. 29 of the Ontario *Family Law Act*.

⁸ *Id.*, at s. 68(2).

⁹ M. had actually settled her lawsuit against H. prior to the Supreme Court's hearing, so technically speaking, the case was moot. However, one could imagine a similar situation where settlement had not occurred. For a recent example, see *Johnson v. Sand* (2001), 91 Alta. L.R. (3d) 249 (Surrogate Ct.); supplementary reasons (2001), 91 Alta. L.R. (3d) 262 (Surrogate Ct.), discussed below. An Ontario court has, correctly in our view, employed a variety of means to mitigate the injustice of denying a remedy to a same sex partner like M. whose relation dissolved before the post *M. v. H.* legislation came into effect. See *S. (R) v. H. (R)* (2000), 49 O.R. (3d) 451, at 454-55 (S.C.J.) discussed below.

still lack a statutory cause of action for spousal support; the contrast with *Miron* is stark.

The second pair of cases arose in the criminal context, and concerned constitutional duties imposed by the Charter on the police. In *R. v. Hebert*,¹⁰ the Court held that the right to silence of an accused person is violated by the elicitation of a statement by an undercover police officer after arrest. Prior to that judgment, such statements were admissible.¹¹ *Hebert* was handed down on June 21, 1990, and did not state whether it applied only prospectively from the date of the judgment, or retroactively to cases still in the justice system. This question, however, was answered by the Court in a later judgment,¹² in which an accused successfully challenged the admissibility of a statement given to an undercover police officer at trial. Although the statement was admitted at least three weeks before *Hebert* was handed down,¹³ and hence was admissible under the law at that time, on appeal the accused was allowed to take the benefit of *Hebert* retroactively. But a different result obtained in *R. v. Bartle*,¹⁴ where the Court held that the right to counsel encompasses the right to be informed about the availability of duty counsel, if such a service exists. The judgment contains language suggesting that it only applied prospectively 30 days from the Court's judgment, albeit not in the case at hand as the accused was able to take the benefit of the Court's ruling.¹⁵ Taken together, these measures — prospective effect, combined with a transition period — put the effective date of the judgment at October 20, 1994. It follows that arrests that occurred before that date were not governed by the Court's holding. This interpretation was confirmed by the Alberta Court of Appeal, in a case where an accused sought to rely on *Bartle*.¹⁶ Although it was clear that the rule set out in *Bartle* had been breached, the Court held that since the arrest had taken place

¹⁰ [1990] 2 S.C.R. 151.

¹¹ *Rothman v. The Queen*, [1981] 1 S.C.R. 640.

¹² *R. v. Brown*, [1993] 2 S.C.R. 918.

¹³ See Major J.'s judgment in the Alberta Court of Appeal at *R. v. Brown* (1992), 127 A.R. 89, 73 C.C.C. (3d) 481, at 520 (Alta. C.A.).

¹⁴ [1994] 3 S.C.R. 173 [hereinafter "*Bartle*"].

¹⁵ This is our interpretation of the remedial order issued by the Court in a companion case to *Bartle*, *R. v. Cobham*, [1994] 3 S.C.R. 360 [hereinafter "*Cobham*"], in response to a motion brought by the Attorney-General of Alberta. For the text of this order, and a fuller discussion of this point, see *infra*, note 37.

¹⁶ *R. v. Lorincz* (1995), 174 A.R. 321 (C.A.).

in February, 1993, the accused could not take the benefit of the ruling.

These examples raise many difficult questions. Why did the Court treat the claimants in *Miron* and *M. v. H.* so differently? Since both cases involved private financial obligations, they did not implicate the allocation of public resources, which is perhaps a legitimate reason to limit the retroactive impact of a judgment. Indeed, in its section 1 analysis in *M. v. H.*, the Court noted that the private nature of the financial burden was a reason *not* to defer to the Ontario legislature, and distinguished a prior, unsuccessful challenge against the *Old Age Security Act* which had involved a claim against the public purse.¹⁷ In *Miron*, the unconstitutional conduct was remedied by the court; in *M. v. H.*, the task of responding to the finding of unconstitutionality was left to the legislature. Should the result depend on which institution takes the remedial lead? What is lost when the legislature assumes the lead in providing remedies? What is gained? Why are courts sometimes reluctant to provide a retroactive remedy in the case at hand?

Turning to *Hebert* and *Bartle*, it is also not immediately apparent that there was a principled basis for distinguishing the two judgments. Both changed pre-existing legal rules, and imposed new duties on the police. Both also had the effect of curtailing the admissibility of statements made by accused persons to law enforcement officials, and thus created additional constitutional constraints for the investigative process that likely resulted in the acquittal of persons who would have been convicted under pre-existing rules. So under what circumstances should Charter interpretations be retroactive or prospective? An additional wrinkle is that the claimant was exempted from the prospective ruling in *Bartle*, meaning that similarly situated persons were accorded radically different treatment. What was the justification for distributing the protection of the Charter differentially to persons whose treatment at the hands of law enforcement officials had been identical? And to bring the two pockets of cases together, why was the exemption from the transition period or period of court-approved delay for the rights claimant in *Bartle* not applied in *M. v. H.*, to provide constitutional relief to at least the successful party? Why does *Bartle* enjoy the benefits of his Charter victory and *M.* not enjoy hers?

¹⁷ *Egan v. Canada*, [1995] 2 S.C.R. 513.

In this paper, we begin to wrestle with these perplexing issues. Our starting point is that before the advent of the Charter, the Canadian legal system contained settled understandings regarding judicial and legislative approaches to law-making. In brief, legislatures generally made *new* legal rules with *prospective* effect, while courts recognized and applied *pre-existing* legal rules with *retroactive* effect. This traditional approach allocated issues of distributive justice to the legislature, and assigned courts the role of achieving corrective justice in the particular case at hand. However, this simple dichotomy — between prospective legislation and retroactive adjudication — has recently come under severe strain.

First, the Charter has given the courts new and onerous responsibilities to make decisions that are laden with distributive consequences for a wide range of interests other than those of the parties, and which may disrupt a range of legitimate expectations. The traditional norm of immediate and retroactive judicial remedies in the service of corrective justice has in many cases proven to be too blunt an instrument. To temper the drastic effects of some of their rulings, the courts have used new remedial devices such as delayed declarations of invalidity and, in a few cases, prospective rulings (coupled with transition periods). Unfortunately, the courts have not been clear or consistent in their use of these innovative remedial tools. We will examine a number of examples where there has been an embarrassing amount of confusion about the implications of the Supreme Court's rulings. There is a desperate need for legal principles to guide courts about when and why they should depart from their traditions of immediate and retroactive remedies.

Second, legislatures have entered into the domain traditionally reserved to courts, and now provide remedies for the violation of constitutional rights. Courts have prompted legislative remedies through the use of delayed declarations of invalidity, which invite legislatures to remedy the constitutional wrong with a minimum of disruption through carefully tailored legislative amendments. To be sure, legislatures have frequently enacted "reply" legislation in response to delayed declarations of invalidity. When legislatures do so, it is open to them to preempt the declaration of invalidity from taking effect, by retroactively curing the unconstitutionality prior to the termination of the suspension. Functionally speaking, this would mean that the remedy for violations of constitutional rights comes not from the court, but from the legislature. However, most reply legislation is prospective, not retroactive. This is unsurprising, given

that legislatures have not routinely been in the business of providing constitutional remedies, and that retroactive legislation is seen as problematic. But prospective legislation, coupled with new remedial techniques such as delayed declarations of invalidity and prospective ruling, raises concerns that successful Charter rights claimants like M. will have a right, but no remedy.

Our argument proceeds as follows. We begin, in Part II, by reviewing the evolving constitutional practice of judicial remedies under the Charter. We first highlight the norm of retroactive judicial remedies and then examine how courts have departed from that norm. We also examine the confusion that has arisen from the courts' failure to distinguish prospective rulings from delayed declarations of invalidity, and the failure of courts consistently to follow the implications of prospective rulings. In Part III, we review the emerging constitutional practice of legislative remedies, highlighting the norm of prospective legislative remedies and how this can leave successful Charter applicants such as M., and others in her position who did not bring constitutional challenges, without relief. We will also examine how legislatures at times have departed from this norm with retroactive legislation. We will see, however, that such retroactive legislation has rarely served the interests of minority groups and others protected under the Charter.

In Part IV, we provide some guidelines for how courts and legislatures can work together to achieve effective constitutional remedies. First, courts should be careful when departing from the norm of full retroactivity, because of the danger of leaving successful Charter applicants without remedies. Nevertheless the experience under the Charter demonstrates that such departures from traditional norms of corrective justice can in some cases be justified. Second, in cases involving legislation, courts should remand remedial issues to legislatures if the latter enjoy certain kinds of comparative institutional advantages over the former. In a case such as *M. v. H.*, there may be valid reasons why the courts want to encourage legislatures to formulate remedial legislation from a range of constitutional options, and in a manner that may be more comprehensive than any remedy that courts could devise. Nevertheless, courts should only engage in such measures after carefully considering the implications of not providing a retroactive remedy for the successful Charter applicant. Moreover, legislatures should be encouraged to consider the case for making remedial legislation retroactive so that successful Charter applicants and

others in a similar position are not left without a remedy. Courts may assist in this important endeavour in a variety of ways. One way is to exempt successful Charter applicants from a period of delay accompanying a delayed declaration of invalidity or a prospective ruling. This approach has some support in the cases. It does, however, raise issues of horizontal equity with respect to the treatment of similarly situated persons who do not engage in litigation and who may be left without a remedy if remedial legislation is prospective. Another alternative that has already been used by courts in a few cases is to interpret remedial legislative replies to a court's decision without the traditional presumption that legislation is prospective. Indeed, there may be an emerging new presumption that remedial legislation has retroactive effect. We will suggest that such a presumption is attractive for a number of reasons. One is that it is loyal to the courts' traditional concerns about retroactive justice and ensuring that where there is a right, there is a remedy. Another reason is that such an approach will benefit not only the successful Charter applicant in the case which triggers the legislative reply but all similarly situated individuals. We will argue that such an approach allows courts and legislatures to play distinctive institutional roles that are well-suited to achieving both retroactive and prospective constitutional justice.

II. JUDICIAL REMEDIES: FROM RETROACTIVE TO PROSPECTIVE

1. Retroactive Judicial Remedies

Under the Charter, retroactivity is the default position. Judicial Charter remedies are retroactive in two senses. First, they attempt to remedy unconstitutional states of affairs that took place *prior* to the date of judgment. A number of well known cases illustrate that the whole range of section 52 remedies operate retroactively in this way. Consider declarations of invalidity under section 52, which are presumed to be fully retroactive. Recall what such a declaration means — that the relevant legislature *never* had the authority to enact the provision or law. The legislature lacked the power to act the way that it did, making that decision, literally, *ultra vires*. The clear and unavoidable implication would be that “the law no longer

exists *and never did exist*.¹⁸ This is the traditional view in the United States.¹⁹ It is also the widely accepted view in Canada. Peter Hogg states, for example, that “[a] judicial decision that a law is unconstitutional is retroactive in the sense that it involves the nullification of the law from the outset.”²⁰ The leading example is the Court’s judgment in a non-Charter case, *Reference Re Manitoba Language Rights*,²¹ where the Court found that every Act passed by the Manitoba Legislature since 1890 was unconstitutional, because they had been enacted in English only. The Court devoted considerable attention to the difficulties that would arise if Manitoba’s unilingual laws were to be struck down:

[A]ll legal rights, obligations and other effects which have purportedly arisen under all Acts of the Manitoba Legislature since 1890 would be open to challenge to the extent that their validity and enforceability depends upon a regime of unconstitutional unilingual laws.²²

The point to note is the Court’s explicit statement that a declaration of invalidity would have imperiled rights, obligations and other acts of private and public reliance *dating back to 1890*, 95 years *before* the Court handed down its judgment in 1985. These concerns only arise if the declaration has retroactive effect. By contrast, if such declarations only operated prospectively, the Court’s concerns would have been limited to the legal vacuum going forward from the date of the judgment.

Other remedies issued under section 52 operate retroactively in this first sense as well. *Miron*, discussed earlier, shows how reading-in is retroactive and benefits a person who before the Court rendered its judgment was excluded from the legislation. Another example is *Sharpe*, where the Court found the child pornography provisions of the *Criminal Code*²³ to be unconstitutional for overbreadth. Surprisingly, the Court opted to read-in new defences to narrow the

¹⁸ Roach, *Constitutional Remedies in Canada*, looseleaf ed. (Aurora: Canada Law Book, 1995), at para. 14.920 (emphasis added).

¹⁹ *Norton v. Shelby County*, 118 U.S. 425 (1886), at 442: “an unconstitutional law is not a law ... it is, in legal contemplation, as inoperative as though it had never been passed.”

²⁰ Hogg, *Constitutional Law of Canada*, looseleaf ed. (Toronto: Carswell, 1997), at 55-1.

²¹ [1985] 1 S.C.R. 721 [hereinafter “*Manitoba Language Reference*”].

²² *Id.*, at 748.

²³ *R. v. Sharpe*, [2001] 1 S.C.R. 45. The impugned provision was s. 163.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

scope of the offence. Moreover, it ordered that the accused be remitted for a new trial on the basis of the amended provision. Since the alleged breach of the *Code* took place in 1995 and 1996, well before the Court's judgment in 2001, Sharpe was able to retroactively take the benefit of defences that did not exist when he was first charged. Indeed, the judgment at retrial confirms the retroactive nature of the remedy, because he was permitted to rely on one of the new defences, albeit unsuccessfully.²⁴

The remedy of severance also operates retroactively to change the past. The leading example here is *R. v. Hess*,²⁵ where the Supreme Court held that the removal of the defence of mistake of fact from a *Criminal Code* provision prohibiting intercourse with females under 14 years of age²⁶ was unconstitutional. The Court found that the appropriate remedy was to rewrite the provision by severing a phrase that explicitly removed this defence, and then ordered "a new trial under the section as amended,"²⁷ *i.e.*, where it was open to the accused to attempt to take the benefit of the previously non-existent defence. Had the remedy not had retroactive effect, the accused could not have been tried under the newly amended provision, because the acts complained of took place in 1985, five years before the Court's judgment in 1990.²⁸

Second, remedies are retroactive in another sense — they are parasitic on a view of the substantive legal principles in force at the time of the unconstitutional act. That is, only if the impugned legislation or conduct was unconstitutional *at the time it occurred* could it give rise to a cause of action culminating in a favourable court ruling, including a remedy. This stance poses considerable difficulty in the subset of cases where there are gaps in the law, where precedents conflict, or where they are ambiguous — different varieties of "hard cases" that make up the overwhelming majority of the Supreme Court's docket. In these sorts of cases, courts often fashion novel constitutional rules that modify the law as it existed before the judgment. However, the fiction adopted by the courts is that these judgments declare the law as it has always been — that

²⁴ *R. v. Sharpe*, [2002] B.C.J. No. 610 (S.C.).

²⁵ *R. v. Hess*; *R. v. Nguyen*, [1990] 2 S.C.R. 906 [hereinafter "*Hess*"].

²⁶ R.S.C. 1970, c. C-46, s. 146(1).

²⁷ *Supra*, note 25, at para. 54, *per* Wilson J.

²⁸ Also see the *Provincial Court Judges References*, *infra*, note 42, at para. 294, where the Court stated that the severance of language from a statute was "fully retroactive."

judges discover, not make the law — and apply the pre-existing law to the dispute at hand. This traditional approach is also supported by statements by both Blackstone and Dicey which stress the close connection between rights and remedies.²⁹ Notwithstanding this fiction, in hard cases, past transactions are governed by novel legal rules in the cases where those rules are announced. Moreover the principle of equality before the law means that other transactions are governed by new legal rules, even if those rules did not exist when those transactions took place. This, of course, is what happened with *Hebert*, the benefit of which was taken in *Brown*, notwithstanding that the Charter violation in that case occurred before *Hebert* was handed down. And as one of us has recently noted, the phenomenon extends beyond the public law context, to the recasting of private law doctrine.³⁰

2. Prospective Judicial Remedies

Set against this background, prospective rulings are a radical departure from the Supreme Court's normal remedial practice.³¹ In the context of criminal procedure, the Court issued its first two prospective rulings in *R v. Brydges*³² and *Bartle*, two cases on the so-called “informational component” of the right to counsel. *Brydges*

²⁹ As quoted in Roach, *Constitutional Remedies in Canada*, *supra*, note 18, at para. 1.10.

³⁰ Duggan and Roach, “A Further Note on *Final Note*: The Scope and Limits of Judicial Law-Making” (2002) 36 Can. Bus. L.J. 115, at 130.

³¹ Although this practice is well-established in the context of the right to counsel, it was first proposed by Lamer J. in dissent in *R. v. Mills*, [1986] 1 S.C.R. 863. In that case, it fell to Lamer J. to consider whether the right of an accused person to a trial within a reasonable time protected by s. 11(b) of the Charter had been violated, and if so, what the remedy should be. That case was also the first occasion for the Supreme Court to establish the interpretive framework for that right; prior to that judgment, as Lamer J. said, “[T]he full scope of the section, and the nature of the obligation it has imposed upon the government and the courts has remained uncertain for the period prior to the rendering of this judgment.” (at para. 243) In recognition of the fact that the Court was addressing a novel legal issue with potentially wide ramifications across the criminal justice system, Lamer J. would have imposed a transition period during which his judgment was phased in. Although Lamer J. did not say so explicitly, this transition period was coupled to giving only prospective effect to his reasons. Thus, he stated that it would be undesirable “to give effect to behaviour which occurred prior to this judgment against a standard the parameters of which were unknown to all.” (at para. 244)

³² [1990] 1 S.C.R. 190 [hereinafter “*Brydges*”].

held that the right to counsel includes the right to be informed of the existence of duty counsel and the ability to apply for Legal Aid, if available. *Bartle* expanded the informational component to encompass the right to be informed of the availability of free and immediate preliminary legal advice from duty counsel accessible by a toll-free number; a companion case also held that if the right to counsel were exercised, police were obliged to inform a detainee of their duty to “hold off” further questioning until legal advice became available.³³ In *Brydges*, Lamer J. (speaking for the majority) was mindful that the Court was modifying existing constitutional doctrine, and was explicit in his acknowledgment of the Court’s law-making activity. Thus, he referred to “[t]he imposition of the *additional duty* on the police in respect of duty counsel and Legal Aid,”³⁴ and to the “new burden”³⁵ created by the judgment. To cushion the impact of the judgment, Lamer J. also established a “transition period” of 30 days, which in his view was “sufficient time for police forces to react, and to prepare new cautions.”³⁶ Although the Court made no reference to comparative constitutional experience, prospective ruling had been used by the Warren Court in the United States to cushion the drastic impact of some its landmark rulings about constitutional criminal procedure requirements. The fact that prospective rulings were a novel departure from the Court’s normal practice might have led to the separate concurrence of La Forest J. (who spoke for himself and L’Heureux-Dubé and McLachlin JJ.). La Forest J. agreed with Lamer J., but did not endorse his prospective remedial order.

Bartle was not explicit about the novelty of its holding and no transition period was imposed. However, on October 20, 1994, the Court imposed a “transition period” in a companion case to *Bartle*, *R. v. Cobham*,³⁷ in response to a motion from the Attorney General of Alberta, in the following order:

The application for a re-hearing is granted on the issue of whether there should be a transition period, and the operation of the judgment herein

³³ *R. v. Prosper*, [1994] 3 S.C.R. 236 [hereinafter “*Prosper*”].

³⁴ *Brydges*, *supra*, note 32, at 215 (emphasis added).

³⁵ *Id.*, at 217.

³⁶ *Id.*

³⁷ *Supra*, note 15.

[i.e. *Cobham*] is stayed for a period of 21 days from the date such judgment was issued, namely September 29, 1994.³⁸

To these two cases we add a third outside the context of the right to counsel, *R. v. Feeney*.³⁹ The Court modified the common law rule governing warrantless searches in dwelling houses, and held that the constitutional right against unreasonable search and seizure generally prohibited such searches save for in exceptional circumstances. Subsequent to the judgment, the Court ordered a “transition period” until December 19, 1997, close to seven months after handing down its judgment.⁴⁰

None of these judgments explicitly stated that it was to be applied only prospectively, creating doubt in an area where there is a desperate need for clarity. Indeed, all three applied retroactively to the benefit of the claimants with evidence being excluded in all three cases under section 24(2). However, in *Brydges*, the language about “new” and “additional” burdens is highly suggestive. If the burden had applied retroactively, it would have been nonsensical to talk about the new burden; rather, it would have been a burden that existed since the advent of the Charter, in accordance with the fiction of adjudication as discovery. And the imposition of a “transition period” in all three cases lends support to the view that the judgments apply prospectively. The purpose of the transition periods was to give the police time to come to terms with their new duties. If these judgments had had retroactive effect, those transition periods would simply have delayed the effect of the judgments in those cases for a limited period, at the end of which the judgments would apply to all cases still in the justice system, including those which arose before the date of the judgments. If this had occurred, it is not clear how a transition period would have been helpful to the police. The new cautions, duty to “hold off” and warrant requirements would not prevent prior claims from being brought with respect to arrests, detentions and searches which occurred before the effective date of the judgment (in these cases, the end of the transition period). If *Brydges* and *Bartle* had applied

³⁸ As cited in *R. v. Latimer*, [1997] 1 S.C.R. 217, at para. 40. SC discloses that he served as Law Clerk to Lamer C.J. during the 1996-7 term, when *Latimer* was heard. Nothing in this article reveals any confidential information acquired during that time.

³⁹ [1997] 2 S.C.R. 13 [hereinafter “*Feeney*”].

⁴⁰ *R. v. Feeney*, [1997] 3 S.C.R. 1008 (application).

retroactively, even with a transition period, new standards would have been imposed on prior conduct.

Admittedly, however, it is possible that these judgments could have applied retroactively, in the manner of *Hebert*. Thus, the Court's statement in granting the application for rehearing in *Feeney*, that "[t]he transition period will have effect throughout Canada but will have no application to the disposition that has been made or is to be made of the present case" only clarifies that the claimant could take the benefit of the judgment, but is decidedly ambiguous on whether the judgment had retroactive or prospective effect in other cases.⁴¹ And there is further confusion about the distinction between prospective rulings (coupled with transition periods) and delayed declarations of invalidity, something only increased by Lamer J.'s citation of the delayed declaration of invalidity case of the *Manitoba Language Reference* as a precedent for the use of a transition period with the prospective ruling in *Brydges*, and the Court's failure to examine the issue fully in *Bartle* and *Feeney*. This is regrettable, because there is an important difference between a prospective ruling, coupled with a transition period, and a delayed declaration of invalidity. Although both remedies postpone the operative date of the judgment, a delayed declaration of invalidity is fully retroactive, whereas a prospective ruling only applies to the future — not much different than how legislation often comes into force on a date after it becomes law, through royal proclamation (which highlights the legislative nature of the remedy). This difference is reflected in the effect of a judgment on conduct *during the period of the suspension*. With respect to prospective rulings coupled with a transition period, conduct during the transition period would not be governed by the new legal rule, because the judgment applies prospectively from the end of that period. With respect to delayed declarations of invalidity, the judgment still has fully retroactive effect, covering the time period *including* the period of the suspension.

The failure of the Court to articulate and respect these basic analytical distinctions did not stop it from finally recognizing the existence of prospective overruling in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*,⁴² a set of

⁴¹ *R. v. Feeney*, [1997] 2 S.C.R. 117, at para. 1.

⁴² [1997] 3 S.C.R. 3 [hereinafter "*Provincial Court Judges References*"], motion requesting suspension granted [1998] 1 S.C.R. 3 [hereinafter "*Provincial Court Judges*"]

appeals from Alberta, Manitoba and Prince Edward Island in which the Court interpreted the right to a trial before an independent and impartial tribunal to require governments to set judicial compensation through a special procedure that most, if not all, provinces failed to satisfy at the time of the judgment. Moreover, compliance with the Court's reasons, through the establishment of independent, effective, and objective commissions to recommend judicial compensation, as well as the setting of judicial compensation by legislatures in response to those recommendations, required time. In recognition of the difficulties of implementation, at a rehearing of the case, the Court modified its initial remedy, and combined a prospective judgment with a transition period of one year.⁴³ The Court was explicit: "there will be a transition period of one year before that requirement takes effect. As of September 18, 1998, the judicial compensation commission requirement will apply prospectively."⁴⁴ And as examples of prospective rulings, it cited *Brydges* and *Feeney* (but oddly, not *Bartle*), finally clarifying the prospective nature of those rulings several years after they had been handed down.⁴⁵

Prospective ruling is an exception to the norm of retroactive judicial law-making. Courts should employ this device with caution, but it may be warranted in some cases. Prospective rulings, coupled with transition periods, can in cases like *Brydges* and *Feeney* soften some of the impact of dramatic changes in the law. The Warren Court in the United States made some of its most dramatic criminal procedure rulings prospective in part because of fears that the new right to counsel and search and seizures obligations would have disturbed too many cases still in the system. At the same time, this consequentialist reasoning cannot be taken too far, especially in Canada where some of the Court's most dramatic criminal procedure rulings — the *Askov*⁴⁶ standards for trial within a reasonable time or

References — Rehearing"], motion to extend period of suspension granted [1998] 2 S.C.R. 443. SC discloses that he served as Law Clerk to Lamer C.J. during the 1996-7 term, when the *Provincial Court Judges References* were heard. Nothing in this article reveals any confidential information acquired during that time.

⁴³ *Provincial Court Judges References — Rehearing, id.*, at para. 18.

⁴⁴ *Id.*

⁴⁵ *Id.*, at para. 20.

⁴⁶ *R. v. Askov*, [1990] 2 S.C.R. 1199.

the *Stinchcombe*⁴⁷ standards for Crown disclosure of relevant material — have been made with retroactive effect.

The Warren Court's use of prospective ruling was also influenced by a sense that the new constitutional requirements — the exclusionary rule to enforce search and seizure standards and *Miranda* warnings to enforce the accused's right against self-incrimination — were more a means to protect a constitutional right than an essential attribute of the constitutional right itself. It could be argued that prospective ruling was appropriate in the *Provincial Court Judges References* in part on the basis that a commission to determine judicial salaries was a process required to protect judicial independence as opposed to an essential attribute of the right to an independent judiciary.

Prospective rulings may also be justified if the Court determines it is impossible or unreasonable to expect immediate compliance from the government. In *Brydges*, Lamer J. indicated that some time would be required for new caution cards outlining the availability of legal aid to be prepared for the police. In the *Provincial Court Judges References*, new independent commissions to determine judicial salaries had to be created in some jurisdictions and it would take time for provincial governments to study issues concerning the composition and mandate of these commissions and enact the required legislation. Prospective rulings can also be an appropriate means to protect genuine reliance interests in old law.⁴⁸ Under the Charter, these reliance interests may primarily be held by governments, but may also involve others who have relied on a law that the Court wishes to indicate is no longer constitutional. Prospective ruling should be used with caution and restraint, but may be justified in some exceptional cases. At the very least, courts should be explicit about prospective rulings, and should specify their reasons for departing from the retroactive norm.

The novelty of prospective overruling, the failure of the Supreme Court to acknowledge this practice explicitly until very recently, and the Court's refusal to offer an extended justification of it, has had great costs. For example, it has created confusion in the lower courts. Faced with little or no direction from the Supreme Court, courts in several provinces have given retroactive effect to judgments that the

⁴⁷ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

⁴⁸ Friedland, "Prospective and Retrospective Judicial Lawmaking" (1974) 24 U.T.L.J. 170; Duggan and Roach, *supra*, note 30.

Court intended to apply only prospectively. This problem has been most prevalent with respect to *Bartle* (and its companion case, *Prosper*) which applied prospectively to arrests and detentions from October 20, 1994 onward. However, in several judgments handed down after October 20, 1994, *Bartle* was applied to arrests that took place *prior* to that date. These cases came from five provinces — British Columbia,⁴⁹ Newfoundland,⁵⁰ Ontario,⁵¹ and Nova Scotia,⁵² and Saskatchewan.⁵³ To be sure, *Bartle* was complied with in some cases, so giving it retroactive application made no difference to the outcome.⁵⁴ In most of these decisions, *Bartle* was cited and applied without extended comment, which likely reflects a sense that the norms of retroactive application of judicially discovered constitutional rules governed. This is most explicit in *Thai*, where the Court faced the issue of retroactivity directly:

While *Bartle* was decided after the accused were arrested, the law is well settled that the principles enunciated in that decision, apply to the case at bar. ... where convictions are not final (ie. are being appealed), the accused may take advantage of changes in the law that enure to his or her benefit. That principle certainly applies in my opinion to the case at bar, where the trial was still ongoing.⁵⁵

⁴⁹ *R. v. Couterville* (1995), 65 B.C.A.C. 185 (C.A.) (arrest on December 30, 1992 did not comply with *Prosper*); *R. v. Hleck*, [1995] B.C.J. No. 921 (Prov. Ct.) (arrest on July 3, 1993 did not comply with *Bartle*); *R. v. Bridson*, [1994] B.C.J. No. 3180 (Prov. Ct.) (arrest on March 6, 1994 did not comply with *Bartle*).

⁵⁰ *R. v. Baker* (1995), 127 Nfld. & P.E.I.R. 233 (Nfld. Sup. Ct.) (arrest in 1993 complied with *Bartle*).

⁵¹ *R. v. DeAbreu*, [1994] O.J. No. 2735 (C.A.) (date of arrest unclear, but before date of Court of Appeal hearing on November 18, 1994; arrest did not comply with *Bartle*); *R. v. Green*, [1995] O.J. No. 597 (Gen. Div.) (arrest on October 21, 1992 complied with *Bartle*); *R. v. Wilson*, [1995] O.J. No. 557 (Gen. Div.) (arrest on June 19, 1993 did not comply with duty to “hold off” under *Prosper*); *R. v. Thai*, [1994] O.J. No. 3128 (C.J. – Prov. Div.) [hereinafter “*Thai*”] (arrest on February 26, 1993 did not comply with *Bartle*); *R. v. Bessette*, [1995] O.J. No. 3643 (Prov. Ct.) (arrest on July 29, 1994 complied with *Bartle*).

⁵² *R. v. Durham* (1994), 137 N.S.R. (2d) 128 (Prov. Ct.) (arrest on March 12, 1994 did not comply with *Prosper*).

⁵³ *R. v. Sharf* (1995), 136 Sask. R. 178 (Q.B.) (arrest before June 9, 1993 complied with *Bartle*).

⁵⁴ *R. v. Baker*, *supra*, note 50; *R. v. Green*, *supra*, note 51; *R. v. Bessette*, *supra*, note 51; *R. v. Sharf*, *id.*

⁵⁵ *Thai*, *supra*, note 51, at para. 14. Moreover, the Crown did not contest the application of *Bartle*, and conceded that *Bartle* had been violated (para. 15).

Feeney was applied retroactively as well, albeit in a smaller number of cases.⁵⁶ To be fair, all of these cases were heard prior to the imposition of the transition period by the Court (which, to recall, took place after the judgment was handed down), although in one case, the judgment was handed down after the transition period was announced.⁵⁷ However, even then, a transition period is analytically distinct from a prospective overruling, although the two are often used together. To be sure, some courts did grasp the prospective nature of these judgments. In *R. v. Kennedy*, the court held that *Brydges* did not govern an arrest that occurred two months before that judgment was handed down, although the court referred to the transition period, not prospective overruling, as the justification for its holding.⁵⁸ Only in *Lorincz* did the court grasp the heart of the issue, when it stated that “[t]he law in *Cobham* does not apply retroactively.”⁵⁹

And the confusion is not limited to the lower courts. In the initial judgment in the *Provincial Court Judges References*, the Supreme Court issued a series of declarations of invalidity for appeals from Alberta and Manitoba — declarations that normally have fully retroactive effect.⁶⁰ Indeed, this is the only way to explain its order of mandamus in the appeal from Manitoba, directing the government to retroactively and immediately grant a salary increase effective April 3, 1993 — over four years *before* the Supreme Court’s judgment — that was to have taken place before Manitoba enacted its unconstitutional wage reduction.⁶¹ On rehearing, the Court expressly affirmed the fully retroactive nature of those declarations on numerous instances in its reasoning.⁶² However, in the same breath, it modified its initial remedy, and held that the new procedures for

⁵⁶ *R. v. Hay*, [1997] B.C.J. No. 2729 (S.C.) (warrantless search on September 1, 1995 did not comply with *Feeney*); *R. v. Damianakos* (1997), 126 Man. R. (2d) 81 (C.A.) [hereinafter “*Damianakos*”] (warrantless search on August 18, 1994 did not comply with *Feeney*); *R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.) (warrantless search on January 27, 1995 complied with *Feeney*).

⁵⁷ *Damianakos*, *id.*

⁵⁸ (1995), 135 Nfld. & P.E.I.R. 271 (Nfld. C.A.).

⁵⁹ *R. v. Lorincz*, *supra*, note 16, at para. 5. *Lorincz*’s interpretation of the transition period in *Cobham* was followed by the Northwest Territories Supreme Court in *R. v. Itulu*, [1995] N.W.T.J. No. 40, at para. 12 (S.C.).

⁶⁰ *Provincial Court Judges References*, *supra*, note 42, at paras. 291, 292, 294.

⁶¹ *Provincial Court Judges References*, *supra*, note 42, at para. 294.

⁶² *Provincial Court Judges References* — Rehearing, *supra*, note 42, at paras. 1, 2, 15, 20.

setting judicial compensation applied prospectively from one year after the handing down of its initial judgment. But this is utterly incoherent. If a ruling is prospective, then it does not apply to past government conduct. Indeed, this is the whole point of prospective overruling. Retroactive and prospective overrulings, in other words, are mutually exclusive. Clearly, the Court wanted to have it both ways — to be able to assess prior acts against the new constitutional standard, *and* to limit the applicability of the new standard to the future.

To be sure, the Court *has* combined prospective and retroactive relief, but in a very limited way. Thus far, successful litigants have been exempted from prospective overruling, and permitted to take retroactive benefit of the judgments in their cases. Thus, in *Brydges*, the Court held that the right to counsel had been violated, and in the result, restored an acquittal entered by the trial judge; in *Bartle*, the Court held that the right to counsel had been violated, quashed the conviction, and entered an acquittal; and in *Feeney*, the Court ordered a new trial in which the violation of the Charter was assumed.⁶³ The Court has not explained the justification for these exemptions from the prospective effect of its holdings. The likely rationales are that the failure to do so would eliminate the incentive to launch constitutional challenges in the first place and the Court's understandable reluctance to send a successful Charter applicant away with no remedy. The Court's silence may also relate to the fact that the exception for the successful Charter litigant raises difficult questions regarding the equitable treatment of other similarly situated rights-claimants. Only the claimant who reaches the Supreme Court first receives the retroactive benefit of the ruling. In *Bartle*, for example, the Ontario Court of Appeal heard six cases together that raised the same issue.⁶⁴ However, since they were indigent accused, it was decided by counsel that two cases would go to the Supreme Court as test cases, on the assumption that the other four accused would be able to benefit from a favourable ruling. But because of the prospective nature of the remedy, these four accused

⁶³ *R. v. Feeney* (2001), 86 B.C.L.R. (3d) 30 (C.A.).

⁶⁴ *R. v. Baldwin* (1993), 14 O.R. (3d) 29, 81 C.C.C. (3d) 353 (Ont. C.A.).

were presumably denied the relief afforded to *Bartle*, creating real concerns regarding horizontal equity.⁶⁵

In its judgment on the rehearing in the *Provincial Court Judges References*, the Court invoked *Feeney* and *Brydges* to justify its mixture of retroactive and prospective remedies, on the grounds that “[i]n the rare cases in which this Court makes a prospective ruling, it has always allowed the party bringing the case to take advantage of the finding of unconstitutionality.”⁶⁶ Indeed, in the appeals from Alberta, the three claimants were individually accused, putting those cases on all fours with *Brydges*, *Bartle* and *Feeney*. However, if that is what the Court wanted to do, it should have issued personal exemptions under section 24(1), which as we discuss below, would be analogous to the exemptions granted to successful litigants from suspended declarations of invalidity under section 52. But declarations of invalidity are section 52 remedies *that attach to legislation*, and are not personal in nature. Thus, the judgment says *both* that legislatures had acted unconstitutionally in the past *and* that legislatures would only be under a new constitutional obligation one year after its initial judgment.

It is hard to make sense of the Court’s schizophrenic remedial order. The result has been chaos in provincial courts of appeal. The Quebec Court of Appeal refused to apply the judgment to events that transpired in 1992, 1993, and 1995, stating the new rule in the *Provincial Court Judges References* was “prospective, except with respect to judges who had taken proceedings before the courts for a declaration of the unconstitutionality of a statute which affected them.”⁶⁷ However, four more provincial courts of appeal — British Columbia, New Brunswick, Newfoundland, and Prince Edward Island — have given retroactive effect to the ruling, to events that transpired well before the initial judgment.⁶⁸ A fifth, the Alberta

⁶⁵ The United States Supreme Court has stressed the inequity of only exempting litigants from prospective rulings. See *Harper v. Virginia Dept of Taxation*, 509 U.S. 86 (1992); *Reynoldsville v. Hyde*, 514 U.S. 749 (1995).

⁶⁶ *Supra*, note 42, at para. 20.

⁶⁷ *Conférence des Juges du Québec v. Québec*, [2000] R.J.Q. 2803, 196 D.L.R. (4th) 533, at para. 65 (Que. C.A.).

⁶⁸ *British Columbia Legislative Assembly Resolution on Judicial Compensation (Re)* (1998), 51 B.C.L.R. (3d) 139, 160 D.L.R. (4th) 477 (C.A.) (applying the *Provincial Court Judges References* to a decision of 12 June 1995); *Mackin v. New Brunswick*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405; (applying the *Provincial Court Judges References* to a decision of 1 April 1995); *Newfoundland Assn. of Provincial Court*

Court of Appeal, applied the judgment to an order in council issued on August 26, 1998, after the initial judgment, but before the coming into force of the judgment on December 19, 1998.⁶⁹ One possible explanation for these five decisions could be that they were handed down before, and hence in ignorance of, the Court's remedial order. However, in fact the rulings were all handed down *after* the Court gave its judgment prospective effect.⁷⁰

Faced with these judgments, the Supreme Court should have taken the first opportunity to clarify its remedial order. However, it denied leave to appeal in the cases from British Columbia⁷¹ and Alberta.⁷² Moreover, when requested by the Quebec Judges Conference to clarify if the *Provincial Court Judges References* applied retroactively in that province, the Court refused, stating that the matter was to be resolved by the Quebec courts, which were apprised of the relevant facts.⁷³ Finally, the Court did hear an appeal, and held in *Mackin* that notwithstanding its own remedial order, the *Provincial Court Judges References* applied retroactively in New Brunswick.⁷⁴ The Court's reason for its about face was that the applicants had instituted their case *before* the *Provincial Court Judges References* had been handed down, and thus, for reasons of horizontal equity, it would be unjust to deny them the benefit of the judgment, because they were similarly situated to the successful litigants. If this is the governing principle, then the appellate courts of British Columbia and Prince Edward Island were right to apply the judgment retroactively, because those constitutional challenges

Judges v. Newfoundland (2000), 192 Nfld. & P.E.I.R. 183 (Nfld. C.A.) (applying the *Provincial Court Judges References* to decisions taken in 1991 and 1992); *R. v. MacDonald (M) et al.* (1998), 162 Nfld. & P.E.I.R. 357 (P.E.I.S.C.A.D.) (applying the *Provincial Court Judges References* to the very events with respect to which the Supreme Court answered reference questions in that appeal).

⁶⁹ *Alberta Provincial Judges' Assn. v. Alberta* (1999), 71 Alta. L.R. (3d) 269 (C.A.).

⁷⁰ The dates were: 20 July 1999 (Alberta Court of Appeal); 26 May 1998 (British Columbia Court of Appeal); 26 November 1998 (New Brunswick Court of Appeal); 1 September 2000 (Newfoundland Court of Appeal); 15 April 1998 (Prince Edward Island Supreme Court Appellate Division).

⁷¹ [1998] S.C.C.A. No. 401 (21 January 1999).

⁷² [1999] S.C.C.A. No. 470 (8 June 2000).

⁷³ [1998] S.C.J. No. 60 (9 July 1998).

⁷⁴ *Supra*, note 68.

were commenced before the Court's judgment,⁷⁵ and the Quebec Court of Appeal was right not to have done so, because the litigation in that province was commenced afterward.⁷⁶ But it is hard to square with *Brydges*, *Bartle*, and *Feeney*, where only the successful claimant was supposed to be able to take the benefit of those rulings, as opposed to all who commenced litigation before that date. And, it still does not explain the retroactive application of the *Provincial Court Judges References* in Alberta or Newfoundland, where the litigation was commenced afterward as well.⁷⁷ But the only reference in *Mackin* to the judgments of courts of appeal other than New Brunswick's was to Newfoundland's, which was cited with approval, suggesting that case was rightly decided.

Perhaps the answer is as follows — that in the two provinces with respect to which declarations of invalidity were issued (Alberta, Manitoba), and the one province with respect to which the Court answered reference questions (P.E.I.), the judgment had retroactive effect, but in the rest of the country, the judgment applied prospectively (e.g., Quebec), save for in those provinces where litigation was already underway (British Columbia, New Brunswick). But if this is true, then the Newfoundland decision is still wrong. Moreover, it would have the bizarre result of denying the Court's judgments uniform effect across Canada, creating horizontal inequities of a radically different sort. Indeed, the Newfoundland Court of Appeal effectively said that the Court could not have possibly intended this outcome, and for that reason, refused to give the *Provincial Court Judges References* solely prospective effect in that province. The tortured saga of the *Provincial Court Judges References* vividly demonstrates the need for some clear guidance on prospective overruling from the Court in the not-so-distant future.⁷⁸

⁷⁵ The dates were 16 February 1996 (British Columbia) and sometime in 1994 (Prince Edward Island).

⁷⁶ Sometime in 1999 after the Quebec legislature refused to follow the recommendations of a Commission established to look into the issue of judges' salaries, which tabled a report on August 4, 1998.

⁷⁷ On November 14, 1997 (Newfoundland) and November 10, 1998 (Alberta).

⁷⁸ One area that has attracted relatively minimal attention from constitutional scholars, but which is relevant to our discussion, is the question of the remedies available for the levying of unconstitutional taxes. The case-law is unclear. In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, La Forest J. stated in *obiter dicta* that the general rule was one of non-recovery, and offered a number of reasons, drawn from both the law of restitution and general considerations of public policy. The latter centred on the allegedly disruptive effect of a restitutionary remedy on public fi-

III. LEGISLATIVE REMEDIES

1. Suspended Declarations of Invalidity

Prospective rulings, coupled with transition periods, are remedial devices that make courts look like legislatures. But the second part of the shift in remedial practice has been the assumption by legislatures of the responsibility for providing remedies for breaches

nances, both in terms of the potentially large dollar amounts and the difficulties in planning public expenditure without certain knowledge of revenue streams. As Wilson J. noted in dissent, the rule against non-recovery seems grossly inequitable, because it places the costs of unconstitutionality on the innocent taxpayer, when in fact the loss should be borne by the public (*id.*, at para. 93). And it is therefore significant that the Supreme Court in *Re Eurig Estate*, [1998] 2 S.C.R. 565 [hereinafter "*Eurig Estate*"] recently refused to endorse La Forest J.'s analysis, noting that he spoke for a plurality, but not a majority of the panel in *Air Canada*. Assuming without deciding that the general rule was one of non-recovery, the Court noted that La Forest J. had left open an exception in the case of payment "under compulsion or protest" (*Eurig Estate, id.*, at para. 47) and held that the taxpayer fell within this exception. However, the language of the judgment suggests that the Court is more sympathetic to recovery beyond this narrow set of circumstances. As the Court said, "[had] the proper judgment been required at first instance, the appellant would not have paid the fee. It would therefore be inequitable to deny recovery at this stage," (*Eurig Estate, id.*, at para. 47) which suggests a broader basis for restitution.

Among scholars of private law, debate here has centred on whether a claim in restitution lies for the return of taxes paid pursuant to a law later found to be unconstitutional, and in particular, on how to weave such a claim into the existing law of unjust enrichment, which generally governs private relations. But if we approach this issue through the lens of constitutional remedies, it is apparent the debate over the recovery of unconstitutional taxes is really a debate over whether the remedy should be retroactive or prospective. A claim in restitution for unjust enrichment is parasitic on a retroactive declaration of invalidity, for as La Forest J. put it in *Air Canada*, just as an unconstitutional statute was never law, "anything done under colour of an ultra vires statute has not more effect than if the statute had not existed" (*id.*, at para. 56). Thus, by going on to argue that "[t]here is a clear distinction between declaring an Act unconstitutional and determining the practical and legal effects that flow from that determination," (*id.*, at para. 57) La Forest J. raised the possibility that notwithstanding the fact that governments had acted unconstitutionally in the past, a remedy need not be retroactive and attempt to undo past fiscal harm. To deny restitution for unconstitutional taxes, as La Forest J. did, is tantamount to denying retroactive relief. Moreover, although La Forest J. did not say so explicitly, this remedy is prospective, because it relies on the assumption that going forward, governments would comply with the Court's declaration and discontinue the collection of an unconstitutional tax. Indeed, were the government to defy the Supreme Court, we have little doubt that La Forest J. would have ordered restitution, on the grounds that the government was engaging in an "abuse of authority," one of his stated exceptions to the rule of non-recovery.

of constitutional rights. The courts have actively participated in this change in the legislative role, by remanding remedial issues to legislatures. The central judicial device here is the suspended declaration of invalidity. Such declarations suspend the remedy of striking down for a temporary period of time, in order to give the government an opportunity to respond to the court's judgment with new legislation that complies with the Constitution.

The idea that suspended declarations of invalidity invite legislatures to craft constitutional remedies is novel. Although the institutional interplay between courts and legislatures prompted by suspended or delayed declarations of invalidity has generated considerable scholarly attention,⁷⁹ this body of work has focused on the question of whether the possibility of legislative replies eliminates or dilutes the counter-majoritarian objection to judicial review. The dominant metaphor is one of dialogue, a term that captures the idea that courts and legislatures play important but distinct roles in the protection of important constitutional values, and in balancing those values against important social interests. Judicial review is justified, then, not as a final check on legislative power, but as a mechanism to enrich democratic debate through the highlighting and strengthening of important interests that might be overlooked in the legislative process, and to bring to the attention of legislatures the unintended consequences of laws when applied in practice. In keeping with its post-*Marbury* orientation,⁸⁰ the literature on dialogue focuses on the relationship between the *substance* of reply legislation and court judgments.⁸¹ To be sure, this is a crucial, if not the central dimension of the inter-institutional dialogue set up and

⁷⁹ Hogg & Bushell "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001) [hereinafter "*Supreme Court on Trial*"].

⁸⁰ Roach "American Constitutional Theory for Canadians (And the Rest of the World)" (2002) 52 U.T.L.J. 503.

⁸¹ For example, in their detailed study of reply legislation, Hogg and Bushell state that legislatures usually meet the constraints set by court judgments by modifying the means chosen to pursue certain legislative objectives — for example, by narrowing the scope of legislation (where laws infringing freedom of expression have been found unconstitutional for overbreadth), by broadening it (where laws infringing the right to equality have been found unconstitutional for under-inclusion), or by adopting fairer procedures (where laws have been found unconstitutional for violating various procedural rights). Hogg & Bushell, "The Charter Dialogue Between Courts and Legislatures," *supra*, note 79.

nourished by the Constitution. However, there is another dimension to dialogue that warrants attention. Quite aside from a comparison of the substance of court judgments and legislative replies, dialogue also takes place when courts punt remedial issues to legislatures.

The use of suspended declarations of invalidity as a form of remedial remand has evolved over time. The suspended declaration of invalidity was first used by the Supreme Court in the *Manitoba Language Reference*, a case discussed above that arose under the *Manitoba Act, 1870*.⁸² It was used to avoid the “legal vacuum” and “chaos and anarchy” that would have resulted had all of Manitoba’s unilingual laws been immediately declared of no force or effect, a remedy which was apparently demanded by a literal reading of section 52 of the *Constitution Act, 1982*,⁸³ which simply declares that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

The *Manitoba Language Reference* presented an extreme set of circumstances, and accordingly, demanded an extraordinary response from the Court. Since then, however, the use of suspended declarations of invalidity has grown by leaps and bounds, so that they now verge on the routine. Indeed, since 1985, suspended declarations of invalidity have been used in at least 42 decisions,⁸⁴ on

⁸² *Supra*, note 21.

⁸³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁸⁴ *Manitoba Language Reference*, *supra*, note 21, supplementary reasons [1985] 2 S.C.R. 347; *R. v. Mercure*, [1988] 1 S.C.R. 234 [hereinafter “*Mercure*”]; *Dixon v. B.C. (A.G.)* (1989), 35 B.C.L.R. (2d) 273 [hereinafter “*Dixon*”]; *R. v. Swain*, [1991] 1 S.C.R. 933 [hereinafter “*Swain*”]; *Pacific Press Limited v. Canada (Minister of Employment and Immigration)*, [1991] 2 F.C. 327 (C.A.); *Sinclair v. Quebec (A.G.)*, [1992] 1 S.C.R. 579 [hereinafter “*Sinclair*”]; *R. v. Bain*, [1992] 1 S.C.R. 91 [hereinafter “*Bain*”]; *R. v. Lines*, [1993] O.J. No. 3284 (Gen. Div.) [hereinafter “*Lines*”]; *MacKinnon v. Prince Edward Island*, [1993] 104 Nfld. & P.E.I.R. 232 (P.E.I.S.C.) [hereinafter “*MacKinnon*”]; *Epilepsy Canada v. Alberta (A.G.)* (1994), 20 Alta. L.R. (3d) 44 (C.A.); *L’Association des Parents Francophones de la Colombie Britannique v. B.C.* (1996), 27 B.C.L.R. (3d) 83 (S.C.); *Provincial Court Judges References*, *supra*, note 42; *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 [hereinafter “*Eldridge*”]; *Schafer v. Canada (A.G.)* (1997), 35 O.R. (3d) 1 (C.A.) [hereinafter “*Schafer*”]; *Eurig Estate*, *supra*, note 78; *Taylor v. Rossu*, [1998] 216 A.R. 348 (C.A.); *R. v. Lauzon* (1998), 230 N.R. 272; *R. v. Boivin*, (1998), 245 N.R. 341 (C.M.A.C.); *United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. Kmart Canada Ltd.* [1999] 2 S.C.R. 1083 [hereinafter “*Kmart*”]; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [hereinafter “*Corbiere*”]; *M. v. H.*, *supra*, note 2; *R. v. Hoepfner* (1999), 134 Man. R. (2d) 163 (C.A.) [hereinafter “*Hoepfner*”], reconsidered (2000), 145 Man. R.

14 of those occasions by the Supreme Court itself⁸⁵ (see Table A). Moreover, they have been used in a broad variety of cases. As in the *Manitoba Language Reference*, they have been used in the context of the rights of linguistic minorities.⁸⁶ They have been used in many cases involving unconstitutional criminal laws.⁸⁷ They have been used in constitutional challenges brought on the basis of the Charter's right to vote.⁸⁸ Suspended declarations of invalidity have been used in challenges to under-inclusive social policy legislation, governing both public expenditure⁸⁹ and private income support.⁹⁰

(2d) 151 (C.A.); *Balders Estate v. N.S. (Registrar of Probate, County of Halifax)* (1999), 179 N.S.R. (2d) 146 (S.C.) [hereinafter "*Balders Estate*"]; *Friends of Democracy v. Northwest Territories (A.G.)*, [1999] N.W.T. J. No. 28, 171 D.L.R. (4th) 551 (S.C.) [hereinafter "*Friends of Democracy*"]; *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.) [hereinafter "*Parker*"]; *Figueroa v. Canada (A.G.)*, 2003 SCC 37 (S.C.C. Bulletin, 2001, at 515); *Independence of the British Columbia Justices of the Peace (Re)* (2000), 81 B.C.L.R. (3d) 164 (S.C.); *British Columbia Ferry Corp. v. Canada (Minister of National Revenue — MNR)*, [2001] 4 F.C. 3; *R. v. Guignard*, [2002] 1 S.C.R. 472 [hereinafter "*Guignard*"]; and *Walsh v. Bona* (2000), 183 N.S.R. (2d) 74 (C.A.) (reversed on other grounds by the Supreme Court of Canada), *Nova Scotia (A.G.) v. Walsh*, 2002 SCC 83, S.C.J. No. 84; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 [hereinafter "*Dunmore*"]; *Moncton (City) v. Charlebois* (2001), 242 N.B.R. (2d) 259 (C.A.); *Barreau de Montreal c. Quebec (Procureur General)*, [2001] R.J.Q. 2058 (C.A.); *Johnson v. Sand*, *supra*, note 9; *Mackin*, *supra*, note 68; *Vann Niagara Ltd. v. Oakville (Town)* (2002), 60 O.R. (3d) 1 (C.A.); leave to appeal to the Supreme Court of Canada granted January 30, 2003 (S.C.C. Bulletin, 2003, at 142); *United Taxi Drivers Fellowship of Southern Alberta v. Calgary (City)* (2002), 3 Alta. L. R. (4th) 211 (C.A.); leave to appeal to the Supreme Court of Canada granted March 20, 2003 (S.C.C. Bulletin, 2003, at 445); *R. v. Hurrell* (2002), 60 O.R. (3d) 161 (C.A.); leave to appeal to the Supreme Court of Canada granted February 20, 2003 (S.C.C. Bulletin, 2003, at 288); *Hendricks c. Quebec (Procureur General)*, [2002] J.Q. No. 3816 (Sup. Ct.) (on appeal); *Hitzig v. Canada*, [2003] O.J. No. 12 (S.C.J.); *Hodge v. Canada (Minister of Human Resources Development)*, [2003] 1 F.C. 271 (C.A.); application for leave to appeal to the Supreme Court of Canada granted March 20, 2003 (S.C.C. Bulletin, 2003, at 441).

⁸⁵ *Manitoba Language Reference*, *supra*, note 21; *Mercure*, *id.*; *Swain*, *id.*; *Sinclair*, *id.*; *Bain*, *id.*; *Provincial Court Judges References*, *supra*, note 42.; *Eldridge*, *id.*; *Eurig Estate*, *supra*, note 78.; *Kmart*, *id.*; *Corbiere*, *id.*; *M. v. H.*, *supra*, note 2.; *Guignard*, *id.*; *Dunmore*, *id.*; *Mackin*, *supra*, note 68.

⁸⁶ *Mercure*, *supra*, note 84; *L'Association des Parents Francophones de la Colombie Britannique v. B.C.*, *supra*, note 84.

⁸⁷ *Swain*, *supra*, note 84; *Bain*, *supra*, note 84; *Lines*, *supra*, note 84; *Hoepfner*, *supra*, note 84.

⁸⁸ *Dixon*, *supra*, note 84; *MacKinnon*, *supra*, note 84; *Friends of Democracy*, *supra*, note 84.

⁸⁹ *Schachter*, *infra*, note 101; *Eldridge*, *supra*, note 84; *Schafer*, *supra*, note 84.

⁹⁰ *M. v. H.*, *supra*, note 2.

Legislation governing taxes,⁹¹ labour relations,⁹² judicial compensation,⁹³ and voting rights on reserves⁹⁴ have also triggered suspended declarations of invalidity when found unconstitutional.

Suspended declarations of invalidity are deeply controversial, because they allow an unconstitutional state of affairs to persist, thereby posing a threat to the very idea of constitutional supremacy.⁹⁵ The Supreme Court has justified them on the basis of a pair of interrelated, but distinct concerns. First, they prevent the legal discontinuity that would result from declarations of invalidity with immediate effect. Such declarations produce gaps in the relevant regime, with potentially negative consequences. The implicit calculus is one of costs and benefits — with the Court apparently reasoning that the costs of legal discontinuity outweigh the constitutional damage wrought by the preservation of an unconstitutional state of affairs. However, the demands of constitutional supremacy are accommodated in two ways. First, in *Schachter*, the Court identified a relatively narrow set of cases in which the costs of legal discontinuity were sufficiently high to warrant suspended declarations of invalidity. There were three categories of cases: (a) where striking down a provision created a potential danger to public safety,⁹⁶ (b) where a declaration of invalidity posed a threat to the rule of law (e.g., because of the wholesale invalidation of laws⁹⁷ or holding that a legislative assembly had been composed in an unconstitutional fashion),⁹⁸ and (c) where the striking down of under-inclusive social policy legislation threatened vulnerable beneficiaries.⁹⁹ Second, the suspension of the declaration of invalidity is only temporary. The idea is that the period of suspension affords the legislature limited time to craft replacement legislation that is constitutionally compliant. The

⁹¹ *Eurig Estate, supra*, note 78.

⁹² *Kmart, supra*, note 84.

⁹³ *Provincial Court Judges References, supra*, note 42.

⁹⁴ *Corbiere, supra*, note 84.

⁹⁵ As the Court said in *Schachter v. Canada*, [1992] 2 S.C.R. 679, at para. 81: “A delayed declaration is a serious matter from the point of view of the enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter for a time despite the violation.”

⁹⁶ *Swain, supra*, note 84; *Hoepfner, supra*, note 84; *Parker, supra*, note 84.

⁹⁷ *Manitoba Language Reference, supra*, note 21; *Mercure, supra*, note 84. Also see *Sinclair, supra*, note 84.

⁹⁸ *Dixon, supra*, note 84.

⁹⁹ *Schachter, infra*, note 101.

suspension serves to facilitate or smooth the transition from an unconstitutional to a constitutional state of affairs, with minimal disruption. The fact that the period of suspension is temporary ensures that the Constitution will be respected even if the legislature does not enact reply legislation. Nevertheless, as our discussion of *M. v. H.* demonstrated, courts cannot always ensure that the successful litigant actually receives a tangible remedy.

But of course, the sequence of suspension followed by legislative reply is not the only way to preserve legal continuity in the face of a successful constitutional challenge. Courts have at their disposal an array of remedies that allow them to modify legislation to bring it into compliance with the Constitution. Courts may narrow the scope of a law through reading down provisions capable of both an unconstitutional and constitutional construction. Alternatively, they may sever the offending portion of the legislation, either to narrow the legislation, or to extend it, depending on how it is drafted. Finally, and most dramatically, they may extend the law through the remedy of reading-in. These remedies have the attraction of being immediate, simultaneously satisfying the constraints of constitutional supremacy and legal continuity. However, they collide with the second argument in favour of suspended declarations of invalidity — that legislatures enjoy a comparative institutional advantage over courts in the drafting of legislation. In particular, legislatures are better able to weigh and consider a range of constitutionally compliant responses than are courts. A recent example of judicial sensitivity to the comparative institutional advantage enjoyed by legislatures is *Halpern v. Canada (Attorney-General)*, where the Ontario Superior Court of Justice unanimously found that the restriction of marriage to persons of the opposite sex was unconstitutional, but a majority acknowledged the possibility of a range of legislative responses, from opening up marriage to same sex couples to the abolition of civil marriage altogether. The Ontario Court of Appeal, however, ordered an immediate remedy, because none of the *Schacter* categories applied.¹⁰⁰

¹⁰⁰ *Halpern v. Canada* (2002), 60 O.R. (3d) 321 (S.C.J.), remedy varied (2003), 225 D.L.R. (4th) 529 (Ont. C.A.). But see *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251, B.C.J. No. 994 where the British Columbia Court of Appeal reformulated the common law definition of marriage to include same-sex couples. It suspended the relief for a period of just over a year solely to give the federal and provincial governments time to review and revise legislation to bring it into accord with the decision. Subsequent to the Ontario Court of Appeal's decision in *Halpern*,

In our view, recent jurisprudence on delayed declarations of invalidity demonstrates that the idea that the legislature is often better suited to formulate remedies now dominates the alternative rationale that a delay is necessary to prevent legal discontinuities. The delayed declaration of invalidity has evolved beyond its origins as an emergency measure and emerged in cases such as *M. v. H.* as a powerful dialogic device that allows a court to remand complex issues to legislative institutions. This evolution is remarkable, because in *Schachter*, the Supreme Court explicitly stated that “[t]he question whether to delay the application of a declaration of nullity should ... turn not on considerations of the role of the courts and the legislature, but rather on considerations ... relating to the effect of an immediate declaration on the public.”¹⁰¹ But the Court’s denial of the dialogic or institutional aim of delayed declarations of invalidity in *Schachter*, as well as that case’s narrow categories of danger to public safety, rule of law or invalidation of benefits, have largely been ignored in subsequent cases.

Courts rarely attempt to cite the costs of legal discontinuity, let alone weigh those costs against the costs of maintaining an unconstitutional state of affairs. When *Schachter* is cited, courts almost never slot cases into the *Schachter* categories.¹⁰² Indeed, *Schachter* is not always cited, illustrating the loose hold that that decision has on courts.¹⁰³ Courts have emphasized instead their preference for a legislative or governmental response to findings of unconstitutionality. For example, in *Corbiere*, while the Supreme Court found that the complete denial of voting rights to off-reserve band members was unconstitutional, it also held that schemes that accorded different rights to on- and off-reserve band members could be constitutional, and that Parliament was better suited to consider and choose among

and on the consent of the parties, this remedy was varied to have immediate effect (*Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 406).

¹⁰¹ *Schachter*, *supra*, note 95, at para. 83.

¹⁰² *E.g.*, *Kmart*, *supra*, note 84, at para. 79, where the Court simply stated that it was “following the principles of constitutional remedies stated in the case of *Schachter v. Canada*.” The issuance of suspended declarations of invalidity outside the *Schachter* categories was evident even before *Schachter* was handed down. In *Bain*, *supra*, note 84, the Court issued a suspended declaration of invalidity with respect to a provision of the *Criminal Code* governing jury selections. It is not clear that an immediate declaration of invalidity would have posed a danger to the public, threatened the rule of law, or deprived vulnerable persons of legally-mandated benefits.

¹⁰³ *E.g.*, *Eldridge*, *supra*, note 84, *Provincial Court Judges References*, *supra*, note 42, *Eurig Estate*, *supra*, note 78.

these various options. Moreover, Parliament's comparative advantage included its ability to "consult with and listen to the opinions of Aboriginal people,"¹⁰⁴ because a finding of unconstitutionality could be leveraged by the group affected into a role in negotiations.

This unannounced, yet clear shift in the rationale for suspended declarations of invalidity is to be welcomed, albeit with some cautions and caveats. In our view, it fits into a conception of institutional relationships under the Constitution in which both legislatures and courts take joint responsibility for ensuring compliance with constitutional norms. The suspended declaration of invalidity can be viewed as a form of legislative remand, whereby unconstitutional legislation is sent back for reconsideration in light of the court's judgment. At the same time, however, the court does not abdicate the responsibilities of judicial review. It formulates a remedy that will come into effect should the legislature not enact constitutional legislation by the court's deadline. In some cases, the Supreme Court has clearly retained jurisdiction to allow both the government and the successful Charter applicants to return to the Court during the period of the delay. This occurred in the *Manitoba Language Reference* and in a range of delayed declarations of invalidity cases under the Charter including *Swain* and *Corbiere*. Delayed declarations of invalidity do not depart from the traditional judicial role as much as prospective rulings because they accept the default position of retroactivity. But nevertheless, a suspended declaration of invalidity gives the legislature the first opportunity at redressing the constitutional wrong. Reply legislation should accordingly be understood as a form of legislative remedy for the violation of Charter rights.

2. Legislative Remedies: The Prospective Norm

Understanding reply legislation as a form of constitutional remedy raises the question of whether this legislation should adhere to the retroactive norm of judicial remedies, or whether prospective legislation will suffice. The Supreme Court has not turned its mind to this question. While inviting legislative remedies, the Court has rarely specified how they should be structured, out of a sense of deference. A starting point is the suspended declaration of invalidity issued by a court, which is fully retroactive if it comes into effect. Thus, a

¹⁰⁴ *Corbiere, supra*, note 84, at para. 116.

purpose of the delay is to give legislatures a chance both to respond to and to pre-empt a finding that the impugned legislation was unconstitutional *ab initio*. What this means is that reply legislation could address *both* the time period between the enactment of the unconstitutional law and the moment of the judgment (during which time the law was unconstitutional) *and* the period of time going forward from the court's ruling. Suspended declarations of invalidity thus serve as invitations to legislatures not only to conform to the constitution in the future, but also to undo or cure the effects of their past unconstitutional conduct, through remedial legislation, before the fully retroactive judgment comes into force and creates difficulty.

Like a judicial remedy, a legislative remedy can be retroactive. However, a careful review of reply legislation enacted in the context of suspended declarations of invalidity demonstrates that this has rarely happened (see Table B). Notwithstanding the potential for legislative remedies to be framed retroactively, the norm is for such legislation to be prospective. This is rarely stated explicitly. But a review of reply legislation suggests that in many cases, the remedial legislation is enacted with no explicit retroactive effect. Such legislation may then be interpreted as having only a prospective effect according to a well established rule of statutory interpretation that statutes are presumed to not have retroactive effect. In Part IV, we will suggest that this presumption has not always been applied to such remedial legislation and indeed should not apply. Nevertheless, there is a real risk that courts will apply the presumption against retroactive legislation to remedial legislation. The result may be to leave successful Charter applicants and others in a similar position without a remedy.

Prospective legislative remedies can be found in a variety of contexts. One set of legislative remedies has arisen in response to constitutional challenges to statutes that impose private financial obligations. The principal example is Ontario's legislative reply to *M. v. H.*, the aptly named *An Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H.*, commonly referred to as Bill 5. *M. v. H.* was a narrowly directed constitutional challenge to the spousal support provisions of the Ontario the *Family Law Act*,¹⁰⁵ which applied to opposite sex, common law couples but not to same sex couples. The legislative reply was wide-ranging, proposing amendments to numerous pieces of legislation that were

¹⁰⁵ *Supra*, note 4.

vulnerable to constitutional challenge in light of the Court's judgment. Included in these were amendments to the spousal support provisions of *Family Law Act*. The amendments generated controversy, for rather than amending the definition of "spouse" to include a same sex partner, they instead maintained a distinction between the two, although the rights conferred and responsibilities imposed were the same. The "separate but equal" response of the Ontario legislature raises serious questions about whether it complied fully with the Court's judgment, and indeed, prompted M. to unsuccessfully petition the Supreme Court for a rehearing.¹⁰⁶ What has not been commented on, though, is that the spousal support provisions in Bill 5 came into force on November 20, 1999, and read against the norms of statutory interpretation, operate only with respect to same sex relationships that dissolved after that date. As a consequence, M. was unable to take the benefit of the legislation (although since the case had settled, this was unnecessary), as were same sex partners whose relationships terminated prior to the date of the reply legislation taking effect.

Prospective legislative remedies are also found in the social policy arena. A leading example is the reply to *Schafer v. Canada (A.G.)*,¹⁰⁷ which was a constitutional challenge to a regime of public income support, the child care benefits issued pursuant to the *Unemployment Insurance Act*.¹⁰⁸ The challenge focused on a provision conferring a right to additional leave for children suffering from psychological, physical or emotional conditions that require additional care, but only where children were six months or older at the time they arrived in the claimant's home. The Ontario Court of Appeal found that the legislation unjustifiably discriminated on the basis of age, ordered the severance of the age restriction on 8 August 1997, but suspended its order for two years. However, because a parallel challenge under the *Canadian Human Rights Act*¹⁰⁹ had led to a court order requiring the government to cease to apply the same section as of 6 June 1998 (at the end of a one year suspension),¹¹⁰ the federal government decided to govern itself by the latter decision,

¹⁰⁶ Supreme Court of Canada, Bulletin, 26 May 2000 (application for rehearing denied).

¹⁰⁷ *Supra*, note 84.

¹⁰⁸ R.S.C. 1985, c. U-1 (Repealed by S.C. 1996, c. 23, s. 155).

¹⁰⁹ R.S.C. 1985, c. H-6.

¹¹⁰ *Gonzalez v. Canada (Employment and Immigration Commission)*, [1997] 3 F.C. 646 (T.D.).

and disapply the age restriction as of 6 June 1998.¹¹¹ The legislative reply came in two stages two years later on 29 June 2000, in the form of the *Budget Implementation Act, 2000*. As an interim measure (for children born or placed for adoption before December 31, 2000), the Act provided for additional leave on exactly the same terms as specified by the Court — without any restrictions on the basis of age.¹¹² But for children born or adopted after that date, the special leave provisions were eliminated entirely — an option that also complied with the Court’s judgment because it did not discriminate on the basis of age.¹¹³ On its face, the legislative remedy did not apply retroactively to the claimants, because their child was adopted on November 24, 1990, or to others in their situation.

Prospective legislative remedies have figured prominently in constitutional challenges to electoral systems. The first such case was *Dixon*, which held that the entire system of electoral boundaries in British Columbia was unconstitutional, because gross population disparities between different ridings — with rural areas securing disproportionate representation in the legislature in comparison to urban areas — unjustifiably limited the right to vote.¹¹⁴ The British Columbia Supreme Court issued a suspended declaration of invalidity. Its principal concern was the prospect of future chaos, namely the inability to hold an election in the absence of legislation defining electoral boundaries. However, in a subsequent judgment, the court also acknowledged the difficulties that a declaration of invalidity would create for the *present* operation of the legislature, stating that “the result would be the annulment of the Legislative Assembly itself”¹¹⁵ — which would only occur if the judgment had retroactive effect, rendering the previous election unconstitutional. The Court envisioned the legislature’s reply in remedial terms, with the Court stating that “the legislature will promptly enter on the question of what remedial steps should be taken to remedy the deficiencies in the existing legislation.”¹¹⁶ The remedy came in two

¹¹¹ Conversation with Gail Sinclair, Counsel, Department of Justice, Government of Canada, 19 August 2002.

¹¹² S.C. 2000, c. 14, s. 7.

¹¹³ *Id.*, s. 3(3). However, the Act increased the amount of leave available to all parents to 15 weeks.

¹¹⁴ *Supra*, note 84.

¹¹⁵ *Dixon v. British Columbia (A.G.)* (1989), 37 B.C.L.R. (2d) 231, 60 D.L.R. (4th) 445, at 447 (S.C.).

¹¹⁶ *Supra*, note 84, at 282.

installments — the *Electoral Boundaries Commission Act*¹¹⁷ and the *Electoral Districts Act*.¹¹⁸ Neither sought to undo the previous unconstitutional elections, and instead corrected the constitutional defect in the electoral boundary regime for future elections. A similar sequence of events played out in Prince Edward Island¹¹⁹ and the Northwest Territories,¹²⁰ in parallel litigation. A prospective legislative remedy also came out of *Corbiere*, where the Court held that the restriction of the right to vote in band elections under the *Indian Act* to band members ordinarily resident on a reserve to be unconstitutional. The Supreme Court severed the residency requirement from the Act, but suspended its remedial order for 18 months, inviting Parliament to respond. Moreover, the Court explicitly contemplated that the legislative remedy would be prospective, with L'Heureux-Dubé J. stating that “[w]hat is at issue in this Court is not a remedy affecting band councils elected under the previous regime, but rather a declaration that will have the effect of changing future election rules.”¹²¹ The remedy came in the form of a regulation to the *Indian Act*, which governs elections after November 20, 2000.¹²²

Finally, a prospective legislative remedy has been used in the criminal justice context. In *R. v. Swain*,¹²³ the Court found that the automatic detention of persons found not guilty by reason of insanity under the *Criminal Code*¹²⁴ was unconstitutional, because it required a trial judge to order a detention without the consideration of any criteria or standards, and without a hearing. On the remedial issue, the Supreme Court balked at the prospect of issuing a declaration of invalidity with immediate effect, because “as of the date of this judgment, judges will be compelled to release into the community all insanity acquittees, including those who may well be a danger to the

¹¹⁷ R.S.B.C. 1996, c. 107.

¹¹⁸ R.S.B.C. 1996, c. 108 (later repealed by the *Electoral Districts Act*, S.B.C. 1999, c. 31, s. 5).

¹¹⁹ *MacKinnon*, *supra*, note 84. The legislative reply was the *Electoral Boundaries Act*, S.P.E.I. 1999, c. 13.

¹²⁰ *Friends of Democracy*, *supra*, note 84. The reply was *An Act to Amend the Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 19, s. 2.

¹²¹ *Corbiere*, *supra*, note 84.

¹²² *Regulations Amending the Indian Band Election Regulations*, SOR /00-391.

¹²³ *Swain*, *supra*, note 84.

¹²⁴ *Criminal Code*, *supra*, note 23, s. 542(2).

public.”¹²⁵ The Court suspended its declaration of invalidity, and Parliament responded by enacting provisions to the *Criminal Code*,¹²⁶ which came into force on February 4, 1992¹²⁷ and govern persons found not guilty by reason of insanity after that date. Persons detained under the previous unconstitutional provision were not able to take the benefit of that ruling.

3. Legislative Remedies: The Retroactive Exception

There are two pockets of cases in which retroactive legislative remedies have been a central issue, both outside the context of the Charter. The first concerns the constitutional obligation to enact statutes in both French and English. In addition to applying to both Parliament and the Quebec legislature through the operation of section 133 of the *Constitution Act, 1867*,¹²⁸ an identical obligation is imposed on the Manitoba legislature by section 23 of the *Manitoba Act, 1870*,¹²⁹ the statute that created the province of Manitoba, and which enjoys constitutional status. As part of an attempt to eradicate the use of French in the province, the Manitoba legislature from 1890 onward enacted statutes only in English. In 1985, the Supreme Court held in the *Manitoba Language Reference* that every statute enacted by the Manitoba legislature since 1890 was unconstitutional, and issued a suspended declaration of invalidity.

In its analysis of the effects of the judgment, the Court noted that a declaration of invalidity with immediate effect would create two problems. First, going forward, Manitoba faced a legal vacuum because of the absence of any validly enacted laws in force in the province (save for pre-1890 statutes enacted in both French and English that would be revived). Our focus is on the second problem — that “the rights, obligations and other effects”¹³⁰ arising not only under current statutes, but spent or repealed statutes, were also presumptively invalid, except to the extent that they were saved by *res judicata* and the *de facto* doctrine. The Court was extremely clear on the remedy required from the Manitoba legislature — that it

¹²⁵ *Swain*, *supra*, note 84, at para. 156.

¹²⁶ Part XX.1 (ss. 672.1 – 672.95), *Criminal Code*, *supra*, note 23.

¹²⁷ *An Act to Amend the Criminal Code (Mental Disorder)*, S.C. 1991, c. 43.

¹²⁸ *Constitution Act, 1867 (U.K.)*, 30 & 31 Vict., c. 3.

¹²⁹ R.S.C. 1970, App. II.

¹³⁰ *Manitoba Language Reference*, *supra*, note 21, at para. 83.

translate and re-enact not only statutes that would be currently in force, but that it do the same and then repeal expired and spent statutes. With respect to the latter, the Court said:

... to ensure the continuing validity and enforceability of rights, obligations and any other effects not saved by the *de facto* or other doctrines, *the repealed or spent Acts of the Legislature, under which these rights, obligations and other effects have purportedly arisen, may need to be enacted, printed and published, and then repealed, in both official languages.*¹³¹

The consent order governing the issue of remedy accordingly provided for the “translation, re-enactment, printing and publishing of ... the unilingual repealed and spent Acts of the Legislature of Manitoba,” although oddly enough, it did not provide that those laws then be repealed.¹³² But the government decided to re-enact only those statutes that were currently in force, relying on *res judicata* and the *de facto* doctrine to save rights and obligations arising under spent and repealed statutes.¹³³

Parallel litigation took place in Saskatchewan, arising under a similar constitutional provision which had similarly been ignored, but which led to quite a different result.¹³⁴ On the issue of remedy, the Supreme Court issued a suspended declaration of invalidity, and stated that the legislative response required in Saskatchewan could take one of two forms. It could follow “the procedure required for Manitoba,”¹³⁵ which would have required it to re-enact and then repeal spent and repealed statutes. But unlike in Manitoba, the Court also held that the Saskatchewan legislature was competent to repeal the obligation to enact statutes in both French and English, which meant it could “resort to the obvious, if ironic expedient of enacting a bilingual statute removing the restrictions imposed on it ... and then declaring all *existing* statutes valid notwithstanding that they were enacted, printed and published in English.”¹³⁶ The

¹³¹ *Id.*, at para. 111 (emphasis added).

¹³² *Reference re Manitoba Language Rights*, [1985] 2 S.C.R. 347, at para. 1.

¹³³ Conversation with Valerie Perry, Legislative Counsel, Province of Manitoba, 6 May 2003.

¹³⁴ *Mercure*, *supra*, note 84. The challenged provision was s. 110, *North-West Territories Act*, R.S.C. 1886, c. 50. The Court held that this provision continued in force through the operation of s. 16 of the *Saskatchewan Act*, S.C. 1905, c. 42.

¹³⁵ *Mercure*, *id.*, at 280.

¹³⁶ *Id.*, at 280-81 (emphasis added).

Saskatchewan legislature's response was the *Language Act*.¹³⁷ Nearly identical legislation was enacted in Alberta, which had contravened the same constitutional provision, and which was also competent to amend the relevant constitutional provision.¹³⁸ As the Court had suggested, the statutes abolished the obligation to enact statutes in both official languages; the relevant provision appears to only apply prospectively.¹³⁹ But the statutes then both declared "Acts ... enacted *prior* to the coming into force of this Act valid notwithstanding that they were enacted, printed and published in English only."¹⁴⁰ This formulation covered not only existing statutes, as the Court had recommended it should, but also encompassed pre-existing laws, that had expired or been repealed. With respect to the former, the provision re-enacted those laws in English going forward. However, because the statutes did not retroactively repeal the requirement for bilingual legislation, it is not clear how they could have retroactively validated existing statutes, let alone statutes that had been repealed or which were expired. Nevertheless, albeit imperfect, the legislative remedies in Alberta and Saskatchewan were retroactively framed.

The second set of cases that have resulted in the enactment of retroactive legislative remedies arose in the tax context. The leading decision here is *Eurig*, in which the Supreme Court held that probate fees set in Ontario by regulation were unconstitutional, because they were a form of tax, which provincial legislatures are constitutionally required to impose through legislation. A declaration of invalidity with immediate effect would have deprived the Ontario government of future revenue, as the Court noted, and it accordingly granted a suspension of six months. But given the retroactive nature of the declaration of invalidity, the failure to suspend would have immediately given rise to a vast number of claims for unjust enrichment for probate fees paid in the past. The reply legislation enacted by the government sought to respond directly to this prospect, by providing that the probate fees established therein

¹³⁷ *Languages Act*, S.S. 1988-9, c L-6.1 [hereinafter "*Saskatchewan Languages Act*"].

¹³⁸ *Languages Act*, S.A. 1988, c. L-7.5 [hereinafter "*Alberta Languages Act*"].

¹³⁹ *Saskatchewan Languages Act*, *supra*, note 137, s. 4; *Alberta Languages Act*, *id.*, s. 3.

¹⁴⁰ *Saskatchewan Languages Act*, *supra*, note 137, s. 3(1); *Alberta Languages Act*, *supra*, note 138, s. 2(1). *Saskatchewan Languages Act*, s. 14 and *Alberta Languages Act*, s. 6, clarify that these declarations of invalidity did not revive repealed or spent legislation.

“shall be deemed to have come into force on May 15, 1950,” which is the date when probate fees were first set by regulation, and hence, became unconstitutional.¹⁴¹ An identical challenge in Nova Scotia,¹⁴² prompted a similar legislative remedy.¹⁴³ In both cases, retroactive legislative remedy was designed primarily to preserve the public finances. In the Saskatchewan and Alberta cases, the retroactive legislative response was one that eliminated previous rights of linguistic minorities. What is tellingly absent from these examples of retroactive legislative remedies are remedies which fulfill the aspirations of L’Heureux-Dubé J. in *Corbiere* where she predicted that the legislature would develop a legislative remedy after consulting minorities. Legislatures have used the extraordinary device of retroactive legislation to protect their own interests and limit their own obligations as opposed to ensuring that minorities and others protected by the Constitution can benefit from retroactive legislative remedies.

IV. WHERE DO WE GO FROM HERE?

1. Why is Prospectivity the Legislative Norm?

Why are legislative remedies generally framed in prospective terms? The presumption against non-retroactivity is thought to be central to even the most minimal conception of the rule of law, because it is difficult for individuals to plan their conduct in the absence of a stable legal framework. However, it fits uncomfortably with legislation that is remedial in purpose, and where achieving remedial ends can only be achieved by retroactively changing the rules governing past transactions. To be sure, the presumption against retroactivity can be overcome either expressly or through necessary implication. However, it is our intuition that the norm against retroactive law-making has been internalized by political

¹⁴¹ *Tax Credits and Revenue Protection Act, 1998*, S.O. 1998, c. 34, s. 64(2) and s. 7(1) of Schedule. Mr. Eurig’s estate was exempted from the probate fees pursuant to s. 7(2) of the Schedule. The first Ontario regulation to set probate fees was O. Reg. 114/50.

¹⁴² *Balders Estate*, *supra*, note 84.

¹⁴³ *An Act to Amend Chapter 104 of the Revised Statutes, 1989, the Costs and Fees Act, and Chapter 359 of the Revised Statutes, 1989, the Probate Act*, S.N.S. 1999 (2nd Sess), c. 1, s. 4. Note that the provision was made retroactive to October 1, 1982, whereas the regulation that was struck down came into force on September 14, 1982 (Regulation 199/82).

actors as an indicator of bad or illegitimate laws. This poses considerable difficulty when it comes to legislative remedies, because governments do not fully apprehend the role that the courts have thrust upon them. Governments fashioning a legislative reply might think that they are acting in their normal, law-making capacity, as opposed to fashioning a remedy for a violation of the Constitution. As a consequence, legislation is reflexively drafted with only the future in mind, when in fact serious consideration should be given to whether legislation ought to be framed retroactively. In some cases, however, there may be a good reason not to respond to a delayed declaration of invalidity in a retroactive fashion. In terms of criminal and quasi-criminal laws, legislatures may understandably be unwilling to enact an offence with retroactive application, given that this may be a *prima facie* violation of section 11(g) of the Charter.¹⁴⁴

Another factor likely leading governments to not enact explicitly retroactive remedial legislation may be the self-interest of governments in benefit cases. It is striking that the two cases of retroactive remedial legislation discussed above were cases in which governments had incentives to enact retroactive legislation in order to minimize the obligations to enact bilingual legislation and to prevent claims against public finances. Legislatures remain majoritarian institutions and although they should enact legislation that complies with the Charter, they cannot normally be expected to

¹⁴⁴ In such a scenario, the Court might, if possible, want to save the unconstitutional offence as it existed at the time of the accused's actions through a variety of devices such as reading down and reading in. See for example *Sharpe*, *supra*, note 23. This might allow the accused to be tried under the law that existed at the time of the alleged offence even if, unlike in *Sharpe*, the Court also entered a delayed declaration of invalidity and required Parliament to fashion a new offence. If this combination of remedies, however, was not possible, it might be difficult to try the accused at all because the offence that existed at the time of the alleged crime would be unconstitutional and any new offence would most likely be prospective. Indeed, this possibility might have motivated the Supreme Court to have saved the overbroad offence in *Sharpe* to ensure that the accused could be tried on the facts alleged. A more drastic alternative would be to strike down the offence and for the legislature to enact a new offence with retroactive effect. This would violate the right in s. 11(g) against retroactive offences. The government could attempt to justify the violation of s. 11(g) as a reasonable limit under s. 1 of the Charter that was required because of the Court's ruling and the social need to avoid a temporal gap in the application of an offence for serious criminal conduct. Given the fundamental nature of the requirement of legality and the rule against retroactive offences, however, the courts might be understandably reluctant to uphold even such a limited violation of s. 11(g) under s. 1 of the Charter. We thank Stephane P errault for bringing these scenarios to our attention.

enact retroactive remedial legislation to their own detriment unless some clear signals are provided that courts will expect legislatures to at least consider this option.

When crafting remedies for constitutional violations, legislatures should self-consciously address themselves to whether those remedies are retroactive or prospective. Legislatures should consider whether remedial legislation that follows the prospective norm will leave successful Charter litigants and other similarly situated persons with no remedy. This is of critical importance to the claimant, because of the doctrine of *res judicata*. That doctrine precludes the re-litigation of claims which are no longer in the judicial system. If a legislative remedy is retroactive, then the claimant may receive some benefit, depending on how the remedy is framed. But if the legislative remedy is prospective, then the claimant, by definition, cannot benefit from it, because it only governs future transactions. And if the rules governing *res judicata* apply, the litigant cannot go back to court to ask for a judicial remedy on the basis of the past unconstitutionality. In essence, the claimant can claim a moral victory for winning on the merits, but in concrete terms, receives no relief whatsoever.

2. Encouraging Courts to Look After the Successful Charter Litigants When They Overrule Prospectively or Issue Suspended Declarations of Invalidity

When confronted with such a situation, the natural impulse for courts working within the retroactive mold would be to provide a judicial remedy for the successful litigant, notwithstanding the suspended declaration of invalidity. Unfortunately, the case-law here is unclear. The Supreme Court's initial attitude was to not grant such a remedy, on the grounds that it would undermine the very goal of the suspension — to prevent legal discontinuity. Thus, in *Bilodeau v. A.G. (Manitoba)*,¹⁴⁵ a case brought subsequent to the *Manitoba Language Reference*, but which had prompted that reference in the first place, the claimant challenged his conviction under a unilingual statute. The Court acknowledged that the plaintiff's rights had been violated by Manitoba's unilingual statutes, but upheld his conviction, invoking the suspended declaration of invalidity, which it described

¹⁴⁵ *Bilodeau v. Manitoba (A.G.)*, [1986] 1 S.C.R. 449.

as being based on the “rule of law.”¹⁴⁶ The same reasoning governed in *Mercure*, which was also brought by a person convicted under a unilingual statute. The high-water mark of the judicial resistance to providing relief for successful litigants is *Schachter*. The Supreme Court stated that “where the declaration of invalidity is temporarily suspended, a section 24 remedy will not often be available,” because “to allow for section 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect.”¹⁴⁷ This is a confusing statement, because the suspension does not alter the presumptively retroactive nature of a declaration of invalidity; it only affects *when* the fully retroactive declaration of invalidity comes into force. Thus, the Court’s objection was likely that a section 24 remedy would be immediate, and would undermine the very goal of the suspension. *Schachter* was recently applied by lower courts to deny an individual remedy to the claimants in *Walsh v. Bona*¹⁴⁸ and *Johnson v. Sand*,¹⁴⁹ which were successful Charter challenges to the exclusion of common law couples from a marital property regime, and intestate succession legislation, respectively.

But *Schachter*’s restrictive approach to conferring a section 24 remedy in the face of suspended declarations of invalidity stands at odds with the Supreme Court’s recent judgment in *Corbiere*. Although the Court unanimously denied the successful claimant’s request for an exemption, the rule seems to have been reversed, establishing a presumption in *favour* of relief for the successful litigant in the face of a suspended declaration of invalidity. Thus, five members of the Court stated “[w]e would not grant a constitutional exemption ... during the period of suspension, as would normally be done,”¹⁵⁰ and inexplicably, cited *Schachter* in support of this proposition. The remaining members of the Court likewise stated that “[i]n general, litigants who have brought forward a Charter challenge should receive the immediate benefits of the ruling, even if the effect of the declaration is suspended,” and this case was “one of those exceptional cases where immediate relief

¹⁴⁶ *Id.*, at para. 14.

¹⁴⁷ *Schachter*, *supra*, note 95, at para. 89.

¹⁴⁸ *Walsh v. Bona* (2000), 185 N.S.R. (2d) 190 (C.A.).

¹⁴⁹ *Supra*, note 9.

¹⁵⁰ *Corbiere*, *supra*, note 84, at para. 23.

should not be given to those who brought the action.”¹⁵¹ The leading example of the provision of a personal remedy to the successful litigant is *Eurig*, where the Supreme Court issued a suspended declaration but ordered the return of a probate fee to the claimant. Courts of appeal have followed suit. In *Hoepfner*, the Manitoba Court of Appeal issued a suspended declaration of invalidity in striking down provisions of the *Criminal Code*,¹⁵² but ordered the release of the claimant from detention, with Scott C.J. stating that “[g]iving Parliament and the provinces a reasonable period of time to correct the constitutional oversight, is not a justification, in my view, to deny Hoepfner the constitutional remedy to which he is entitled.”¹⁵³ In *Taylor v. Rossu*,¹⁵⁴ the successful litigant in a constitutional challenge to provincial spousal support legislation received an award of interim spousal support from the Alberta Court of Appeal, notwithstanding a suspended declaration of invalidity. The combination of suspension and exemption was also used in *Hodge*,¹⁵⁵ a successful challenge to the exclusion of common law spouses from the survivor’s pension benefit under the *Canada Pension Plan*.¹⁵⁶ In *Parker*, without referring to *Schachter*, the Ontario Court of Appeal granted a stay of proceedings, and a constitutional exemption going forward from the Court’s judgment, to an accused who successfully challenged a provision of a federal law restricting the consumption of marijuana.¹⁵⁷ And finally, the successful Charter applicants in *Brydges*, *Bartle*, *Feeney* and the criminal accused from Alberta in the *Provincial Court Judges References* were all given the benefit of the Supreme Court’s rulings, even though the judgments were prospective. These cases all demonstrate the understandable reluctance of judges to leave successful Charter applicants without a remedy, even when they

¹⁵¹ *Id.*, at para. 122.

¹⁵² *Criminal Code*, *supra*, note 23, ss. 672.54 and 672.81(1).

¹⁵³ *Supra*, note 84, at para. 90.

¹⁵⁴ *Supra*, note 84.

¹⁵⁵ *Supra*, note 84.

¹⁵⁶ R.S.C. 1985, c. C-8, s. 2(1).

¹⁵⁷ *Supra*, note 84. The provision struck down was s. 4 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Also see *Lines*, *supra*, note 84, where the judge suspended a declaration of invalidity with respect to the fleeing felon provision of the *Criminal Code*, but acquitted the accused, without referring to s. 24.

conclude that for other reasons a delayed declaration of invalidity is the appropriate remedy or that the ruling must be prospective.¹⁵⁸

Exempting a successful Charter litigant from a suspended declaration of invalidity or a prospective ruling preserves the traditional idea that remedies should be provided retroactively where rights are recognized, but such exemptions have some problems. One doctrinal problem is that they often combine a remedy under section 52(1) of the *Constitution Act, 1982* with an individual remedy under section 24(1) of the Charter. The Court has in a series of cases, starting with *Schachter*, demonstrated a reluctance to combine such remedies.¹⁵⁹ Another problem is that the exemption of the successful litigant raises horizontal equity concerns with respect to the treatment of similarly situated persons who have not brought the claim. These people may fall through the cracks because they are not exempted from the suspended declaration of invalidity or the prospective ruling, and then are excluded in cases where remedial legislation is prospective. There may even be something of a race to the Supreme Court in which only the litigants who go to the Court obtain exemptions for periods of delay.

Concerns about horizontal equity have featured prominently in some arguments rejecting prospective ruling and even delayed declarations of invalidity as inconsistent with the judicial function. But in our view, horizontal equity concerns should not be taken too far, especially when viewed in the broader context of the entire legal process, and in particular, the operation of savings doctrines such as the *de facto* doctrine and *res judicata*. *Res judicata* means that courts will not generally re-open a case that has gone through the entire legal system, even if the courts have subsequently recognized new rights that would change the result of the case. For example, the Supreme Court has refused to re-open convictions no longer in the system and subject to further appeal under the constructive murder provisions of the *Criminal Code* after those were found to be

¹⁵⁸ Another device to mitigate some of the harmful effects of a suspended declaration of invalidity is for the court to retain jurisdiction over the matter so that the parties can return to the court in a cost effective manner for subsequent relief. Retention of jurisdiction has the potential to ensure that successful Charter applicants can be protected from abuse during the period of delay. See Roach, "Remedial Consensus and Dialogue Under the Charter" (2002) 35 U.B.C. L. Rev. 211.

¹⁵⁹ *Schachter*, *supra*, note 95; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Mackin*, *supra*, note 68.

unconstitutional.¹⁶⁰ The horizontal equity problems raised by the continuing and long term imprisonment of people for violating an unconstitutional murder offence are at least as great as any horizontal equity problems created by exempting a successful Charter litigation from a suspended declaration of invalidity or a prospective ruling.

It seems intuitively wrong to not give successful Charter applicants something for their efforts, and exemptions can be justified on a case-by-case basis. Indeed, as in *Corbiere*, if the successful Charter applicant is not exempted from the period of delay, there are concerns about inadequate incentives to engage in litigation. One alternative may be to recognize that such litigants will not receive immediate remedies by awarding them solicitor and client costs. This would respond directly to concerns about incentives to litigate while avoiding the horizontal equity problems of exemptions. Unfortunately, the jurisprudence surrounding the award of costs in Charter litigation is almost as inconsistent and confused as the jurisprudence surrounding the use of delayed declarations of invalidity and prospective rulings. Courts have awarded solicitor and client costs to even unsuccessful Charter litigants,¹⁶¹ but the trend seems to be to reserve such cost awards for cases of governmental misconduct¹⁶² or cases of exceptional merit where a case was taken on pro bono.¹⁶³ A case can be made that when successful Charter applicants do not receive the usual retroactive remedy, they should at least receive solicitor and client costs as some form of compensation. Such awards would be a small price for governments to pay for the opportunity of devising new legislation before the declaration of invalidity takes retroactive effect.

The broader purposes of the Charter are ill served when a successful Charter applicant receives no remedies. One of the many complaints with the *Canadian Bill of Rights*¹⁶⁴ was the lack of effective remedies. The Charter, unlike weaker bills of rights in New Zealand and the United Kingdom, gives courts the mandate to

¹⁶⁰ *R. v. Sarson*, [1996] 2 S.C.R. 223.

¹⁶¹ *Schachter*, *supra*, note 95; *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

¹⁶² *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160.

¹⁶³ *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] 3 S.C.R. 47, at para. 109.

¹⁶⁴ R.S.C. 1985, App. III.

fashion effective remedies.¹⁶⁵ The dilemma at play is that the courts frequently have legitimate reasons for remanding complex remedial issues to the legislature. In many cases, legislatures may have a continued role to play in selecting among a range of constitutional options. In cases such as *M. v. H.* which affect the rights of all same sex partners, the legislature can provide more comprehensive relief than the courts can even if they use their sometimes controversial powers of reading in and severance to the fullest extent. Justice L'Heureux-Dubé in *Corbiere* also argued that legislatures and their governments are in a good position to consult the people that should benefit from the Court's ruling as to the best remedies in their particular and sometimes changing circumstances. In many cases, remands to the legislature make good sense and allow the courts to conscript the institutional capacities and talents of legislatures into complex remedial processes. But the danger is that fully prospective rulings and delayed declarations of invalidity can produce rights without immediate and tangible remedies. This problem is aggravated by the fact that when the court remands remedial issues to legislatures, legislatures are not inclined to enact remedial legislation that is explicitly retroactive. This raises the troubling question of whether judicial remands to the legislature mean that we must leave the past behind us and leave successful Charter applicants or those with the same characteristics with no remedy.

3. Encouraging Legislatures to Consider Retroactive Remedial Legislation

We do not believe that the past must necessarily be left behind as a result of judicial remands of remedial questions to legislatures. We are cautiously optimistic that it is possible to have the best of both legislative and judicial worlds when formulating constitutional remedies. An interesting device to encourage legislatures to consider retroactive remedial legislation is for courts to interpret legislative remedies to apply retroactively. Such a presumption would make clear that in the context of remedial legislation, the ordinary judicial presumption against retroactive legislation has been displaced in favour of a new judicial presumption of retroactivity. Such a new presumption would require legislatures to make remedial legislation

¹⁶⁵ *New Zealand Bill of Rights Act, 1990*, No. 109; *Human Rights Act 1998 (U.K.)*, 1998, c. 42.

explicitly prospective should they wish to escape the new judicial presumption. In other words, the frequent legislative silence on the issue would effectively be treated by the courts as consent to judicial interpretations that would make the remedial legislation retroactive. This interpretive presumption would operate as a “clear statement rule,” analogous to the common law clear statement rules that were the primary vehicles of judicial rights-protection before the advent of the Charter. Clear statement rules promote democratic accountability, because they force legislatures to be explicit about their departures from fundamental constitutional values.¹⁶⁶ In this vein, we recently argued that the “prescribed by law” requirement under section 1 should be interpreted to require a clear legislative statement that statutory discretions may be exercised to violate Charter rights.¹⁶⁷ In a similar fashion, a clear statement rule that remedial legislation is presumed to be given retroactive effect would force legislators to turn their mind to the danger of leaving successful Charter applicants and others without a tangible remedy. Moreover, a clear statement rule would create political incentives for those similarly situated to litigants, but who are not exempted from suspended declarations of invalidity, to pursue their claims for a constitutional remedy in the political arena. The presumption of retroactivity that we propose for remedial retroactivity is only a presumption and it could be displaced by the legislature. We do not, however, preclude that in some cases, claimants might have an independent legal cause of action — perhaps based on the Charter or on unjust enrichment principles — that would prevent the government from putting the past behind it with even an explicitly prospective legislative remedy. In those cases, however, the applicant may well have to challenge the prospective legislative remedy in a direct or indirect fashion, a matter beyond the scope of this paper.

There is some evidence of an emerging presumption that legislation enacted in reply to a successful Charter claim will be interpreted to apply retroactively even when the legislation is silent on the issue and the normal presumption against retroactive legislation might apply. Our evidence for this emerging presumption can be found in two cases.

¹⁶⁶ Roach, *Supreme Court on Trial*, *supra*, note 79, at 256-63.

¹⁶⁷ Choudhry & Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability” (2003) 41 *Osgoode Hall L.J.* 1.

The first was *Re Gruending*,¹⁶⁸ a constitutional challenge to a provision of the *Alberta Insurance Act* that exempted life insurance policies that named spouses as beneficiaries from seizure by creditors. In its first judgment, the Alberta Court of Queen's Bench found that the definition of spouse was unconstitutional because it failed to include common law spouses. The court issued a suspended declaration of invalidity of twelve months, and did not grant the claimant a personal remedy. The legislation was amended to include common law spouses,¹⁶⁹ and the claimant brought a motion to take the benefit of this amendment. The legislation was silent on whether it applied retroactively or prospectively; on the presumption against retroactive legislation, it should have been inapplicable to the claimant. Nonetheless, the court held for the claimant by conceptualizing the legislation in remedial terms, stating that he "was, in essence, awaiting a legislative response to the court's conclusion that the existing statute was unconstitutional," and until the legislature had responded to the court's judgment, "the matter remained unfinished."¹⁷⁰ Although the court acknowledged that it was open to the legislature to not have assisted the claimant, it "specifically addressed Mr. Gruending's situation and passed an amendment that was favourable to him." The court's principal evidence was a statement made in the Alberta Legislative Assembly that the amendments were designed "to implement the decision of the court in the case."¹⁷¹ However, this statement is ambiguous at best, which suggests that the legislature did not really turn its mind to providing a remedy for the claimant, and that the court based its interpretation of the legislation on the principles governing judicial remedies, where retroactivity is the norm.¹⁷²

The second case was *S. (R.) v. H. (R.)* which dealt with the interpretation of Bill 5, the law enacted by Ontario in response to *M. v. H.* The plaintiff in that case was a person whose same sex relationship had ended in 1993 and who was seeking support. The

¹⁶⁸ (1999), 239 A. R. 201, 170 D.L.R. (4th) 541 (Q.B.).

¹⁶⁹ *Insurance Statutes Amendment Act, 1999*, S.A. 1999, c. 31.

¹⁷⁰ *Re Gruending* (2001), 292 A.R. 188, at para. 24 (Q.B.).

¹⁷¹ *Id.*, Appendix "A."

¹⁷² Oddly enough, the court went on to hold that for all other parties, the legislation only had prospective effect, noting without irony that to rule otherwise would impair vested rights. Unfortunately, the court did not explain how legislation could be read to apply retroactively to a single dispute not expressly referred to in the statutory text, but prospectively for everyone else.

defendant argued that no support could be ordered because Bill 5 was enacted in November 1999 with no provision that it would have retroactive effect. On a plain meaning of the law, it appeared that the plaintiff, like *M.*, was out of luck and would receive no remedy. The trial judge noted that “there is a presumption that legislation is not intended to have a retroactive or retrospective application. This is a difficult presumption to rebut.”¹⁷³ In the end, however, the judge resisted such a conclusion in part on the basis of another provision in the *Family Law Act* that allowed retroactive orders to be made. As in *Re Gruending*, the judge was also influenced by the fact that the remedial legislation “was passed ‘because of’” *M. v. H.*, a decision that “was to remedy a systemic wrong.” As such, she was prepared to interpret the remedial legislation “broadly,” and more to the point, retroactively. What is most interesting for our purposes, however, is the trial judge’s statement that, even in the absence of such a provision, she would not have interpreted Bill 5 as only having prospective effect. She reasoned that the presumption against retroactive legislation “does not apply to remedial legislation.”¹⁷⁴ This opens the intriguing possibility that courts could encourage legislatures to make remedial legislation retroactive by interpreting such legislation to have retroactive effect, even in the absence of clear statements that this is the legislature’s intent. Such an approach would produce a rich and complex dialogue between courts and legislatures. Courts would remand remedial issues to legislatures in part because of the ability of legislatures to fashion comprehensive relief and pick between the constitutionally sufficient options. Legislatures would be given an opportunity to fashion legislative remedies to displace the court’s remedy. At the same time, courts would encourage legislatures to consider departing from the prospective norm of legislation by applying a strong presumption that such legislation would have retroactive effect.

This last case is also attractive because it responds to some of the horizontal equity concerns that attached to a judicial decision to exempt a successful Charter litigant from either a delayed declaration of invalidity or a transition period attached to a prospective ruling. In the above case, the action for spousal support had been launched contemporaneously with the lower court litigation in *M. v. H.* and held in abeyance pending the Supreme

¹⁷³ *Supra*, note 9, at para. 7.

¹⁷⁴ *Id.*, at para. 12.

Court's decision. If the judge had not been prepared to interpret the post *M. v. H.* remedial legislation retroactively, the Charter claimant would have been denied a tangible remedy just as M. had been. This case suggests that it may be possible to have the best of both judicial and legislative institutions in the sense that the legislature is allowed to craft a legislative remedy that suits both the demands of the Constitution and the needs of society while the courts remain committed to the traditions of ensuring tangible and retroactive remedies in individual cases.

V. CONCLUSION

As we noted in the introduction, there have been some cases in which successful Charter litigants have not received tangible remedies because the courts have used the new devices of suspended declarations of invalidity and prospective rulings to remand complex remedial issues to the legislatures. Cases such as *M. v. H.* are jarring because they seem to create rights without remedies. Our discomfort with such cases is only partially addressed by devices such as exempting the successful litigant from the period during which a declaration of invalidity is delayed or made prospective. These devices ensure that successful litigants receive remedies, but they leave others in the litigants' position without a remedy, especially if the remedial legislation follows normal patterns of legislation and only has prospective effect.

One rather drastic response would be to require the courts to enact fully retroactive remedies in every case and to abandon new devices such as suspended declarations of invalidity and prospective ruling as unfair to litigants and inconsistent with the judicial role. But such a radical approach would require admitting that a considerable number of cases have been wrongly decided. More importantly, it would stuff all Charter issues into the restrictive and traditional mold of corrective justice in which remedies can in all cases be retroactive and fitted to a discrete wrong. But Charter cases such as *M. v. H.* have distributional implications for many groups and the courts often have good reason to remand complex remedial issues to legislatures. Fully retroactive remedies will often be too blunt given the policy-laden character of much Charter litigation.

A less drastic alternative, which we support, is for courts to adopt a presumption that remedial legislation has retroactive effect. Such a presumption should encourage legislatures to consider the case for

retroactive relief. This presumption has already been used to ensure that other same sex partners in M.'s position receive the retroactive benefit of that case, even though their relations dissolved before Ontario enacted its remedial legislation in response to the Supreme Court's decision. Such a presumption allows courts to be as loyal as possible to the traditional ideal of retroactive justice and ensuring that, where there are rights, there are also remedies while also leaving open the possibility that in some cases the legislature may make a clear statement that the past must be left behind. Such a proposed presumption would continue the important remedial dialogue that has already begun between courts and legislatures, and would allow each institution to play distinct roles and to be enlisted in the important process of devising constitutional remedies.

**Table A — Judgments Issuing Suspended
Declarations of Invalidity**

Case	Length of Suspension
Supreme Court of Canada	
<i>Reference Re: Language Rights Under The Manitoba Act, 1870</i> , [1985] 1 S.C.R. 721, supplementary reasons [1985] 2 S.C.R. 347	“from the date of this judgment to the minimum period necessary for translation, re-enactment, printing and publishing”
<i>R. v. Mercure</i> , [1988] 1 S.C.R. 234	“within a reasonable time” (<i>Id.</i> at para. 66)
<i>R. v. Swain</i> , [1991] 1 S.C.R. 933	6 months, extended to 9 months
<i>Sinclair v. Quebec (A.G.)</i> , [1992] 1 S.C.R. 579	12 months
<i>R. v. Bain</i> , [1992] 1 S.C.R. 91	6 months
<i>Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island</i> , [1997] 3 S.C.R. 3	12 months
<i>Eldridge v. British Columbia</i> , [1997] 3 S.C.R. 624	6 months
<i>Re Eurig Estate</i> , [1998] 2 S.C.R. 565	6 months
<i>United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. Kmart Canada Ltd.</i> , [1999] 2 S.C.R. 1083	6 months
<i>Corbiere v. Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 S.C.R. 203	18 months

<i>M. v. H.</i> , [1999] 2 S.C.R. 3	6 months
<i>Dunmore v. Ontario (Attorney General)</i> , [2001] 3 S.C.R. 1016	18 months
<i>Mackin v. New Brunswick; Rice v. New Brunswick</i> , [2002] 1 S.C.R. 405	6 months
<i>R. v. Guignard</i> , [2002] 1 S.C.R. 472	6 months
<i>Trociuk v. British Columbia (Attorney General)</i> , 2003 SCC 3	12 months
<i>Figueroa v. Canada (Attorney General)</i> , 2003 SCC 37	12 months
Federal Court of Appeal	
<i>Pacific Press Limited v. Canada (Minister of Employment and Immigration)</i> , [1991] 2 F.C. 327 (C.A.)	12 months
<i>British Columbia Ferry Corp. v. Canada (Minister of National Revenue — MNR)</i> , [2001] 4 F.C. 3	Until Oct. 1, 2001 (4 months and 21 days)
<i>Hodge v. Canada (Minister of Human Resources Development)</i> , [2003] 1 F.C. 271 (C.A.), application for leave to appeal to the Supreme Court of Canada granted March 20, 2003	12 months
Court Martial Appeal Court	
<i>R. v. Lauzon</i> (1998), 230 N.R. 272 (C.M.A.C.)	12 months
<i>R. v. Boivin</i> (1998), 245 N.R. 341 (C.M.A.C.)	Until Sept. 18, 1999 (the end date of the suspension period established in <i>Lauzon</i>)
British Columbia Supreme Court	
<i>Dixon v. B.C.(A.G.)</i> (1989), 35 B.C.L.R. (2d) 273 (S.C.); on time limit (1989), 37 B.C.L.R. (2d) 231 (S.C.)	No time limit
<i>L'association des parents francophones de la Colombie Britannique v. B.C.</i> (1996), 27 B.C.L.R. (3d) 83 (S.C.)	"no later than the last day of the legislative session commencing immediately after the current session of the Legislature" at para. 52
<i>Independence of the British Columbia Justices of the Peace (Re)</i> (2000), 81 B.C.L.R. (3d) 164 (S.C.)	9 months
Alberta Court of Appeal	
<i>Epilepsy Canada v. Alberta (A.G.)</i> , (1994) 20 Alta. L.R. (3d) 44 (C.A.)	Until April 30, 1995 (10 months and 27 days)
<i>Taylor v. Rossu</i> (1998), 216 A.R. 348 (C.A.)	12 months

<i>United Taxi Drivers Fellowship Of Southern Alberta v. Calgary (City)</i> (2002), 3 Alta. L.R. (4th) 211 (C.A.); leave to appeal to the Supreme Court of Canada granted March 20, 2003	Until Oct. 1, 2002 (4 months and 2 days)
Alberta Surrogate Court	
<i>Johnson v. Sand</i> (2001), 91 Alta. L.R. (3d) 249 (Surrogate Ct.); supplementary reasons (2001), 91 Alta. L.R. (3d) 262 (Surrogate Ct.)	9 months
Manitoba Court of Appeal	
<i>R. v. Hoepfner</i> , (1999) 134 Man. R. (2d) 163 (C.A.), remanded by Supreme Court (S.C.C. Bulletin, 1999, p. 1335), reconsidered (2000), 145 Man. R. (2d) 151 (C.A.)	12 months
Ontario Court of Appeal	
<i>Schafer v. Canada (A.G.)</i> (1997), 35 O.R. (3d) 1 (C.A.); leave to appeal to S.C.C. refused 153 D.L.R. (4th) vii, 49 C.R.R. (2) 186n.	24 months
<i>R. v. Parker</i> (2000), 49 O.R. (3d) 481 (C.A.)	12 months
<i>Vann Niagara Ltd. v. Oakville (Town)</i> (2002), 60 O.R. (3d) 1 (C.A.); application for leave to appeal to Supreme Court of Canada granted January 30, 2003	6 months
<i>R. v. Hurrell</i> (2002), 60 O.R. (3d) 161 (C.A.); application for leave to appeal to the Supreme Court of Canada granted February 20, 2003	6 months
Ontario Court General Division/Superior Court of Justice	
<i>R. v. Lines</i> , [1993] O.J. No. 3284 (Ont. Ct. G. D.)	6 months
<i>Hitzig v. Canada</i> (2003), 171 C.C.C. (3d) 18, O.J. No. 12 (S.C.J.)	6 months
Quebec Court of Appeal	
<i>Barreau de Montreal c. Quebec (Procureur General)</i> , [2001] R.J.Q. 2058 (C.A.)	12 months
Quebec Superior Court	
<i>Hendricks c. Quebec (Procureur General)</i> [2002] J.Q. No. 3816 (Sup. Ct.) (on appeal)	24 months
New Brunswick Court of Appeal	
<i>Moncton (City) v. Charlebois</i> (2001), 242 N.B.R. (2d) 259 (C.A.)	12 months

Nova Scotia Court of Appeal	
<i>Walsh v. Bona</i> (2000), 183 N.S.R. (2d) 74 (C.A.); reversed on other grounds by Supreme Court of Canada; <i>Nova Scotia (A.G.) v. Walsh</i> , 2002 SCC 83, 221 D.L.R. (4th) 1	12 months
Nova Scotia Supreme Court	
<i>Balders Estate v. N.S. (Registrar of Probate, County of Halifax)</i> (1999), 179 N.S.R. (2d) 146 (S.C.)	10 weeks
Prince Edward Island Supreme Court	
<i>MacKinnon v. Prince Edward Island</i> (1993), 104 Nfld. & P.E.I.R. 232 (P.E.I.S.C.)	“within a reasonable time”
North West Territories Supreme Court	
<i>Friends of Democracy v. Northwest Territories (A.G.)</i> , [1999] N.W.T. J. No. 28; 171 D.L.R. (4th) 551 (S.C.), leave to appeal to N.W.T.C.A. refused 176 D.L.R. (4th) 661	27 days

Table B — Reply Legislation Enacted in Response to a Suspended Declaration of Invalidity

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
Supreme Court of Canada					
<i>Reference Re: Language Rights Under The Manitoba Act, 1870</i> , [1985] 1 S.C.R. 721, supplementary reasons [1985] 2 S.C.R. 347	13/6/85	All legislation re-enacted bilingually	Various	Yes	No
<i>R. v. Mercure</i> , [1988] 1 S.C.R. 234	25/2/88	In Saskatchewan: <i>The Language Act</i> , S.S. 1988-89, c. L-61; in Alberta: <i>Language Act</i> , S.A. 1988, c. L-75	26/4/88; 20/7/89	Yes Yes	Yes Yes
<i>R. v. Swain</i> , [1991] 1 S.C.R. 933	2/5/91	<i>An Act to Amend the Criminal Code (mental disorder)</i> , S.C. 1991, c. 43	4/2/92	Yes	No
<i>Sinclair v. Quebec (A.G.)</i> , [1992] 1 S.C.R. 579	27/2/92	None			
<i>R. v. Bain</i> , [1992] 1 S.C.R. 91	23/1/92	<i>An Act to Amend the Criminal Code (jury)</i> , S.C. 1992, c. 41, s. 2	23/7/94	Yes	No
<i>Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island</i> , [1997] 3 S.C.R. 3	18/9/97	<i>Payment to Provincial Judges Regulation</i> , Alta. Reg. 176/98	16/9/98	Yes	Partly (to April 1, 1998)

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
<i>Eldridge v. British Columbia</i> , [1997] 3 S.C.R. 624	9/10/97	None	N/A	N/A	N/A
<i>Re Eurig Estate</i> , [1998] 2 S.C.R. 565	27/4/98	<i>Estate Administration Tax Act</i> , S.O. 1998, c. 34	Received Royal Assent 18/12/98	Yes	Yes
<i>United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. Kmart Canada Ltd.</i> , [1999] 2 S.C.R. 1083	9/9/99	No Response	N/A	N/A	N/A
<i>Corbiere v. Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 S.C.R. 203	20/5/99	<i>Regulations Amending the Indian Band Election Regulations, Regulations Amending the Indian Referendum Regulations</i> , SOR 2000-391, SOR 2000-392	20/11/00	Yes	No
<i>M. v. H.</i> , [1999] 2 S.C.R. 3	20/5/99	<i>An Act to Amend Certain Statutes because of the Supreme Court of Canada Decision in M. v. H.</i> , S.O. 1999, c. 6	20/11/99	Yes	No, but see <i>R.S. v. R.H.</i> (2000), 49 O.R. (3d) 451 (S.C.J.)

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
<i>Dunmore v. Ontario (Attorney General)</i> , [2001] 3 S.C.R. 1016	20/12/01	<i>Agricultural Employees Protection Act, 2002</i> , S.O. 2002, c. 16	Upon proclamation by the Lieutenant Governor (s. 21) — not yet proclaimed	Yes	No
<i>Machin v. New Brunswick; Rice v. New Brunswick</i> , [2002] 1 S.C.R. 405	14/2/02	<i>An Act to Amend the Provincial Court Act</i> , 54th Leg., N.B., 2003.	11/4/03	Yes	No
<i>R. v. Guignard</i> , [2002] 1 S.C.R. 472	21/2/02	City of Saint-Hyacinthe, By-law No. 1200-364, <i>Reglement modifiant le reglement 1200 en ce qui a trait aux enseignes</i> (5 August 2002)	5/8/02	Yes	No
Federal Court of Appeal					
<i>Pacific Press Limited v. Canada (Minister of Employment and Immigration)</i> , [1991] 2 F.C. 327 (C.A.)	22/4/91	<i>An Act to Amend the Immigration Act</i> , S.C. 1992, c. 49	17/12/92	Yes	No

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
<i>British Columbia Ferry Corp. v. Canada (Minister of National Revenue — MNR)</i> , [2001] 4 F.C. 3	10/4/01	<i>Excise Act, 2001</i> , S.C. 2002, c. 22, ss. 426-31	13/6/02	Yes	Yes (s. 430 states “The Ships’ Stores Regulations ... are deemed to have been validly made and everything done under, and all consequences flowing from, those Regulations since November 10, 1986 are deemed effective as if those Regulations were so made.”)
<i>Hodge v. Canada (Minister of Human Resources Development)</i> , [2003] 1 F.C. 271 (C.A.); application for leave to appeal to the Supreme Court of Canada granted March 20, 2003	14/6/02	On appeal			

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
Court Martial Appeal Court					
<i>R. v. Lauzon</i> (1998), 230 N.R. 272 (C.M.A.C.)	18/9/98	An Act to amend the National Defence Act and to make consequential amendments to other Acts, S.C. 1998 c. 35, s. 42 (NB: this legislation was before Parliament when <i>Lauzon</i> was decided)	1/9/99	Yes	No
<i>R. v. Boivin</i> (1998), 245 N.R. 341 (C.M.A.C.)	9/12/98	See <i>Lauzon</i> (above)	See <i>Lauzon</i>	See <i>Lauzon</i>	See <i>Lauzon</i>
British Columbia Supreme Court					
<i>Dixon v. B.C. (A.G.)</i> (1989), 85 B.C.L.R. (2d) 273 (S.C.); on time limit (1989), 37 B.C.L.R. (2d) 231 (S.C.)	18/4/89	<i>Electoral Boundaries Commission Act</i> , S.B.C. 1989, c. 65; <i>Electoral Districts Act</i> , S.B.C. 1990, c. 39	20/7/89; new districts take effect the day the 34th Parliament is dissolved	Yes	No
<i>L'association Des Parents Francophones De La Colombie Britannique v. B.C.</i> (1996), 27 B.C.L.R. (3d) 83 (S.C.)	19/8/96	<i>School Amendment Act</i> , 1997, S.B.C. 1997, c. 52	30/7/97 except s. 26 which is deemed to come into force 2/1/95	Yes	Partly

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
<i>Independence of the British Columbia Justices of the Peace (Re)</i> (2000), 81 B.C.L.R. (3d) 164 (S.C.)	6/10/00	<i>Provincial Court Amendment Act, 2001</i> , S.B.C. 2001, c. 20	11/4/01	Yes	No
Alberta Court of Appeal					
<i>Epilepsy Canada v. Alberta (A.G.)</i> (1994), 20 Alta. L.R. (3d) 44 (C.A.)	3/6/94	<i>Charitable Fund-raising Act</i> , S.A. 1995, c. C-45	1/5/95	Yes	No, s. 54 (1) preserves status quo until Dec. 31, 1995 or until licenses are cancelled under this Act
<i>Taylor v. Rossu</i> (1998), 216 A.R. 348 (C.A.)	16/6/98	<i>Domestic Relations Amendment Act</i> , 1999, S.A. 1999, c. 20	19/5/99	Yes	Yes (s. 8 states: "This Act applies to common law relationships arising before or after this Act comes into force.")
<i>United Taxi Drivers Fellowship Of Southern Alberta v. Calgary (City)</i> (2002), 3 Alta. L.R. (4th) 211 (C.A.); leave to appeal to the Supreme Court of Canada granted March 20, 2003	29/5/02	On appeal			

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
Alberta Surrogate Court <i>Johnson v. Sand</i> (2001), 91 Alta. L.R. (3d) 249 (Surrogate Ct.); supplementary reasons (2001), 91 Alta. L.R. (3d) 262 (Surrogate Ct.)	2/4/01	<i>Intestate Succession Amendment Act, 2002</i> , S.A. 2002, c. 16	14/5/02	Yes	No (s. 7(2) states: "The previous Act continues to apply in cases of death occurring before this Act comes into force.")
Manitoba Court of Appeal <i>R. v. Hoepfner</i> (1999), 134 Man. R. (2d) 163 (C.A.); remanded by Supreme Court (S.C.C. Bulletin, 1999, at 1335), reconsidered (2000), 145 Man. R. (2d) 151 (C.A.)	17/3/99	The legislative scheme found unconstitutional by the Manitoba Court of Appeal in <i>Hoepfner</i> was upheld and clarified by the Supreme Court of Canada in <i>Winko v. British Columbia (Forensic Psychiatric Institute)</i> , [1999] 2 S.C.R. 625.			

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
Ontario Court of Appeal					
<i>Schafer v. Canada (A.G.)</i> (1997), 35 O.R. (3d) 1 (C.A.); leave to appeal to S.C.C. refused 153 D.L.R. (4th) vii, 49 C.R.R. (2) 186n.	8/8/97	<i>An Act to Implement Certain Provisions of the Budget</i> , S.C. 2000, c. 14, s. 7	31/12/00	Yes	No
<i>R. v. Parker</i> (2000), 49 O.R. (3d) 481 (C.A.)	31/7/00	No Response	N/A	N/A	N/A
<i>Figueroa v. Canada (A.G.)</i> (2000), 50 O.R. (3d) 161; leave to appeal to S.C.C. granted 15 March, 2001	16/8/00	On appeal			
<i>Vann Niagara Ltd. v. Oakville (Town)</i> (2002), 60 O.R. (3d) 1 (C.A.); application for leave to appeal to Supreme Court of Canada granted January 30, 2003	14/6/02	On appeal			
<i>R. v. Hurrell</i> (2002), 60 O.R. (3d) 161 (C.A.); application for leave to appeal to the Supreme Court of Canada granted February 20, 2003	19/7/02	On appeal			
Ontario Court General Division/Superior Court of Justice					
<i>R. v. Lines</i> , [1993] O.J. No. 3284 (Ont. Ct. G. D.)	26/4/93	<i>An Act to Amend the Criminal Code and the Coastal Fisheries Protection Act (force)</i> , S.C. 1994, c. 12, s. 1 (Bill C-8, 1994)	1/7/94 (the suspension ended Oct. 26, 1993)	Yes	No

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
<i>Halpern v. Canada (Attorney General)</i> (2002), 60 O.R. (3d) 321 (S.C.J.) (on appeal)	12/7/02	On appeal			
<i>Hitzig v. Canada</i> (2003), 171 C.C.C. (3d) 18, O.J. No. 12 (S.C.J.)	9/1/03				
Quebec Court of Appeal					
<i>Barreau de Montreal c. Quebec (Procureur General)</i> , [2001] R.J.Q. 2058 (C.A.)	25/4/01	An Act to amend the Act respecting administrative justice and other legislative provisions, L.Q. 2002, c. 22	13/6/02 (except for certain sections — see s. 42)	Yes	No
Quebec Superior Court					
<i>Hendricks c. Quebec (Procureur General)</i> , [2002] J.Q. No. 3816 (Sup. Ct.) (on appeal)	6/9/02	On appeal			
New Brunswick Court of Appeal					
<i>Moncton (City) v. Charlebois</i> (2001), 242 N.B.R. (2d) 259 (C.A.)	20/12/01	All by-laws re-enacted in both French and English	2/4/02	Yes	No

Case	Date	Reply Legislation	Date in Force	Prospective	Retrospective
Nova Scotia Court of Appeal					
<i>Walsh v. Bona</i> (2000), 183 N.S.R. (2d) 74 (C.A.); reversed on other grounds by Supreme Court of Canada, <i>Nova Scotia (A.G.) v. Walsh</i> , 2002 SCC 83; 221 D.L.R. (4th) 1	19/4/00	Reversed on appeal on other grounds			
Nova Scotia Supreme Court					
<i>Balders Estate v. N.S. (Registrar of Probate, County of Halifax)</i> (1999), 179 N.S.R. (2d) 146 (S.C.)	20/8/99	<i>An Act to Amend Chapter 104 of the Revised Statutes, 1989, the Costs and Fees Act, and Chapter 359 of the Revised Statutes, 1989, the Probate Act, S.N.S. 1999 (2nd Sess.)</i> c. 1.	28/10/99	Yes	Yes (see s. 4 <i>id.</i>)
Prince Edward Island Supreme Court					
<i>MacKinnon v. Prince Edward Island</i> (1993), 104 Nfld. & P.E.I.R. 232 (P.E.I.S.C.)	16/2/93	<i>Electoral Boundaries Act, S.P.E.I. 1994, c. 13</i>	19/5/94	Yes	No
North West Territories Supreme Court					
<i>Friends of Democracy v. Northwest Territories (A.G.)</i> , [1999] N.W.T. J. No. 28; 171 D.L.R. (4th) 551 (S.C.); leave to appeal to N.W.T.C.A. refused 176 D.L.R. (4th) 661	5/3/99	<i>An Act to Amend the Legislative Assembly and Executive Council Act, S.N.W.T. 1999, c. 19, s. 2</i>	First dissolution of legislative assembly after 1/4/99	Yes	No