Potential Struggle Between the Legislative and Judicial Branches of Canada: A Contestational Approach to Interpreting the *Canadian Charter of Rights and Freedoms* Through *Bedford* and *PHS Community Services*

by

Garrett Lecoq

A thesis submitted to the Faculty of Graduate and Postdoctoral Affairs in partial fulfillment of the requirements for the degree of

Master of Arts

in

Legal Studies

Carleton University
Ottawa, Ontario

Abstract

This project examines how two recent controversial Canadian Supreme Court decisions, *Bedford* and *PHS Community Services*, combined with their legislative responses, demonstrate competing interpretations of the *Canadian Charter of Rights and Freedoms* between the legislative and judicial branches of the state. Using Bonnie Honig's account of agonism, this paper creates a contestation-centred approach that emphasizes disagreement between these branches to illustrate how, despite what the judicial dialogue literature insists, a final interpretation of the *Charter* is not possible. The remainder of this project demonstrates how the legislature's responses to these cases could have been more democratic by emphasizing the contestation taking place between it and the judiciary over the interpretation of the *Charter*. Specifically, it argues that the contestation in these instances could have been made more accessible by the legislature justifying its decision to resist the judiciary's interpretations of the *Charter*, or, in exceptional circumstances, invoking the notwithstanding clause.

Acknowledgements

I am graciously indebted to a great many amazing individuals who have offered an undescribable level of guidance, support, and love while completing this project. Your encouragement has been truly heartwarming beyond words and this project would not be what it is without all of you.

Stacy, your insightful wisdom and tenacity for detail have been a major influence not only on this project, but how I think about my work more broadly. From the impromptu meetings to helping me realize what this project was *not about*, I am eternally grateful for all of your contributions and how you have inspired me in my future research endeavours.

Vince, your comments and criticisms were extremely beneficial in helping me appreciate the nuances of the law and advising me in navigating them. This project is far more accessible because of your additions and I sincerely appreciate all of your assistance in helping me bring it to fruition.

Radha, your valuable feedback has helped me improve the thesis and opened my eyes to possible avenues of thought I had not previously considered. I am much obliged.

Peter and Neil, our talks have been uplifting, informative, and, of course, witty. Your influence on parts of this project as well as my growth throughout the Masters program has not gone unnoticed. For this, the metaphors, the beers, and so much more, thanks.

I would also like to thank SSHRC for their generous financial support.

Finally, to Mom, Dad, Dayton, Landon, and all my other family, friends, and colleagues: I appreciate your endless praise, even if I was not the clearest when explaining "what it is I was doing in Ottawa".

To all of you, thank you ever so much.

Table of Contents

I am no more persuaded that judicial hegemony is appropriate than I am that judicial review should be constrained to reflect a narrow or strict interpretation of constitutional provisions or to enforce the limited state. A better way to assess how a bill of rights affects judicial and political power is to think of constitutional judgements as a shared responsibility.

–Janet Hiebert, *Charter Conflicts*, page 43.

At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom. Rather than speaking of an essential antagonism, it would be better to speak of an "agonism"—of a relationship that is at the same time mutual incitement and struggle; less of a face-to-face confrontation that paralyzes both sides than a permanent provocation.

–Michel Foucault, "The Subject and Power", page 342.

Introduction

In October 2009 three sex workers, Terri-Jean Bedford, Amy Lebovitch, and Valerie Scott, brought an application to the Ontario Superior Court of Justice arguing that ss. 210, 212(1)(j), and 213(1)(c) of the *Criminal Code of Canada* were unconstitutional.[1] They claimed that these provisions, restricting owning/operating a bawdy-house, living on the avails of prostitution, and communicating for the purpose of prostitution respectively, forced sex workers into precarious working conditions featuring an increased risk of violence. A key underlying context throughout the trial was the nefarious image of Robert Pickton. A notorious serial killer, Pickton was charged with killing six women (and suspected of killing dozens more) two years prior. A majority of his victims were sex workers who, in part, were forced to work in unsafe situations due to the provisions in question.[2] In September of 2010, almost a year later, the application judge released her decision finding that the impugned provisions violated the s. 7 rights of the applicants and invalidated the provisions in question.

The *Bedford* case was appealed all the way to the Supreme Court of Canada, which released its decision on December 20th 2013.[3] Agreeing with the trial judge on almost every issue, the unanimous Court confirmed that the impugned provisions violated the constitutional rights of the applicants by unnecessarily increasing the risk of violence facing sex workers. The decision of the Court however, argued that to find the provisions

[1] *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, [2010] 102 OR (3d) 321 [*Bedford 2010*]; *Criminal Code,* RSC 1985, c C-46 [*Criminal Code*].
[2] David Hugill, *Missing Women, Missing News: Covering Crisis in Vancouver's Downtown Eastside* (Winnipeg: Fernwood Basics, 2010); Stevie Cameron, *On the Farm: Robert William Pickton and the Tragic Story of Vancouver's Missing Women* (Toronto: Knopf Canada, 2010).
[3] *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*]

invalid would concern many Canadians, and therefore suspended the declaration of invalidity for 12 months, leaving the legislature a year to address the points raised.

The legislative rebuttal, the *Protection of Communities and Exploited Persons Act* (2014), came into effect in December 2014, and amended the *Criminal Code* to address the Supreme Court's decision in *Bedford*.[4] While the *Act* addresses the legal components of the decision, it leaves sex workers in precarious situations similar to those pre-*Bedford* by hyper-regulating aspects of the sex trade. As such, it challenges components of the Court's decision. The Supreme Court came to its decision because the impugned provisions were found to unduly place sex workers in undue situations of risk. Despite this, the legislature's response leaves sex workers in risk-prone scenarios. Through various avenues (one example being the highly regulated provisions forbidding anyone from owning or operating a bawdy-house employing multiple sex workers) the legislation prioritizes (and responds to) the legal tests conducted by the Court over *why* it came to its decision—the undue risk placed upon sex workers by the provisions in question.

This aspect of disagreement between the Supreme Court and the federal legislature is not singular to *Bedford*. *PHS Community Services*, an equally controversial case discussing the regulation of safe injection sites, is another instance where there is a visible disagreement between the legislature and the Supreme Court.[5] The Court's decision in *PHS* found that s. 4(1) of the *Controlled Drugs and Substances Act* was only constitutional because the Minister of Health *could* grant an exemption to any program where to do so

[4] Canada *Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014 (assented to 6 November 2014) [*Protection of Communities and Exploited Persons Act* herein *PCEPA*].
[5] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS*]; *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

would be in the interest of the public. The Court found that the Minister had not utilized his discretion in accordance with the *Canadian Charter of Rights and Freedoms* by failing to balance between the public health and safety goals the Court interpreted from the *CDSA*.[6] The legislative response, the *Respect for Communities Act* (2015), addressed the concerns of the *PHS* decision by creating criteria to guide the Minister of Health's discretion almost exclusively towards maintaining public safety *over* public health.[7] Unfortunately, similar to the *PCEPA*, the *RCA* addressed the Court's decision in *PHS* without considering why—namely the sizeable improvement in public health following the InSite program.

The thrust of my project takes the *Bedford* and *PHS* decisions, coupled with their legislative rebuttals, and examines how the legislative and judicial branches of the state have offered competing interpretations of the *Charter*. I do so by analyzing how these differing interpretations represent sites of contestation between the legislative and judicial branches of the state over the interpretation of the *Charter* as it relates to regulating sex work and safe injection sites respectively. Viewing the interpretational process as one of contestation emphasizes a horizontal structure of the state by acknowledging that both the legislative and judicial branches possess equal ability to interpret the *Charter*. This paper deviates from questioning which institution should have the final interpretation of the *Charter* as is prevalent in the judicial review literature. Instead, this project inquires how the legislature's interpretation and application of the *Charter* could be more transparent and thus democratic. In particular, this project analyzes how the legislature`s responses to *Bedford* and *PHS* could have been more transparent in two different avenues. The preferred

[6] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].
[7] Canada *Bill C-2, An Act to amend the Controlled Drugs and Substances Act*, 2nd Sess, 41st Parl, 2015 (assented to 18 June 2015) [*Respect for Communities Act*].

avenue would require the legislature to explicitly justify its decision to bypass the interpretation of the *Charter* put forward by the Supreme Court, thus increasing the democratic values of both the Canadian legal and political systems. Alternatively, the legislature could invoke the override clause—a clause under s. 33 of the *Charter* that allows a piece of legislation to directly operate outside of the Constitution for a period not exceeding five years. However, the paper proposes this clause should only be used in exceptional circumstances, specifically when, in the legislature's opinion, the judicial decision would be harmful to society if left unchallenged.[8]

Theoretical Framework

It is a longstanding tradition in Canadian law that many of our constitutional principles remain unwritten.[9] This means that many actions of the Canadian state operate on institutional cultural practices and not written guidelines. Peter Hogg, one of Canada's leading constitutional law scholars, argues that the *Constitution Act 1867* distinguishes between the branches of the state but does not clearly separate them. Subsequently, it is not explicit where one branch's jurisdiction begins and the other's ends.[10] There has been a large spectrum of debate in Canada over how these branches of the state interpret the Constitution. This uncertain division reveals the possibility for one branch to contest the

[8] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act 1982*].
[9] Peter W Hogg, *Constitutional Law of Canada*, 2003 student ed (Scarborough, Ont: Carswell, 2003) [Hogg, *Constitutional Law of Canada*] at 403. See also Peter H. Russell, "Constitution" in John C. Courtney & David E. Smith, eds, *The Oxford Handbook of Canadian Politics*, (New York: Oxford University Press, 2010) 21 [Russell, "Constitution-Oxford Handbook"] at 23;Vincent Kazmierski, "Draconian but not Despotic: The "Unwritten" Limits of Parliamentary Sovereignty in Canada" (2010) 41 Ottawa L Rev 245 [Kazmierski, "Draconian but not Despotic"].
[10] See Peter H Russell, *The Judiciary In Canada* (Toronto: McGraw-Hill Ryerson, 1987) [Russell, *The Judiciary in Canada*]; F. L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: The University of Toronto Press, 2000) [Morton & Knopff, *Charter Revolution*]; Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Interpretation*, (Montreal: McGill-Queens University Press, 2010) [Baker, *Not Quite Supreme*].

other and has been the centre of a large debate regarding the validity of judicial review—the capacity for the judiciary to review the constitutional legitimacy of legislation.

The main divide within the judicial review literature in Canada is between fundamental rights scholars and *Charter* critics. The former are strong supporters of the *Charter* and are typically not opposed to the judiciary having a final say on interpreting the Constitution. The latter, on the other hand, argue that the judiciary is an anti-majoritarian institution and has expanded its reach beyond its prescribed boundaries.[11] Emerging as a response to the *Charter* critics, judicial dialogue theory argues that a dialogue can be observed between the legislative and judicial branches when pairing judicial decisions with their legislative responses.[12] Varying from fundamental rights scholars, dialogue scholars argue that a judicial decision requires appreciation from the legislature, but that the legislature always has the capacity to have the 'final say'.[13] The result of both these views infers that a final interpretation of the *Charter* exists and that it simply needs to be discovered by either the legislative or the judicial branches of the state. Advocating that a final interpretation of the *Charter* is possible in this way, inadvertently privileges one branch over the other.[14]

---

[11] James Kelly, *Governing With the Charter: Legislative and Judicial Activism and Framer's Intent* (Vancouver: UBC Press, 2005) [Kelly, *Governing with the Charter*].
[12] Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75 [Hogg & Bushell, "Charter Dialogue"]; Brian Slattery, "A Theory of the *Charter*" (1987) 25 Osgoode Hall LJ 701 [Slattery, "Theory of the Charter"].
[13] Alon Harel and Adam Shinar, "Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review" (2012) 10 International Journal of Constitutional Law 950 [Harel & Shinar, "Between Judicial and Legislative Supremacy"].
[14] Tsvi Kahana, Understanding the Notwithstanding Mechanism (2002) 52 UTLJ 221 [Kahana, "Understanding the Notwithstanding Mechanism"]; Bonnie Honig, "Dead Rights, Live Futures: A Reply to Habermas's "Constitutional Democracy"" (2001) 29 Political Theory 292 [Honig, "Dead Rights"].

To resolve this issue, this project looks toward coordinated approaches to interpreting the Constitution.[15] Known by other names, including equilibrium dialogue theory, constitutional departmentalism, shared responsibility theory, or coordinate construction theory, this perspective *presupposes* a cooperative relationship between the judicial and legislative branches of the state when interpreting the *Charter*. Doing so reiterates the blurred divide between these branches and maintains that both branches hold equal authority to interpret the Constitution.[16] While coordinated approaches are less prone to inferring a final interpretation of the *Charter*, they do not expressly speak against it. To address this persistent shortcoming in the judicial review literature, this project adopts Bonnie Honig's iteration of agonism—referring to the Greek word for struggle or contest—to contend that a truly final of the interpretation of the *Charter* is not possible.

Using agonism, this paper maintains that the legislative and judicial branches of the state have not only the ability, but an obligation to contest *current* interpretations of the *Charter* if, in their opinion, they are inadequate.[17] An agonistic view of the *Charter* interpreting process therefore refutes the claim of a final iteration of the *Charter* by normalizing disagreement between the legislature and the judiciary. Subsequently, while a *current* interpretation is always possible (and of course necessary for legal institutions), this paper argues that there is always a capacity for that iteration to be altered. That is to say, an agonistic approach does not aim to paralyze the two branches of the state by offering them the capacity to constantly disagree with one another, but instead celebrates the

[15] See especially Slattery, "A Theory of the *Charter*", *supra* note 12. See also Christine Bateup, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" 71 Brook L Rev 1109 [Bateup, "Dialogic Promise"]; Rosalind Dixon, "The Supreme Court of Canada, *Charter* Dialogue, and Deference" 47 Osgoode Hall LJ 235 [Dixon, "Dialogue and Deference"].
[16] Baker, *Not Quite Supreme*, *supra* note 10 at 53.
[17] Hannah Arendt, *The Human Condition*, 2nd edition, (Chicago: The University of Chicago Press, 1998) [Arendt, *The Human Condition*].

provocation to ensure the interpretation of the Constitution reflects (ever-changing) societal interests.[18] Highlighting the benefits of contestation *with* an appreciation for order, as found by combining Honig's virtue and *virtù* theories of politics, this project illustrates how a contested—or agonistic—approach to *Charter* interpretation strengthens the legal and political processes by emphasizing the conflict inherent in the Constitution-interpreting process to the public (and each other).[19] Accordingly, agonistic theory strengthens the coordinate interpretation literature by emphasizing the legislature's responsibility to stand up and exercise its role as an equal interpreter of the *Charter*.

A key element of a contestational approach to constitutional interpretation is that both sides *should* clearly articulate *why* they disagree with the other branch's interpretation. Expressing *why* one branch feels the current interpretation is inadequate articulates that the *Charter*-interpreting process exists between the legislative and judicial branches of the state while also demonstrating a respect for the other branch's equal authority to interpret the *Charter*. Coordinating in this fashion not only normalizes contestation over competing interpretations of the *Charter* but renders the interpretational process of the Constitution legible to the public by acknowledging instances where one branch disagrees with the other. Emphasizing the importance of justifying disagreement over the interpretation of the *Charter* resonates with Etienne Mureinik's culture of justification.[20] A culture of

[18] Michel Foucault, "The Subject and Power" in James D. Faubion, ed, *Michel Foucault: Power* (New York: The New Press, 2000); Honig, "Dead Rights", *supra* note 14.
[19] Bonnie Honig, *Political Theory and the Displacement of Politics* (New York: Cornell University Press, 1993) [Honig, *Displacement of Politics*].
[20] See Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 31 [Mureinik, "A Bridge to Where"]. See also David Dyzenhaus, "Law as Justification: Etienne Muernik's Conception of Legal Culture" (1998) 15 SAJHR 11 [Dyzenhaus, "Law as Justification"]; Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons From the Ignored Practice of Section 33 of the *Charter*" (2001) 44 Canadian Public Administration 255 [Kahana, "Notwithstanding Mechanism and Public Discussion"] at 273.

justification maintains that any institution that derives its power from a constituency has an obligation to inform the population why it has operated in a specific fashion. Publically justifying a disagreement with the current interpretation therefore serves two purposes. First and foremost, it articulates what one branch finds problematic about an interpretation of the *Charter* while simultaneously attempting to address these issues. Second, it holds both branches of the state accountable to the public by explaining why the state has proceeded to operate in a specific fashion.[21]

The justification process functions differently for the legislature and the judiciary. This is because the structure of judicial decision-making explicitly requires a justification as to why the courts have overturned previous case or statute law.[22] The legislature on the other hand, is not required to justify its decision because of its democratically legitimate position to create legislation. While there are mechanisms for attempting to justify the legislature's interpretation of the *Charter* such as Preambles and, in the case of the *PCEPA*, *Technical Papers*, the legislature is not obligated to justify its interpretation to the public. As such, the main theme of this project critiques the legislature for its lack of meaningful responses to the *Bedford* and *PHS* decisions.

In addition to this culture of justification, I argue the legislature always has the ability to operate notwithstanding the judiciary's interpretation of the Constitution regardless of whether it decides formally to invoke the notwithstanding clause.[23] Combining a culture of justification with the capacity to operate notwithstanding the

[21] Honig, *Displacement of Politics*, *supra* note 19; Mureinik, "A Bridge to Where", *ibid*; David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev Const Stud 87 [Dyzenhaus, "Culture of Justification"]; Moshe Chohen-Eliya & Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59 American Journal of Law Review 463 [Chohen-Eliya & Porat, "Proportionality and the Culture of Justification"].
[22] Hogg "Constitutional Law of Canada", *supra* note 9.
[23] Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14 at 273.

current interpretation of the Constitution, this paper investigates how the legislature's responses to *Bedford* and *PHS* could have been more democratic by emphasizing its contestation with the judiciary over the interpretation of the *Charter*.[24] Therefore this paper argues that the legislature should clearly justify its decision to overturn the interpretation of the judiciary to highlight where contestation is clearly happening over the interpretation/application of the Constitution as it relates to regulating the sex trade and safe injection sites respectively.[25]

In short, this project argues that the legislature could have been more direct in acknowledging its disagreement with the Supreme Court's interpretations of the *Charter* in the *Bedford* and *PHS* decisions by offering a detailed rationalization. Alternatively, if the legislature deemed the Court's decisions exceptionally problematic or harmful to society, it could invoke the notwithstanding clause. This avenue of response would be in line with an agonistic rendition of politics by embracing the legitimacy of both branches to interpret the *Charter*, while ensuring the public has the capacity to understand why the state (either the Court or the legislature) has acted in a certain way. The result is an added level of nuance to coordinated approaches of interpreting the Constitution (by fostering the ability for the legislative and judicial branches of the state to contest one another) in a way that asserts a truly final iteration of the *Charter* is not possible.

[24] When I say the legislative response could have been more democratic, I am simply saying that the state could have been more transparent in its decision. I use democracy as a barometer because it has underlying notions of transparent and accountable government, coupled with the idea that the government's power derives from the populace.

[25] I combine interpretation and application here because they both refer to the act at the core of the process. This is because the very act of judges applying the *Charter* simultaneously interprets it. While the legislature can interpret the *Charter*, it can never apply it to individual cases in the way that the judiciary does. See for example Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14 at 269.

Methodology

This project applies the theoretical framework outlined above to the recent controversial decisions of the Supreme Court in *Bedford* and *PHS* and the legislative responses to those decisions. Using doctrinal legal analysis, this paper analyzes the legal texts—whether legal decision or legislation—without considering speeches from Ministers during the debates in the House of Commons. This decision that the legal texts are the most important to study stands on the ground that the contestation over the *Charter* takes place between these texts, and not the intentions of the authors—whether it be of judges or Members of Parliament—behind them.[26] Whereas minutes from the House of Commons subcommittee debates could be advantageous and reveal individual perspectives of MPs, they do not accurately record the intent of the legislature as a whole. Therefore, this paper emphasizes the finalized legal texts because the intent of the entire legislature is the target of my analysis as it is the body that passed the *Acts* in question and not the speeches/subcommittee meetings from the legislative process.

This paper differs from the recent turns in the literature that analyze how the executive branch dominates the legislature, further complicating investigations into the relationship between the legislative and judicial branches. [27] This is not because I dispute the claims of authors who advance this perspective. Quite the contrary, I agree with these

[26] Roland Barthes, "Death of the Author" (1967) online: UbuWeb <http://www.tbook.constantvzw.org/wp-content/death_authorbarthes.pdf>.

[27] Lorne Sossin, "Book Review: Charter Conflicts: What is Parliament's Role?, by Janet L Hiebert" (2004) 42 Osgoode Hall LJ 189 [Sossin, "Book Review"]; Sossin, Lorne. "Between the Judiciary and the Executive: The Elusive Search for a Credible and Effective Dispute-Resolution Mechanism" in Adam Dodek & Lorne Sossin (eds). *Judicial Independence in Context* (Toronto: Irwin Law, 2010) [Sossin, "Effective Dispute-Resolution Mechanism"]; Janet Hiebert, "Governing Like Judges" in Tom Campbell, K D Ewing, & Adam Tomkins, (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford, UK: Oxford University Press, 2011) [Hiebert "Governing Like Judges"]; Vanessa MacDonnell, "The Civil Servant's Role in the Implementation of Constitutional Rights" (2015) 13 I Con 383 [MacDonnell, "Civil Servant's Role"]; Kelly, *Governing With the Charter*, *supra* note 11.

scholars that the executive has dominated and directed, at least in part, the actions of the legislature. However, while the executive—specifically the Cabinet, but also other central agencies such as the Department of Justice—have had an increased role in guiding the legislature and ensuring legislation can withstand *Charter* scrutiny, ultimately it is still the legislature that is accountable for the legislation it passes.

While, as Dennis Baker argues, there exists a potential for the legislature to disagree with the executive branches, this is not necessarily common.[28] The simple possibility that the legislature *could*, however unlikely, resist the suggestions of the executive, is enough for the purposes of this project. Janet Hiebert attempts to provide Parliament-based alternatives such as a *Charter* committee to fulfil the role the Department of Justice has assumed in guiding legislation, yet as Lorne Sossin and James Kelly argue, this does not fully address the executive's domination over the legislature.[29] I defer to these scholars as examples of how this project could be expanded in the future. Unfortunately, to do so presently is outside the scope of this paper. Acknowledging this limitation, I advance this project in a different direction.

My approach couples two Supreme Court of Canada decisions with their legislative responses. I adopt this approach of pairing judicial decisions with legislative responses from the judicial dialogue literature to demonstrate how the legislative and judicial branches engage one another by contesting the *current* interpretation of the *Charter*.[30] Common in the judicial dialogue literature, this coupling is rooted in the works of Peter Hogg & Allison Bushell who argue these institutions can only be in dialogue if the

[28] Baker, *Not Quite Supreme*, *supra* note 10.
[29] Sossin, "Effective Dispute-Resolution Mechanism", *ibid*; Kelly, *Governing With the Charter*, *ibid*.
[30] See especially Hogg & Bushell, "Charter Dialogue", *supra* note 12 at 79.

legislature has the opportunity to respond to a judicial decision finding legislation unconstitutional—something I argue is always the case.[31] Alternatively, James Kelly & Christopher Manfredi use a similar approach to analyze the impact a decision may have on the balance of power between the legislative and judicial branches.[32] While I borrow from both of these approaches, I also deviate from them to better address a contested, horizontal approach to interpreting the *Charter*.

First, I agree with Hogg & Bushell when they argue that a dialogue *can* be seen to emerge when placing judicial decisions beside legislative responses. That is not to say that I agree entirely with their precise interpretation of judicial dialogue. Specifically, I agree with critiques made by Kent Roach, Manfredi & Kelly, and others that the original components of dialogue theory can be problematic, such as its over simplistic requirements to achieve judicial dialogue.[33] To remedy this, I only borrow the method of pairing a legal case with its legislative response to create a site ripe for analyzing the relationship between the legislative and judicial branches of the state.

Second, I repurpose Kelly & Manfredi's approach to balance between the legislative and judicial branches to look towards substantive differences. This means that I do not look at how a decision may shift the power between the courts and Parliament as this would be out of place for a coordinated approach to interpreting the *Charter*. Instead, I compare the legislative responses to the judicial decisions to determine if the legislative response responds to the rationale provided in the judicial decisions in a clear and

[31] *Ibid*.
[32] Christopher P. Manfredi & James B. Kelly. "Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures" (2001) 64 Sask Law Rev 323 [Manfredi & Kelly, "Dialogue, Deference, and Restraint"] at 337-38.
[33] Kent Roach, *Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) [Roach, *Supreme Court on Trial*]; Manfredi & Kelly, "Dialogue, Deference, and Restraint", *ibid*.

transparent manner or if it avoids doing this and, as a result, represses the disagreement between the legislature and the judiciary.

I selected my sites of analysis—*PHS, Bedford*, and their legislative responses— for a variety of reasons. First, they are legal decisions regarding highly controversial topics. While the issue of the purchasing of sex has been a long lasting issue of moral debate, safe injection sites are a relatively newer area kick-started in Canada with the InSite program. Second, these cases are recent and topical. Whereas the *Bedford* decision was released in late December 2013, the legislative response did not receive royal assent until December 6th 2014. *PHS*, on the other hand, was decided back in 2011, yet its legislative follow-up only received royal assent on June 18th 2015.[34] As such, both these cases offer a contemporary view of the relationship between the legislative and judicial branches of the state. This distinguishes an analysis of these cases from the judicial review literature that, for the most part, analyze instances of dialogue that have long come and gone.[35] Subsequently, what I lose in certainty from analyzing instances processes of *Charter* interpretation, I gain in the ability to portray *current* disagreement over the interpretation/application of the *Charter*.[36]

Third, these two cases are related by the constitutional challenges they featured, specifically as they discuss the right to security of the person and the principles of fundamental justice located under s. 7 of the *Charter*. The two cases are therefore legally

[34] *Bedford*, *supra* note 3; *PHS*, *supra* note 5.
[35] For examples see Baker, *Not Quite Supreme*, *supra* note 10; Kelly, *Governing With the Charter*, *supra* note 11; Roach, *Supreme Court on Trial*, *supra* note 33; and Morton & Knopff, *Charter Revolution*, *supra* note 10.
[36] Most notable is the *O'Connor-Mills* series of dialogue. Many scholars have talked about this decision as an example of judicial dialogue in motion, specifically as the legislature effectively re-enacted the provisions found unconstitutional by the Supreme Court in *O'Connor*. See especially Baker, *Not Quite Supreme*, *ibid* for a detailed account of this dialogic episode. See also *R v O'Connor* [*1995*] 4 SCR 411; *R v Mills* [*1999*] 3 SCR 668.

related, yet discuss very different controversial moral topics. Moreover, these cases and their legislative responses have been the target of both fanfare and criticism as Chapters 3 and 4 demonstrate. The resulting publicity has tried to frame one side (either the courts or the legislature) as a 'winner' and the other as a 'loser'.[37] Presenting the branches of the state in this fashion parallels the debate featured in the judicial review literature that I aim to avoid. By analyzing these cases using the contestational model I develop, I demonstrate how the judicial review literature is unnecessarily limiting in its assumption that one of the two parties 'wins' over the other.

In addition to my case studies, I utilize a variety of secondary sources from academic scholars, public associations, newspaper articles, and reports to Senate sitting committees to supplement my case studies. Where possible, this has included primary, secondary, and tertiary sources to demonstrate my familiarity with legal concepts and the surrounding literature. Due to the recent nature of my two case studies, there has not been a great deal of literature on these topics. This is especially the case for my analysis regarding *PHS* and its legislative response. Instead, I have relied upon statements by public associations who have submitted information before the courts or legislature in an attempt to summarize their position. These documents are written, for the most part, by practicing lawyers or other professionals who demonstrate an expertise on the issues at hand, whether it be the sex trade or safe injection sites.

[37] See e.g. Sean Fine, "Supreme Court Unfair to Harper Government, New Ontario Justice Wrote As Professor", *The Globe and Mail* (27 July 2015) online: The Globe and Mail <http://www.theglobeandmail.com/news/politics/supreme-court-unfair-to-harper-government-new-ontario-justice-says/article25715590/>.

Outline

The first Chapter starts with an overview of the Canadian judicial and political systems and argues that a majority of the literature on dialogue theory is inadequate because it implies that a final interpretation of the *Charter* is possible. This includes a brief examination of the judiciary and the legislature, as well as a more thorough investigation into the *Constitution Act 1982*. The amendments made in 1982, this paper asserts, reflect a larger change in the Canadian political discourse towards a horizontally structured state over the previous practice of parliamentary supremacy.[38] From there, the Chapter proceeds to review the constitutional dialogue literature as it has played out in the Canadian context. This consists of summarizing the views of fundamental rights scholars and their critics, as well as the pivot towards dialogue theory as a response to the *Charter* critics. Considering the shortcomings present in dialogue theory, this paper turns towards the works of Dennis Baker and Hiebert to demonstrate how coordinate approaches to constitutional interpretation question *how* current iterations of the *Charter* develop.[39] Ultimately, the Chapter argues the model of dialogic analysis presented by these coordinate interpretation authors, while an improvement over the restricting nature of dialogue, still does not go far enough in accounting for the contestation between the legislature and the judiciary.

Utilizing aspects of agonism, the second Chapter fills this gap by articulating a desire for a public and vocalized contestation between these branches. Through

---

[38] Kelly, *Governing With the Charter*, *supra* note 11.

[39] Janet Hiebert, *Charter Conflicts: What is Parliament's Role* (Montreal: McGill-Queens University Press, 2002) [Hiebert, *Charter Conflicts*]; Janet Hiebert, "A Relational Approach to Constitutional Interpretation: Shared Legislative and Judicial Responsibilities" (2001) 35 Journal of Canadian Studies 161 [Hiebert, "Relational Approach"]; Janet Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy" in Paul Howe & Peter H Russell, (eds) *Judicial Power and Canadian Democracy* (Montreal: McGill-Queens University Press, 2001) [Hiebert, "Wrestling with Rights"]; Baker, *Not Quite Supreme*, *supra* note 10.

understandings of both virtue and *virtù* theories of politics as outlined by Honig, Chapter 2 demonstrates how a contestation-centred approach of *Charter*-interpretation facilitates opportunities for increasing state transparency and constitutional change.[40] This does not mean that the legislative and judicial branches of the state cannot agree on an issue, and in fact, they commonly do. The emphasis of this Chapter demonstrates the *capacity* for these branches to hold differing views concerning the interpretation and application of the Constitution, and the importance that, when one branch disagrees with the other, it should be forthright with the public about this disagreement. This Chapter concludes by arguing that the legislature, in failing to offer a pointed justification and/or invoking the notwithstanding clause, has obfuscated the *Charter*-interpreting process in such a fashion that runs against the grain of Canada's democratic foundations.

Chapter 3 analyzes how the legislative response to *Bedford* has concealed the contestation between it and the judiciary over the interpretation/application of the *Charter*. It outlines the history of the *Bedford* decisions, including the influences from the *Prostitution Reference*, and synthesizes key themes from the Supreme Court of Canada's decision.[41] The Chapter advances by reviewing the *PCEPA*. Building upon these summaries, the thrust of this Chapter asserts that the focus of the legislative response, a shift in the *objective of the law*, represses the contested nature of the process of constitutional interpretation instead of embracing it. Subsequently, Chapter 3 demonstrates how the legislature's response offers a new interpretation of the *Charter* without acknowledging or justifying the legislature's resistance to the interpretation put forward by

[40] Honig, *Displacement of Politics*, *supra* note 19; Honig, "Dead Futures", *supra* note 14.
[41] Reference re *ss. 193 and 195.1(1)(c) of the Criminal Code* (Man.), [1990] 1 SCR 1123 [*Prostitution Reference*].

the judiciary, therefore challenging aspects of transparency and democratic accountability in Canada.

The fourth Chapter explores the Supreme Court's decision in *PHS* and argues that the legislature could have tendered a more democratic response by justifying its resistance to the interpretation laid down by the Supreme Court, or, if it felt the decision was harmful to society, by invoking the notwithstanding clause. The Chapter starts by discussing the Court's decision finding that the constitutionality of s. 4(1) of the *Controlled Drugs and Substances Act* hinged on the capacity for the Minister of Health to grant exemptions under s. 56 to balance public health and safety. This paper then summarizes the legislature's amendments in the *RCA* and demonstrates how it revised the *CDSA* to prioritize values of public safety over public health. The core of Chapter 4 argues that this revision to heavily prioritize public safety over public health demonstrates a disagreement with (and resistance to) the Supreme Court's finding that the Minister is required to balance public health and safety when considering whether to grant an exemption under s. 56 of the *CDSA*. This decision to resist the judiciary's requirement of balancing between public health and safety has not, as this chapter argues, been adequately justified by the legislature.

The conclusion ties together all of the Chapters and demonstrates how the legislature could have made its responses to the *Bedford* and *PHS* decisions more transparent by accentuating its contestation with the judiciary's interpretation/application of the *Charter*. Highlighting disagreement, this paper concludes, demonstrates the legislature's respect for the judiciary's authority to interpret the *Charter* while advancing an interpretation that both announces and addresses Parliament's concerns. An agonistic rendition of politics assists in this objective by normalizing the capacity for disagreement

between the legislative and judicial branches of the state. The argument advanced therefore, may come across as one interested in the technicalities of how these branches dialogue with one another over substantive change for those affected by the laws in question. However, there is something to be said about a system that fosters and cherishes a legitimated perpetual provocation between the legislative and judicial branches of the state over one that denies and obfuscates disagreement between them. Whereas the former, grounded in a formal acknowledgment of contestation and adequate justification makes both the political and legal systems more transparent, the latter supports concealing the inner functions of the state in such a way that runs against the grain of Canada's constitutional democracy by arbitrarily prioritizing one interpretation of the *Charter* over another.

Chapter 1
Much Ado About Judicial Review: The Inadequacies of 'Final Say' Approaches to Dialogue Theory

> In a constitutional democracy, a court's ruling that a law or government act is invalid because it violates the *Charter* (or any other provision of the Constitution) should not be judged solely on the basis of that activist result but, rather, on the basis of the reasons given by the court for reaching that conclusion.
>
> -Peter H. Russell, "The *Charter* and Canadian Democracy", 296.

The debate over whether the legislature or the judiciary holds the final say regarding constitutional interpretation has been an ongoing topic of debate in Canada and abroad. This Chapter investigates the judicial review literature in Canada and demonstrates how it inadequately accounts for legitimate disagreement between the legislative and judicial branches of the state. Specifically, I argue that the literature obfuscates the contestation between these two branches of the state by focusing on *who* has the authority to interpret the Constitution instead of *how* these institutions invoke their power to interpret the *Charter*. Emphasizing *how* instead of *who* reveals the contested nature of the interpretation of the *Charter*, assuming both the legislative and judicial branches have legitimate authority to interpret it. Subsequently, this Chapter turns towards a coordinate interpretational approach to demonstrate the problem of assuming a 'final say' of the *Charter*.

The first section provides a brief background on Canada's constitutional democracy, specifically in the context of the *Constitution Act 1982*. Here I establish the foundation of my project, namely that both branches of the state have equal authority to interpret the Constitution found under ss. 1 and 33 of *Charter* and s. 52(1) of the

Constitution Act 1982.[42] Coupled with Canada's culture of unwritten constitutional principles, I argue the *Charter* represents an epochal shift where Parliament formally acknowledged the judiciary as an equal, and not a subordinate branch of the state.[43]

The second section advances a discussion of the judicial review scholarship—a field of literature that analyzes the ability of the judiciary to review the constitutional legitimacy of legislation. This specific area has developed three main groups of scholars in Canada. The first two, emerging following the introduction of the *Constitution Act 1982* are the fundamental rights scholars and their critics. The next wave, offered as a response to the *Charter* critics, is judicial dialogue, notably popularized by Peter Hogg & Allison Bushell.[44] Following a review of the literature in these fields, I demonstrate how the dialogue literature prioritizes *who* has the final say of the *Charter* over other components, such as *how* the *Charter* is interpreted.[45] I argue emphasizing *who* over *how* has led the judicial dialogue literature to turn its gaze away from its original premise of analyzing how the legislative and judicial branches of the state interact. Whereas the literature has focused on formal considerations, such as findings of *Charter* incompatibility or who has legitimate authorization to interpret the *Charter*, the question I ask is a different one. Specifically, I inquire as to *how* these two branches of the state should interpret the *Charter* assuming they both have equal authority to do so.[46]

---

[42] Lorraine Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" (2001) 6 Rev Const Stud 119 [Weinrib, "Paradigm Lost"].
[43] Russell, *The Judiciary in Canada*, *supra* note 10; Kelly, *Governing with the Charter*, *supra* note 11.
[44] Kelly, *Governing with the Charter*, *ibid*.
[45] Bateup, "Dialogic Promise", *supra* note 15; Dixon "Dialogue and Deference", *supra* note 15; Harel & Shinar, "Between Judicial and Legislative Supremacy" *supra* note 13.
[46] See especially Slattery, "Theory of the Charter", *supra* note 15 at 705-08. See also Baker, *Not Quite Supreme*, *supra* note 10 at 40.

Embracing this objective, I branch out from the judicial review literature into the coordinate interpretational works of Dennis Baker and Janet Hiebert in the third section. While Baker claims to support a coordinate constitutional approach, I demonstrate how he undermines the central thesis of a coordinated approach—that both branches have equal authority to interpret the Constitution—by arguing that the legislature should be able to have the final interpretation of the *Charter*.[47] Additionally, agreeing with Hiebert, I critique the legislature for not fully exercising its power to interpret the *Charter*.[48] Unfortunately, while these coordinated approaches address some issues raised by judicial dialogue scholars, they still fail to establish the problems underlying a final interpretation of the *Charter*. I conclude by summarizing the shortcomings of these coordinated approaches to set up the proceeding Chapter where I demonstrate how an agonistic perspective addresses the shortcomings in these iterations of coordinate theory by normalizing disagreement.

The Framework of the Canadian State: the Judiciary, the Legislature, and the *Charter*

Canada, like several other Western countries, originated as a dominion under the United Kingdom and, as such, adopted a parliamentary form of democracy.[49] This system features a separation of the state into three separate (but sometimes overlapping) branches: the executive, the legislature, and the judiciary.[50] This model resulted from Canada's

[47] *Baker*, *Not Quite Supreme*, *ibid*.
[48] Hiebert, "Parliamentary Bills of Rights": An Alternative Model" (2006) 69 Mod L Rev 7 [Hiebert, "Parliamentary Bills of Rights"]; Hiebert, "Wrestling with Rights", *supra* note 39; Hiebert, "Relational Approach", *supra* note 39.
[49] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (New York: Cambridge University Press, 2013) [Gardbaum, *Commonwealth Model of Constitutionalism*] at 97.
[50] The executive, for the most part, is outside the scope of this project. That is not to say that it is irrelevant by any means, but simply to say that I am interested in how the judicial and legislative branches interact with each other. See especially Chief Justice Dickson's comments at para 39 in *Fraser v PSSRB*, [1985] 2 SCR 455.

confederation following the *Constitution Act 1867*.[51] As Peter Russell notes, in the original Constitution there was no amendment formula for Canada to amend its own Constitution. Instead, the Canadian Constitution relied on the United Kingdom to make amendments on its behalf.[52] This was finally changed in 1982 when Canada "patriated" its Constitution.[53]

The *Constitution Act 1982* was the crest of Canada's rights movement, demonstrated by the entrenchment of the *Canadian Charter of Rights and Freedoms* as part of the Constitution.[54] Following the Second World War, Canada as well as most other Western states experienced increasing calls for the formal protection of a series of inalienable rights.[55] Approaching rights in this way implies that they exist above both the judiciary and the legislature, and limit the actions of the state as a whole.[56] Subsequently, all three branches of the state are restricted into complying with the *Charter*.[57]

The relations between these three branches are more nuanced than they appear and are at the heart of my project. While I focus on the relationship between the branches authorized to make/interpret law—the legislative and judicial branches respectively—the executive has a large role in parliamentary systems. The executive and legislative branches,

---

[51] Russell, *The Judiciary In Canada*, *supra* note 10; Christopher P. Manfredi, *Judicial Power and the Charter*, 2nd ed (Toronto: Oxford University Press, 2001) [Manfredi, *Judicial Power and the Charter* 2nd ed] at 11-13.
[52] Russell, "Constitution-Oxford Handbook", *supra* note 9 at 23.
[53] *Ibid* at 28.
[54] See Christopher P. Manfredi, *Judicial Power and the Charter*, (Toronto: University of Oklahoma Press, 1993) [Manfredi, *Judicial Power and the Charter*] at 32. See also Russell, "Constitution-Oxford Handbook", *ibid* and Beverley McLachlin, "The Role of the Courts in the New Democracy" in Joseph Eliot Magnet, ed, *Constitutional Law of Canada: Cases, Notes, and Materials*, vol 2 8th ed (Edmonton: Juriliber, 2000) [McLachlin, "The Role of the Courts"] 117 at 119-20.
[55] Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, (Toronto: Wall & Thompson, 1989) [Mandel, *Legalization of Politics*] at 9-15; McLachlin, "The Role of the Courts", *ibid* at 119-20; Radha Jhappan, "*Charter* Politics and the Judiciary" in Michael Whittington & Glen Williams, eds, *Canadian Politics in the 21st Century* 5th edition (Scarborough, Ont.: Nelson Thompson Learning, 1999) 217.
[56] See especially Patrick J. Monahan *Constitutional Law* (Toronto: Irwin Law, 2002) [Monahan, *Constitutional Law*] at 19. See also McLachlin, "The Role of the Courts", *ibid* at 119-20.
[57] Exceptions to this rule do exist, such as invoking the notwithstanding clause under s. 33 of the *Charter*.

as Baker and others discuss, have many overlapping points.[58] The executive may not have the authority to enact legislation, but it has a significant capacity to influence which laws are enacted through the legislature due to the dominance of the Prime Minister and Cabinet within the legislature as well as their control of the legislative agenda. This is especially true in instances where the governing party controls a majority of the seats in the legislature. Moreover, the executive plays a significant role in the legislation-crafting process demonstrated through the increased role of the Department of Justice in reviewing draft legislation as it may pertain to the Constitution.[59]

The Canadian Constitution does not explicitly establish where the jurisdiction of the legislature ends and the judiciary's begins, thus making the *Charter*-interpreting process an awkward endeavour.[60] Constitutional law scholar Peter Hogg claims that while there is a differentiation between the legislative and judicial branches of the state, no strict line completely distinguishes them.[61] The power to interpret the *Charter* is thus shared between the two branches of the state because the courts can always reject legislation if they interprets it as incompatible with the Constitution, and the legislature can always pass new or amend previous legislation in a manner that reflects its own interpretation of Constitutional requirements. The resulting system of government resembles a pluralist

[58] Baker argues against these two branches becoming fused together, and instead argues that there is a large amount of overlap between them. As such, while the legislature mostly sides with the executive, Baker justifies this overlapped relationship on the premise that the legislature *could* resist the executive if it desires. This *capacity* for resistance is enough to justify the tightly knit relationship of these two branches. See Baker, *Not Quite Supreme*, *supra* note 10 at Chapters 3 and 4. See also Hiebert, "Governing Like Judges", *supra* note 27 and MacDonnell, "Civil Servant's Role", *supra* note 27. See also Kelly, *Governing With the Charter*, *supra* note 11 And Sossin, "Effective Dispute-Resolution Mechanism", *supra* note 27.
[59] This debate exceeds the scope of this paper. I simply point out the overlapping nature of the legislative and executive branches and defer to other scholar's works for a further investigation of this component.
[60] See especially Monahan, *Constitutional Law*, *supra* note 56 at 17-20. See e.g. Peter McCormick, *End of the Charter Revolution: Looking Back From the New Normal* (Toronto: University of Toronto Press, 2015) [McCormick, *End of the Charter Revolution*] at 46. See also Manfredi, *Judicial Power and the Charter* 2nd ed, *supra* note 51 at 12.
[61] Hogg, *Constitutional Law of Canada*, *supra* note 9.

rendition with both branches having *equal* authority that maintains the ability of both branches to disagree with the other's interpretation/application of the *Charter*.[62] Baker expands upon this by arguing that the bleeding between these two branches creates room for resistance, while not necessitating it.[63] This potential overlap between the two branches is represented by how they make/(re)interpret law and is emphasized in the judicial review literature.

A Quick View of Judicial Review: Fundamental Rights Scholars, *Charter* Critics and Judicial Dialogue in Canada

In the context of a state governed by a written Constitution, judicial review is the term used to describe the power of the judiciary to ensure legislation is compliant with the Constitution. Generally speaking, the judicial review literature is situated on a continuum between the extremes of judicial supremacy—the view that the judiciary should always have the final say regarding the interpretation—and legislative supremacy—which argues the legislature should always have the final say on constitutional matters. Two differing factors contribute to this divide in Canada. First, as discussed above, the separation of powers in Canada coupled with its culture of unwritten principles means there is no decisive distinction where the jurisdiction of one branch ends and the other begins. Second, the judicial and legislative branches approach the *Charter*-interpreting process through different avenues as I discuss below.

---

[62] See especially Russell, *The Judiciary in Canada*, *supra* note 10 at 93. *S*ee generally Baker, *Not Quite Supreme*, *supra* note 10 at 39-41; Stephen Gardbaum, "The Place of Constitutional Law in the Legal System" in Michel Rosenfeld and Andras Sajo, eds *The Oxford Handbook of Comparative Constitutional* (Oxford: Oxford University Press, 2012) 170; Simon V. Potter and Emily MacKinnon *The Executive Branch: Defender of Canadian Liberties* (Presentation delivered at the Canadian Bar Association's National Constitutional and Human Rights Conference, June 27 2014), [unpublished].

[63] See Mandel, *Legalization of Politics*, *supra* note 55 at 35-40. See also Baker, *Not Quite Supreme*, *ibid* at 39–41.

What follows is an investigation into the judicial review literature and its (in)ability to illustrate *how* the *Charter* is interpreted.[64] In arguing over *who* should have the final say, I maintain that the judicial review literature has effectively inferred that one party has to have the last say lest there be a chain of never-ending responses.[65] When I outline my distinction between *who* and *how*, I am not arguing that the literature does not acknowledge the *how* in some capacities.[66] Instead, I am emphasizing *how the particular model* I develop in the first two Chapters investigates broader implications of the legislature`s actions that have been under examined in the judicial review literature. I contend that my approach differs from the existing judicial review literature by offering a pathway to a more democratic legal and political process through increasing the transparency of the state.[67]

Fundamental Rights Scholars and the Capacities for Judicial Review

Fundamental right scholars, such as Lorraine Weinrib and Wayne MacKay, claim that the *Charter* has allocated a significant portion of power to the judiciary and that it has accepted this increased role following the *Constitution Act 1982*.[68] Weinrib argues that the

[64] Hiebert, *Charter Conflicts*, *supra* note 39 at 50-51; Alon Harel & Tsvi Kahana, "The Easy Core Case For Judicial Review" (2010) 2 *Journal of Legal Analysis* 227 [Harel & Kahana, "Easy Core Case"] at 228.
[65] See E.g. Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999) [Waldron, Law and Disagreement] at 297; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (New Jersey: Princeton University Press, 2008) [Tuishnet, *Weak Courts, Strong Rights*]; T R S Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 4 *Oxford Journal of Legal Studies* 563; T R S Allan, Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review" (2010) 60 UTLJ 41; Francesco Duranti, "New Models of Constitutional Review" (2014) 5 Comparative Law Review 1.
[66] Hiebert, *Charter Conflicts*, *ibid* at 43.
[67] This claim may come across as a strawman argument, but I would disagree with that claim. While I specifically advocate for *how* my model may play out, I do so on the general assumption that both branches are equal. As such, I do not develop a strawman in my analysis of the judicial review literature, but instead emphasize a component that is generally marginalized within the literature itself.
[68] Wayne MacKay, "The Legislature, the Executive, and the Courts: The Delicate Balance of Power Or Who Is Running This Country Anyway?" (2001) 24 Dal LJ 37 [MacKay, "Delicate Balance of Power"]; Lorraine E. Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution" (2001) 80 Can Bar Rev 699 [Weinrib, "Fundamental Rights"].

Charter introduced a pivotal shift from majoritarian government to a pluralist rendition of the state as part of the global shift to a rights culture following the Second World War.[69] The *Charter*, for fundamental right scholars, demonstrates an acknowledgement that pure democratic-legislative rule is inadequate in the post-Second World War era. These scholars highlight the importance, within a rights culture, of the capacity for the judiciary to review legislation to ensure it is congruent with the Constitution. They locate the capacity for judicial review under several different avenues, including: 1) the limitation clause—s. 1 of the *Charter*; 2) the override provision—s. 33 of the *Charter*; 3) the remedy clause located under s. 24(2) of the *Charter* and; 4) the supremacy clause—s. 52 of the *Constitution Act 1982*.[70]

Due to the nature of common law, members of the judiciary constantly have an obligation to explain how they came to their decisions. As such, if the courts ever find that the legislature has passed legislation incongruent with the Constitution the courts have to articulate their reasons for finding an infringement, as well as why the infringement of the *Charter* was not justified. These justifications, or reasons, allow legislatures to understand where the legislation at issue is constitutionally problematic and to craft any new legislation or amendments in a way that avoids the problems identified with the legislative provisions that were found to be unconstitutional by the judiciary.

In a seemingly contradictory fashion, s. 1 of the *Charter* guarantees the rights and freedoms outlined therein to "such reasonable limits prescribed by law as can be

[69] Weinrib, "Fundamental Rights", *ibid* at 724; MacKay, "Delicate Balance of Power", *ibid* at 42.
[70] Weinrib, "Fundamental Rights", *ibid* at 728; MacKay, "Delicate Balance of Power", *ibid* at 54. Section 24(2) allows for a judge to dismiss evidence from the trial if they feel it was obtained in a wrongful manner. However, this avenue is outside the discussion of this paper.

demonstrably justified in a free and democratic society".[71] Starting with its germinal decision in *R v Oakes*, the Supreme Court of Canada has developed a legal test consisting of three different branches to determine whether a given law can *justifiably* limit a constitutional right pursuant to s. 1.[72] Subsequently, if the judiciary feels the government is unreasonably limiting a right, it expresses *why* the legislation in question is unreasonable. Alternatively, the legislature can enact the notwithstanding clause if they disagree with the judiciary's decision striking down a particular law or legislative provision.

The notwithstanding, or override clause, also commonly referred to as the "constitutional compromise", is a key aspect that makes the Canadian iteration of a parliamentary democracy unique.[73] Section 33 of the *Charter*, the override clause, can be invoked before or after a judicial decision concerning the constitutionality of a legislative provision. Pursuant to section 33, the legislature can make a formal declaration that any legislation shall operate (or remain legally binding) notwithstanding whether it violates s. 2 or ss. 7-15 of the *Charter*. To use the notwithstanding clause, the legislature must explicitly invoke it in a piece of legislation, with the declaration only being valid for up to

[71] *Charter*, *supra* note 6, s. 1.

[72] This means for a *Charter* right to be limited/justifiably infringed by the government it must: 1) be clearly prescribed by legislation; 2) have a pressing and substantial objective related to the public's interest; 3) be proportionate to the public issue at hand (this is configured through an analysis of there being a rational connection between the law and the objective of the law, that the infringement impair the *Charter* right in question as minimally as possible, and to make sure the issue at hand is of a proportionate severity worth restricting).

[73] Janet Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding", in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism* (Victoria: UBC Press, 2009) [Hiebert, "Compromising the Notwithstanding Clause"] at 107; Hiebert, "Parliamentary Bills of Rights", *supra* note 48 at 12; Peter H Russell "The *Charter* and Canadian Democracy", in James B Kelly and Christopher P Manfredi, eds, *Contested Constitutionalism* (Victoria: University of British Columbia Press, 2009) 287 [Russell, "The Charter and Canadian Democracy"] at 292; Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in James B. Kelly & Christopher P. Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Victoria: University of British Columbia Press, 2009) 50 [Huscroft, "Rationalizing Judicial Power"] at 55-56. Gardbaum, *Commonwealth Model of Constitutionalism*, *supra* note 49 at 97. Roach, *Supreme Court on Trial*, *supra* note 33 at 7-8.

five years, ensuring a general election will occur before it can be renewed. Introduced as a last minute compromise to ensure the *Charter* received the support of provincial Premiers, s. 33 addresses fears that the judiciary could supersede provincial and federal legislative interpretations of rights.[74] The notwithstanding clause contributes to the judiciary's capacity to review the constitutionality of legislation by acknowledging the need to prioritize democracy over constitutionalism at times and allow the legislature to operate outside the limits (or, more accurately, the judiciary's interpretation) of the Constitution.[75]

The final, but most explicit proponent supportive of judicial review by the fundamental rights scholars is the supremacy clause. Found under s. 52 of the *Constitution Act 1982*, the supremacy clause explicitly states that the Constitution is the supreme law of the land. Consequently, any law that the courts or legislature find are in conflict with the Constitution is of no force or effect.[76] Due to the judiciary's pivotal position on interpreting legislation, the judiciary, especially for fundamental rights scholars, has the power to strike down legislation that contravenes the *Charter*. Combined with ss. 1 and 33 of the *Charter*, these provisions qualify the capacity of the judiciary to review the constitutionality of legislation according to fundamental rights scholars.[77]

The legislature differs from the judiciary because it is legitimized through the democratic structure of Parliament and therefore does not *have to* justify its decision to

---

[74] Hiebert, "Compromise and the Notwithstanding Clause", *ibid* at 115.
[75] Honig, "Dead Rights", *supra* note 14.
[76] *Constitution Act* (1982), *supra* note 8 at s. 52. See especially Monahan, *Constitutional Law*, *supra* note 56. See also Russell, *The Judiciary in Canada*, *supra* note 10 at 93. See generally Baker, *Not Quite Supreme*, *supra* note 10; Manfredi, *Judicial Power and the Charter 2nd ed*, *supra* note 51; McLachlin, "The Role of the Courts", *supra* note 54. See also James B. Kelly and Christopher P. Manfredi "Should We Cheer? Contested Constitutionalism and the Canadian *Charter* of Rights and Freedoms in James B. Kelly and Christopher P. Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 3 [Kelly & Manfredi, "Should We Cheer"] at 5-8.
[77] Weinrib, "Fundamental Rights", *supra* note 68; MacKay, "Delicate Balance of Power", *supra* note 68.

pass or amend legislation. This is an idealized justification because a majority in Parliament does not necessarily reflect the wishes of a majority of the country, but that debate is outside the scope of this paper.[78] That is not to say that there are no measures in place to ensure legislation in the House of Commons meets *Charter* scrutiny, but that the legislature is authorized to create law without justifying its decision to the judiciary.[79] Consequentially, the legislative and judicial branches of the state make/interpret law in different ways.[80] Whereas the judiciary's capacity to review legislation is formally grounded in the *Constitution Act 1982*, the legislature's is in the majoritarian and democratic structure of Parliament. This difference is pivotal to the judicial review literature as it frames the debate between fundamental rights scholars and their critics.

Charter Critics and the Illegitimacy of the Courts

Charter critics argue against the claim that the judiciary is legitimate in reviewing legislation as advocated by the fundamental rights scholars. Ranging from scholars on both the political left, such as Andrew Petter and Michael Mandel, as well as the right, including Christopher Manfredi, Ted Morton, and Rainer Knopff, *Charter* critics argue that the judiciary's power post-1982 has exceeded its legislated intent. Petter argues that the *Charter*, unlike its goal of protecting minorities, will induce the opposite effect because its negative (or restrictive) nature prohibits the government from violating rights *in a specific*

[78] Peter H Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy* (Toronto: Emond Montgomery Publications, 2008).
[79] Kelly, *Governing With the Charter*, *supra* note 11.
[80] Specifically, the courts typically are required to provide a justification as to why a piece of legislation is incongruent with the *Charter*. This requirement does not exist for the legislature. This does not mean that there are not components that address the intent of the bill, specifically through preambles addressed at the requirements of Oakes or speeches of the Minister who introduces the *Act*. However, as discussed earlier these provisions still do not necessarily address the entirety of the legislature, which is extremely problematic under majority governments since the capacity to disagree with the current government is stifled. Peter Russell, "Learning to Live with Minority Parliaments" in Peter Russell & Lorne Sossin eds. *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

fashion, and not in their entirety.[81] Similarly, Mandel argues that the *Charter* necessitates speaking about issues in a certain way that may not be the most advantageous to those whose rights are being infringed.[82] The *Charter*, for its critics on the left, is problematic because it limits arguments to the legal framework of the *Charter*, and more to the point pushes social issues to arise through the courts instead of the legislature. The consequence of framing rights in this fashion is that law becomes the central dimension of settling a dispute with the government as opposed to other, non-legal alternatives.

Charter critics on the political right, spearheaded by Morton and Knopff and their book, *The Charter Revolution and the Court Party*, differ from their colleagues on the left by advancing two critiques that the courts are anti-democratic and exceeding their legislated mandate.[83] The first critique, referred to as anti-majoritarian, proposes that moving the final interpretation of the Constitution under the jurisdiction of the judiciary bypasses the democratic structure of the state as discussed above.[84] *Charter* critics claim the judiciary has no democratic legitimacy because it is not publicly elected and therefore should not be able to rule on issues of policy.[85] Scholars on the right, such as Manfredi and Knopff, claim that the appointed members of the judiciary should defer to the legislature as opposed to striking down legislation passed by the democratically elected legislature.[86]

---

[81] Andrew Petter, "The Politics of the *Charter*" (1986) 8 Sup Ct L Rev 473 reprinted in Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) at 18-19.
[82] Mandel, *Legalization of Politics*, *supra* note 55 at 310.
[83] Morton & Knopff, *Charter Revolution*, *supra* note 10. See also MacKay, "Delicate Balance of Power", *supra 68* at 39.
[84] See especially Alexander Bickel "The New Supreme Court: Prospects and Problems" 45 Tul L Rev 229 at 241. See also Jim Allan, "An Unashamed Majoritarian" 23 Dal LJ 537 at 546; Charles-Maxime Panaccio, "Professor Waldron Goes to Canada (One More Time): The Canadian *Charter* and the Counter-Majoritarian Difficulty" (2011) 39 C L World Rev 100.
[85] See especially Roach, *The Supreme Court on Trial*, *supra* note 33 at 106-07.
[86] See Manfredi, *Judicial Power and the Charter 2nd ed*, *supra* note 51 at 139; Rainer Knopff "Courts Don't Make Good Compromises" in Paul Howe & Peter H. Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queens University Press, 2001) 87.

Expanding upon this, the second critique argues that the courts have become political in their function, and are overturning policy decisions made by the democratic branch of the state. This is particularly problematic because it requires courts to move beyond their natural role of interpreting and applying the law to a role that involves balancing policy priorities, a job best handled by the legislature.[87] In concert, these two critiques claim that the courts are illegitimately acting as a major policy maker in Canada. The result is not a problem with the *Charter* as much as it is with the tendency for judges to act on activist parameters outside the scope of their legislated powers. The result of these critiques is a judiciary, according to Morton & Knopff, that has changed values in Canadian society to reflect their activist agendas.[88]

The result is two approaches to judicial review that contest each other. While fundamental rights scholars advocate that judicial supremacy is legitimate and necessary to protect fundamental rights, their critics contend that judges have taken on too much power under the *Charter* and that this excess of power is undemocratic, anti-majoritarian, and exceeds the legislated capacity of judges. The debate between fundamental rights scholars and *Charter* critics has expanded beyond these grounds in the turn towards judicial—or constitutional—dialogue theory.

Dialogue as a Response to *Charter* Critics

Offered as a response to *Charter* critics, dialogue theory addresses the main critiques of the role of judges under the *Charter* through interpreting the relationship

[87] This is a key point of contention in the literature. Fundamental rights scholars generally argue that the judiciary deserves to influence political decisions of the legislature as it falls under the capacity to review the constitutionality of legislation. Critics, such as Morton and Knopff, Huscroft, and Baker argue that the judiciary is unable to address these political issues due to its emphasis on legal over political expertise.
[88] Morton & Knopff, *Charter Revolution*, *supra* note 10; Morton, F. L. & Rainer Knopff. *Charter Politics* (Scarborough, Ont.: Nelson, 1992).

between the legislature and the judiciary as an ongoing dialogue or conversation. Peter Hogg and Allison Bushell's inaugural article from 1997 entitled "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" is cited as the authoritative source on judicial dialogue theory in the Canadian context.[89] In their paper, they argue that the *Charter* facilitates a metaphorical dialogue by allowing the legislature to respond to the judiciary's interpretation and application of the *Charter* on most issues, and that typically the legislature responds to judicial decisions in instances of dialogue.[90] They find the capacity for dialogue facilitated by four parts of the *Charter*: ss. 1 and 33, the "qualified *Charter* rights"—ss. 7, 8, 9, and 12, and equality rights found under s. 15(1), the first three of which are relevant to this paper.[91]

Whereas fundamental rights scholars utilize s. 1 to support a judicial supremacy, dialogue scholars identify it as an indicator of the legislature's capacity to respond to the courts. Hogg & Bushell argue that the legislature has the capacity to see where the judiciary disagrees and amend it because s. 1 requires the court to note (or justify) explicitly why the legislation in question is incongruent with the *Charter*.[92] Subsequently, the legislature has the capacity to respond to the courts by adapting the legislation to meet the specific issues

[89] Hogg & Bushell, "Charter Dialogue", *supra* note 12.
[90] See especially Hogg & Bushell, "Charter Dialogue", *ibid at 9*0-91. Peter W Hogg, Allison A Bushell Thornton, & Wade K Wright, "Charter Dialogue Revisited: Or "Much Ado About Metaphors" (2007) 45 Osgoode Hall LJ 1 [Hogg, Bushell, & Wright, "Charter Dialogue Revisited"] at 5.
[91] Section 15(1) prohibits discrimination based on a variety of demographic factors including age, gender, ethnicity, religion, and mental/physical disabilities. Decisions of this kind, such as same-sex marriage, often leave the legislature open to draft a response to the law, as the courts are solely concerned with addressing its unconstitutional components on a technical basis. See especially Hogg & Bushell, "Charter Dialogue", *ibid* at 90-91. In response, Kent Roach offers further justifications for judicial review such as the capacity to protect minorities vulnerable to a tyranny of the majority allowing them to partake and be protected in the adversarial process of the Canadian criminal justice system. See Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall LJ 169 [Roach, Sharpening the Dialogue Debate] at 179-80.
[92] For more context on how s. 1 allows the government to justify its infringements of the *Charter* refer to note 72.

found to be incongruent with the Constitution (as interpreted by the courts).[93] Similarly, dialogue scholars argue that s. 33 is a legitimate avenue for ensuring the legislature can respond, where the legislation may violate s. 2 or ss. 7-15 of the *Charter* by inserting a notwithstanding clause into the legislation. In tandem, these two sections of the *Charter* allow the legislature to respond to an actual or anticipated finding by the courts that legislation is inconsistent with the Constitution by amending the legislation to address these issues or by introducing a clause that the legislation will operate notwithstanding the *Charter*.[94] In these capacities, dialogue theory addresses the critiques of *Charter* critics by arguing that the legislature always has the capacity to respond to the courts in instances of dialogue.

The qualified rights, located under ss. 7, 8, 9, and 12 vary from s. 1 in that they are qualified in and of themselves. While this means they are still subject to s. 1 limitation, there are internal limitations to the rights protected by these clauses.[95] For instance, s. 7 guarantees the right to life, liberty, and security of the person as far as it does not violate principles of fundamental justice. Section 1 therefore can limit these rights, but only in certain capacities as these rights have internal qualifications that exist beyond the scope of s. 1 to ensure that limitations on the *Charter* right are reasonable.

While dialogue theory may justify judicial review, it mainly attempts to demonstrate that Canada operates under a softer iteration of judicial review than its

[93] Notably, s. 7 of the *Charter* has been found by the courts to be exceptionally hard to justify infringing under s. 1, and will come into play in Chapters 3 and 4. See especially *R. v Oakes*, [1986] 1 SCR 103. See also Hogg & Bushell, "Charter Dialogue", *supra* note 12 at 84-87.
[94] Hogg & Bushell, "Charter Dialogue", *ibid*; Roach, "Sharpening the Dialogue Debate", *supra* note 91.
[95] There is some speculation that s. 7 may not be limitable by s. 1, however this issue has never arisen in a decision by the Supreme Court. Some scholars point to how the principles of fundamental justice occupy similar limits as found under s. 1. For more see Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, (Toronto: Irwin Law, 2012) at 287 [Stewart, *Fundamental Justice*].

American counter-parts.[96] Yet, Hogg and Bushell still advocate for the judiciary's interpretation of the Constitution to be supreme against a legislative supremacy short of the notwithstanding clause.[97] Arguing against coordinated approaches to interpreting the *Constitution*, dialogue scholars argue that the courts are fallible, but that the legislature responds to their decisions where they "get it wrong".[98] Hogg and his colleagues go so far as to acknowledge that the legislative and executive branches do and should interpret the *Charter*, but that the courts may be better suited to interpreting the *Charter* than the legislature.

In short, dialogue scholars concede some issues raised by the *Charter* critics such as the issue of judicial supremacy, and advocate for a softer form of judicial review that features capacities for response by the legislative branch. This concession distances them from the fundamental rights scholars because it claims that the legislature always has the capacity to respond by addressing the failed components under s. 1 analysis or invoking the override clause. Consequentially, dialogue scholars argue that judicial review under the *Charter* is not anti-majoritarian because the legislature has the *capacity* to respond to judicial findings of unconstitutionality and that in situations where the legislature does not respond, it should be assumed the legislature agrees with the position of the judiciary.

[96] The justification for judicial review is premised on three components as discussed by the fundamental rights scholars. Namely, that Canada has entered a post-Second World War era where inalienable rights exist in modern society. Second, the *Charter* passed with the support from the democratically elected Parliament. Finally, ss. 1 and 33 of the *Charter*, combined with s. 52 of the *Constitution Act 1982* demonstrate Canada's choice to place the judiciary in a position capable ensuring the constitutional legitimacy of legislation. For more see Hogg, Bushell & Wright, "Charter Dialogue Revisited", *supra* note 90 at 28.
[97] Roach, "Sharpening the Dialogue Debate", *supra* note 91; Hogg, Bushell & Wright, "Charter Dialogue Revisited", *ibid* at 31-33.
[98] Hogg, Bushell & Wright, "Charter Dialogue Revisited", *ibid* at 32.

Responses to Dialogue Theory: Consolidating Critiques of the *Charter* Critics

While the judicial dialogue literature has complicated the view of some fundamental right scholars, dialogue critics still maintain that the courts are exceeding their legislated capacity and are operating undemocratically.[99] Four of the leading scholars who critique dialogue theory are Christopher Manfredi, James Kelly, Grant Huscroft, and Andrew Petter. I shall discuss their critiques of dialogue theory in turn.

Coming from two different positions on the political spectrum, Manfredi and Kelly have united against the literature's taking up of dialogue theory for a few reasons. First, they argue that Hogg and Bushell's claim that the legislature had responded to a majority of the controversial judicial decisions does not necessarily mean there is a dialogue between the judicial and legislative branches. Specifically, they critique this notion under the premise that many of these instances of dialogue are actually the legislature amending the legislation in accordance with the court's decision.[100] In addition, Manfredi and Kelly claim that a majority of the legislative responses to judicial decisions featured major and not minor revisions as Hogg and Bushell suggest. Subsequently, Manfredi and Kelly find that dialogue does not address the legitimacy issues of the courts as dialogue scholars insist, but instead advocates a system where the courts can continuously overrule the legislature.

[99] I switch between *Charter* critics and dialogue critics for point of flourish. While not all dialogue critics are necessarily *Charter* critics, the critical response to dialogue theory is mostly couched in *Charter* critics terms. As such, I use both here to reflect how *Charter* critics argue dialogue theory does not adequately address the substance of their previous critiques against the fundamental rights scholars. See especially Dominic DiFruscio, "Patriation, Politics and Power: The State of Balance Between the Supreme Court and Parliament after Thirty years of the *Charter*" 8 Journal of Parliamentary and Political Law 29 [DiFruscio, "Patriation, Politics and Power"]. See also Roach, *Supreme Court on Trial*, *supra* note 33 at 105; Richard Sigurdson, "Left- and Right-wing *Charter*phobia in Canada: A Critique of the Critics" (1993) 35 International Journal of Canadian Studies 3.

[100] Christopher Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall LJ 513 [Manfredi & Kelly, "Six Degrees of Dialogue"] at 519-20.

Disagreeing with Hogg and Bushell's position that the judiciary should be the final interpreter of the *Charter*, Huscroft argues that prioritizing judicial over legislative interpretations of the Constitution undermines the concept of dialogue.[101] Huscroft acknowledges the capacity of the courts to review the constitutionality of legislation, but finds a lack of a structure to regulate this practice.[102] Specifically, he contends that the courts effectively limit the capacity of the legislature to respond to issues because they can either narrowly or broadly interpret the scope of rights under the *Charter* in cases, such as *RJR MacDonald*.[103] Whereas Hogg and his colleagues argue that judicial dialogue enforces a soft form of judicial review, Huscroft claims that the courts have interpreted the *Charter* to grant them the ability to have the last say by constantly finding the legislature's response incompatible with the *Charter*.[104] As such, Huscroft maintains that dialogue scholars are not concerned with normative justifications of judicial review, but instead rationalizing judicial supremacy over the Constitution by highlighting the illusion of a capacity for the legislature to respond to a judicial decision.[105]

---

[101] Grant Huscroft, "Constitutionalism From the Top Down" (2007) 45 Osgoode Hall LJ 91 [Huscroft, "Constitutionalism From the Top Down"] at 92-93.
[102] *Ibid*, at 94-95.
[103] *RJR MacDonald* was a case questioning big tobacco companies' right to free speech in relation to advertising. The Supreme Court, in their 5-4 majority decision, found that the legislation was overly broad when enacting a ban on advertising. Justice McLachlin, as she then was, found partial bans on advertising in conditions such as targeting youth, or lifestyle advertising. The legislature in its response specifically followed these non-restrictive recommendations in an attempt to ensure the new legislation could withhold *Charter* scrutiny. Consequentially, scholars have argued that due to the detailed response by the courts outlining what it would deem as a reasonable limit, that the legislature had no room to insert their own take on the issue and conceded to the Supreme Court's suggestion. See *RJR-MacDonald Inc. v Canada (Attorney General)* 1995 3 SCR 199 [*RJR-MacDonald*]. See also Huscroft, "Rationalizing Judicial Power", *supra* note 73. See also Hiebert, *Charter Conflicts*, *supra* note 39 at 77-90; Hiebert, "Wrestling with Rights", *supra* note 39 at 175-83.
[104] Huscroft, "Constitutionalism from the Top Down", *supra* note 101 at 97.
[105] Huscroft, "Rationalizing Judicial Power", *supra* note 73 at 52.

Agreeing with Huscroft, Petter argues that judicial dialogue theory does not account for the policy decisions the court makes under the *Charter*.[106] Further critiquing dialogue theory, Petter argues that offering the legislature the opportunity to respond does not justify the court's actions as interpreted by fundamental rights and judicial dialogue scholars, and thus the court's decision to trump the legislature is illegitimate.[107] Moreover, Petter argues against dialogue theory for fear that it grants political powers to the courts through interpreting cases, hierarchizing them over the legislature.[108]

A culminating critique of the dialogue critics is that the final say on interpreting the *Charter* is left to the judiciary despite the claims of Hogg and his colleagues that the legislature always has the capacity to respond. Specifically, dialogue critics claim that the judiciary in any given instance has the capacity to have the last say on interpreting the *Charter* where the legislature is limited in its responses. Dialogue critics claim that using s. 33 of the *Charter* would trigger large public backlash making it politically untenable, or that the courts have expanded rights outside of their context in such a way that it has limited the possible legislative responses. The result, for critics of dialogue theory is that the exercise of judicial review under the *Charter* remains undemocratic because it skirts other branches of the government and hierarchizes judicial interpretations of the Constitution.[109]

---

[106] Andrew Petter, "Rip Van Winkle in *Charter*land" (2005) 63 The Advocate 337 reprinted in Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) at 141.

[107] *Ibid*, at 143. Specifically, Petter argues it does so through ignoring the privilege of the courts and regarding the legislature's responses similarly, ignoring how the public take up judicial interpretations of the *Charter*, as well as ignoring the legislature's policy objectives on certain issues. See Andrew Petter, "Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn't Such A Good Thing After All)" (2007) 45 Osgoode Hall LJ 147 [Petter, "Taking Dialogue Theory"] at 149.

[108] Petter, "Taking Dialogue Theory", *ibid* at 149.

[109] Baker, *Not Quite Supreme*, *supra* note 10; Andrew Petter, "Taking Dialogue Theory", *ibid*. See also Andrew Petter, "Legalise This: The *Charter*ing of Canadian Politics in James B. Kelly & Christopher P. Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Victoria: University of British Columbia Press, 2009) 33.

These critiques of dialogue theory therefore resonate with the *Charter* critics' concerns regarding the legitimacy of the judiciary to review the constitutionality of the legislation. What I have covered by no means encompasses all of the literature regarding judicial review in Canada. James Kelly, for example, in his book *Governing With the Charter: Legislative and Judicial Activism and Framers' Intent* offers a more nuanced critique of both judicial dialogue scholars and their critics in advocating for a wider understanding of how the state functions outside of the dichotomy of the legislative and judicial branches. While these other approaches have made interesting contributions to the judicial review debate in Canada, to expand further upon these nuances is beyond the scope of this project.

Towards a Charitable Rendition of Judicial Dialogue: Coordinated Interpretation and Contestation

To mediate this divide on which branch holds the final say over the *Charter* I turn towards a coordinated approach to interpreting the *Charter.* Taking arguments from both sides, a coordinated approach skirts the aspect of final say featured in these above debates and argues that the two branches are equally legitimate in interpreting the *Charter*.[110] This approach requires analyzing how the legislative and judicial branches of the state interact with one another through interpreting the Constitution. I directly use the works of Baker and Hiebert as two examples of coordinate theory to articulate the benefits of moving away from the legitimacy debate to focus on the actual interactions between the judicial and legislative branches.

[110] See especially Slattery, "Theory of the Charter", *supra* note 12 at 705-8. See also Barry Friedman, "The Politics of Judicial Review" (2005) 84 Tex L Rev 257.

In his book, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation*, Baker proposes a coordinate interpretational approach to the Constitution.[111] Coordinate interpretation theory starts from the idea that, both the legislative and judicial branches have the ability to interpret the *Charter* as argued by the fundamental rights scholars above. Each institution (whether it be the legislature or the judiciary) brings its own areas of strength or expertise to the interpretation function. This simply means that the legislature will have more expertise in policy concerns, whereas the judiciary is more equipped to deal with individual cases, but both avenues of interpretation are valid. Consequentially, while one party may be better equipped to deal with a certain issue, the other branch still has stakes in the outcome. Therefore these branches need to work together to interpret the *Charter* through each of their sets of expertise.[112] Notably, coordinate theory specifically recognizes the capacity of the legislature to interpret the Constitution in an unlimited capacity, unlike the position advocated by Hogg and his colleagues.[113]

[111] This mode of coordinate interpretation has many names. I choose to use Slattery's term—coordinate interpretation—because Baker has taken it up in his book. The term implies an approach where the branches of the state coordinate with each other, reflecting a horizontal structure between them. Moreover, I feel it is the most charitable term to reflect a distancing from the formal debate of judicial review in trying to settle on a middle ground. Consequently, while other scholars may refer to similar ideas as equilibrium theory (Christine Bateup), constitutional departmentalism (Ming-Sung Kuo), shared responsibility (Janet Hiebert), or coordinate construction (Roach). I remain consistent in calling it coordinate interpretation. That does not however restrict me from drawing upon these authors and their similar arguments. See generally Baker, *Not Quite Supreme*, *supra* note 10; Bateup, "Dialogic Promise", *supra* note 15; Dixon, "Dialogue and Deference", *supra* note 15; Hiebert, *Charter Conflicts*, *supra* note 39; Roach, *Supreme Court on Trial*, *supra* note 33; Hiebert, "Relational Approach", *supra* note 39; Ming-sung Kuo, "Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?" (2013) 26 Can JL & Jur 341.

[112] Baker, *Not Quite Supreme*, *supra* note 10 at 61. See E.g. Slattery, "A Theory of the Charter", *supra* note 12.

[113] Hogg, Bushell, & Wright, "Dialogue Theory Revisited", *supra* note 90; Roach, "Sharpening the Dialogue Debate", *supra* note 91.

Baker deploys this concept of a coordinated interpretation in two different instances. The first is what he calls a "minority retort" that speaks to the legislature adopting the wording of a dissenting judicial decision—Baker is specifically interested in 4-5 'coin-flip' dissents—into the legislature's interpretation of the Constitution. This reflects an understanding of coordinate interpretation where the legislature considers the contributions of the judiciary, but ultimately aligns with the dissent because the reasons of the dissent better align with the policy preferences of the legislature.[114] Adopting the reasons of the dissenting judges simultaneously demonstrates an appreciation for the judiciary's right to interpret the *Charter* while disagreeing with the majority opinion.

The second instance Baker labels a "textual retort" and comes about when the legislature amends legislation to address the judiciary's technical concerns while maintaining the spirit and objectives of the previous legislation. Under this model, Baker advocates that the judiciary should accept the amended provision, and reverse its previous judicial decision.[115] This textual retort reflects the legislature "standing its ground" and

[114] Throughout his book Baker continuously refers to the 5-4 decisions as being hugely chance based and resembling the 'flipping of a coin'. This metaphor, while apt and not entirely untrue, limits his interpretation of coordinate interpretation to specific instances where the courts are heavily divided. Baker, *Not Quite Supreme*, *supra* note 10 at 18 and 45. Baker specifically uses the *O'Connor* and *Mills* decisions of the Canadian Supreme Court as a case of this three-stepped instance of dialogue to demonstrate an instance where this has happened. My concern is that it does not reflect instances where the courts are united, which are the examples I analyze in my case studies.

[115] The example analyzed by Baker cases of *Morales* and *Hall*. In *Morales* the Supreme Court of Canada struck down s. 515(10) of the *Criminal Code of Canada* after finding that it could not be saved under s. 1 of the *Charter* as they found there to be no pressing and substantive objective to the law in addition to its harm being disproportion to the benefits gained. In response to this decision Parliament tendered a new version of s. 515(10) of the *Criminal Code* that was more nuanced and pointed than the impugned provisions found in *Morales*, but simultaneously shared the same objective of the prevision provision and used a non-exhaustive list in comparison to the tightly restrictive instances Chief Justice Lamer offered in *Morales*. The case of *Hall* the accused had killed a relative and there was little concern that the accused would flee the country or reoffend, but was detained under the new s. 515(10) of the *Criminal Code*. Chief Justice McLachlin, speaking for the majority in *Hall* found that removing "on any other just cause being shown and without limiting the generality of the foregoing" that s. 515(10) could withstand *Charter* scrutiny, and therefore agreed with the decision of the bail judge to deny bail to the accused. Doing so, as Baker demonstrates, was to rely on the *Morales* decision of the Supreme Court, although not in spirit. Combined with the dissenting opinion by Justice Iacobucci, Baker argues that Supreme Court of Canada's

refuting the interpretation of the Constitution as offered by the judiciary.[116] These two instances, according to Baker, demonstrate avenues of coordinate interpretation in the Canadian framework by how they facilitate both the legislature and the judiciary to come together in the middle to interpret the Constitution.[117]

Unfortunately, the coin-toss metaphor does not hold up when applied against unanimous verdicts from the Supreme Court. While Parliament can reasonably agree with the minority of judges in a legal decision—even those in dissent—and still be viewed as respecting the judiciary's legitimate authority to interpret the *Charter*, Baker's claim becomes problematic in cases involving less divided decisions from the judiciary.

Conversely, when the legislature enacts a textual retort it demonstrates a disagreement of interpretation over the Constitution and attempts to make that disagreement known by standing its ground against the judiciary's interpretation. In these instances, the legislature is not asserting dominance over the judiciary but instead letting its interpretation of the Constitution be known. Voicing disagreement in this fashion does not assert any finality to the legislature's interpretation. Instead, it exemplifies the legislature offering a response to the judiciary using its equal authority to tender a competing interpretation of the *Charter*. Disagreeing with the judiciary in this way pushes

---

decision in *Hall* is "illustrative of the hostility towards the textual retort". See especially Baker, *Not Quite Supreme*, *ibid* at 24-37. See also *R. v Morales*, [1992] 3 SCR 711 [*Morales*]; *R. v Hall*, [2002] 3 SCR 309, 2002 SCC 64 [*Hall*].

[116] In addition, and to an extent precluding to this, Hiebert contends that bills of rights are more than just laws. Instead, they are a codification of morals and normative/symbolic gestures of what society values. If the legislature is more receptive to the judicial interpretations of the *Charter* then it may be more facilitative in its legal decision-making. If the opposite is true however, she forecasts that the judiciary may be reluctant to give way to the legislature's interpretation of the right up for discussion. While it may be too early to say this is necessarily the case, in Chapters 3 and 4 I take up instances where it appears these parties have started to talk past each other, instead of directly to each other. See Hiebert, "Parliamentary Bills of Rights", *supra* note 48; Hiebert, "Wrestling With Rights", *supra* note 39.

[117] Baker, *Not Quite Supreme*, *supra* note 10 at 18.

away from the judicial review debate of legitimacy and demonstrates the capacity of both branches to interpret the Constitution.

In order for coordinate interpretation approaches to function, Baker claims a lack of any hard separation of powers between the branches of the state.[118] Using the work of Hogg, Baker argues that the separation of powers distinguishes between, but does not separate, the powers between the legislature and the judiciary.[119] He finds that watertight distinctions between these branches of the state are not necessary to have these branches speak with one another.[120] The result is a system where the different branches of the state bleed into one another, allowing for interactions between themselves provided that one branch does not entirely subsume the other.[121] These sites of overlap are where, according to Baker, conflict in this model tends to happen. This fluid understanding necessitates the capacity for one branch to act against the other, yet leaves room for agreement when they agree.

Baker disagrees with dialogue scholars' claims that the Constitution needs to be enforced by an objective and removed institution because it is not explicit in the separation of powers which branch should be given this role. Instead, Baker—mirroring the position of the *Charter* critics discussed above—argues the judiciary has simply assumed this larger

---

[118] *Ibid* at 70 and 77.
[119] *Ibid* at 54. See also *Constitutional Law of Canada*, *supra* note 3.
[120] Baker, *Not Quite Supreme*, *ibid* at 55.
[121] Baker goes into detail regarding the relationship of the executive and the legislature. Engaging with the argument that the legislature and the executive have become fused, Baker argues this is not the case. There are notable instances where these branches have potential to disagree with the other. Consequentially, while the parliamentary model is structured in such a way that members of the executive exist also in the legislature, there are still opportunities, as Baker contends, for backbench MP's to refuse towing party lines. The result is two branches, which are heavily overlapped, yet still retain enough autonomy to resist constitutional interpretations of the other if it so desired. Furthermore, Baker argues that just because the upper house *usually* agrees with the executive, it does not mean that they have to. The possibility for resistance refutes claims of a totalitarian executive, which Baker argues legitimates this interpretation on constitutional interpretation. See especially Baker, *Not Quite Supreme*, *ibid* at 54-79.

position of power upon themselves.[122] Baker contends that the legislature can continue to enact legislation regarding its own interpretation of the Constitution even in cases of disagreement with the judiciary, such as instances of a textual retort.[123] This process of bypassing the courts, is contradictory because it advances against the central thesis of coordinate theory that both the legislature and the judiciary are entitled to interpret the Constitution.

Baker argues that the judiciary has the capacity to easily overturn the legislature through legal decisions, and he argues that it is more difficult for the legislature to amend legislation or invoke a state of constitutional notwithstanding. Basing this argument on *Charter* critics' claims that the legislature is democratic and equally, if not more qualified to interpret the *Charter,* Baker argues that the judiciary creates uncertainties in law that would not exist if it deferred to Parliament.[124] This echoes back to the judicial review debate discussed in section two. Specifically, Baker argues that the legislature should have the last say on certain issues because it is better equipped to deal with certain issues. The result is a contradiction in his claim for a constitution open to constant interpretation by both sides through his legitimating one branches' actions over the other. In attempting to privilege the legislature in certain circumstances, he fundamentally undermines the tenets of coordinate theory by arguing a branch should not be able to tender an interpretation of the Constitution regarding certain issues. This is detrimental to a cooperative approach of interpreting the *Charter* because for both branches to be able to truly interpret the Constitution one branch must not be privileged over the other.

[122] *Ibid* at 104 and 106.
[123] *Ibid* at 121-2
[124] *Ibid* at 51

Hiebert offers an avenue to analyze the relationship between the legislative and judicial branches of the state without regressing into the legitimacy debate. She maintains that both the legislative and judicial branches interpret the *Charter* and that each should feel free to disagree with the other branch's interpretation.[125] Specifically, Hiebert argues it is important to ensure the dialogue between the legislature and the judiciary are clearly revealed to the public as to not trivialize the transparency of the state.[126] Consequentially, Hiebert speaks against the assumption of the judicial review debate that there needs to be a final say through advocating for a coordinate model on *Charter* interpretation that does not place one branch above the other.

A key benefit of Hiebert's approach is that it questions why the judiciary has a privileged position on interpreting the Constitution.[127] This privilege, she argues, comes about from the legislature not using its legitimate authority to interpret the Constitution despite having various means to override the court's interpretation of the Constitution such as the legislative legitimacy to create/amend legislation and to invoke the notwithstanding mechanism.[128] By placing an onus on the legislature to assist in interpreting the *Charter*, Hiebert's take on coordinate theory argues it is the goal of both the legislative and judicial branches to interpret the *Charter* in line with its individual interests. The result is an approach that argues that the judiciary has not bullied the legislature out of a significant interpretive role as *Charter* critics contend, but rather suggests the judiciary is doing its duty to present its voice against a seemingly timid legislature.[129]

---

[125] Hiebert, *Charter Conflicts*, *supra* note 39; Hiebert, "Parliamentary Bills of Rights", *supra* note 48; Hiebert, "Relational Approach", *supra* note 39.
[126] Hiebert, "Wrestling With Rights", *supra* note 39 at 205-06.
[127] Hiebert, "Parliamentary Bills of Rights", *supra* note 48 at 27.
[128] *Ibid* at 19.
[129] Hiebert, *Charter Conflicts*, *supra* note 39.

Hiebert speculates that understanding how *Charter* values are internalized by the legislature is "a vital indicator of the *Charter*'s effect on governing".[130] This emphasis on the *Charter* as an effect on governance reveals how the courts not only interact, but also *govern* with the legislature. The problem is, according to Hiebert, that the legislature is prone to wait for the courts to address a controversial issue, in fear that the judiciary's interpretation trumps its own.[131] Specifically, she argues that the legislature waits for the courts to address the issue before proceeding in fear that a judicial verdict could arise before the legislation is drafted, effectively wasting both the time and money invested into constructing it. By waiting for the courts to address the issue, the legislature is neglecting its duty to interpret the *Constitution* until after the courts have, resulting in a privileging of the judiciary to be the first to interpret controversial issues.[132]

The culture of the legislature, according to Hiebert, is concerned with adhering to the limits on the Constitution placed by the judiciary. She theorizes that the legislature specifically internalizes the current judicial interpretations of the *Charter* and attempts to ensure that current bills do not violate them. The legislature consequentially has developed a culture where it fears the judiciary's interpretations of the *Charter* to the point of not disputing its judicial interpretation, even in situations where it disagrees with the courts.[133] This is problematic because it suggests that any views disagreeing with the judicial interpretation of the *Charter* are not put forward. This effectively prioritizes the judiciary's interpretation of the Constitution over the legislature's interpretation. The result shifts away

[130] Hiebert, "Relational Approach", *supra* note 39 at 166. See also Janet Hiebert, "Parliamentary Engagement with the *Charter*: Rethinking the Idea of Legislative Rights Review" (2012) 58 Sup Ct L Rev 87 [Hiebert, "Parliamentary Engagement"] at 92.
[131] Hiebert, "Relational Approach", *ibid* at 167.
[132] Hiebert, *Charter Conflicts*, *supra* note 39 at 43-45.
[133] Hiebert, "Relational Approach", *supra* note 39 at 173.

from a coordinate approach, as one side is too afraid to engage the other, leaving the judiciary to dominate the debate.[134]

An example of the legislature refusing to stand up for its interpretation in such a manner is the *RJR MacDonald* case. In *RJR MacDonald* the judiciary largely influenced the legislative response through its discussion of what a reasonable limit of the right to freedom of expression *might* include in its reasons for decision in the case, and the legislature did not feel it had the ability or desire to dispute the suggestions.[135] This scenario, using Hiebert's approach, reveals how the legislature was not bound to accept the judiciary's comments as Huscroft contends, but nonetheless backed away from offering a conflicting interpretation of the Constitution in fear that they may be incorrect.[136] Essentially, the claim that both branches can actively interpret the Constitution is severely undermined if the legislature refuses to advance a conflicting interpretation of the Constitution for fear that its interpretation may be incorrect.[137]

Rights, Hiebert expands, are inherently disputable and therefore we should not default to one branch regarding their interpretation.[138] Ensuring that both the legislature and the judiciary have the opportunity to advance their own interpretations of the *Charter* supports a horizontal structure among these branches by allowing for each branch to express its position on the issue at hand if it so desires. The result is a reflexive model with a perpetual capacity for inter-institutional disagreement. Notably, as I expand upon in the next section, this potentiality for contestation differs from a necessity of it.

---

[134] Hiebert, *Charter Conflicts*, *supra* note 39 at 174.
[135] Hiebert, "Relational Approach", *supra* note 39 at169; *RJR MacDonald*, *supra* note 103. See note 103 for more information on *RJR MacDonald*.
[136] Huscroft, "Rationalizing Judicial Power", *supra* note 73.
[137] *Ibid*.
[138] Hiebert, "Compromise and the Notwithstanding Clause", *supra* note 73 at 113.

This rendition of a coordinated approach is focused on how the branches of the state interact. Hesitant to use the word dialogue, Hiebert elects to speak about this relationship as a conversation because it suggests a fluid understanding of how these systems interact. Specifically, Hiebert finds that a conversation approach better relates how these branches are both legitimate in interpreting the *Charter* while highlighting their different areas of concern and expertise in running the state.[139] Most importantly, this theoretical approach celebrates the disagreement between the legislative and judicial branches as it organically arises and argues that the legislature should not be afraid to advocate for its own interpretations of the Constitution.[140]

Regarding the notwithstanding clause, Hiebert identifies the override clause as a tool to use when the legislature vehemently disagrees with the judiciary's interpretation of the *Charter*. She argues that it should only be used in exceptional instances of fundamental disagreement, such as to soothe worries about a misplaced judicial decision. Moreover, in support of Allan Blakeney, Hiebert argues that the notwithstanding clause should never be used pre-emptively as to do so would not allow the judiciary to use its legitimate authority over the *Charter* to voice its perspective, consequentially removing the judiciary's view from the public debate.[141] As I expand upon in the next Chapter, the notwithstanding clause offers an extreme yet legitimate avenue of further voicing the disagreement between the two branches of the state. For the purposes of this discussion however, Hiebert argues that

---

[139] *Ibid* at 200-01.
[140] Hiebert, *Charter Conflict*, *supra* note 39 at 50-51 and 208-12
[141] Hiebert, "Wrestling With Rights", *supra* note 39; Allan Blakeney, "The Notwithstanding Clause, the *Charter*, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010) 19 Const Forum Const 1 [Blakeney, "What I Thought We Were Doing"] at 4-6.; Hiebert, "Compromise and the Notwithstanding Clause", *supra* note 73; Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14.

the notwithstanding clause should only be used in response to a judicial decision, and never prior.

Hiebert, in distancing her position from the judicial review debate, emphasizes an analysis of *how* the *Charter* is interpreted over *who* has the most legitimacy to interpret it. Baker's response frames itself as one of advancing a coordinate approach to interpreting the *Charter*, yet in advocating for a primary role to be played by the legislature in certain circumstances, he regresses back to the *Charter* critic's position of hierarchizing the legislature's interpretation over that of the courts. As such, he privileges the interpretation of Parliament because he fears that the judiciary has been granted too much authority, ultimately limiting the potential of a coordinated approach.

Conclusion

Canada, as this Chapter has argued, has supported a horizontal model of the three branches of the state following the *Constitution Act 1982*. While the judicial review literature considers the relationship between the legislative and judicial branches, section two demonstrated the literature's limitations. In particular, by prioritizing which branch is more legitimate in its claim to interpreting the Constitution, the judicial review literature has under examined *how* the legislature's actions may have broader implications. While coordinate interpretation scholars, such as Baker and Hiebert, push the judicial review debate outside its traditional territory to acknowledge a working relationship to accommodate for these shortfalls, they do not go as far as desired. Specifically, Baker regresses into a position that plainly privileges the legislature over the judiciary whereas Hiebert allows a final interpretation of the *Charter* to emerge.

The following Chapter demonstrates how an agonistic approach to politics strengthens Hiebert's push for a *Charter*-interpreting legislature by normalizing contestation in the public realm while supporting democratic renditions of transparent government by urging the government to justify its decisions regarding controversial issues. My goal in doing so is to demonstrate how removing the capacity of a final say over the Constitution allows the legislative and judicial branches to publically disagree with each other, and in doing so, constantly challenge each other to ensure the *current* interpretation of the *Charter* is the best it can be. The consequence of such an approach increases the transparency of the state by clearly articulating where these branches disagree with one another, and more importantly, *why*.

Chapter 2: Doing Away With the Final Say: An Agonistic Approach to Interpreting the Constitution

> To affirm the perpetuity of contest is not to celebrate a world without points of stabilization; it is to affirm the reality of perpetual contest, even within an ordered setting, and to identify the affirmative dimensions of contestation.
>
> –Bonnie Honig, *Displacement of Politics*, page 15.

This Chapter expands upon the last by problematizing the idea of a final say regarding interpreting the Constitution. The judicial review literature contends that a last say is possible in its attempt to argue that either the judiciary or the legislature have more authority to interpret the *Charter*. Implying that one side can have the final say is problematic because, as this Chapter illustrates, it presupposes that ultimately there is one all-encompassing definition of the Constitution.[142] To do so undermines the horizontal structuring of the legislative and judicial branches by insinuating that one ultimately prevails *over* the other, creating a finite trajectory for the *Charter*. This Chapter argues that while disagreement over a specific issue may settle over time, it is always available to re-emerge as social circumstances change. Allowing for this capacity through eliminating concepts of a final say demonstrates that this practice of active contestation and disagreement is not a means to an end, but an end in and of itself.[143]

---

[142] Kahana, "Understanding the Notwithstanding Mechanism", *ibid* at 248. It is important to note that Kahana is specifically talking about a "deliberative disagreement approach" whereas I am arguing for an agonistic disagreement approach. The difference is mapped out by a series of scholars, most notably Mark Wenman, *Agonistic Democracy: Constituent Power in the Era of Globalization* (New York: Cambridge University Press, 2013) [Wenman, *Agonistic Democracy*] at the introduction. The key difference is that a deliberative approach prioritizes a settling function. So while this approach allows both sides to continuously argue back and forth and eventually it claims they will settle on a universal interpretation of the *Charter* . This is not the case for an agonist approach. An agonist approach features the same bartering between positions, but it does not subscribe to settling. Settlement still happens under this model, but not through actively seeking it. For agonistic approaches, full, unapologetic disagreement is encouraged because it reflects a pluralist understanding of society. See also Chantal Mouffe, "Deliberative Democracy or Agonistic Pluralism?" (1999) 66 Social Research 745; Fuat Gursozlu, "Debate: Agonisim and Deliberation—Recognizing the Difference", 17 The Journal of Political Philosophy 356.

[143] Honig, *Displacement of Politics*, *supra* note 19 at 15.

Contestation, as I refer to it here, speaks to the idea of indefinite unapologetic conflict—or struggle—between the interpretations of the *Charter* rendered by both the legislative and judicial branches of the state.[144] Moving away from the coordinate models discussed above, a contestational approach acknowledges outright that these two branches of the state will disagree on certain issues. While this disagreement may happen for a variety of reasons including political ideology, differing backgrounds and expertise, or activist agendas to name a few, a contestational theory acknowledges both the legislature and judiciary's authority to interpret the *Charter*.[145] This disagreement on certain issues does not mean that one side should sit idly by and let the other interpret the Constitution on its own. Instead, it argues that both sides, similar to Baker's textual retort, should firmly stand to the defense of their interpretations when possible. The benefit of this contestational approach is that it normalizes disagreement between the legislature and judiciary while making this disagreement clearer to the public, making the interpreting process more transparent and thus democratic.[146]

A contestational approach respects both parties' interpretations, but also acknowledges that the public have a stake in these interpretations. Making this debate more visible—whether it be through technical papers, case law, special Parliamentary committee reports, or, in exceptional cases, invoking the notwithstanding clause—increases the transparency of the state which, in a democratic nation such as Canada, allows for the public to voice their (dis)satisfaction with an interpretation of the Constitution.[147] This

[144] Andrew Schaap, "Introduction" in Andrew Schaap, ed, *Law and Agonistic Politics* (Farnham, England: Ashgate Publishing, 2009) 1 at 1.
[145] Arendt, *The Human Condition*, *supra* note 17.
[146] Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20 at 273.
[147] *Ibid* at 273.

discontent could arise in letters to MPs, newspaper editorials, or ultimately at the ballot box during an election, ensuring greater transparency (and accountability) in the operation of democratic institutions, including the legislature, judiciary, and even the executive.

I ground this contestational approach in the works of Bonnie Honig as she divides constitutionalism and democracy. Rooted in the works of Friedrich Nietzsche and Hannah Arendt, Honig rests her approach in agonism and embraces uncompromised contestation in the public sphere.[148] I adapt Honig's concepts as they relate to Canadian democratic values and apply them to the dialogic relationship between the legislative and judicial branches of the state. This process involves an explicit voicing of disagreement, making the positions of the judicial and legislative branches visible to the populace regarding the issue at hand.[149] I integrate this approach by arguing that the legislature can legitimately operate notwithstanding the Court's interpretation of the *Charter without* formally invoking the override clause. This *informal* way of acting notwithstanding the *Charter*, I argue, obfuscates the contested nature of the interpretation of the *Charter* and prioritizes the legislature over the judiciary by repressing the disagreement between them.

In my view, it is preferable for the legislature to justify its decision to bypass the interpretation offered by the Courts. However, in extreme situations where the legislature feels it necessary to maintain the state's best interests, it may be beneficial for the legislature to invoke s. 33. In this way, I advance two different dimensions to consider the democratic aspects of the legislature's decision to act notwithstanding the *Charter* in response to a judicial interpretation of the *Charter.* These factors—whether the legislature

[148] Honig, *Displacement of Politics*, *supra* note 19.
[149] Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Hiebert, "Wrestling With Rights", *supra* note 39.

has provided an adequate justification for its decision to act notwithstanding the judiciary's interpretation of the *Charter* and whether or not the legislature has officially invoked the notwithstanding mechanism, measure, in part, how democratic the legislature is in its response to a judicial decision. While a legislative response that justifies its deviation from Courts is the most ideal, in exceptional circumstances invoking the override clause may also play a part in rendering the Canadian legal and political systems more transparent and thus democratic.

Action, Agonism, and Democracy

In her book *Political Theory and the Displacement of Politics*, Honig distinguishes two theories of politics. The first, which she calls virtue theories of politics, are rooted in the works of Immanuel Kant and John Rawls and separates conflict from politics by assuming that there is an 'end state' to politics. This 'end state' argues that eventually society will become homogenized, therefore rendering an ultimate form of politics that addresses all issues. The other position, which she calls *virtù* theories of politics, celebrates sites of perpetual contestation over the political, as it exists in the public realm.[150] The core of her argument is that these competing natures exist in tandem. In other words, the first theory advocates for order and stability in society, whereas the latter argues for an unlimited *potential* of change/resistance against the *current* state of affairs. I utilize these theories here to demonstrate how interpretations of the *Charter* are stabilized in that the law always has a *current* interpretation (whether it is from the legislature or the judiciary) *as well as* the *capacity* to be interpreted differently by either branch. In combination, these theories normalize the contested process of *Charter*-interpretation.

[150] Honig, *Displacement of Politics*, *supra* note 19 at 28; Arendt, *The Human Condition*, *supra* note 17 at 28.

Virtue theories of politics are concerned with managing the population and ensuring consistency with the goal of upholding public order.[151] In tying together the views of Kant and Rawls, Honig argues virtue theories of politics attempt to remove politics from the public and replace it with systems of bureaucratic administration.[152] These theories strive to remove constituent power—power originating in the public—and place them under an agreed upon authority such as law and constitutions.[153] Subsequently, these theories have a (teleological) desire to reduce and limit resistance as it runs against the goals of an order-obeying society.[154] Theories of virtue are problematic then, because they eliminate the possibility for plurality and, more generally, restrict competing interpretations of society (and therefore the law). To nuance this theory of politics, Honig turns towards *virtù* theories of politics in order to embrace a radical potential for difference.[155]

Virtù theories of politics, as Honig uses them, originate in the works of Arendt regarding action and the public/private divide, and draws upon the *agon*—the Greek word for contest or struggle—to create a perpetual *potential* for disagreement.[156] The public/private divide argues that there are two spheres in society. The public sphere is where people come together and communicate with each other and is integral to a functioning society. Alternatively, the private life is more personal and not integral to the running of the state as it takes place behind closed doors. Dividing between these two

[151] Honig, *Displacement of Politics*, *ibid* at 3 and 38.
[152] I*bid* at 2; Wenman, *Agonistic Democracy supra* note 142 at 221
[153] The act of creating a Constitution has been the target of countless academic inquiries and are outside the scope of my project. See E.g. Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).
[154] Honig, *Displacement of Politics*, *supra* note 19 at 9; Wenman, *Agonistic Democracy*, *supra* note 142 at 222.
[155] Honig, *Displacement of Politics*, *ibid* at 164; Wenman, *Agonistic Democracy*, *ibid* at 222.
[156] Arendt, *The Human Condition*, *supra* note 17 at 22.

creates a space where government functions—the public sphere—and one in which people live through their daily lives—the private sphere.[157]

The basis for this public/private divide is grounded in Arendtian thought regarding action. Actions, for Arendt, are consequences from individual's activities in the public realm and originate from an understanding of individuals that are free to act outside of (government) restraints.[158] Viewing actions in this way presents a pluralist rendering of society in which there are competing claims and no universal viewpoint.[159] Actions of people are connected to other people and reflect the connected aspect of society.[160] Subsequently, power comes from the ability to act in the public sphere that necessitates interacting with a network of people through actions.[161] This uncertainty of action and influence secures a perpetual state of contestation as actions will always change and develop along with society because different people will act in different ways.[162] A claim or idea in the public sphere is only as resonant as it is able to convince people to act in a certain way, leading to a perpetual potential for differing viewpoints on different issues.

The public sphere demonstrates where Arendt distances herself from philosophy in hopes of prioritizing action. For Arendt, action is the focus of political philosophy due to its emphasis on how freedom is actualized in the public sphere.[163] Freedom, in this way, is

---

[157] Helen McManus "Enduring Agonism: Between Individuality and Plurality" (2008) 40 *Polity* 509 [McManus, "Enduring Agonism"] at 509.
[158] Arendt, *The Human Condition*, *supra* note 17 at 9; Monique Deveaux "Agonism and Pluralism" (1999) 25 *Philosophy & Social Criticism* 1 [Deveaux, "Agonism and Pluralism"]; Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought* (New York: Viking Press, 1961) [Arendt, *Between Past and Future*] at 151-153.
[159] Arendt, *Human Condition*, *supra* note 17 at xii, 8, and 58.
[160] Honig, *Displacement of Politics*, *supra* note 19 at 76-80.
[161] Arendt, *Human Condition*, *supra* note 17 at 200-02; Honig, *Displacement of Politics*, *ibid* at 97.
[162] Arendt, *Between Past and Future*, *supra* note 158 at 192 and 223-24.
[163] Bikhu Parekh, *Hannah Arendt and the Search for a New Political Philosophy* (London: Palgrave Macmillion, 1981) [Parekh, *Arendt and the Search for a New Political Philosophy*] at Chapter 1.

actualized by having the *potential* to act in the public sphere—a component of which is to disagree with the current state of affairs. Consequently, for Arendt, acting in the public sphere is a fundamental part of the human experience.[164] It follows that the state, made up of its citizens partaking in the public sphere, should follow shifts in the public to reflect the ever-changing nature of a pluralist society more accurately.[165]

Action, for Arendt therefore allows a bypassing of pleasantries, striving to (re)create relations between institutions and people as opposed to further reinforcing existing ones. A virtuosic approach is harshly honest, rejecting the niceties of disagreement, and proceeds to shatter the self-disciplining models of deliberation—settling on an idea after a continuous back-and-forth between two sides—in the name of plurality.[166] Democratic politics, according to Honig, blend with this *virtù* approach as it resonates with the ever-changing and ambivalent nature of the population, and therefore the state.[167] The point however, of a virtuosic approach is to offer the *capacity* to disagree with the majoritarian view of society. This *capacity* to disagree ensures society continues to develop by one of two avenues. The first avenue is that the challenging/resisting opinion or view is found to resonate with the public. While this does not necessarily mean the new view is better, it could be advantageous for some reason over the previous. Alternatively, the *capacity* to disagree allows the public to reject the proposal, ensuring that the current system already addresses the concerns underlying this new proposal. Either way,

[164] Andrew Schaap, "Hannah Arendt and the Philosophical Repression of Politics" in Jean-Phillipe Deranty & Alison Ross, eds, *Jacques Ranciere in the Contemporary Scene: The Philosophy of Radical Equality* (London Continuum, 2012) [Schaap, "Repression of Politics"].
[165] Deveaux, "Agonism and Pluralism", *supra* note 158, McManus, "Enduring Agonism", *supra* note 157; Honig, *Displacement of Politics*, *supra* note 19 at 173.
[166] Honig, *Displacement of Politics*, *ibid* at 115-8; McManus, "Enduring Agonism", *ibid*.
[167] Honig, *Displacement of Politics*, *ibid* at 3 and 116.

challenging the status quo ensures society is able to change in accordance with the population and to develop/become more accommodating.

Honig is careful to mediate her divide between virtue and *virtù* theories of politics. While she pushes for the *virtù* and its capacities of the *agon*, she does not dismiss virtue theories of politics as they represent the settlement that happens in the public sphere.[168] In arguing that these branches are not necessarily opposite to each other, and instead rely on each other, Honig demonstrates the benefits of combining both theories. Specifically, while the virtue theories tend to stabilize and homogenize, the *virtù* theories increase the flexibility of the state by always offering the *potential* to challenge it. In the Canadian context, the virtue theories represent the desire for stability, such as the Constitution, whereas the *virtù* theories are symbolized in the capacity for the *Charter* to be constantly (re)interpreted by the legislative and judicial branches of the state.[169]

The important point is that this coupling does not undermine the power of the *agon* to resist and challenge the status quo. Resonating with an Arendtian understanding of individuals and actions, Honig's push for agonism reveals the possibility for radical disagreement in the public sphere. Moreover, this radical disagreement is necessary to ensure society remains fluid and pluralist. To disallow pluralist renditions of democracy, as Honig argues, would restrict the public sphere and not allow for new opinions on how society should function to develop. Facilitating contestation does not presuppose that a settling action does not happen in the public realm of the political.[170] Instead, it illustrates

[168] Honig, *Displacement of Politics*, *ibid* at 119 and 209-210. See also Honig, "Dead Rights", *supra* note 14. 200-4 and 209-10; Schaap, "Repression of Politics", *supra* note 164.
[169] Honig, *Displacement of Politics*, *ibid* at 200-11. See also Schaap, "Repression of Politics", *ibid*; Wenman, *Agonistic Democracy*, *supra* note 142 at 218.
[170] Honig, *Displacement of Politics*, *ibid* at 15.

how a democratic state requires both a limiting function *and* a function that facilitates resistance to current understandings of society in order for the state to remain free and in line with the desires of its population.[171]

Honig's agonistic approach reveals how the means of a contestational system are the ends in and of themselves for a democratic constitution. While on their own the virtue theories of politics advocate for a settling as society becomes homogenized, the *virtù* theories of politics ensure that there is always the *potential* to challenge these lines of thought. The *capacity* to challenge the status quo in such a fashion is important because it refuses to allow for a 'homogenized end' to political process. This foreseen end as advocated for by the virtue theories of politics is problematic because it implies a point in which radically different ideas are no longer allowed to manifest in the public realm whether it is a public opinion on policy or an interpretation of the *Charter*. Consequently, an agonistic approach to interpreting the Constitution supports the stabilizing components of virtue theories of politics while ensuring that there is always a *potential* for action, a prerequisite for freedom in an Arendtian view of the political.

Agonism, Contestation, and *Charter* Interpretation

The judicial review literature speaks to the virtue theories of politics as discussed by Honig by prioritizing the discussion of bureaucratic components—or legitimating features—placed upon the judicial and legislative branches. These administrative components are the focus of the literature as it emphasizes determining the legitimacy of two branches and which is the more legitimate of the two as the administrative and regulatory functions of the law require it.

[171] Honig, "Dead Rights", *supra* note 14 at 795-97.

According to the agonistic approach, the *current* interpretation of the Constitution supported by the virtue theories of politics—whether found in legislation, an amendment to that legislation, a judicial decision, or any other form of law utilized in a regulatory fashion—does not entirely dismiss other interpretations. It simply reflects that these systems, in order to function, *require one enforceable interpretation of the Charter at any given time*. A contest-centred approach therefore acknowledges the *current* interpretation of the Constitutions only offers a *contemporary snapshot* of the *Charter* and does not restrict what it *could* become in the future.[172]

Virtù theories of politics explain how interpretations of the Constitution come about. This entails two processes. The first requires understanding the contesting views offered by both the legislative and judicial branches of the state. Understanding why these branches have interpreted the Constitution in the way they have, as Peter Russell and Janet Hiebert argue, allows us to understand not only the issue in contention but also the position of the two branches on a certain issue.[173] The second process probes how these two branches mediate the contestation in question. As Honig suggests, this is not simply an approach focused on a deliberative compromise. Instead, it acknowledges that both branches of the state have the authority to interpret the *Charter* and that both come from different backgrounds that will influence their interpretation.[174] While the administrative nature of virtue theories of politics is necessary to maintain order in the public sphere, the

[172] Both the legislature's position to always create or amend legislation and in the judiciary's ability to override previous judicial findings if new evidence has arisen or the public has shifted its opinion on an issue demonstrate this balancing in action. See *Dead Rights*, *ibid*.
[173] Russell, "The *Charter* and Canadian Democracy", *supra* note 73.
[174] Honig, *Displacement of Politics*, *supra* note 19.

virtù theories offer a second dimension of this process that guarantees freedom in interpreting the *Charter*.[175]

This second process is not an attempt to undermine the rule of law—the idea that the government is required to live by its own laws—but instead to demonstrate the ever-changing realities of society by allowing the *Charter* to mutate alongside society.[176] It ensures that one branch does not abuse its power by always providing the other an avenue to respond.[177] Subsequently, the second process allows one branch to overturn the *current* interpretation of the *Charter*, specifically in instances where either the legislative or judicial branches feels there are significant problems with it. Whether it be through releasing a judicial decision or passing/amending legislation, both of these branches always have the capacity to have their voiced heard, and, more importantly, hold the opposite branch accountable. Allowing this flexibility demonstrates how society changes and is free to do so. Without the flexibility offered by *virtù* theories of politics, the Constitution could eventually settle on a firm interpretation that would undermine the capacity for both branches to tender new interpretations to either enforce its own position, or, more drastically, to hold the opposite branch accountable.[178] This stagnation is problematic

---

[175] *Ibid*.

[176] I specifically use the word mutate here because I am hesitant to invoke the growing tree metaphor commonly found in the constitutional law literature. This hesitance is grounded in the fact growing implies a teleological trajectory of forward, and the Constitution does not necessitate this. The Constitution allows for continual development reflecting of the changing nature of the populace, but this does not restrict back slides into previous Constitutional debates. Moreover, it is important that the Constitution does not get restricted from having these debates as to do so would ultimately limit the possibilities of what the *Charter could* be. Instead, seeing this mutation as a process in and of itself, as Honig suggests, there can never be a firm limit placed upon the Constitution as to do so would ultimately restrict freedom found in action. Examples of this include the ongoing debates in Canada over abortion or same sex marriage. While these decisions have not been reversed, it does not preclude a group of people from having, and expressing interest in re-criminalizing these acts.

[177] Notably, if the notwithstanding clause were to be invoked the courts *can still respond*, it just would need to wait until the override period ended. I take this issue up in more depth later on.

[178] Honig, *Displacement of Politics*, *supra* note 19; Honig, "Dead Rights", *supra* note 14.

because it ultimately limits action according to Arendt, and therefore dilutes freedom. Put in other words, the reflexive nature offered by the *virtù* theories of politics allows for the legislature and judiciary to contest one another and to change the interpretation of the *Charter* to reflect its current interests and to address problematic interpretations as they arise.[179]

Understanding contestation as neither progressive nor regressive, but as a means of rendering disagreement visible in the public realm allows citizens to see the battle over interpretations of rights by the legislative and judicial branches of the state.[180] Admittedly, this does not allow for immediate or direct influence on the state. Instead, it informs the electorate and allows them to voice their support (or concerns) regarding *the current interpretation(s)* of the *Charter* to their MP's, or more dramatically, through elections. Doing so will bring the population into the debate happening in the public sphere regarding the constitutional issue at hand.

This project is a push to include the *virtù* theories of politics into discussions revolving around the relationship between the legislative and judicial branches of the state. Approaching the relationship between the judiciary and the legislature through this framework illustrates how these institutions are more intermingled than the legitimacy-based arguments undertaken by dialogue scholars and their critics allow. The *virtù* theory of politics highlights how the *Charter* is constantly interpreted between two branches, something that is left at the wayside in the dialogue literature. The result is an obfuscation

[179] Wenman, *Agonistic Democracy*, *supra* note 142 at 223.
[180] Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Hiebert, "Wrestling Rights", *supra* note 39.

of substantive issues worthy of public debate through a rhetoric of the *legitimacy* of judicial review and its consequential emphasis on judicial versus Parliamentary supremacy.

This agonistic approach differs from the literature because it emphasizes a second, under-analyzed nature of this relationship that rejects limits and invites new ideas to contest the status quo. Additionally, I strengthen Hiebert's move for the legislature to defend its interpretation of the Constitution by revealing how a contested Constitution allows for greater freedom through an Arendtian understanding of action.[181] Honig's arguments regarding a division between the virtue and *virtù* theories of politics, while revealing a capacity for contention, unfortunately do not offer examples of how this contestation may take place.[182] While the judiciary expresses their opinion in legal cases, the legislature's capacity to respond requires passing/amending a piece of legislation, or, in extreme cases, invoking the override clause.[183] Consequentially, while extreme and not necessarily the best path of action, invoking the override clause is a clear way to acknowledge the contestation over the Constitution by formally announcing that the legislature has elected to operate notwithstanding the judiciary's interpretation of the *Charter* as I discuss in the remainder of this Chapter.[184]

---

[181] Wenman, *Agonistic Democracy*, *supra* note 142.

[182] Honig briefly mentions the notwithstanding clause in her final paragraph in "Dead Rights, Live Futures", *supra* note 14. However, she does not adequately render a possibility as to how this contestation could play out. Specifically, she praises the notwithstanding clause as acknowledging the need to balance between aconstitutionalism and democracy, and how in times, the democracy may need to bypass the Constitution.

[183] The judiciary argues its capacity to do so through a combination of the supremacy clause, located under s. 52 of the *Constitution Act* (1982), coupled with s. 24 of the *Charter* which allows the courts to make remedies as they seek appropriate. See Gardbaum, *Commonwealth Model of Constitutionalism*, *supra* note 49 at 101. Also see Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" (2012) 34 International Political Science Review 39.

[184] Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Gardbaum, *Commonwealth Model of Constitutionalism*, *ibid* at 125.

Public Backlash or Ignoring Conflict: An Argument for the Notwithstanding Clause

The notwithstanding clause was added late in *Charter* negotiations to address provincial fears that the *Charter* would allow the judiciary to act unchecked.[185] It is located under s.33 of the *Charter* and allows the federal Parliament or provincial legislatures, to expressly declare a piece of legislation to operate notwithstanding a violation of s. 2, or ss. 7 through 15 of the *Charter*. This is limited to a period of five years, but can be renewed if the authorizing body so chooses. Commonly referred to as the constitutional compromise, s. 33 is part of what makes the Canadian iteration of a parliamentary democracy unique.[186] The notwithstanding clause has the capacity to be used in anticipation of a judicial response, however, as Blakeney notes, this was an accidental consequence of its quick addition to the *Charter*.[187]

It is important to also note that the phrasing of the notwithstanding clause differs from its use. While it *allows* a piece of legislation to act notwithstanding of the *Charter*, in effect, it allows the legislature to act notwithstanding of the *judiciary's interpretation* of the *Charter*. The override clause should be analyzed this way for two reasons. First, the notwithstanding clause was added specifically to address the concerns of the provinces that

[185] Russell, "The Charter and Canadian Democracy", *supra* note 73; Hiebert, "Compromising the Notwithstanding Clause", *supra* note 73; Blakeney, "What I Thought We Were Doing", *supra* note 141.
[186] Canada is the only Westminster system that offers the legislature a direct capacity to override the Constitution. For more see Hiebert, "Compromising the Notwithstanding Clause", *ibid*; Hiebert, "Parliamentary Bills of Rights", *supra* note 48 at 12; Russell, "The Charter and Canadian Democracy", *ibid* at 292; Huscroft, "Rationalizing Judicial Power", *supra* note 7373 at 55-6; Gardbaum, *The New Commonwealth Model of Constitutionalism*, *supra* note 49 at 97 and 127; Roach, *Supreme Court on Trial*, *supra* note 33 at 7-8.
[187] Blakeney, "What I Thought We Were Doing", *supra* note 141. In addition, scholars such as Kahana and Hiebert argue against the legislature invoking the notwithstanding pre-emptively as it would not allow the judiciary to voice its opinion on the constitutional issue. See Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14; Hiebert, "Wrestling With Rights", *supra* note 39.

the *Charter* would effectively allow the courts to overrule them.[188] The notwithstanding clause therefore only ensures that the judiciary cannot rule the legislation unconstitutional for a period up to five years (or longer if the clause is renewed). Second, the judiciary always has the ability to interpret the *Charter* due to its role in interpreting/applying the law. As such, the judiciary does not need an ability outside of that granted to it under s. 52 of the *Constitution Act 1982* to be able to hold its interpretation against the legislature.[189] The legislature, however, has difficulty offering a binding interpretation of the *Charter* short of passing/amending legislation.[190] In other words, the legislature does not need the notwithstanding clause to amend its own legislation/interpretation of the *Charter* because it has the authority to do that without invoking the override. Consequentially, while s. 33 is framed as allowing a piece of legislation to operate outside of the *Charter*, in effect, its only purpose is to override other interpretation of the *Charter*, which, for the purposes of this paper, refers to the judiciary.[191]

Navigating the override clause literature is difficult because it assimilates the debate on legitimacy between judicial dialogue scholars and their critics. For my purposes, I provide a small review of this debate to demonstrate the controversy around s. 33 between judicial dialogue and judicial activism scholars. Scholars on the left, such as Hiebert and

[188] Blakeney, "What I Thought We Were Doing", *supra* note 141; Hiebert, "Compromising the Compromise", *supra* note 141; Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14; Roach, *Supreme Court on Trial*, *supra* note 33 at 70.
[189] Gardbaum, *The New Commonwealth Model of Constitutionalism*, *supra* note 49 at 100-101.
[190] A Minister could for example offer a statement claiming the legislature's position on a certain issue, but short of legislation supporting that claim the judiciary would most likely support the common law/judiciary's interpretation of the Constitution.
[191] Tushnet, *Weak Courts, Strong Rights*, *supra* note 65 at 53. Honig, in her article "Dead Rights", *supra* note 14, praises the notwithstanding clause for acknowledging the potential to prioritize democracy over constitutionalism. The notwithstanding mechanism, I argue, does not operate in this capacity specifically because it is not a necessary tool due to both branches having the innate ability to reinterpret the *Charter* without invoking it.

Kent Roach, are in favour of the legislature revitalizing the use of the notwithstanding clause.[192] They argue that the override clause is a legitimate tool for the legislature to use in cases of disagreement with the constitutional interpretation put forward by the judiciary and that it can lay to rest any qualms about the judiciary placing its interpretation of the Constitution over the legislature's.[193] The response to this from *Charter* and dialogue critics, including Christopher Manfredi, Mark Tushnet, Grant Huscroft, and Baker, is that the notwithstanding clause is unusable due to imminent public backlash.[194]

Charter critics contend the use of the notwithstanding clause invokes the image that the legislature is wilfully violating constitutional rights, and therefore cannot be used without triggering public backlash.[195] This development is based on the political culture around the notwithstanding clause that has, as Hiebert notes, been poorly developed and maintained.[196] Starting with the poor wording of the legislation, the public's perception of the override clause is that it signifies an acknowledgement of unconstitutional action, whereas reliance on s. 33 may be more aptly described as an attempt to defend a contested interpretation of the Constitution against the judiciary.[197] Subsequently, both *Charter* and dialogue critics claim that arguments relying on the use of the notwithstanding clause as a

[192] Hiebert, *Charter Conflicts*, *supra* note 39; Hiebert, "Wrestling With Rights", *supra* note 39; Hiebert, "Parliamentary Bills of Rights", *supra* note 48; Roach, *Supreme Court on Trial*, *supra* note 33 at 265.
[193] Hiebert is very stern on requiring the legislature to express its opinion as to why they disagree with the judiciary when enacting the override. In parallel, an agonist approach to contestation requires that both sides carefully explain its opinion to make this contestation more transparent. For more see Hiebert, "Wrestling With Rights", *ibid*.
[194] Baker, *Not Quite Supreme*, *supra* note 10; Manfredi, *Judicial Power and the Charter 2nd ed*,, *supra* note 51 at 188*;* Tushnet, *Weak Courts, Strong Rights*, *supra* note 65; Huscroft, "Rationalizing Judicial Power", *supra* note 73.
[195] Baker, *Not Quite Supreme*, *ibid*. Part of the dilemma arises from the language of s. 33 itself, which implies that human rights are being wilfully violated if enacted. See E.g. Tushnet, *Weak Courts, Strong Rights*, *ibid* at 56.
[196] Hiebert, "Compromising the Notwithstanding Clause", *supra* note 73.
[197] Tushnet, *Weak Courts, Strong Rights*, *supra* note 65 at 53.

balance to judicial supremacy is unrealistic because it cannot reasonably be used by a government without political consequences associated with its inaugural use. [198]

These assertions are a poor critique of the notwithstanding clause for three key reasons. Firstly, the federal and provincial legislative bodies passed—and hold the ability to amend—the notwithstanding clause. If the legislature insists on a more contestation-friendly wording of the notwithstanding clause, it is their prerogative to implement this change, as that is outside the jurisdiction of the judiciary.[199] Secondly, in a system where both sides have the ability to interpret the Constitution, it follows that the public may have a multiplicity of views, preferring one interpretation to another. The argument that it is unreasonable for the public to agree with the judiciary's interpretations of the Constitution is therefore unfounded in a contested approach to *Charter* interpretation because both branches have equal authority to interpret the *Charter*. Subsequently, if the legislature is afraid the public will not support its use of the notwithstanding clause, it may very well be because the public does not prefer that specific iteration of the *Charter*. If this is the case, in a democratic state, the legislature is burdened with explaining *why* the interpretation tendered by the judiciary is inadequate and requires the use of the override clause. While some critics such as Manfredi and Baker argue that the deck is stacked in favour of supporting the judicial interpretations of the *Charter*, this again is no fault of the judiciary.

[198] Barbara Billingsley, "Section 33: The *Charter*'s Sleeping Giant" (2002) 21 Windsor YB Access Just 331 [Billingsley, "Sleeping Giant"] at 342; David Snow, "Notwithstanding the Override: Path Dependence, Section 33, and the *Charter*" 8 Innovations: A Journal of Politics 1 [Snow, "Notwithstanding the Override"] at 12; *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 [Ford]; Tushnet, *Weak Courts, Strong Rights*, *ibid* note 203 at 53.

[199] This is a difficult endeavour as it requires support from all the provincial legislatures, but that does not make it an impossible venture.

Thirdly, empirical evidence dismisses the claim that radical political backlash would emerge if the notwithstanding clause were to be invoked.[200] Research done by Nik Nanos found that a majority of Canadians were unaware of the existence of the notwithstanding clause, and that those who knew of its existence were ambivalent about its use.[201] In addition, Roach points to examples where the override clause was invoked in provincial settings and the party that used it was successfully re-elected.[202] Subsequently, the empirical evidence suggests fears over using the override clause may not be as grounded as dialogue critics claim.

With these points in hand, I am still sceptical of invoking the override on a frequent basis due to the temporary restriction (or loss) of rights it brings about by circumventing the *Charter*. While invoking the notwithstanding clause makes contestation over the Constitution explicit, it also restricts the capacity for contestation in the short term, allowing the legislature to solely interpret the Constitution. Regardless of these critiques, the notwithstanding clause is still a legitimate part of the Canadian state, and, as Honig notes, demonstrates Canada's acceptance of the need to operate aconstitutionally at times in the name of democracy.[203] Following these lines, I advocate that the notwithstanding clause should only be invoked in extreme situations where the legislature feels the courts have erred in such severity that to not address the issue in such a severe fashion would be potentially harmful to the state. In the following Chapters, I offer it as a possible avenue, not because I think it would be the best solution, but because it is a common alternative in

[200] Russell, "The Charter and Canadian Democracy", *supra* note 73 at 293.
[201] Nik Nanos, "*Charter* Values Don't Equal Canadian Values: Strong Support for Same-Sex and Property Rights" (2007) 28 Policy Options 50.
[202] Roach, *Supreme Court on Trial*, *supra* note 33.
[203] Honig, "Dead Rights", *supra* note 14 at 801.

the literature. As such, the override clause is not without its faults, but, in line with the thrust of this project, to invoke it would clearly articulate the disagreement between the judicial and legislative branches over interpreting the *Charter*. Articulating the divide with such an extreme tool should not be taken lightly. Regardless, the override clause is an alternative that *could* have made the disagreement between the Supreme Court and the legislature more transparent, thus warranting its discussion here.

Consequently, the notwithstanding clause allows for an extreme, but more transparent, and therefore democratic, rendition of the political relationship between the legislature and the judiciary by clearly articulating the disagreement between the legislative and judicial branches. Addressing the *virtù* side of politics in such a fashion acknowledges that rights are not set in stone and that they are constantly (re)interpreted. Doing so moves away from traditional dialogue theory by demonstrating *how* the *Charter* is interpreted *between the legislature and the judiciary* as opposed to discussing which branch's interpretation should be privileged over the other's. Moreover, this demonstrates that there is tension between these two branches, and reveals the position these branches have on certain issues as well as their underlying political ideology to the public.[204] Below, I analyze two dimensions of legislative response that I argue could make the tensions between the legislative and judicial branches of the state more visible.

Two Dimensions of Legislative Action: (In)Formal Override and Justification

It is important to start by noting the speculative nature of any argument relating to the notwithstanding clause. Almost every scholar who investigates this area of

[204] Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14; Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20.

constitutional law is hesitant due to the lack of data to support any argument made.[205] As such, this section should be interpreted in light of the fact that it must be rooted in the consideration of hypothetical actions of the legislature.

The two dimensions I develop here are tailored to analyzing broader implications of the legislature's actions. The first of these is that the legislature has the legitimate and innate ability to operate notwithstanding the judiciary's interpretation of the Constitution regardless of whether s. 33 is invoked or not. The result is a binary—either the legislature can formally override the judiciary's interpretation of the Constitution through invoking the notwithstanding mechanism, or they can informally do so by amending/passing legislation that resists the judiciary's interpretation of the *Charter*. There is no capacity for a legislative response to exist between these two binary measures when responding to a judicial decision.

Revitalizing the override clause could be a beneficial way of acknowledging the contestation over the interpretation of the Constitution; however, this is not the only option the legislature has at its disposal to operate notwithstanding the judiciary's interpretation of the *Charter*.[206] Baker's textual retort is a good example of this. Where the legislature responds to a judicial decision by passing new legislation that essentially maintains the approach of the original (invalidated) legislation, in effect, the legislature is bypassing the judiciary's interpretation of the *Charter*.[207] This could be seen as an instance of dialogue, but that does not undermine my point that it creates a situation where the legislature is

[205] Tushnet, *Weak Courts, Strong Rights*, *supra* note 65; Billingsley, "Sleeping Giant", *supra* note 198; Snow, "Notwithstanding the Override", *supra* note 198; Kahana, "Understanding the Notwithstanding Mechanism", *ibid*; Kahana, "Notwithstanding Mechanism and Public Discussion", *ibid*.
[206] Tushnet, *Weak Courts, Strong Rights*, *ibid* at 53; Baker, *Not Quite Supreme*, *supra* note 10 at 119.
[207] Baker discusses this concept of a textual retort at great length in his book. See especially Baker, *Not Quite Supreme*, *ibid* at 24. See also Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14.

currently operating notwithstanding the constitutional interpretation advanced by the judiciary in the case the legislation responded to.[208]

The second dimension I bring forward is far less severe and pursues a reasoned justification for the legislature's decision to either formally or informally operate notwithstanding the judiciary's interpretation of the Constitution. Rooted in the works of Etienne Mureinik, and expanded upon by David Dyzenhaus, this dimension asserts a responsibility to explain to the population why the government—in this instance the legislature—has decided to operate in a certain way.[209] Resonating with the Arendtian concept of freedom through action and a *virtù* approach to politics, a culture of justification seeks to keep the state accountable to the public by increasing its transparency. Combined, I argue that these two dimensions while not all encompassing, demonstrate how the legislature has the capacity to be more democratic by voicing disagreement with the judiciary than it elected to be in its responses to the *Bedford* and *PHS* decisions from the Supreme Court of Canada.

Mureinik's approach maintains that any decision coming from an institution that derives its authority from the populace—such as the legislative and judicial branches of the state—must accompany a justification to be legitimate.[210] A culture of justification

[208] See especially Kahana, "Understanding the Notwithstanding Mechanism", *ibid* at 269. See also Hogg & Bushell, "Charter Dialogue", *supra* note 12 at 104; Hiebert, "Compromising the Notwithstanding Clause", *supra* note 73 at 116. A good example of this in action would be the debate regarding the case of *Daviault*. In this case the accused consumed a large amount of alcohol and ended up sexually assaulting a friend of his wife. The Supreme Court found that the accused was excessively drunk to a state of insanity or automatism, and therefore could not be found with the requisite *mens rea* of the offense. Following the Supreme Court's decision there was a large public backlash in which the legislature changed the *Criminal Code* to prohibit self-induced intoxication as a defence. In doing so, the legislature effectively operated notwithstanding the judiciary's interpretation. See also *R v Daviault* [1994] 3 SCR 63 [*Daviault*].
[209] Mureinik, "A Bridge to Where", *supra* note 20; Dyzenhaus, "Law as Justification", *supra* note 20; Chohen-Eliya & Porat, "Proportionality and the Culture of Justification", *supra* note 21.
[210] Dyzenhaus, "Law as Justification" *ibid* at 33.

therefore does not empower one branch of the state with power over another, but insists that when an institution disagrees with another it should justify why/how it came to that decision. Whereas the courts are predisposed to do this by clearly giving its reasons in a legal decision, the legislature is not. Justifying actions in this way keeps the state accountable to its populace, and according to Mureinik, increases the participatory capabilities of the state.[211] Furthermore, justifying the state's actions in this way demonstrates a respect to the populace through informing them why the state has acted in such a way. Subsequently, the public can become a sort of tiebreaker where disagreements between the branches of the state arise by voicing their desires to their MPs.

As Tsvi Kahana and Hiebert discuss, offering an explanation is extremely important for situations in which the legislature operates notwithstanding of the judiciary's interpretation.[212] Each branch should listen to the other, assuming the Constitution is a shared priority between them. Doing so requires acknowledging the other branch's arguments. Carefully responding to them also demonstrates a mutual respect for each other as found in a culture of justification as well as under principles of agonism.[213] Combined, these two dimensions reflect broader implications of the legislature's response to instances of dialogue, specifically in relation to making the contested nature of the Constitution transparent to the public. While the more favourable outcome to render visible this contestation over the *Charter* would be a justification of the legislature on its actions, a formal invocation of the override would also see similar results. Notably, these two

[211] Etienne Mureinik, "Reconsidering Review: Participation and Accountability" (1993) 35 Acta Juridica 35 at 42 [Mureinik, "Reconsidering Review"].
[212] Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20 at 263; Hiebert, "Wrestling With Rights", *supra* note 73 at 205.
[213] Honig, *Displacement of Politics*, *supra* note 19.

dimensions do not necessitate the other. I advocate that the legislature could use both, but that does not mean invoking the override when the legislature offers a sufficient explanation behind its actions to operate notwithstanding the judiciary's interpretation of the Constitution.

As Hiebert notes in her discussion of a Parliamentary committee, the key concern of whether or not the override should be used depends on the legislature's opinion on the issue at hand. If, on the one hand, it feels the impugned rights are fundamental to Canadian society it makes sense to not invoke the notwithstanding clause, and to try and amend the legislation in such a way that speaks to the judiciary's concern with the legislation. On the other hand, the override could be used in instances where the legislature feels the objective of the law in question is paramount to the point of trumping the *Charter*. Additionally, the override clause should, as Hiebert and Blakeney note, should not be used pre-emptively to a judicial decision. Thus the override is still a legitimate response from the legislature, however, I argue it should only be used in severe situations where the legislature feels it necessary to convey their interpretations of the *Charter* against the judiciary's.[214]

If the legislature were to provide a detailed response to the judiciary's decisions such as why it felt them inappropriate, out of context, or neglectful, the disagreement between the legislative and judicial branches of the state would be more visible. A possible example of this could be a Parliamentary committee specifically drafted to write a report, similar to the Department of Justice's *Technical Paper* that adequately outlines how the new legislation responds point by point to the preceding judicial decision. While the *Technical Paper* does this in part, it has two flaws. First, the legislature itself, and not the

[214] Hiebert, "Wrestling With Rights", *supra* note 73 at 205-06.

Department of Justice—a component of the cabinet—drafts the bill. While the Department of Justice may have an increased role in framing bills to ensure they meet *Charter* scrutiny, ultimately it is not the body held accountable for passing the legislation. Secondly, the *Technical Paper* does not adequately account for much of the Supreme Court's decision in *Bedford*. While it demonstrates how the *PCEPA* changes the objective of the law, and therefore addresses the specific issues found to violate the applicant's right to security of the person, it does not adequately address *why* the applicants' rights were engaged in the first place—the law's role in creating additional risk for sex workers. A Parliamentary committee creating a report that therefore demonstrates an appreciation of the Court's decision, but also offers a detailed point-by-point response justifying the legislature's disagreement, would increase the transparency of the state and thus be more democratic.[215]

In addition to *Technical Papers*, there have been other mediums that have gestured towards the disagreement between the legislative and judicial branches such as comments from the Minister of Justice, newspaper articles, and public speeches to name but a few. However, these all are typically oriented towards individual opinions and not the collective of the legislative process, which is the focus of analysis here. Moreover, these texts (including the *Technical Paper* regarding the *Bedford* decision) do not offer a highly detailed response to the legal decisions. While they talk about broader concerns, and cherry pick certain aspects, as a whole they inadequately respond to the core of the judicial decisions they respond to (as I expand upon in Chapter 3 regarding the *Technical Paper*).

[215] While this seems to cut against my decision to not analyze the subcommittee Hansard regarding the drafting of the *PCEPA*, this is not entirely the case. While the subcommittee transcripts may offer insight into this issue, even though Hansard transcripts are publically available, it is still rather inaccessible. A report created by a specific committee both demonstrates a clear understanding of what the courts have argued (which is important to ensure the legislature can in turn respond to these points), as well as a clear articulation of the position of the legislature on the issue of hand. Moreover, while the legislature's position can be implied from the *Preamble* of an *Act*, this style of report would offer more depth and clarity.

In acknowledging the horizontal relationship of these branches by respecting the judiciary as having equal authority over the interpretation of the *Charter* and acknowledging any disagreement over the interpretation of the *Charter* with an explicit rationale, the legislature would make constitutional issues more accessible to the public. Doing so emphasizes the contested nature of the Constitution, while ensuring the government is acting on behalf of the public. If the legislature elects not to justify its decision, or cannot, as Hiebert argues, this is most likely a sign of operating on a political agenda/not based in the situation at hand and should be discouraged.[216]

Relating to Honig's work, these classifications in acting notwithstanding the judiciary's interpretation of the *Charter* represents where the virtue and *virtù* theories of politics contact each other. Requiring a current and enforceable understanding of the law at any time, coupled with the capacity to disagree with the current interpretation of the Constitution demonstrate how the virtue and *virtù* theories of politics work hand in hand. Regardless of whether the legislature acknowledges it is operating notwithstanding of the judiciary's interpretation of the Constitution, the virtue theories of politics require a current iteration of the *Charter* to ensure order and stability in the public realm.[217] This is the current say and not the final say because a final say cannot exist under a horizontal model as the other branch always has the capacities to offer a rebuttal.

Virtù theories of politics emphasize contestation and the ability for any idea to be put forward in the public sphere. Specifically, the judiciary (or the legislature) are both able to consider new interpretations of the *Charter*, but have different ways of bringing these

[216] Hiebert, "Wrestling With Rights", *supra* note 73 at 205-6.
[217] This capacity is limited through the difficulties of amending the Constitution directly. While interpretation is far more accessible an avenue, direct amendment needs strong consensus.

interpretations forward as discussed earlier. While the judiciary cannot do this if the legislation is formally enacted notwithstanding the judiciary's interpretation of the *Charter*, this does not preclude a response from them once the period of notwithstanding has ended (provided a case comes before the courts). Facilitating a possibility for contestation to emerge in the public sphere, be it from the courts or the legislature, demonstrates the horizontal structure of the state. Following from this, *virtù* theories of politics ensure that the current say established under the virtue theories of politics always have the *potential* to be contested.

Conclusion

Whether it is the regulation of the sex trade or safe injection sites, contestation over the Constitution as it applies to controversial issues is a key aspect of Canada's democratic system. This Chapter, by turning to Honig's virtue and *virtù* theories of politics, responds to the inadequacies of coordinate theory by offering a reason *why* the judicial and legislative branches should contest one another. The result, as I have argued, would increase the transparency of the Canadian state and is thus more democratic than a typical coordinate approach by offering these branches the perpetual *capacity* to disagree with one another. Emphasizing that the legislature, in instances of disagreement, should be forthright with the judiciary, this Chapter has advocated for two potential dimensions for the legislature to achieve this goal: justifying its decision to override the judiciary's interpretation of the *Charter* and/or, in exceptional circumstances, formally invoking the notwithstanding clause.

The proceeding Chapters use the framework presented here as the foundation for analyzing two recent case studies. These case studies exemplify current controversial

issues in Canada and attempt to map out the contestation over the interpretation and application of the *Charter* to these issues. In highlighting both the judicial cases and the legislative responses, what follows demonstrates how the legislature has elected to conceal the contestation over these constitutional issues by obfuscating its decision to operate notwithstanding the judiciary's interpretations of the *Charter*.

Chapter 3
Agree to Disagree: Confronting Prostitution in Canada

> Social change is a constant struggle, not a short battle. The relationship between our government, our Supreme Court, and our Charter is contingent, political, changing. Law is a sociological phenomenon. The landscape will look different at some point. Then where will our principles—and our theories—be?
>
> –Sonia Lawrence, "Expert Tease", page 7.

This Chapter investigates the disagreement between the legislative and judicial branches of the state over the interpretation and application of s. 7 of the *Canadian Charter of Rights and Freedoms* as it applies to the regulation of sex work. To illustrate this disagreement this Chapter juxtaposes the Supreme Court's reading of the *Charter* in *Bedford* with the legislative retort to *Bedford*, the *Protection of Communities and Exploited Persons Act*, as they offer two different and contesting readings of the *Charter*.[218] The Supreme Court of Canada's decision in *Bedford* found that ss. 210, 212(1)(j), and 213(1)(c) of the *Criminal Code of Canada* infringed the section 7 *Charter* right to security of the person of the applicants, and that the violations were not in accordance with the principles of justice. Although the legislative response superficially addressed some of the concerns raised by the Supreme Court in *Bedford,* its primary focus was to *shift the objective of the law*. As a result, the legislative response effectively left sex workers in the same vulnerable position as under the previous legislative regime.

This Chapter argues that, through its legislative response, the legislature has *informally* operated notwithstanding the reading of the *Charter* offered by the judiciary, revealing a site of contestation between the two branches of the state. The legislature, this Chapter argues, has obfuscated the disagreement between the judicial and legislative

[218] *Bedford*, *supra* note 3; *PCEPA*, *supra* note 5.

branches by not clearly justifying its decision to bypass the Supreme Court's decision in *Bedford*, and by not *formally* invoking the override clause.

This Chapter entails four sections. First, I offer a review of the Supreme Court's decision in the *Prostitution Reference* and a summary of the decisions of all three courts that heard the *Bedford* case.[219] I demonstrate how these courts found that ss. 210, 212(1)(j), and 213(1)(c) were unconstitutional because of the possible harm placed upon sex workers coupled with the ineffective nature of the provisions. Second, I review the legislative response to the *Bedford* decision. Specifically, I am interested in how the legislature changed the objective of the law after *Bedford* by implementing a new emphasis on protecting communities from the sex trade. As such, the first half of the Chapter focuses on summarizing the two differing narratives on the appropriate, constitutional, legal regulation of the sex trade in Canada presented by the two branches of the state. Third, I juxtapose these two narratives to demonstrate how the legislature has resisted the interpretation and application of s. 7 of the *Charter* tendered by the judiciary in *Bedford* by refusing to acknowledge the issues that led to engaging the applicant's right to security of the person and solely replying to the analysis regarding the principles of fundamental justice. Finally, I conclude by demonstrating how the legislature's response could have been more democratic by formally invoking the notwithstanding clause, or, more preferably, adequately justifying its disagreement with the judiciary's reading of the *Charter* found in *Bedford.*

[219] Reference re *ss. 193 and 195.1(1)(c) of the Criminal Code* (Man.), [1990] 1 SCR 1123 [*Prostitution Reference*].

Sex Work in Canada: The *Prostitution Reference* and *Bedford*

The issue of sex work has been a long-standing controversial issue in Canada. Whereas *Bedford* and its legislative response are the newest iterations, the Supreme Court previously looked at the issue in the *Prostitution Reference* in 1990.[220] In this decision, the Supreme Court of Canada was tasked with determining whether ss. 193 and 195.1(1)(c) of the *Criminal Code of Canada* violated the right to freedom of expression located under s. 2(b) as well as the right to liberty found under s. 7 of the *Charter*.[221]

The *Prostitution Reference* was a split decision featuring a 4-2 majority with both female judges, Justices Wilson and L'Heureux-Dubé, dissenting. The majority found that the provisions forbidding keeping a bawdy-house (s. 193) and communicating for the purposes of prostitution (s. 195.1(1)(c)) were not inconsistent with s. 7 of the *Charter* as they did not violate the principles of fundamental justice whether it be on their own or in combination.[222] Moreover, the Court found that while the communication provisions violated the right to freedom of expression under the *Charter* that it was a justified limit under s. 1.[223] These provisions are still at the heart of the *Bedford* debate as they were amended to ss. 210 and 213(1)(c) of the *Criminal Code* respectively, but their context in the *Prostitution Reference* demonstrates how, under the law, it had been assumed that s. 7 of the *Charter* could not be triggered under provisions for keeping a bawdy-house or communicating for the purposes of prostitution.

---

[220] *Ibid*.
[221] These two provisions criminalized owning, operating, or visiting a bawdy-house as well as communicating for the purposes of prostitution respectively.
[222] A bawdy-house was defined under s. 197 of the *Criminal Code* as a place that is kept, occupied, or resorted to by a person or group of people who, for the purpose of prostitution, engage in acts of indecency. Notably, the legislative response has since removed the words prostitution from s. 197 of the *Criminal Code*. *Prostitution Reference, supra* note 219 at 1141.
[223] *Ibid* at 1143-44.

The Lower Court in *Bedford*

Three applicants, Terri Jean Bedford, Amy Lebovitch, and Valerie Scott who were, or had been sex workers in Canada, brought the *Bedford* case before the courts.[224] They claimed that three sections of the *Criminal Code* infringed their rights granted under the *Charter.* First, they argued that ss. 210 and 212(1)(j) of the *Criminal Code*—which allowed for keeping a bawdy-house and living off the avails of prostitution respectively—violated s. 7 of the *Charter's* right to security of the person. They argued that the impugned provisions did not comply with the principles of fundamental justice, specifically, arbitrariness, overbreadth, and gross disproportionality.[225] Additionally, the applicants claimed that s. 213(1)(c) of the *Criminal Code*—which criminalizes communications for the purpose of prostitution—violated their s. 2(b) *Charter* right to freedom of expression on the grounds that new evidence was available to contest the Supreme Court's earlier finding in the *Prostitution Reference*. Finally, they concluded their application by arguing that none of these provisions were justified limits under s. 1 of the *Charter*.[226]

The application judge pointed out problems in the evidence provided by both parties, ultimately finding the provisions in question led to a deprivation of the applicant`s rights to security of the person by placing them in undue situations of harm.[227] Specifically, Justice Himel found that s. 210 of the *Criminal Code* did not allow sex workers to operate

[224] A main issue in the case is that of standing. In Canada a party must have either public or private standing to bring an issue before the courts. The application judge, Justice Himel, argued that while Terri Jean Bedford and Valerie Scott were not prostitutes at the time of the case, they still had private interest standing as they held genuine wishes to return to the sex trade.
[225] See especially *Bedford supra* note 3 at paras 98-104 and 111-122. See also Hamish, *Fundamental Justice*, *supra* note 95; Hogg, *Constitutional Law of Canada*, *supra* note 9.
[226] *Bedford*, *supra* note 3 at paras 61-72; Laura Sampson, ""The Obscenities of This Country": Canada v. Bedford and the Reform of Canadian Prostitution Laws" (2014) 22 *Duke Journal of Gender Law & Policy* 137 [Sampson, "Obscenities of This Country"].
[227] *Bedford 2010*, *supra* note 1 at paras 292 and 359.

in-call—where a client visits a building employing sex workers—and therefore placed sex workers in more risk than was necessary to achieve the law's objective. Similarly, s. 212(1)(j) was found to place more risk on sex workers through precluding the legal hiring of staff, such as bodyguards and drivers. Finally, the application judge found that s. 213(1)(c) of the *Criminal Code* prohibited street level sex workers—who face the highest risk of violence—from screening clients, therefore furthering their risk of violence.[228] Justice Himel found that while the client typically conducts the violence on sex workers, that the law had a facilitative role in making it illegal for sex workers to take "some extremely rudimentary" steps to reduce the potential of violence against them.[229]

After finding that these provisions deprive the applicants' right to security of the person, Justice Himel considered if these deprivations were in accordance with principles of fundamental justice.[230] Justice Himel found ss. 210 and 213(1)(c) were not arbitrary because there was a demonstrable logical connection between the effect of the laws and their goals of reducing community nuisance.[231] On the other hand, she found s. 212(1)(j) arbitrary because it prevented sex workers from hiring staff to increase their safety, such as bouncers, call screeners, or drivers.[232] However, in concert with each other, Justice Himel found that the impugned provisions were arbitrary, meaning that there was no logical connection between the effect of the law and its legislated goals.[233]

---

[228] *Ibid* at para 361.
[229] *Ibid* at para 362.
[230] For more on fundamental principles of justice see *R. v Malmo-Levine*; *R. v Caine*, [2003] 3 SCR 571, 2003 SCC 74 at paras 93, 113; *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, 2007 SCC 9 at para 25; *Bedford*, *supra* note 3 at 93. See also Hamish, *Fundamental Justice*, *supra* note 95.
[231] *Bedford 2010*, *supra* note 1 at para 378 & 384.
[232] *Ibid* at para 379.
[233] Specifically, Justice Himel found that s. 210 of the *Criminal Code* was arbitrary because: 1) the safest medium for conducting sex work was found to be bawdy-houses; 2) out-call sex trade workers were being placed in dangerous provisions by their inability to hire support staff; 3) street-level sex trade workers were

Regarding overbreadth—when the effect of a law is too wide sweeping and interferes with conduct it was not intended to address—the application judge had three findings.[234] First, she found that the term bawdy-house was overly broad in that it applied to people not in mind of the drafters of the s. 210 provision.[235] Second, Justice Himel ruled that s. 212(1)(j) was overly broad by targeting all people living off the avails of prostitution, not just those in cases of exploitation/parasitism.[236] Third, the judge found that s. 213(1)(c) was not overbroad due to its requirement of reducing social nuisance as discussed in the *Prostitution Reference* by Chief Justice Dickson as he then was.[237]

Finally, the application judge considered the grossly disproportionate nature of the provisions. Gross disproportionality analyzes the importance of the legislative objective of the law against the effect it has on the public.[238] This included a two-step test, the first considers if the provisions pursued a legitimate state interest, the second analyzes if the effects of the law were overly extreme to the point of being disproportionate to the state's interest.[239] First, she found that the provisions in question all served legitimate state interests.[240] Second, the application judge found that all of the provisions placed sex

in violation of s. 213(1)(c) for a minimal reason, and; 4) putting sex trade workers in areas of questionable safety was incongruent with the legislation's goal of protecting the health and safety of its citizens. The provision was found arbitrary because in concert these secondary effects "exacerbated the nuisance Parliament intends to eradicate." Moreover, the evidence to make this finding was not available at the time of the *Prostitution Reference* and therefore offered a justifiable foundation to overturn the court's previous findings regarding the bawdy-house and communication provisions. *Ibid* at para 98-104 and 385-88.

[234] *Ibid* at paras 98-104.

[235] *Ibid* at paras 397-401. The trial judge found that the definition of bawdy-houses were overly generic as they included but were not necessarily relate to roofed/enclosed areas, permanent buildings, or small house-operated businesses.

[236] *Ibid* at para 402.

[237] *Ibid* at paras 409-410.

[238] *Ibid* at paras 98-104.

[239] *Ibid* at para 416.

[240] Justice Himel found that s. 210 aimed to keep communities safe by preventing public disruption, s. 212(1)(j) was aimed at preventing the exploitation of sex workers by pimps, and s. 213(1)(c) intended to lower public nuisance generated by communicating for the purposes of selling sex. All of which, were legitimate state interests. *Ibid* at paras 418-19.

workers at greater risk of violence and consequently found them to deprive the applicants' rights to security of the person and that the imposition of this risk to sex workers was grossly disproportionate to the purpose of the legislation.[241] Furthermore, the application judge found that none of the provisions would be saved under s. 1 of the *Charter,* as the exceptional circumstances required to limit s. 7 were not present.[242]

Concluding her decision, the application judge found sections 210, 212(1)(j), and 213(1)(c) of the *Criminal Code* to be of no force or effect under section 52(1) of the *Constitution Act*. While the respondents asked for an 18-month grace period, Justice Himel found that the laws were of little effect, and to leave the provisions in a state of suspension would cause more harm to sex workers than the public.[243]

The Appellate Court in *Bedford*

On appeal to the Ontario Court of Appeal, the majority found that the application judge was correct in assuming the bawdy-house and living off the avails of prostitution provisions unduly violated the right to security of the person found under s.7 of the *Charter*.[244] To remedy the issues the appellate court removed the word prostitute from the bawdy-house provision under s. 197(1) of the *Criminal Code*. Furthermore, the court 'read in' the words "in circumstances of exploitation" to the living off the avails provision to specifically target instances of abusive relationships. The Court of Appeal found that the applicant judge's interpretation of both the social science evidence and legislative interpretations were not privileged with deference.[245] Additionally, the appellate court

[241] *Ibid* at paras 421-428 (s. 210), 429-431 (s. 212(1)(j), 432-434 (s. 213(1)(c), and 435-437 (conclusion).
[242] *Ibid*.
[243] *Ibid* at paras 536-539.
[244] *Ibid* at para 326
[245] *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 [*Bedford 2012*] at para 327 and 103; *Bedford*, *supra* note 3 at para 48.

found that the communications provision infringed the right to security of the person but that it did so in a way that was acceptable within the principles of fundamental justice because it addressed the nuisance-related components caused by solicitations for prostitution.[246] Ultimately, the Court of Appeal only found ss. 210 and 212(1)(j) of the *Criminal Code* unconstitutional, but allowed Parliament 12 months to address the issues raised by the court. Both parties appealed the Court of Appeal's decision to the Supreme Court of Canada.

The Supreme Court in *Bedford*

The Supreme Court heard the case in June of 2013 and released its decision in December of that year. Writing on behalf of the unanimous court, Chief Justice Beverley McLachlin found that all three impugned provisions, ss. 210, 212(1)(j), and 213(1)(c) of the *Criminal Code* violated the s. 7 right to security of the person under the *Charter*.[247] Agreeing with both the lower courts, the Supreme Court found the right to security of the person was engaged because the safest form of sex work is that conducted on an in-call basis and that the bawdy-house provisions located under s. 210 of the *Criminal Code* legally prohibited sex workers from working on such a basis.[248] Further echoing the application judge's decision, Chief Justice McLachlin agreed that the living off the avails provisions located under s. 212(1)(j) of the *Criminal Code* engaged the right to security of the person because it prevented sex workers from legally hiring staff to lessen the risk of

[246] *Bedford 2012*, *ibid* at para 328; Sampson, "Obscenities of This Country", *supra* note 226 at 141-42.
[247] *Bedford*, *supra* note 3 at paras 65, 136, 67, 142, 72 and 159. Additionally, the Chief Justice found that lower courts, contrary to the decision reached by the Court of Appeal, could revisit issues provided a change in the circumstances such as or a new legal issue is raised on paras. 48-53. Second, the Court found, contrary to the Court of Appeal, that deference should be paid to the trier of fact's interpretation of both social and legislative facts, short of a reviewable error on paras 55-56. The result was to allow the trier of fact—the application judge—was entitled to deference from the Court of Appeal.
[248] *Ibid* at paras 61-65. See also *Bedford 2010*, *supra* note 1 at paras 305, 361, 385, and 421.

violence, such as drivers, bodyguards, and receptionists.[249] Additionally, again in concurrence with the application judge, the Chief Justice found the communications section prohibited street-level sex workers from screening clients for "intoxication or propensity to violence, which can reduce the risks they face" as well as the secondary effect of displacing sex workers into marginalized, less safe, areas.[250]

The Attorneys General of Canada and Ontario raised two alternative arguments before the Supreme Court that are important for the scope of this paper. First, they claimed that the applicants could avoid the risky nature of the sex trade by choosing not to engage in it.[251] Second, they argued that third parties—johns—were the sources of harm and not the government itself.[252] In response to the first point, the Supreme Court found that some sex workers, specifically those who work on an out-call basis, are typically disenfranchised minorities and therefore do not truly choose this lifestyle over another.[253] The Chief Justice refuted the second argument by finding that it makes no difference who was the origin of the harm beyond the fact that the state was helping facilitate it. The role of the state in allowing these unsafe practices for sex workers under the legislation being challenged was sufficient to trigger a deprivation of the applicants' rights to security of the person protected by s. 7 of the *Charter*.[254]

Following this, the Supreme Court turned towards addressing whether the infringement of the right to security of the person of sex workers was in accordance with

[249] *Bedford*, *ibid* at paras 66-67. See also *Bedford* 2010, *ibid* at para 361.
[250] *Bedford*, *ibid* at paras 68-72. See also *Bedford* 2010 *ibid* at paras 301 and 421.
[251] *Bedford*, *ibid* at para 79.
[252] *Ibid* at para 84.
[253] *Ibid* at para 86.
[254] *Ibid* at paras 74-92; Sampson, "The Obscenities of This Country", *supra* note 226 at 142. These two issues are important to bring up because they resonate with the legislative response. I engage in this in more depth in sections 2 and 3.

the principles of fundamental justice. The rights protected under s. 7 are not absolute. The principles of fundamental justice are a qualifier to the rights found under s. 7 of the *Charter* and allow legislation and government actors to restrict these rights as long as they do so in accordance with certain broadly accepted principles. These principles, for the purpose of *Bedford*, include prohibitions against overbreadth, gross disproportionality, and arbitrariness and warrant broad interpretation to ensure basic rights are not violated by the state.[255]

The Chief Justice found that the bawdy-house provision, s. 210 of the *Criminal Code*, was aimed towards preventing nuisance to the community, and was therefore grossly disproportionate because in-call work was found to be safer by the lower courts and the harm caused by prohibiting it was not in proportion to the goal of preventing nuisance arising from indoor bawdy-houses.[256] With regard to the living on the avails of prostitution, s. 212(1)(j), the Court found it to target parasitic and exploitative actions by pimps, and not the commercialization of prostitution as the Attorneys General argued.[257] As a result, the Court found the provision overbroad due to its restriction on hiring bodyguards, drivers, and other staff who could reduce the risk of harm to sex workers.[258] Finally, the Supreme Court found the communication provision, s. 213(1)(c), was addressed towards reducing public nuisance arising from the selling of sex, or "to take prostitution off the streets and out of public view".[259] On this basis, the Chief Justice

[255] *Bedford*, *ibid* at para 96; Re BC Motor Vehicle Act, [1985] 2 SCR 486 at paras 24-25. Specifically, Justice Lamer explains how principles of fundamental justice are the qualifiers of the right not to be deprived of life, liberty, and security of the person. See Hamish, *Fundamental Justice*, note 95 for an explanation of the principles of fundamental justice.
[256] *Bedford*, *supra* note 3 at para 134-36.
[257] *R. v Downey*, [1992] 2 SCR 10 at 32; *Bedford*, *ibid* note 3 at paras 137-38.
[258] *Bedford*, *ibid* at paras 139-45.
[259] *Ibid* at para 147.

restored the application judge's finding that the harm caused by the communication provisions were grossly disproportionate to the law's objective of reducing public nuisance generated by communicating for the purposes of selling sex.[260]

In sum, the Supreme Court's decision in *Bedford* found that the negative impact of the impugned provisions either outweighed any possible positive impacts of meeting the goal or captured too many activities and therefore violated the principles of fundamental justice by unduly increasing the potential risk against sex workers as originally outlined by the application judge. The result was a decision from the Supreme Court that recognizes Parliament's ability to regulate against public nuisance, but not arbitrarily at the cost of the health and safety of sex workers.[261] The next section examines how the legislative response to *Bedford* addresses the issues raised in the Court's consideration of the principles of fundamental justice by altering the objective of the law to prioritize protecting the community over sex workers whilst sidestepping the substantive components that the Court found originally engaged the right to security of the person of the applicants.

Parliament's Response: The Protection of Communities and Exploited Persons Act

The legislative response to *Bedford*, the *PCEPA*, received royal assent on November 6 2014 and came into force on December 6 of that year.[262] The *Act* emphasizes reducing access to the sex trade by focusing on purchasers of sex over sex workers.[263] As noted by the Department of Justice`s *Technical Paper*, the *Act* was informed by a

[260] *Prostitution Reference*, *supra* note 219 at 134-35; *Bedford*, *ibid* at paras 146-59.
[261] Sampson, "Obscenities of This Country", *supra* note 226 at 143.
[262] Lyne Casavant & Dominique Valiquet, "Legislative Summary—Bill C-36: AN Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts" online: *Library of Parliament* <http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/2/c36-e.pdf> [Legislative Summary C-36]; *PCEPA*, *supra* note 4.
[263] Chris Bruckert, "Protection of Communities and Exploited Persons Act: Misogynistic Law Making in Action" (2015) 30 CJLS 1 [Bruckert, "Bruckert PCEPA"] at 3.

combination of evidence presented to the courts in *Bedford* and available research on the sex trade in both Canada and abroad.[264] The result was a shift away from interpreting sex workers as a public nuisance, to an approach that treats sex workers as victims of sexual exploitation.[265] Furthermore, the legislation is aimed at limiting those who purchase sex from causing and perpetuating the harms of the sex trade to both communities and individuals, especially females.[266]

The major change under the *PCEPA* is that for the first time the purchasing of sex is made illegal in Canada. Pursuant to s. 286.1 of the *Criminal Code*, purchasing sex is now an indictable offence and accompanied with an increase in the minimum sentences for a majority of the existing prostitution offences. According to the Department of Justice's *Technical Paper*, the legislation aims to reduce the demand for prostitution—including lap dances, masturbation of a client, self-masturbation in a private room, as well as any sado-masochistic activities.[267] Coupled with criminalizing the advertising of sexual services under s. 286.4 of the *Criminal Code*, these new provisions seek to reduce the demand for the sex trade as well as the social harm caused through objectifying women. This goal is specifically identified in the *Preamble* to the *Act* that states:

---

[264] The *Technical Paper* presented by the Department of Justice is offered as a condensed justification for the new bill. Consequentially, this section is based both off the actual amendments made under the *PCEPA* but also the justifications for these decisions as presented by the Department of Justice. Building the legislature's narrative regarding in this way may seem limiting because it does not account for the debates in the committee meanings, yet I would argue against those claims. Specifically, the *Technical Paper* is offered as a post-hoc rationalization for the *Act*, but it is also presented to justify the legislation, specifically as it applies to *Bedford.* This is in accordance with the increasing role of the Department of Justice in leading the legislature as discussed by James Kelly, Lorne Sossin, and Vanessa MacDonnell. What my project emphasizes is the finalized legislative product because it is the authoritative text in and of itself after it has received royal assent. Canada, Department of Justice, *Technical Paper—Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts* [*Technical Paper*] at 3.
[265] *Ibid* at 3.
[266] *Ibid* at 4.
[267] While these actions regard acts of prostitution, acts related to stripping or the creation of pornography is notably outside the scope of the legislation. See *ibid* at 5.

> Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;
>
> Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;
>
> Whereas it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;
>
> Whereas it is important to denounce and prohibit the purchase of sexual services because it creates a demand for prostitution.[268]

The second component of the *PCEPA* relates to the living on the avails of prostitution provision. The *Act'*s objective of deterring sex work and reducing exploitation of others resonates with the new offence under s. 286.2 of the *Criminal Code* that makes it an offence to receive financial or material benefits that derive from, be it directly, or indirectly, an act of prostitution.[269] Whereas the old provision, s. 212(1)(j) was found incongruent with the *Charter* due to its over`breadth, the new provision includes exceptions that allocate for spending on living arrangements, supporting family members or dependants, as well as hiring staff such as drivers and bodyguards.[270] This exclusion is notably not available for cases of exploitation such as for actions made under threat of violence, from a person who provides narcotics or alcohol to the person providing the sexual service, or services received through a commercial relationship such as through an escort agency or a strip club.[271]

[268] *PECEPA*, *supra* note 4 at *Preamble*; *Technical Paper*, *ibid*.
[269] *Criminal Code*, *supra* note 1 at s. 286.2(1).
[270] *Criminal Code*, *ibid* at s. 286.2(1)-286.2(6). *Technical Paper*, *supra* note 264 at 11.
[271] *Criminal Code*, *ibid* at s. 286.2(5).

Thirdly, the *PCEPA* removed the word prostitution from the bawdy-house provision under s. 197 of the *Criminal Code*. Under this amendment, bawdy-houses are still illegal to visit, operate, or own under s. 210 of the *Criminal Code*, but the legislation now targets cases of indecency instead of prostitution.[272] Bawdy-houses are only legal in instances where no one is profiting off them, such as safe house sites where sex trade workers can bring clients to ensure their safety. This provision responds to the Supreme Court's finding in *Bedford* that safe havens such as Grandma's House are beneficial to reduce the likelihood of violence against sex workers.[273] The revisions to the bawdy-house provisions are therefore aimed towards the *PCEPA*'s new objectives of reducing the demand for the sex trade by criminalizing both the ownership of any profit-minded bawdy-house and the purchasing of sex within one.[274]

In addition, the *PCEPA* discourages the sale of sexual services, but treats those who sell sexual services as victims in need of help rather than blame and punishment.[275] In assuming this approach, the legislation hopes to encourage sex workers to report incidents of violence as opposed to avoiding law enforcement. Subsequently, sex workers are immune from prosecution for their role in selling their own sexual services, advertising their own sexual services, or the purchasing of their own sexual services. According to the

---

[272] The second problematic aspect of s. 286.2(1) is that it is hinged upon the concept of indecent acts. The problem of this is that the current laws regarding indecency are hinged on a slippery harm principle slope as discussed in *R v Tremblay*, [1993] 2 SCR 932; *R v Mara*, [1997] 2 SCR 630, and *R v Labaye*, [2005] 3 SCR 728 [*Labaye*]. More specifically, the legal test developed in *Labaye* finds that many acts are indecent, but that they are allowable provided they do not harm anyone else. This precludes more kink-inspired styles of sex, but also places a strong burden on a liberal harm principle regarding what may occur. Ultimately, if the harm that may be caused to public is severe enough anything can be considered as indecent and deemed criminal under s. 286.2(1). See especially Richard Jochelson & Kirsten Kramar, *Sex and the Supreme Court: Obscenity and Indecency Laws in Canada* (Winnipeg: Fernwood Publishing, 2011).

[273] Grandma's House was a safe haven where sex workers could bring clients and feel safe and secure. *Bedford*, *supra* note 3 at para. 64.

[274] *Technical Paper*, *supra* note 264 at 9-11.

[275] *Ibid* at 9.

Technical Paper, this reflects the legislation's goal in helping sex workers in leaving the practice, while also diminishing the demand for prostitution.[276]

Finally, the *PCEPA* responds to the grossly disproportionate nature of the previous communication provisions found under s. 213(1)(c) of the *Criminal Code* by targeting communications on public locations such as schools and parks. Doing so, the *Technical Paper* maintains, simultaneously speaks to the judiciary`s finding of disproportionality in focusing on the limitation of communication and supports the legislation`s new goal of protecting the community from the harms of prostitution.[277]

In sum, Parliament responded to the *Bedford* decision through legislation that attempted to technically address the constitutional infringements of the *Criminal Code* found by the Supreme Court. In its response, Parliament has prioritized objectives of eliminating the sex trade while simultaneously protecting both women and the community at large from the harms of the sex trade. Through allowing for in-call work, the hiring of drivers and bodyguards, and criminalizing the communications for the purposes of prostitution, the legislature has addressed the grossly disproportionality and overbreadth problems identified in *Bedford* by shifting the *objective of the law* compared to the pre-*Bedford* provisions. The new legislation portrays sex workers and the communities as victims, and amends the law to focus on reducing the victimization of women by the sex trade as opposed to the pre-*Bedford* focus of targeting public nuisance arising from the sex trade. This approach focuses on the reasons why the impugned provisions in *Bedford* were not in accordance with the principles of fundamental justice *and not why the right to security of the person was engaged in the first place*. Below, I examine the ways in which

[276] *Ibid* at 9.
[277] *Ibid* at 9-10.

the legislative response has failed to address the substantive ways in which the law infringed the right to security of the person in *Bedford*, and how the legislative response has thereby resisted the Court's interpretation and application of s. 7 of the *Charter*.

Unveiling Disagreement: Recognizing Conflict Regarding Canada's Sex Trade

There has been wide debate in Canada regarding the controversial status of the *PCEPA*. While the legislation emits an image of concern for sex workers, women and the community, scholars on the left argue this is lacking in substance.[278] These scholars argue that the legislature has altered the objective of the law in a way that penalizes sex workers, contrary to the spirit of the *Bedford* decision. Subsequently, this section juxtaposes the positions of the legislative and judicial branches regarding the regulation of the Canadian sex trade. The legislature's response, I argue, is not illegal or illegitimate, but is an example of how Parliament has tried to justify the restriction of rights through the impugned/amended provisions of the *Criminal Code* instead of addressing many of the conditions that the Supreme Court of Canada found engaged the applicant's rights to security of the person under s. 7 of the *Charter*.

As discussed in Chapter 1, the judiciary interprets law by determining the meaning of, and applying written text to individual cases. In *Bedford*, the Supreme Court found that ss. 210, 212(1)(j), and 213(1)(c) of the *Criminal Code* infringed the right to security of the person of sex workers and that the impugned provisions were overbroad and grossly disproportionate, and therefore incongruent with the *Charter* because they placed sex

[278] Michael Plaxton, "First Impressions of Bill C-36 in Light of Bedford" (12 June 2014), online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447006> [Plaxton "First Impressions"]; Bruckert*, "*Bruckert PCEPA", *supra* note 263; Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in Bedford and Bill C-36" (2015) 30 *Canadian Journal of Law and Society* 5 [Lawrence, "Expert-Tease"].

workers into risk-prone scenarios without meaningfully furthering the objectives of the law. This reading of s. 7 found that, on a substantive level, the law was facilitating an increased risk of violence against sex workers and that this effect was unconstitutional. The legislative response, while effecting some substantial changes such as allowing for the hiring of bodyguards and drivers, reflects a shift in the *objective of the law* from targeting public nuisance to preventing the exploitation of women and the community.

Critics of the *PCEPA* argue that the legislation prioritizes the technical aspects of the *Bedford* decision to the detriment of the underlying substantive issues.[279] More specifically, through addressing why the provisions violated the principles of fundamental justice the legislature has disagreed with the courts by not attempting to meaningfully address how the state facilitates an increased risk of harm against sex workers. To demonstrate how the legislature's actions effectively resist the interpretation of the *Charter* found by the judiciary in *Bedford*, I offer two critical analyses of the *PCEPA*. The first regards a false presupposition that all people who engage in the sex trade are victims, the second that the actions taken to discourage sex work are overzealous and parallel a criminalized approach that still displaces sex workers to unsafe areas.

The first critique argues that the underlying assumption for the *PCEPA* is that sex workers are victims. As Chris Bruckert discusses in her recent commentary, the new legislation zealously supports portrayals of the sex trade being dominated with exploitative conditions coupled with vulgar acts of violence.[280] These portrayals overlook any

[279] Sampson, "Obscenities of This Country", *supra* note 226 at 154; Bruckert, "Bruckert PCEPA", *ibid*; Lawrence, "Expert-Tease", *ibid*; Jacqueline M. Davies "The Criminalization of Sexual Commerce in Canada: Context and Concepts for Critical Analysis" (2015) 24 *The Canadian Journal of Human Sexuality* 78 [Davies, "Sexual Commerce"] at 81.
[280] Bruckert, "Bruckert PCEPA", *ibid*. See also Michael Plaxton "Nussbaum on Sexual Instrumentalization" (2014) *Criminal Law and Philosophy*, online:

autonomy in the sex trade and ignore the narratives of sex workers who wilfully choose their line of work.[281] Moreover, in portraying sex workers as exploited and vulnerable, the legislation is *strategic* because it simultaneously insinuates that sex workers need rescuing from their life style choices while arguing that doing so increases public safety.[282]

Presenting the sex trade in this way reveals the moral-basis of the legislature's response by framing the sex trade as always harmful to both sex workers and the public. Parliament, in its legislative response, has made it difficult for sex workers who choose that life style by portraying them as social deviants. The law's new objective of increasing safety for women and the public by trying to reduce the sex trade still facilitates sex work albeit through an extremely arduous and roundabout process that, as will be demonstrated below, is economically infeasible and prone to exposing sex workers to a higher risk of violence.[283] While this new objective of the law responds to the impugned provisions found to violate the principles of fundamental justice in *Bedford*, it does not consider what caused the applicant's right to security of the person to be engaged in the first place—the state's role in facilitating violence against sex workers. Instead, the legislation attempts to justify the s. 7 violations of security of the person by arguing it is in the best interest of sex workers to leave the sex trade.

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377509>; Martha C Nussbaum, ""Whether From Reason or Prejudice": Taking Money For Bodily Services" (1998) 27 *Journal of Legal Studies* 693.

[281] While the *Bedford* decision discusses how some sex workers may not have an alternative, it still accounts for sex workers as a whole to have a sense of autonomy. The legislative response does not account for this. Instead, by painting with a broad stroke, it assumes that all sex workers are victims and that they could not reasonably choose to be a sex worker.

[282] Davies, "Sexual Commerce", *supra* note 279 at 79-80.

[283] Senator Platt has even gone so far as to say that the goal of the legislation is not to make sex trade safer, but to abolish it altogether. Senate Committee on Legal and Constitutional Affairs, September 9, 2014 (Senator Plett) [*Senate Committee*]; Lawrence, "Expert-Tease", *supra* note 278. See also Plaxton, "First Impressions" *supra* note 278 at 10.

The second critique argues that the actions taken by the legislature to discourage people resorting to the sex trade are overly restricting. Canada, in its approach, has enacted a response similar to a Nordic model. This model originates in Sweden and targets purchasers of sex, but not those who sell it.[284] The Canadian iteration amounts to a Nordic model on steroids because it is hyper-regulatory and does not allow many avenues for sex workers to pursue profitable business.[285] This is observable through three different components. Firstly, as Michael Plaxton comments, section 286.5(2)—the section allowing sex trade workers to be exempt from criminal sanctions—specifically implies that sex workers are committing illegal activities, and that they are simply not being prosecuted for them.[286] Subsequently, the immunity granted to sex workers is limited, and feels like an afterthought as opposed to a priority.[287]

Secondly, through over regulating instances of advertising as well as living off the avails provision, the options of sex trade workers to limit their vulnerability are restricted.[288] The advertising restrictions effectively make it almost impossible for sex workers to find clientele because advertising sex work is claimed to objectify women's bodies, causing public harm by degrading women everywhere.[289] The result is a piece of legislation that prioritizes a possible harm to the public, as well as the resulting degradation to women as a whole, over the risk of violence to sex workers as they attempt to find clients.

---

[284] Sandra Ka Hon Chu & Rebecca Glass, "Sex Work Law Reform in Canada: Considering Problems With the Nordic Model" (2013) 51 *Alberta Law Review* 101 [Chu & Glass, "Sex Work Law Reform"] at 103.
[285] Kyle Kirkup, "New Prostitution Laws, Same Old Harms to Sex Workers", *The Globe and Mail* (5 June 2014) online: < http://www.theglobeandmail.com/globe-debate/new-prostitution-laws-same-old-harms-to-sex-workers/article18992544/> [Kirkup, "Same Old Harms"]; Plaxton, "First Impressions", *supra* note 278 at 5.
[286] Plaxton, "First Impressions", *ibid*.
[287] Plaxton, "First Impressions", *ibid* at 7. See also Bruckert, "Bruckert PCEPA", *supra* note 263.
[288] Plaxton, "First Impressions", *ibid* at 9-10.
[289] This reasserts the first critique as well that sex workers need rescuing and that they could not reasonably choose this life style and further deprives them of their autonomy.

Furthermore, the living off the avails provision outlaws a series of relationships, such as living with a boyfriend who may deal drugs even if the relationship is mutual and not exploitative. This is problematic because there are reasonably foreseeable scenarios where sex workers wilfully choose to consume drugs or alcohol, yet the legislation insinuates that this would not be the case if they were cognizant of the aberrant nature of the sex trade.[290] While the new living off the avails provision found under s. 286.2 of the *Criminal Code* addresses some of the underlying components of the judiciary's findings in *Bedford*, it is still problematic under s. 286.2(5) because people can still be charged with living off the avails of sex work, including partners, roommates, children/dependants, and managers.[291]

Additionally, the new bawdy-house provisions are highly restrictive. While the bawdy-house provision found under s. 210 has been amended to target acts of obscenity—which could entail acts of prostitution—the restrictions placed through the living on the avails provision most likely would not allow for ownership of bawdy-houses.[292] While this may be possible through cooperative approaches (e.g. Co-ops), which emphasize a horizontal/non-exploitative relationship, the legislative response more or less only allocates for self-employed bawdy-houses or safe houses. Furthermore, under the new s. 286.1 of the *Criminal Code*, it is an offence to purchase sex even in bawdy-houses, making it even more difficult to operate a bawdy-house. Combined with the fact that advertising the sale of sexual services for anyone but yourself is a crime under s. 286.4 of the *Criminal Code*, bawdy-houses, while not explicitly illegal, are still hard to operate both legally and

---

[290] *Ibid* at 9-10.
[291] Stephanie Claivaz-Loranger, "Brief to the Standing Committee on Legal and Constitutional Affairs Regarding Bill C-36, The Protection of Communities and Exploited Persons Act" (September 2014) , online: *Canadian HIV/AIDS Legal Network:* <http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/C-36_brief_Cdn_HIV-AIDS_E.pdf> [Claivaz-Loranger, "CHALN Brief on C-36*"*] at 4-5.
[292] Plaxton, "First Impressions", *supra* note 278 at 9.

profitably. The result is a law that decriminalizes bawdy-houses for the purposes of prostitution, but effectively creates extremely high—if not impossible—barriers to creating a safe and reliable in-call establishment.[293] As Plaxton states "there is a world of difference between saying that people who engage in a lawful activity are entitled to do it *safely*, and saying that they are entitled to do it *profitably*".[294]

The new legislation is a hyper-restrictive rendition of the Nordic model that, in effect, keeps the sex trade in similar conditions prior to the *Bedford* decision. This happens because while the new legislation allows bawdy-houses, it does so in an unfeasible manner by criminalizing bawdy-houses that are not solely self-employed by a single sex worker. Subsequently, the new bawdy-house provisions do not absolve the previous issues that found s. 210 of the *Criminal Code* engaged the right to security of the person for the applicants by restricting in-call sex work. Instead, the response solely addresses the Supreme Court's finding that the previous bawdy-house provisions were grossly disproportionate based on the law's old objective of reducing public nuisance, and has altered the objective of the law to void this concern. Consequently, the legislation has prioritized answers to the legal test and not the causes underlying the *Bedford* decision.[295]

The legislature's decision to restrict these components limited what the courts found as the safest mode of sex work throughout the academic literature—in-call sex work.[296] Straddling the line between formal acknowledgement and substantive disagreement, the legislative response discourages sex workers from entering the sex trade

[293] Plaxton, "First Impressions", i*bid*; Claivaz-Loranger, "CHALN Brief on C-36", *supra* note 291 at 6.
[294] Plaxton, "First Impressions", *ibid* at 10 [original emphasis].
[295] Kirkup, "Same Old Harms" *supra* note 285, *supra* note 302; Bruckert, "Bruckert PCEPA", *supra* note 263; Chu & Glass, "Sex Work Law Reform", *supra* note 284; Sampson, "Obscenities of This Country", *supra* note 254.
[296] *Bedford 2010*, *supra* note 1 at paras 361-62; *Bedford*, *supra* note 3 at 132.

while placating would-be critics with overly restrictive conditions which, under rigorous analysis, offer little assistance to sex workers. The result is a piece of legislation that attempts to limit the sex trade while purporting to care about victimized sex workers. Unfortunately, the response fosters problems that, in effect, make it difficult to legally work in a bawdy-house or on the avails of prostitution. In doing so, the *PCEPA* reads as a resistance to the judiciary's decisions in *Bedford* by attempting to justify the *Charter* violations over addressing the underlying circumstances leading to sex workers being placed in situations with an increased risk of violence.[297]

Furthermore, the new legislation, in its totality, effectively leaves sex workers in the same predicament they were in prior to the *Bedford* decision.[298] By targeting johns, the new legislation leaves sex workers in the same vulnerable positions found prior to the *Bedford* decision regarding an increased risk of violence.[299] In focusing on criminalizing johns over sex workers, the legislation still pushes the act of purchased sex from safe neighbourhoods to areas where johns are not likely to be caught. Put otherwise, *the act of one person paying another for mutual sex is still criminalized* and displaced to less safe areas in fear of a party being caught. The result encourages sex workers to step into unknown cars in fear that, if they spend too much time trying to screen their clients before getting into the vehicle, their trick may move on or get arrested.[300] Moreover, johns are

[297] Plaxton, "First Impressions", *supra* note 278 at 8-9; Kirkup, "Same Old Harms", *supra* note 285.
[298] Plaxton, "First Impressions", *ibid;* Kirkup, "Same Old Harms", *ibid*; Lawrence, "Expert-Tease", *supra* note 278; Bruckert, "Bruckert PCEPA", *supra* note 263; Sampson, "Obscenities in This Country", *supra* note 246; Angela Campbell, "Sex Work's Governance: Stuff and Nuisance" 23 *Feminist Legal Studies* 23 [Campbell, "Sex Work's Governance"] at 29-33.
[299] See E.g. Plaxton, "First Impressions" *ibid* at 10. See also Claivaz-Loranger, "CHALN Brief on C-36", *supra* note 291.
[300] This fear is encouraged by the pressure placed on targeting johns. Specifically, in targeting johns the *act* of selling sex is legal, but the *purchasing* is still illegal. Consequentially, sex trade workers are forced into situations where their clients will not be caught purchasing sex under the new model, resulting in sex trade workers to go to marginalized/unsafe areas to receive clients.

likely to exert pressure on sex workers to act outside of the legal frameworks to ensure their own safety such as operating in unsafe environments to ensure they are not apprehended.[301]

As bawdy-houses are effectively still illegal to operate in most, if not all feasible profitable fashions, the new provision still forces sex workers to work on an out-call basis, which the judiciary found significantly less safe than in-call based work. In regards to the new communications provision, s. 286.1 of the *Criminal Code*, it is still broad and grants a large amount of discretion to police officers to define what constitutes a public place or a place open to public view beside a school, daycare, or playground, resulting in a potential detriment to sex workers by being unclear where it is legal to communicate for the purposes of prostitution. Moreover, s. 286.1 makes the act of communicating for the purposes of purchasing sex illegal regardless of where it takes place—a more broad and restrictive prohibition than seen under the previous impugned provision found in *Bedford*.[302] Consequently, sex workers who wish to ensure their own safety are limited due to the heavy restrictions found under the new communication provisions s. 213(1.1) as well as the conditions offered under s. 286.1. The result mirrors conditions found to infringe the security of the person in *Bedford*, but the legislature has altered the objective of the law to skirt the court's application of the principles of fundamental justice in that case.

Rather quizzically, the legislative response does not outright criminalize the sex trade, yet the legislation clearly implements measures that increase the potential for risk to sex workers through multiple avenues that zealously regulate advertising, bawdy-houses,

[301] Emily van der Meulen & Elya Maria Durisin, "Why Decriminalize?: How Canada's Municipal and Federal Regulations Increase Sex Workers' Vulnerability" (2008) 20 CJWL 289 at 305 [van der Meulen & Durisin, "Why Decriminalize"].
[302] Claivaz-Loranger, "CHALN Brief on C-36", *supra* note 291 at 2.

and living off the avails of prostitution, and leaves extremely broad interpretations for the new communications provision.[303] The new legislation has attempted to *fine-tune* some of the previous provisions such as the ones relating to owning or operating bawdy-houses by addressing the legal test—why it was found to violate the principles of fundamental justice—and not the underlying causes—why the right to security of the person was triggered in *Bedford*. Similarly, while the living off the avails provision addresses the key issue that was found to trigger the right to security of the person (i.e. not being able to hire assisting staff), s. 286.2(5) still makes it possible for hired help to be charged under living off the avails provision. In its totality, the *PCEPA* carries an image of care about sex workers and society by claiming they are victims of the sex trade, yet at the same time further victimizes sex workers similarly to the previous laws.[304] This raises the question, does the legislature actually see sex workers as victims and want to help them exit the sex trade, or has the response been a *strategic tool* to justify their position on the sex trade in a way that also resists the judiciary's interpretation of s. 7 of the *Charter*?

It is too soon to say if the *PCEPA* is constitutional or not despite Ontario's Premier's comments that Ontario's Attorney-General found it as such.[305] The legislative response was legitimate given the fact that the judiciary struck down the previous provisions.[306] However, instead of making sure the means to achieve the legislation was constitutional, the legislature has decided to change the objective of the law, and in doing

[303] Bruckert, "Bruckert PCEPA", *supra* note 263*;* Kirkup, "Same Old Harms", *supra* note 285.
[304] Additionally, it is worth noting that the removing of the autonomy of sex workers to rationally choose to enter the sex trade could also be seen as another source of victimization.
[305] Allison Jones. "Ontario Review Finds Ottawa's Sex Work Law Constitutional, Wynne Says" Globe and Mail, April 1 online: http://www.theglobeandmail.com/news/politics/ontario-review-finds-ottawas-sex-work-law-constitutional-wynne-says/article23734478/.
[306] The judiciary could attempt to find a response in a new case or the new Parliament could also amend the *Criminal Code* if it felt the changes made in the *PCEPA* were not adequate as well. Either way, this paper is not situated in a position to try and predict this development.

so, implied that the infringements on the right to security of the person (the precarious working conditions for sex workers) are now justified under their interpretation of s. 7 of the *Charter* as it would apply the principles of fundamental justice.[307]

It is worth noting that the *PCEPA* has some redeeming components. Multiple additions to the *Criminal Code* such as the human trafficking provisions, the youth-prostitution provisions, as well as the sex-slave provisions all add teeth to the law regarding these crimes. None of these provisions existed prior to the amendments made under the *PCEPA*.[308] Additionally, the legislation has added avenues for sex workers to hire staff such as drivers and bodyguards, which should reduce the risk to sex trade workers in some instances. Yet, restrictions placed upon these staff, coupled with the restrictions against advertising or working in a bawdy-house have led scholars to raise concerns that the legislation has failed to decrease the vulnerability of sex workers. [309]

This disagreement between the legislative and judicial branches of the state complicates the dialogue metaphor, but also the very idea that the courts act as a power balance for Parliament. The legislature appears to have sidestepped *why* the judiciary reached their conclusion in *Bedford* and focused on a response to meet the formal argument embedded in the Supreme Court's application of the principles of fundamental justice. Overall, the *PCEPA* embodies a substantial disagreement between the legislative and judicial branches of the state, while simultaneously obfuscating it. The result is a bill of half measures that responds to the Supreme Court's decision in *Bedford* that resists the core concerns raised in that decision, namely that *Criminal Code* provisions should not

[307] Bruckert, "Bruckert PCEPA", *supra* note 263; Kirkup, "Same Old Harms", *supra* note 285.
[308] *Technical Paper*, *supra* note 264.
[309] Plaxton, "First Impressions", *supra* note 278; Chu & Glass, "Sex Work Law Reform", *supra* note 284.

arbitrarily increase the vulnerability of sex workers. In the next section, I discuss how the legislature might adopt a more transparent approach, that acknowledges this conflict between the Court and legislature, by explicitly justifying its decision to depart from the Court's findings in *Bedford* or, in exceptional circumstances, by formally invoking the notwithstanding clause.

Dialogue or Soliloquy: Mapping Contestation in *Bedford* and the *PCEPA*

At this junction, it is worth clarifying that the legislature has not acted in an illegitimate capacity in their response to *Bedford*. Rather, by responding to the Supreme Court's findings regarding the unconstitutionality of ss. 210, 212(1)(j), and 213(1)(c) in a way that effectively ignores the reasons the Court found the provisions to be invalid, the legislature has obfuscated the contested nature of the relationship between it and the judiciary.[310] The legislature has tried to placate potential critics of the *PCEPA* by both appearing to support sex workers while restricting the sex trade.[311] While the issue of constitutionality will only be clear if the courts decide to respond, at this juncture it suffices to say that the legislature's response, however problematic in some instances, is entirely legitimate.

As discussed in Chapter 2, I am interested in analyzing this obfuscation through two different dimensions. The first dimension is concerned with whether the legislature has formally or informally acted notwithstanding the constitutional interpretation advanced by the judiciary. The second regards whether the legislature has justified their decision to act notwithstanding this constitutional interpretation. I argue that the *PCEPA* represents

[310] Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Bonnie Honig, "Between Decision and Deliberation: Political Paradox in Democratic Theory" (2007) 101 The American Political Science Review 1 [Honig, "Between Decision and Deliberation"].
[311] Davies, "Sexual Commerce", *supra* note 279.

the legislature operating informally notwithstanding of the judiciary's interpretation and that, in addition, the legislature has not justified its decision to do so.

Regarding the first dimension, I maintain that the legislature has not invoked the override clause, and therefore is *informally* bypassing the judiciary's finding with their legislative response. This claim is further defended by the substantive differences between the judiciary's reading of s. 7 of the *Charter* and the legislature's amendments, specifically as the response addresses why the impugned provisions were found in violation of the principles of fundamental justice, and not why they engaged the right to security of the person. This unofficial state of notwithstanding is brought about by the legislature amending the law in such a way that leaves sex workers in precarious situations similar to those they faced under the law before the *Bedford* decision, specifically in relation to the bawdy-house, living off the avails, and communication provisions.[312]

To formally override the judiciary the legislature would had to have added a clause into the *PCEPA* stating it would operate outside the *Charter* for a period up to five years. While extreme due to its effective removal of rights, implementing the override clause would have clearly identified that the legislature disagreed with the Supreme Court's decision in *Bedford*. The arguments I raise above demonstrate how the proposed legislation still does not adequately address the underlying situations that led the Supreme Court to find the right to security of the person to be infringed in *Bedford*. Subsequently, I argue that the legislature has ignored the core of the judiciary's argument—that the impugned

[312] Additionally, the benefits of enacting the notwithstanding clause include short term stability in the law. Through enacting a piece notwithstanding of judicial interpretations of the *Charter* the legislature removes the ability for the courts to interpret the new legislation as unconstitutional. To not enact the override clause effectively leaves the new legislation vulnerable to lower courts hearing a case and bringing the law on the issue into a state of ambiguity until it is readdressed by the legislature (who are likely to wait for it to reach the Supreme Court). In this way the override clause ensures a stable interpretation of the law until the exemption is completed, or extended. See E.g. Baker, *Not Quite Supreme*, *supra* note 10.

provisions place sex workers in unnecessary harm—and changed the objective of the law to address the Court's analysis regarding the principles of fundamental justice. Using the notwithstanding clause would have expressly clarified the point that the legislation is not concerned with the precarious scenarios for sex workers, but is instead interested in justifying the risk to sex workers. Enacting the override clause would therefore clearly indicate that the legislature disagrees with the courts, while ensuring a lower court could not find the legislation unconstitutional for up to five years.

With that said, the current situation does not require the override clause to advance a different interpretation of the *Charter*. While in extreme cases, such as the case of *Daviault*, Parliament has the option to re-interpret the law if it feels the courts have made a grievous mistake. However, that does not appear to be the case here. Instead, in this instance the legislature has simply ignored the essence of the court's interpretation of the *Charter*. Ignoring the courts in such a fashion does not conclusively illustrate Parliament's discontent with the court's interpretation, and, moreover, unlike *Daviault*, there was not a public outcry against the judiciary's decision. Subsequently, while the use of the override is beneficial in some capacity because it makes the contestation over the *Charter* more apparent, it also would induce a temporary loss of rights and thus is not the most ideal legislative response.[313]

The second, more preferable, dimension of my analysis concerns whether the legislature provided an explicit justification to support its operating notwithstanding (either formally or informally) of the judiciary's interpretation of the *Charter* in a particular case. In this case, I argue the legislature did not adequately justify its decision to informally

[313] For more see text accompanying note 208 and Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14 at 269.

override the judiciary's reading of s. 7 of the *Charter* in *Bedford*. Justifying the rationale for the legislature's response is important for two key reasons. First, it demonstrates a mutual respect for the judiciary to interpret and apply law in relation to their equal authority under the Constitution. Second, it further explains what these branches are disagreeing about, and why the legislature feels the judiciary's application was inadequate.[314] This is specifically useful for placating the possible stigma associated with invoking the override clause.[315] Furthermore, offering a rationalization for their decision to operate notwithstanding the judiciary's interpretation helps ensure that the government is not acting outside public support to a severe degree, or if they do so, that the public is aware how its government may not be operating in its interest and can act accordingly.[316]

A possible avenue to offer this justification would be a report from a Parliamentary committee aimed at explaining the legislature's choice to resist the interpretation of the *Charter* tendered by the Supreme Court's decision in *Bedford*. The benefits of this report, echoing recommendations of Janet Hiebert, would be a clear acknowledgement of the issues of the Court and a detailed point by point response explaining why the legislature agreed or disagreed with them.[317] Presenting a legislative justification in this way, in combination with other efforts such as newspaper articles, offers an avenue that simultaneously presents the legislature's rationale to resist the judiciary's interpretation of the *Charter* while emphasizing (and normalizing) the disagreement between the legislative and judicial branches.

---

[314] Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14; Russell, "The Charter and Canadian Democracy", *supra* note 73 at 296; Hiebert, "Wrestling With Rights", *supra* note 73 at 205-06.
[315] Hiebert, *Charter Conflicts*, *supra* note 39; Roach, *Supreme Court on Trial*, *supra* note 33.
[316] Honig, *Displacement of Politics*, *supra* note 19; Mureinik, "A Bridge to Where", *supra* note 20; Dyzenhaus, "Law as Justification", *supra* note 20.
[317] Hiebert, "Wrestling with Rights", *supra* note 73 at 205-06.

There are two counter-arguments to my proposed paths of action. The first is that the *PCEPA* is an instance of the legislature testing the waters in responding to the judiciary. Under this approach, the *PCEPA* should not be seen as an authoritative resistance but instead a deliberative/dialogic approach to how the state chooses to regulate sex work. Under this critique, until the courts have a chance to either disagree or accept the legislative changes, it may be overly critical to assume the legislative and judicial branches of the state vehemently disagree with each other. This is a valid critique for not invoking the notwithstanding clause, insofar as it would trouble a judicial response until it ran its duration. It does not, however, address why the legislature has not reasonably justified its decision to informally override the position offered by the Supreme Court. Until further responses take place, it simply is impossible to know if this was the intent of the legislature or not.

The second possible counter-argument claims that the legislature has offered a justification for their decision to override the judiciary's findings in *Bedford* regarding sex worker safety. This critique is focused on the materials discussed above—such as the legislation and the *Technical Paper* offered by the Department of Justice—as offering a justification for the legislature's actions.[318] Specifically, the preamble of the *PCEPA* clearly expresses a prioritization of communal safety over the individual safety of sex when it states "whereas the Parliament of Canada is committed to protecting communities from the harms associated with prostitution."[319] As with the critiques discussed above, the

[318] Another avenue would be the minutes from the Parliamentary debates or public pronouncements from the Department of Justice. However, as James Kelly discusses, the executive heavily dominates these discussions. As such I focus on the text of the *Act* itself, as well as the *Technical Paper* which is an amalgamation of why the Department of Justice decided to frame the legislation in the way that it did.
[319] *PCEPA*, *supra* note 4 at *Preamble*; Kirkup, "Same Old Harms" *supra* note 285.

PCEPA does not counteract the underlying reasons for the judiciary's decision. Moreover, the *Technical Paper* also does an inadequate job in that it seldom acknowledges issues raised by the courts. Specifically, while the new legislation addresses issues such as human trafficking and youth related selling of sex, outside of these charitable references there is very little engagement with the *Bedford* decision.

As Peter Russell notes, the reasons why the court came to its conclusion are equally as important as the decision itself.[320] The Supreme Court found that the impugned provisions, ss. 210, 212(1)(j), and 213(1)(c) were incongruent with the *Charter* because they placed sex workers in a precarious position that was outside the proportionate goals of the legislation. The *Technical Paper* never addresses the precarious position of sex workers raised by the judiciary, and it does not justify the decisions to ignore the issues found to infringe the right to security of the person for the applicants in *Bedford*.[321] Specifically, the *Technical Paper* does not mention the risk faced by sex workers outside of them being victims for electing to work in the sex trade, similar to the arguments of the Attorneys-General of Ontario and Canada that were dismissed by the Supreme Court of Canada in *Bedford*. Instead, the *PCEPA* assumes that harm done to sex workers is a result of sex workers choosing their line of work, and not by the johns committing the violence.[322] As such, the *Technical Paper* outlines the objectives of the legislation as follows:

---

[320] Russell, "The Charter and Canadian Democracy", *supra* note 73.

[321] Along this point, the technical paper for the *PCEPA* further supports the ideological assumptions of the legislature. While multiple scholars such as Paxton and Campbell demonstrate that the new legislation has no substantial change on the risk to sex trade workers, the technical paper speaks to the legislature's new goals of protecting the community from the nuisance of prostitution as well as the damage done by objectifying women. The technical paper suffers just as much as the *PCEPA* itself does from a fragmented approach that attempts to root itself in the power from agreeing with the judiciary, while simultaneously embedding their own substantive points of eliminating the sex trade. Subsequently the technical paper suffers from the very issues of the legislation in obfuscating this contestation from the public. *Technical Paper*, *supra* note 264.

[322] *Bedford*, *supra* note 3; *PCEPA*, *supra* note 4; *Technical Paper*, *supra* note 264.

> Bill C-36 seeks to denounce and prohibit the demand for [sex work] and to continue to denounce and prohibit the exploitation of the prostitution of others by third parties, in the development of economic interests in the exploitation of the prostitution of others and institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies in which [sex work] takes place.[323]

The goal of the legislation identified by the *Technical Paper* is not geared towards reducing the vulnerable situations sex workers are placed in, but instead to deter sex workers from the sex trade, and through this new avenue, it argues violence will decrease as the number of people employed by the sex trade decreases. Unfortunately, this approach still does not address the real issue—the precarious situations placed upon sex workers by the law.

Furthermore, the last response to *Bedford* in the *Technical Paper* regards safety issues, but even there it relies on ensuring "the safety of all by reducing the demand for prostitution, with a view to deterring it and ultimately abolishing it to the greatest extent possible."[324] It claims that the *PCEPA* increases the safety of sex workers by targeting johns, allowing sex workers to work in-doors, allowing sex workers to hire staff such as bodyguards and drivers, as well as reducing the communication provisions to public areas and schools. These amendments, however, do not necessarily achieve these objectives as the above analysis has demonstrated. While the new provision allows sex workers to work in-doors, it is almost impossible to have a profitable in-call establishment due to the large amount of restrictions. Similarly, staff hired can still be charged under the new s. 286.2(5). Furthermore, due to the vague nature of the new communications provisions police officers are left with a large amount of discretion that could be aggressively enforced similar to the old communications provisions found in *Bedford* under s. 213(1)(c) of the *Criminal*

[323] *Technical Paper*, *ibid* at 4.
[324] *Ibid* at 10.

Code.[325] Consequentially, while the Department of Justice has attempted to justify the legislature's decisions featured in the *PCEPA*, it has not adequately addressed why the judiciary found the right to security of the person to be engaged, or why the legislature has overlooked these questions central to the *Bedford* decision. The result, echoing dialogue theory, demonstrates a tendency of the legislative and judicial branches to talk past rather than to one another.

This disconnect between the legislative and judicial branches of the state can be explained by competing interpretations of the *Charter*. Whereas the judiciary found the impugned provisions in *Bedford* violated the right to security of the person by placing sex workers in unnecessarily risky scenarios and subsequently was in violation of the principles of fundamental justice, the legislature took a different position. The legislative response alters the objective of the law from preventing public nuisance to protecting women and the community from the harms of sex work. In this way, the new provisions technically avoid the issues raised by the judiciary's analysis of the principles of fundamental justice in *Bedford* as that analysis does not directly apply to the new provisions with their new legislative purpose. This strategic decision ensures that the new legislation is, for the time, legitimate, because the *Bedford* decision was grounded on claims of the old provisions not being saved by the law's old objective. The legislature has not necessarily operated unconstitutionally, but rather *strategically* by rendering the judiciary's judgement in *Bedford* moot, and in doing so, resisted the judiciary's interpretation of the right to security of the person located under s.7 of the *Charter*.

[325] Claivaz-Loranger, "CHALN Brief on C-36", *supra* note 291.

An agonistic approach to this contestation does not fear public backlash commonly associated with the notwithstanding clause because it encourages the legislature to clearly articulate its disagreement with the judiciary's finding in *Bedford*. Thus utilizing the notwithstanding clause as a form of agonistic expression, while not necessarily the best response, still removes the problem of *informally* trumping the decision of the courts and renders visible the disagreement regarding the interpretation of the *Charter* between the legislative and judicial branches. The more favourable option, the legislature carefully offering a pointed justification for its decision to *informally* override the judiciary's interpretation tendered in *Bedford,* makes it clear *why* the legislature has disagreed with the judiciary by publicly announcing that the legislation is incongruent with the judiciary's reading of the *Charter*. If a majority of the population is upset with the legislature's decision, it is not obliged to back down from its interpretation of the Constitution—although to not do so runs against the grain of Canada's constitutional democracy by operating outside the will of the public.

The legislature's obfuscation of disagreement then, also limits the capacities for an agonistic approach to the Constitution because it hierarchizes the interpretation of the legislature above that of the courts through the lack of coordinating/fairly addressing the position raised by the judiciary.[326] In relation to including the public sphere, public backlash resulting from a failure of the legislature to justify its decision to override the judiciary's interpretation of the Constitution in a particular case could manifest during an election, through letters being sent to MPs, or other avenues of democratic involvement. This agonistic approach to interpreting the Constitution is arguably more democratic

[326] Hiebert, *Charter Conflicts*, *supra* note 73; Baker, *Not Quite Supreme*, *supra* note 10.

because it results from positions clearly establishing their side, and in theory, justifying them in response to the opposition.[327] If no counter-argument can be claimed and the decision is solely rooted in political rhetoric or ideology, then it stands to suffice the party should be upfront about it as it has elected to operate on its own ideology over the desire of the public in which its power is derived.[328] As Bonnie Honig suggests, this is the explicit purpose of the notwithstanding clause—to operate aconstitutionally*,* which is exactly what would happen if the legislature has elected to bypass the judiciary without justifying its reasons to do so.[329]

Conclusion

This Chapter has examined the relationship between the judiciary and the legislature and their competing interpretations of s. 7 of the *Charter* as they relate to the state's position on making sex workers less prone to violence. Specifically, it has argued that the judiciary applied s. 7 of the *Charter* to find ss. 210, 212(1)(j), and 213(1)(c) were unconstitutional for infringing the security of the person by increasing the risk faced by prostitutes while engaging in a legal activity. These provisions increased the risk faced by prostitutes in a manner not in accordance with the principles of fundamental justice. In the legislative response, the legislature has changed the formal rules regulating prostitution but has effectively maintained the conditions and risks faced by sex workers pre-*Bedford*. The

[327] Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14; Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Mureinik, "A Bridge to Where", *supra* note 20; Dyzenhaus, "Law as Justification", *supra* note 20.
[328] Hiebert, "Wrestling With Rights", *supra* note 73 at 204-06. Mureinik, "Reconsidering Review", *supra* note 211 at 42.
[329] Notably, this *aconstitutional* aspect is not unconstitutional, but, as discussed in Chapters 1 and 2, operating outside of the judiciary's interpretation of the *Charter*. This is because the legislature has an equal capacity to interpret the *Charter*, which is done through passing legislation it feels is *Charter*-compliant. If it declares a piece notwithstanding the *Charter*, in effect it is actually reading a piece notwithstanding the *judiciary's interpretation* of the *Charter*. Honig, "Dead Rights", *supra* note 14.

PCEPA demonstrates a fundamental disagreement between the legislature and the judiciary regarding appropriate legal mechanisms for regulating the sex trade. More to the point, the legislature has addressed how the impugned provisions in *Bedford* were not in accordance with the principles of fundamental justice by altering the objective of the law to one concerned with deterring entry to the sex trade. The result of this decision is one that only marginally addresses how the state is facilitating violence against sex workers, and in doing so *informally* operates notwithstanding the judiciary's interpretation of the *Charter*.

I have demonstrated how the legislature could make this contestation clearer to the public by offering a pointed response to the judiciary's application of the *Charter* instead of simply informally ignoring it, or, if the legislature deemed the issue serious enough, to invoke the override clause. The legislative response obfuscates contestation between the legislative and judicial branches of the state by not formally overriding the judiciary's position as well as by not offering an adequate justification for its decision to disregard how the impugned provisions regarding bawdy-houses, living off the avails of sex work, and communications for the purpose of selling sex engage the s. 7 right to security of the person. Obfuscating the contestation in this way is problematic because it portrays an image of agreement with the judiciary, while simultaneously disagreeing with the components that formed the foundation of the judiciary's finding in *Bedford*. The result diminishes the transparency and therefore democratic values of the Canadian state. The key difference in my proposed alternative of formally overriding the judiciary's stance is that through these two avenues the disagreement between the legislative and judicial branches of the state are emphasized for the public.

In the next Chapter, I outline how the recent debate between the legislative and judicial branches are in a fundamental disagreement regarding safe injection sites. While the *Bedford* decision found parts of the *Criminal Code* unconstitutional, the next case found the Minister of Health's exercise of discretion incompatible with the *Charter*. As such, the focus of the case differs from *Bedford*, yet is ultimately similar in that in contrasts how the two branches of the state approach the balancing of public health and safety within the legal regulation of safe injection sites.

Chapter 4
Safe Streets, Uncertain Rules: (Over)Regulating Safe Injection Sites in Canada

> [T]he reality of the public realm relies on the simultaneous presence of innumerable perspectives and aspects in which the common world presents itself and for which no common measurement or denominator can ever be devised. For though the common world is the common meeting ground of all, those who are present have different locations in it, and the location of one can no more coincide with the location of another than the location of two objects. Being seen and being heard by others derive their significance from the fact that everybody sees and hears from a different position.
>
> –Hannah Arendt, *The Human Condition*, page 57.

This Chapter analyzes the *Canada (Attorney General) v. PHS Community Services Society* case and the legislation enacted in the wake of it, the *Respect for Communities Act*. The central theme of this Chapter considers how the legislative and judicial branches of the state have contested the other's interpretation of the *Charter* as it relates to safe injection sites.[330] I argue that in amending the *Controlled Drugs and Substances Act* that the legislature has operated notwithstanding the judiciary's interpretation of the *Charter* regarding the utility of safe injection programs in advancing public health.[331] The disagreement between the two legislative and judicial branches of the state, I claim, is centred on the obligation of the Minister of Health to act in accordance with the *Charter* when considering whether to grant a safe injection site an exemption under the *CDSA*.

The emphasis of this Chapter is to map the disagreement over safe injection sites and their relation to the principles of fundamental justice as they balance between public health and safety. The disagreement between these two branches, I maintain, is embedded in the obligation of the Minister of Health to exercise their discretion in accordance with

[330] *PHS*, *supra* note 5; *RCA, supra* note 7. Notably, the new legislation elects to use the term supervised consumption site over the literature's term of safe injection site. I use the term safe injection site to remain consistent with the Supreme Court's decision.
[331] *Controlled Drugs and Substances Act* (S.C. 1996, c. 19) [*CDSA*] at s. 52.

the *Charter*, which, on the Supreme Court's reading of the old *CDSA*, required a balancing between public health and safety. The Court came to this conclusion by finding that the benefits of safe injection sites significantly outweighed the marginal risks to public safety, specifically in the case of InSite. Not balancing these two principles, the Court found, engaged the s. 7 rights of the plaintiffs, and suggested that the Minister was acting in accordance with a policy agenda and not on the evidence analyzing safe injection sites.[332]

The other interpretation, tendered by the legislature in the *RCA*, paints a different picture of safe injection sites. Instead of seeing them as beneficial to public health, the new preconditions required to receive a Ministerial exemption required to run a safe injection site have become extremely rigorous and focus on the potential negative effects of safe injection sites with little to no consideration of the positive health benefits. I argue that the amendments to the *CDSA* featured in the *RCA informally* override the judiciary's interpretation of the Constitution by resisting the Court's suggested guidelines to assist the Minister of Health's goal to balance between public health and safety. Moreover, I claim that the legislature has not justified its decision to operate in such stark contrast to the opinion of the judiciary. Trumping the courts in this way does not respect the judiciary's equal authority to interpret the *Charter* and effectively hides a component of the disagreement between the legislative and judicial branches of the state.

Obfuscating fundamental disagreement runs against the grain of Canada's constitutional democracy by purporting an acceptance of the judiciary's position when, in reality, the legislature advances an (unjustified) argument against it. Doing so renders ambiguous the political ideology influencing the legislature's decision, reducing

[332] *PHS*, *supra* note 5 at para 128.

transparency of the government and further separating the public from the debate over the Constitution's role in regulating safe injection sites. Ultimately, I put forward an argument of how offering an explicit justification responding to the Court's decision in *PHS* or, in exceptional circumstances, invoking the notwithstanding clause could have made the legislature's response more democratic by emphasizing the contestation over the requirements imposed by the *Charter* concerning how the discretion of the Minister of Health should be guided (or limited) when considering applications for exemptions under the *CDSA*.

This Chapter encompasses four sections. First, I analyze the judicial decision of the Supreme Court of Canada in *PHS* as it emphasizes the Minister's obligation to adhere to the *Charter* and the principles of fundamental justice. Emphasis is placed on the unanimous judgement of the Supreme Court due to its disconnect from the lower courts.[333] Second, I analyze the new exemption-granting process for safe injection sites located in the *RCA*. Third, I juxtapose these two narratives to tease out how the legislative and judicial branches are in disagreement about safe injection sites through competing approaches to guide the Minister's discretion. Specifically, I compare the Supreme Court's push to hold the Minister to *Charter* scrutiny against the legislature's amendments prioritizing potential pitfalls while downplaying the benefits of safe injection sites to public health. I conclude by demonstrating how the legislative response veils this contestation by not formally

[333] This disconnect exists because the Supreme Court disagreed with the process by the applicants and Crown in both the trial and appellant courts. Rather than issuing a new trial, the Supreme Court ruled on the issue of the Minister of Health violating s. 7 of the *Charter* due to the urgency of the case. The legal issues regarding the division of powers were: 1) are ss. 4(1) and 5(1) of the CDSA *ultra vires* due to the division of powers regarding provincial health facilities and criminal law; 2) should any program a province indicates as serving the public interest be exempt from ss. 4(1) and 5(1), and; 3) should the doctrine of inter-jurisdictional immunity be available to protect provincial goals regarding medical treatments when they overlap with federal jurisdiction.[333] The Supreme Court of Canada answered all three issues in the negative. *Ibid* at paras 46-48, 50-52, 56, 62-73, 116.

invoking the notwithstanding clause or justifying their decision to bypass the Court's decision in *PHS.*

PHS* and Binding the Minister of Health to the *Charter

PHS involves Canada's first supervised injection site, InSite, in Vancouver's Downtown East Side (DTES). InSite is a health program that opened in 2003 and is targeted towards improving the health of drug addicts who are homeless or at risk of homelessness.[334] The staff supervises narcotic injections as well as provides additional services such as clean needles, bleach kits, counselling, and detox programs for its clients at no cost.[335] InSite has had a large degree of success in the DTES including a reduction in overdose fatalities, increased access to counselling and detox treatments, a decreased sharing of needles, and a reduction in public injections.[336] Despite pre-emptive criticism that suggested otherwise, InSite has resulted in no noticeable increase in drug-related loitering, the local crime rate, or drug use in the community.[337]

Safe injection sites, by their nature, engage s. 4(1) of the *CDSA,* which prohibits unregulated persons from possessing illicit substances. At the time of the case, under s. 56 of the *CDSA*, the Minister of Health could grant an exemption to any person or people

[334] InSite is a harm reduction program. This means it acknowledges that people are going to use drugs, and instead of punishing them for their decision, attempts to make their lives easier. This includes acknowledging the harmful impacts of drug addiction, but also appreciating the harms to drug addicts. Consequentially, harm reduction programs, such as InSite, operate to allow people to use drugs in safer environments to prevent probable harm. This probable harm includes overdoses and exposure to HIV/AIDS. InSite therefore lowers the harm to these individuals, and effectively saves lives and money by preventing further harm (and more expensive treatment). *Ibid* at paras. 4-12.
[335] Canada, Federal Coordinating Committee and the Minister of Health, *Vancouver's INSITE service and other Supervised injection sites: What has been learned from the Research? Final report of the Expert Advisory Committee*, (31 March 2008) online: <http://www.hc-sc.gc.ca/ahc-asc/pubs/_sites-lieux/insite/index-eng.php> [*MoH InSite Report*]; *PHS Community Services Society v. Attorney General of Canada,* 2008 BCSC 661 [*PHS Lower Court*] at paras 71-77.
[336] *MoH InSite Report*, *ibid.*
[337] *MoH Insite Report*, *ibid.*

provided it served a medical/scientific purpose, or, was in the public interest.[338] InSite, as well as other safe injection sites, requires these exemptions to operate legally.[339] In *PHS*, the Minister of Health refused to extend InSite's exemption, putting the program's staff and clientele into legal jeopardy. In response, a joint action between PHS Community Services, Dean Wilson, Shelley Tomic (who were both clients of InSite), and the Vancouver Area Network of Drug Users (VANDU) sought a legal remedy from the courts that would allow safe injection sites to function legally without these exemptions from the Minister of Health.[340]

The trial court considered a two-pronged argument. The applicants argued that ss. 4(1) and 5(1) of the *CDSA* were irrelevant on the grounds of inter-jurisdictional immunity, and in the alternative, that criminalizing the possession of illicit drugs found under these two sections contravened s. 7 of the *Charter*.[341] The trial judge answered the first issue in the negative, but found the latter issue to violate s. 7 of the *Charter* in a way not compatible with the principles of fundamental justice.[342] The result was a constitutional exemption for ss. 4(1) and 5(1) under the *CDSA* until the issue was revisited by the appellate court.[343]

---

[338] *PHS Lower Court*, *supra* note 334 at para 1; *CDSA*, *supra* note 331 at ss. 10(1) and 56.
[339] The InSite program supervises individuals as they inject drugs and consists of providing clean injection tools, a safe space to use, as well as medical personnel on hand to help deal with overdoses. *PHS Lower Court, ibid* at paras 71-77.
[340] *PHS Lower Court*, *ibid* at paras 2-3.
[341] Inter-jurisdictional immunity relates to the division of powers outlined under ss. 91 and 92 of the *Constitution Act 1867.* Specifically, issues of criminal law are delegated to the federal government, whereas provincial governments have the authority to act upon health care for its constituents. The argument raised by the claimants maintained that InSite is a health care program, and as such, it should be immune to restrictions of the federal government.
[342] More specifically the trial judge found that there were risks to life of the program's clients, the right to liberty for both staff and clients, as well as the right to security of the person for both clients and staff on the grounds that to deny access to a program that helps deal with substance abuse puts the lives of those involved at increase risk of disease or death. Finding a violation of s. 7, the trial judge also found that ss. 4(1) and 5(1) of the CDSA were arbitrary and inconsistent with the state's goal in preventing illicit substance abuse. Furthermore, the trial judge found that s.56 could not be used to remedy the s. 7 *Charter* violations. *PHS Lower Court*, *supra* note 334 at paras 140-159.
[343] *PHS*, *supra* note 5 at paras 26-31.

The British Columbia Court of Appeal, while disagreeing with the specific reasoning of the trial court, came to a similar conclusion. Justice Rowles found that ss. 4(1) and 5(1) were unconstitutional on the grounds of inter-jurisdictional immunity and, in the alternative, that the s.7 violations were not in accordance with the principles of justice by being overbroad.[344] Justice Huddart agreed with Justice Rowles and found ss. 4(1) and 5(1) unconstitutional under doctrines of inter-jurisdictional immunity and did not feel the need to consider the s. 7 issues.[345] Justice Smith varied from the other two justices by finding that ss. 4(1) and 5(1) of the *CDSA* were not violations of inter-jurisdictional limits, but found that the s. 7 arguments of the trial judge were correct.[346] The majority finding was a dismissal of the appeal by Canada on the grounds that inter-jurisdictional immunity applied to the situation.[347]

The Supreme Court of Canada

The Supreme Court quickly put to rest the issues raised by the lower courts, finding that ss. 4(1) and 5(1) did not warrant inter-jurisdictional immunity due to the power of federal legislation to trump provincial legislation where criminal law is involved.[348] Furthermore, the Court found that ss. 4(1) and 5(1) of the *CDSA* were constitutional under s.7 due to the potential of an exclusion being offered under s. 56, acting as a check-valve to prevent s. 4(1) from being arbitrary or grossly disproportionate in its effects.[349] The Chief Justice, speaking on behalf of a unanimous court, added that s. 5(1) could not be used

[344] *PHS Community Services Society v. Canada (Attorney General),* 2010 BCCA 15 [*PHS Appellant Court*] at para 77.
[345] *Ibid*, at para 193.
[346] *Ibid* at paras 203-204.
[347] *PHS*, *supra* note 5 at paras 32-35.
[348] *Ibid* at para 114.
[349] *Ibid* at paras 129-135.

against the plaintiffs due to the impossibility of trafficking inside the InSite facility. The Court then proceeded to consider the actions of the Minister of Health and queried whether the Minister's decision violated the *Charter*.[350] They found that the Minister of Health's failure to exempt the staff and clients of Insite from s. 4(1) of the *CDSA* engaged the s.7 *Charter* rights of the claimants and was not in accordance with the principles of fundamental justice.[351] Specifically, the Supreme Court found the Minister's decision arbitrary by denying clients the ability to utilize the potentially lifesaving services at InSite as well as grossly disproportionate by prioritizing uniform drug policy over the noted success of InSite in Vancouver's DTES.[352]

The decision of the Supreme Court determined that s. 4(1) of the *CDSA* was constitutional *because* of the Minister's power to provide exemptions under s. 56. This means s. 4(1)'s constitutionality, *as interpreted by the Supreme Court of Canada*, was contingent upon the Minister's ability to grant exemptions under s. 56 through *balancing public health with public safety*.[353] A failure of the Minister to balance between these two goals resulted in the violation of the s. 7 rights of the claimants, specifically, the failure to adhere to the principles of fundamental justice including ambiguity and gross disproportionality.[354]

---

[350] *Ibid* at paras 116-135.
[351] *Ibid* at para 140.
[352] *Ibid* at para 136.
[353] The Supreme Court found this purpose of the *CDSA* under s.10(1). Specifically, they defined public safety is accomplished under the *CDSA* by prohibiting possessing or trafficking illegal substances, whereas the public health portion of the legislation is grounded in averting the use of illicit substances but also the capacity to grant exemptions for medical or research purposes. Consequentially it is the job of the *CDSA* to balance both of these goals equally. Prioritizing one over the other, as the judiciary argued in *PHS,* ignores the purpose of the *CDSA*. *Ibid* at paras 94-96, 107-115, 119-136, and 139-140.
[354] *Ibid* at paras. 129-135. For more on the principles of fundamental justice see Hamish, *Fundamental Justice*, *supra* note 95 and the text accompanying note 95.

The substantive components of the judiciary's decision are more nuanced and demonstrate *why* the Court ruled as it did. Specifically, the Court's opinion relied on its acceptance of the empirical evidence supporting InSite coupled with the obligation of the Minister of Health to balance between the public health and safety it found inherent in the *CDSA*.[355] The Court found that there was ample evidence provided to support InSite's claim of advancing the health of drug users in the DTES. The Chief Justice poignantly summarized the decision of the bench in paragraph 152:

> The dual purposes of the *CDSA*—public health and public safety—provide some guidance for the Minister. Where the Minister is considering an application for an exemption for a supervised injection facility, he or she will aim to strike the appropriate balance between achieving the public health and public safety goals. *Where, as here, the evidence indicates that a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption*.[356]

The result not only balances between public health and safety but also relies on empirical evidence to support this claim. Accordingly, while the formal decision was to force the Minister to renew InSite's exemption, the substantive position of the Court's decision recognized the importance of granting exemptions to safe injection sites where evidence demonstrates significant public health benefits.[357] In this way, the Supreme Court's decision emphasizes that the Minister of Health cannot refuse to grant exemptions for political reasons alone, but instead must base his decision on a consideration of the impact of the safe injection facility on public health and safety.[358]

---

[355] *CDSA*, *supra* note 331 at s. 10(1).
[356] *PHS*, *supra* note 5 at 152 [emphasis added].
[357] *PHS*, *ibid* at para 162.
[358] Notably, the Supreme Court was able to make this decision by 'reading in' the obligation to balance between public health and safety. Therefore when the legislature responded by simply fleshing out the legislation, there is a valid argument that they were entitled to do so. However, this still does not address why the legislature did not refer to the points raised by the judiciary. McLachlin's suggestion that generally exemptions should be granted for safe injection sites still holds up as expressing a legitimate opinion of the

In sum, the Supreme Court found that the Minister of Health's actions violated the claimant's s. 7 *Charter* interests by refusing to grant the InSite program an exemption under s. 4(1) of the *CDSA*.[359] Furthermore, the Minister, as the Chief Justice found, "cannot simply deny an application for a s. 56 exemption on the basis of policy *simpliciter*; insofar as it affects *Charter* rights, his decision must accord with the principles of fundamental justice".[360] The Minister therefore, in line with the judiciary's interpretation of the *Charter*, is required to consider the pros and cons for both public health and safety when considering to grant an exemption under the *CDSA* to conform with s. 7 of the *Charter*.

Four years after the Supreme Court's decision in *PHS*, the federal government introduced Bill C-2, or the *RCA*. This legislation amended the *CDSA* to address the issues raised in the *PHS* decision as well as the growing push for safe injection sites across the country.[361] The bill attempts to address the issues raised by the Court, outlining when exemptions *specifically for safe injection sites* should be granted.

Legislative Response: The Respect for Communities Act

The *RCA* was the legislature's recent response to the *PHS* decision.[362] As noted in the preamble, the purpose of the amendment was to balance the government's objectives of public health and safety.[363] Notably, the final part of the preamble notes the exception under s. 56.1(3) of the *CDSA* and states that it "should only be granted in exceptional

judiciary on the issue of regulating safe injection sites, even if the legislature was legitimate in its decision to sidestep the decision of the Court.

[359] *Ibid*, at para 128.

[360] *Ibid*, at para 128.

[361] Carol Strike et al., "Increasing Public Support for Supervised Injection Facilities in Ontario, Canada" (2014) 109 *Addiction* 946; Emilie Meyers & Ellen Snyder, "Harm Reduction at its Best: A Case for Promoting Safe Injection Facilities" (2014) 4 *University of Ottawa Medical Journal* 24.

[362] *RCA*, *supra* note 7.

[363] *Ibid* at *Preamble.*

circumstances and after the applicant has addressed rigorous criteria."[364] This reflects the legislature's desire to deviate from the approach to exemptions articulated by the Supreme Court of Canada in *PHS.* The *Act* amended several other elements of the *CDSA*; however, for the purposes of this paper, I focus on the changes to s. 56 exemptions as they contest the Supreme Court's claim that safe injection sites should generally receive exemptions where data is available demonstrating that the program increases public health with little to no notable downsides.

Through the amendments introduced by the *RCA*, s. 56 of the *CDSA* has been divided into two categories and demonstrates the legislature's response to safe injection sites. Whereas s. 56(1) still reads similarly, the new subsection 56.1(2) was created to deal with exemptions of illicit substances—controlled substances not obtained in a way authorized under the *CDSA*.[365] Additionally, s. 56.1(3) lists up to 26 criteria materials to be submitted before the Minister will consider an application for an exemption under s. 56.1(2), on the chance that it is readily available.[366] These include: scientific evidence supporting the program, letters from provincial health and safety ministers, forecasted impacts on the local community, letters from the head of police in the municipality the program will be located, a financial plan demonstrating the sustainability of the site, to, as section 56.1(3)(z) states: "any other information that the Minister considers relevant to the

[364] *Ibid* at Preamble.
[365] In effect, this targets any narcotics obtained from illegal vendors on the street, i.e. the majority of people in the DTES who utilize the resources available at InSite. *CDSA*, *supra* note 331 at ss. 56.1(1), 56.1(2), and 56.1(3).
[366] While these criteria must be included, provided the data is available, there is no attempt to explain how this missing data will or will not harm the success of the application. The result will discourage some programs for seeking an exemption if they feel they do not have 'enough' of the requirements before making their application. Adrienne Smith, "Legal Issues with Bill C-2" *Pivot Legal Society* (3 November 2014), online: <http://www.pivotlegal.org/legal_issues_with_bill_c_2> [Smith, "Pivot C-2"] at 8.

consideration of the application".[367] Section 56.1(4) establishes that applications for renewals of exemptions may only be considered provided they present all the materials outlined in sections 56.1(3)(a) through 56.1(3)(z.1) in addition to evidence on both the impact on crime rates in the site's vicinity as well as the change in public health during the period of the previous exemption.[368] The result is a massive expansion of components required to receive an exemption under the new s. 56.1(3) that applied *only for exemptions relating to illicit drugs*.[369] This presents an attempt at regulating the process in which exemptions are granted for illicit substances under s. 56.1(2). Regulating the process in this fashion offers the Minister of Health a multitude of ways to justify their decision to not grant an exemption while making it more difficult to grant one given the difficulty for applicants to gather the information required to submit an application for an exemption under the new legislation.[370]

Likewise, s. 56.1(5) extends this regulatory framework by outlining criteria the Minister of Health must consider, including limiting exemptions to *exceptional* circumstances, further increasing the difficulty for safe injection sites to receive the

[367] The wording of this section is extremely vague, overly broad, and can be disproportional due to its capacity to be a unilateral veto for the Minister of Health. While discretion is a component, it is not revealed how these components should scale with each other. See Smith, "Pivot C-2", *ibid*; *CDSA*, *supra* note 331 at s 56.1(3)(z).
[368] *CDSA*, *ibid* at s. 56.1(4).
[369] This distinction is interesting because none of these criteria are required for exemptions regarding drugs gathered through CDSA-recognized avenues. The result is overly strenuous towards marginalized populations who are getting their drugs from the streets, and specifically targets safe injection sites where the majority of substances consumed within are likely to originate from non-CDSA compliant origins. *CDSA, ibid* at ss. 56.2(a) and (b); Smith, "Pivot C-2", *supra* note 366.
[370] Cecile Kazatchkine, Richard Elliott, and Donald MacPherson, "An Injection of Reason: Critical Analysis of Bill C-2 (Q&A)" Canadian HIV/AIDS Legal network and Canadian Drug Policy Coalition (23 October 2014) online: <http://www.aidslaw.ca/site/an-injection-of-reason-critical-analysis-of-bill-c-2/> [Kazatchkine, Elliot & MacPherson, "Injection of Reason"] at 9-10; Smith, "Pivot C-2", *ibid* at 7; "Safe Injection Site Law 'Whips Up' Tory base, May Block New Facilities" (23 June 2015) online: CBC <http://www.cbc.ca/news/politics/safe-injection-site-law-whips-up-tory-base-may-block-new-facilities-1.3123962> [*CBC Insite*].

appropriate exemption.[371] This subsection specifically directs the Minister to consider the medical side effects of illicit substances, risks of overdosing, the requirement for strict controls, the financing of organized crime through condoning purchases of illicit substances, and the criminal activity that "often results from the use of illicit substances".[372] Altering the legislation in this way responds to the Court's finding in *PHS* by prioritizing public safety over public health.[373]

In short, the *RCA* responds to the Supreme Court's decision by creating a new subsection specifically designed for granting exemptions to safe injection sites under the *CDSA*. The amendments under the *RCA* prioritize goals of public safety over public health. By explicitly emphasizing that the Minister must consider public safety implications of the exercise of their discretion while ignoring the positive, pro-public safety aspects of safe injection sites in the amendments, I argue the legislature has resisted the Court's finding that the Minister's exercise of discretion when considering exemptions for safe injection sites must balance concerns of public health and public safety.

Unshrouding Contestation: Acknowledging Conflict Regarding Safe Injection Sites

The legislative summary of the bill, revised on March 30th 2015, speaks about the commentary on the *RCA* and outlines how a majority of responses to the bill are negative.[374]

---

[371] The section 56.1(5) reads: "The Minister may only grant an exemption for a medical purpose under subsection (2) to allow certain activities to take place at a supervised consumption site in exceptional circumstances and after having considered the following principles: (*a*) illicit substances may have serious health effects; (*b*) adulterated controlled substances may pose health risks; (*c*) the risks of overdose are inherent to the use of certain illicit substances; (*d*) strict controls are required, given the inherent health risks associated with controlled substances that may alter mental processes; (*e*) organized crime profits from the use of illicit substances; and (*f*) criminal activity often results from the use of illicit substances." *CDSA*, *supra* note 331 at s. 56.1(5).

[372] *CDSA*, *ibid* ss. 56.1(5) and 56.1(5)(f)

[373] Kazatchkine, Elliot, & MacPherson, "Injection of Reason", *supra* note 370 at 9-10; Smith, "Pivot C-2", *supra* note 366 at 7.

[374] Martha Butler & Karin Phillips, "Legislative Summary—Bill C-2: An Act to amend the Controlled Drugs and Substances Act" *Library of Parliament* (30 March 2015) online: <http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/2/c2-e.pdf>.

While some parties, such as the Canadian Police Association are in favour of the high threshold for safe injection sites, the majority of interveners opposed it.[375] The Canadian Medical Association, for example, is hesitant towards the amendments and noted that they have "the potential to create unnecessary obstacles and burdens that would ultimately deter the creation of new supervised consumption sites".[376] These barriers, as the CMA argued, contradict the spirit of the Supreme Court's decision in *PHS* by prioritizing public safety over public health. These claims are not unique to the CMA. The Canadian Drug Policy Coalition, PIVOT Legal Society, as well as the Canadian Nurses Association, to name only a few, submitted additional responses highlighting discontent with the amendments to the *CDSA* made under the *RCA* using similar avenues of critique.[377]

These critiques of the *RCA* have four interconnecting themes that speak to the relationship between the legislative and judicial branches of the state and reveal aspects of their contestation over the *Charter* as it relates to safe injection sites. These critiques argue that the *RCA*: 1) does not balance public health and public safety as equal and desirable goals; 2) contradicts the spirit of the Supreme Court's decision in *PHS*; 3) imposes unreasonable barriers and obstacles to obtaining/maintaining an exemption under s. 56.1(2), and; 4) does not outline how the applications should be adjudicated, effectively creating unilateral veto power for the Minister of Health.

---

[375] *Ibid*, at 11-12.
[376] House of Commons, Standing Committee on Public Safety and National Security, *Bill C-2 An Act to amend the Controlled Drugs and Substances Act (Respect for Communities Act): Canadian Medical Association Submission to the House of Commons Standing Committee on Public Safety and National Security* (28 October 2014) [*CMA*] at 2.
[377] Smith, "Pivot C-2", *supra* note 366, Canadian Nurses Association, "Bill C-2: *An Act to amend the Controlled Drugs and Substances Act (Respect for Communities Act): Brief for the Standing Committee on Legal and Constitutional Affairs* (May 2015) [*CNA*]; "Brief to the Standing Committee on Legal and Constitutional Affairs" *Canadian Criminal Justice Association* (8 September 2014), online: Canadian Criminal Justice Association <http://www.ccja-acjp.ca/pub/en/bill-c-36-protection-of-communities-and-exploited-persons-act/>.

The first of these argues that the amendments made to the *CDSA* disproportionately prioritize public safety over public health.[378] The CMA notes how the bill specifically underplays the positive impacts on both public health and safety in exchange for popular opinion.[379] It does so by only acknowledging negative repercussions to safe injection sites and ignoring positive aspects that advance public health as seen in s. 56.1(5).[380] The Canadian Nurses Association further argues that the wording of the bill supports misinformation through portraying the services offered at safe consumption sites as dangerous by paralleling them with the harms of illicit drug use.[381] In addition, critics contend that the public safety concerns listed in the *RCA* are already addressed under criminal law and municipal bylaws.[382] In both undermining the positive aspects of safe injection sites, and emphasizing their potential downsides, critics of the *RCA* claim that it does not strike a meaningful balance between public health and safety as the Supreme Court found under s. 10(1) of the *CDSA*.[383]

Second, critics of the *RCA* argue that the Minister of Health is required to balance public health and safety as the judiciary found in *PHS*. The Supreme Court found in *PHS* that the risk of death, disease, and harm to drug users far outweighs any potential gains to present a united front against drug use.[384] They concluded that the Minister of Health *must* strike a balance between these two goals, as implied in the *CDSA* itself, and that an exemption should generally be granted unless evidence suggests otherwise.[385] As Adrienne

[378] *CDSA*, *supra* note 331 at s. 10(1); *PHS*, *supra* note 5 at para 41.
[379] This can also be seen under s. 56.1(6) that allows for public input within 90 days of announcing an exemption will go into place.
[380] Smith. "Pivot C-2", *supra* note 366 at 6-7.
[381] *CNA*, *supra* note 377 at 5-7.
[382] Smith, "Pivot C-2", *supra* note 366 at 7.
[383] Kazatchkine, Elliot & MacPherson, "Injection of Reason", *supra* note 370 at 9-10
[384] *PHS*, *supra* note 5 at para. 188.
[385] *CDSA*, *supra* note 331 at s. 10(1); *PHS*, *ibid* at para 41.

Smith notes, the *RCA* goes against the judiciary's decision that exemptions should be common if there is no evidence demonstrating negative effects of safe injection sites.[386]

While the judiciary came up with an *inter alia* list of criteria they found important regarding the Minister of Health's discretion to grant an exemption, the legislative response resists it, in part, by directly highlighting the negative aspects of safe injection sites over positive ones linked to increasing public health.[387] The exceptions outlined by the Supreme Court, outlined in its decision at paragraph 153, claims that:

> [t]he *CDSA* grants the Minister discretion in determining whether to grant exemptions. *That discretion must be exercised in accordance with the Charter*. This requires the Minister to consider whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice. *The factors considered in making the decision on an exemption must include evidence, if any, on the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition.*[388]

The list generated by the courts therefore were designed to guide the Minister from acting in a grossly disproportionate or arbitrary manner that would cause an unjustified impediment to accessing a safe injection site by balancing the *CDSA*'s goals of public health and safety. The legislature has resisted the Court's rendition of how the Minister should exercise his discretion by exercising its prerogative to create a detailed list that emphasizes public safety over public health.[389]

---

[386] Smith, "Pivot C-2", *supra* note 366 at 5-7.
[387] This list can be found at paragraph 153 of the Court's decision and outlines that the Minister should consider evidence on a variety of issues including the impact on crime rates, the local conditions that could be addressed through a safe injection site, the resources available to maintain the facility as well as expressions of community support or opposition. *PHS*, *supra* note 5 at para 153. *RCA*, *supra* note 7 at *Preamble*; *CDSA*, *supra* note 331 at s. 56.1(5).
[388] *PHS*, *ibid* note 5 para 153 [emphasis added].
[389] Kazatchkine, Elliot & MacPherson, "Injection of Reason", *supra* note 370 at 9-10; Smith, "Pivot C-2", *supra* note 366 at 7-8.

The third popular critique builds upon the last in that it is concerned about the enormous list of materials required to apply for an exemption under s. 56.1(2) and argues that the amendment purposefully makes it difficult to receive an exemption.[390] Requiring an extremely onerous list of requirements, including letters from Ministers and local police forces (who are not required to review any evidence or justify their support for or against a safe injection site), the *RCA* maintains extremely rigorous standards for granting exemptions to safe injection sites while offering *potentially carte blanche* power to community stakeholders/the Minister themselves.[391] Adding this excessive list of requirements trivializes the Supreme Court's finding that these programs should be granted in situations that successfully balance public health and safety by creating an unyielding list of administrative requirements that are simultaneously hard to forecast and not directly related to the public health function of safe injection sites.[392]

Finally, there are no criteria outlining how the Minister of Health must consider the application with regard to public health. Specifically, the Supreme Court found that InSite was an active contribution to public health by reducing overdose deaths, public injections, and the sharing of needles. These positive aspects, the Court argued, were indicative of the benefits to public health that did not come at the expense of public safety. While the specific benefits of safe injection sites was found specifically for InSite in Vancouver's DTES, the Court's decision clearly articulates that safe injection sites can benefit public health. Subsequently, the lack of any guidelines for the Minister to consider public health

[390] *CBC Insite*, *supra* note 370; *CNA*, *supra* note 377 at 6-7; *CMA*, *supra* note 376 at 6; Kazatchkine, Elliot & MacPherson, "Injection of Reason", ib*id* at 10.
[391] Furthermore, since these letters could be deemed necessary by the Minister, it could create an effective unilateral veto power for a variety of Ministers, or heads of police who may disagree with the program and refuse to provide a report. Smith, "Pivot C-2", *supra* note 366 at 7-8.
[392] Smith, "Pivot C-2", i*bid*, at 7-8; *CNA*, *supra* note 377 at 6-7.

under the *RCA* is problematic because the Minister is never required to look at applications for their public health benefits under s. 56.1(2). Section 56.1(5) explains some key factors the Minister should consider, but it is ambiguous as to how these factors weigh relative to each other.[393] The result guides the Minister to prioritize evidence of public safety over public health, troubling the Court's suggestion that these two components should be balanced. Furthermore, there is no clearly articulated appeal process, meaning that any challenge to the Minister's decision is forced to advance through the Courts.[394] Under the current legislation, the Minister of Health is not required to explain why they elected not to grant an exemption—such as in *PHS*.[395] The result is not a carefully nuanced response to the Supreme Court's decision. Instead, it is an instance where the legislature has elected to use their legitimate authority to overturn the judiciary's position in *PHS* by creating a process that is much more likely to result in the Minister dismissing an application for an exemption under s. 56.1(2).

Consequentially, two positions are revealed through pairing *PHS* with the *RCA*. The first is the Supreme Court's decision that read in a requirement that the Minister of Health must balance public health and public safety concerns when exercising her discretion in order to ensure the constitutionality of s. 4(1) of the *CDSA.* The second is the legislature's position that exemptions for safe injection sites should only be granted under *exceptional* circumstances, and the creation of a set of requirements and criteria that grossly prioritize public safety over public health. The effect of the new legislation offers a quasi-unilateral veto tool to the Minister, or possibly other stakeholders such as local police chiefs

[393] *CNA*, *ibid* at 6-7; *CMA*, *supra* note 376 at 6; Smith, "Pivot C-2", *ibid* at 7.
[394] *CDSA*, *supra* note 331 at s. 56.
[395] Smith, "Pivot C-2", *supra* note 366 at 7-8; *CNA*, *supra* note 377 at 7-8; *CMA*, *supra* note 376 at 5-6; Kazatchkine, Elliot & MacPherson, "Injection of Reason", *supra* note 370 at 9-11.

regarding the exemptions necessary to legally operate a safe injection facility.[396] While not a direct affront to the position put forward by the Court, the legislative response creates an obstacle course of criteria, coupled with negative wording relating safe injection sites to crime, death, and public harm in a way that will most likely hinder the growth of safe injection sites. Accordingly, the legislation demonstrates a sheer disagreement to the decision of the Court on safe injection sites.

While this disagreement is visible through juxtaposing these contrasting opinions regarding safe injection sites, it is not rendered as clear to the public as it could be by the legislature itself. The legislature has acknowledged the judiciary's findings in *PHS* by amending the *CDSA* to prioritize public safety, yet in doing so they have concealed their disagreement with the Supreme Court's approach of balancing public health with public safety. Revealing this political contestation to the public, as I argue in the next section, would inform the public where the legislative and judicial branches of the state lie on certain issues and increase the transparency of the state.

Speaking To or Talking Past: Revealing Contestation in *PHS* and the *RCA*

It is important to note that Parliament has not done anything illegal or illegitimate in their legislative response. However, this does not mean that the contestation between it and the judiciary has settled on a 'final say' as the judicial review literature may suggest. Instead, I argue the legislature has utilized their legitimate ability to amend the *Controlled Drugs and Substances Act* to match their view that safe injection sites have a severe potential to harm public safety. Yet in their decision to do so, the legislature has not justified its decision to sidestep the guidelines set out by the judiciary that exemptions

[396] Smith, "Pivot C-2", *ibid*.

should be granted for safe injection sites under the auspices of balancing public health and safety. The result is democratically valid, yet also undermines the judiciary's equally legitimate authority to interpret the Constitution by trumping it without justifying the decision to do so. This section proposes two dimensions that could increase the transparency of the state. The first would be for the legislature to formally invoke the notwithstanding clause regarding ss. 4(1) and 56 of the *CDSA*, and the second, would be for the legislation to offer a justification for its decision to resist the finding of the Supreme Court in *PHS*. I then conclude by demonstrating how the legislative response can be seen as an instance of the contested form of interpretational theory that accentuates why moving away from final say approaches are necessary.

By not formally invoking s. 33 of the *Charter*, the amendments found under the *RCA* obfuscate the contestation over the Constitution by informally operating notwithstanding of the Supreme Court's interpretation of the *Charter*. While the legislature can legitimately disagree with the Court, informally operating notwithstanding of the Court's decision in *PHS* obfuscates the disagreement between these two bodies from the public. Specifically, by not invoking the notwithstanding clause, while resisting the Court's suggested *inter alia* list of guidelines to assist the Minister of Health in utilizing their discretion in accordance with the *Charter*, the legislature is bypassing the Court's equally valid opinion.

To formally override the Supreme Court's decision, the legislature could have added a clause into the *RCA* explaining that ss. 4(1) and 56.1(2) of the *CDSA* would operate outside the *Charter* for a period up to five years. Including these two sections in a notwithstanding clause would articulate two different aspects of the legislature's response

to the Court. First, it would clearly articulate that the legislature disagrees with the Supreme Court's finding that s. 4(1)'s constitutionality was contingent upon the Minister of Health's ability to grant safe injection sites exemptions under the *CDSA*. Second, by making s. 56.1(2) operate notwithstanding of the judiciary's position in *PHS*, the legislature would also send a clear message that it disagrees with the *inter alia* list provided by the Supreme Court to guide the Minister of Health's discretionary powers by balancing between public health and safety.[397] Combined, both of these sections of the *CDSA* could operate notwithstanding the judiciary's interpretation of the *Charter* and clearly articulate the disagreement between the Supreme Court's decision and the *RCA*.

That is not to say, however, that invoking s. 33 is necessarily the best outcome, as it effectively creates a temporary removal of rights for the marginalized population that use InSite and other safe injection programs. Instead, I refer to s. 33 here as an alternative that could have made the contestational process more transparent. Similarly to the arguments advanced in Chapters 2 and 3, Parliament has the capacity to respond in other ways, the most preferable being a justification for its decision to bypass the interpretations laid down by the judiciary. As such, I use the notwithstanding clause here as an example of how it would be the last resort in accentuating the disagreement between the two branches—not as the ideal solution to the problem of an obfuscated disagreement over the *Charter*.

Obfuscating contestation from the public is problematic for three reasons. First, as Smith forecasts, the issue of safe injection sites will most likely re-emerge through a new

[397] This is a rather unique situation because it involves using the notwithstanding clause to refute the Supreme Court's attempt to guide the Minister of Health to utilize their discretion in accordance with the *Charter*. Yet, doing so would grant the legislature the opportunity to guide the Minister of Health in a way not necessarily supported by the *Charter*, making it a possible avenue to further establish Parliament's disagreement with the decision of the Supreme Court in *PHS*.

case as the issue proceeds through the legal system due to a lack of response to the empirical claims raised in *PHS*.[398] The result, similar to a notwithstanding invocation, is a period of time where the law will be ambiguous across the country until the judiciary may reiterate its interpretation of the Constitution, or the legislature further amends the legislation.[399] Furthermore, by not justifying their issue(s) against the Court's arguments that found safe injection sites advance public health, and not defending this position through invoking the notwithstanding clause, the legislature has resisted the interpretation put forward by the Supreme Court.[400] Second, obfuscating the contestation over the Constitution suggests that the legislature and the judiciary are agreeing with each other, when the exact opposite is true. While there are minor aspects these branches agree on, the legislation directly challenges the finding of the Court by ignoring its finding that the Minister of Health must exercise his discretion pursuant to the purpose of the *CDSA* by balancing public health and safety.[401]

Third, the *RCA* helps conceals the ideological associations of these parties, damaging the transparency of the state. If the legislature has a conservative interpretation of the Constitution, it is completely entitled to it under an agonistic approach.[402] Hiding this ideological basis from the public does not allow people to voice their opinion on the

[398] Smith, "Pivot C-2", *supra* note 366 at 8
[399] I mean it is effectually the same in that the legislature's interpretation of the *Charter* will hold until the courts re-address the issue. This may take some time because the new amendments alter the objective of the law, and therefore a legal case with new facts may be required for the issue to advance through the courts.
[400] Smith, "Pivot, C-2", *supra* note 366 at 8-10. This ambiguity arises due to the uncertainty of a lower court decision. Specifically, if the case seems controversial enough that it will advance, the public may be hesitant to operate on an iteration of the *Charter* which may be re-interpreted by the judiciary.
[401] Honig, *Displacement of Politics*, *supra* note 19.
[402] Wenman, *Agonistic Democracy*, *supra* note 142 at 231; Honig, "Between Decision and Deliberation", *supra* note 310.

matter.[403] The legislature may govern based on its political ideology, but when it does so it should be forthright about how that is exactly what it is doing according to agonistic politics.[404] While this is still undesirable, it emphasizes how the legislative branch is interpreting the Constitution, rendering it more transparent and therefore democratic.[405]

The second, more favourable, dimension the legislature could have utilized was a detailed justification for their decision to operate notwithstanding the judiciary's interpretation rendered in *PHS*. This would entail responding to the court's argument that exemptions for safe injection sites should be granted to balance between public health and safety under the *CDSA* as well as why the legislature has elected to prioritize public safety over public health. A possible example of this would be through a Parliamentary committee creating a report similar to a *Technical Paper* created in response to the *Bedford* decision. This report would articulate the findings of the Court and respond to them in point, justifying *why* the legislature has decided to resist the interpretation laid down by the Court. This report would not only clearly place emphasize the contesting views of the legislative and judicial branches of the state together, but also explain to the public *why* the legislature elected to resist the decision of the Supreme Court. This explanation is important for an agonistic rendition of politics because it exemplifies the capacity for ideas to be debated in the public realm.[406]

---

[403] Honig, *Displacement of Politics*, *supra* note 19; Parekh, *Arendt and the Search for a New Political Philosophy*, *supra* note 163 at 8-10.
[404] Honig, *Displacement of Politics*, *ibid*; Wenman, *Agonistic Democracy*, *supra* note 142.
[405] Honig, *Displacement of Politics*, *ibid*; Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14; Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Hiebert, *Charter Conflicts*, *supra* note 39.
[406] Kahana, "Notwithstanding Mechanism and Public Discussion, *ibid*; Wenman, *Agonistic Democracy*, *supra* note 142.

If the legislature enacted a state of formal notwithstanding under the *Charter* coupled with an explicit analysis as to why it disagreed with safe injection sites, the contestation between the legislative and judicial branches of the state would become clearer than it currently is. Explaining the reasons for the disagreement not only shows a listening for, and speaking to, the substantive components of the Supreme Court's decision, but also shows confidence in the legislature's disagreement with the courts.[407] Furthermore, providing an explicit rationale as to why the legislature disagrees with the judiciary may help convince the public that the notwithstanding clause is a boulevard to violating rights. Instead, the notwithstanding clause could be perceived as protecting the public from the judiciary's ungrounded basis in constructing policy in extreme cases where Parliament feels the judicial interpretation is highly problematic and be harmful to society.[408] Voicing the contestation and the counter arguments in this way supports the dialogic relationship between these branches by demonstrating one is not acting notwithstanding of the other solely because it can.[409]

Seeing the legislative and judicial branches in an instance of contestational dialogue reveals how Honig's virtue and *virtù* theories of politics allow for these branches to disagree with the other without abandoning order. While the virtue theories support the *current* iteration tendered by the legislature, the *virtù* theories leave open the possibility for the courts to respond. Subsequently, by seeing *PHS* and the *RCA* as a dialogic pairing, the problem with the final say present in the judicial dialogue literature becomes highlighted.

---

[407] Honig, *Displacement of Politics*, *supra* note 19; Honig, "Dead Rights"*, supra* note 14; Wenman, *Agonistic Democracy*, *ibid*.
[408] Roach, *Supreme Court on Trial*, *supra* note 33; Hiebert, *Charter Conflicts*, *supra* note 39.
[409] Honig, *Displacement of Politics*, *supra* note 19; Honig, "Between Decision and Deliberation", *supra* note 310.

Specifically, by always allowing one branch to respond to the other—and removing the possibility of a final interpretation of the *Charter*—the contestational dialogue approach I develop demonstrates how privileging one branch of the state over the other undermines the capacity of the other to respond.

Building upon Janet Hiebert's coordinate approach, this case study illustrates *why* it is important for the legislative and judicial branches to stand up for their own interpretation of the *Charter*. The legislature, in standing up for its interpretation, only needs to pass or amend legislation, but under a contestational approach it *should* also justify its decisions when resisting the judiciary. Justifying the legislature's position against the judiciary's not only acknowledges (and thus reveals) the contestation between these branches, but also ensures that the legislature has defended its position as much as possible by explaining the rationale for its decision to resist the interpretation of the judiciary. By not justifying its decision in an adequate manner, the legislature has effectively obfuscated the contestation around the *Charter*-interpreting process. Similarly, while informally operating notwithstanding the decision of the court is within the legislature's purview, it is exceedingly less democratic because it further hides the contestation between the legislative and judicial branches over interpreting the *Charter*.

The disagreement between the legislative and judicial branches is also visible when considering the evidence considered by the legislature as it drafted the *RCA*. As Smith notes, the experts who were called to testify before the Supreme Court were not invited to do so before the committee in charge of drafting the *RCA*.[410] To not analyze the evidence the courts used is acceptable; however, it should be clearly acknowledged with an

[410] Smith, "Pivot C-2", *supra* note 366 at 7.

explanation as to why the evidence presented to the Supreme Court was unsuitable.[411] If there is a conflict of ideological interest, it should clearly be articulated. If the legislature chose experts who have similar crime-control agendas it is perfectly acceptable; however, to not be forthright about this, and to hide the contestation over the interpretation of the *Charter* strains aspects of an accountable democracy.[412] Ultimately, the judiciary listened to a wide array of evidence and found nothing substantial to warrant to broadly restrain exemptions for safe injection sites, yet this is exactly what the legislative response accomplishes.

Conclusion

This Chapter has demonstrated the contestation between the judiciary and the legislature over the interpretation/application of the *Charter* regarding safe injection sites. The *RCA* clearly establishes guidelines that, in their effect, resist the suggestions of the Supreme Court to balance public health and safety. Disagreement between these two branches of the state is visible when observing how the Supreme Court emphasized the benefits of safe injection sites for public health in its consideration of the evidence in *PHS*, whereas the legislative response has heavily prioritized goals of public safety while marginalizing concerns of public health.

[411] Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 14; Kahana, "Notwithstanding Mechanism and Public Discussion", *supra* note 20; Honig, *Displacement of Politics*, *supra* note 14.
[412] Honig, "Dead Rights", *supra* note 14 at 801 discusses how the notwithstanding clause represents an acknowledgement that sometimes the Constitution must be marginally displaced to allow for democratic values. That is not to say that ruling through political ideology is unacceptable, it is however in the face of a constitution's goal of existing outside of majoritarian politics. Yet, a system cannot rely on one without the other. As a result, the notwithstanding clause is a viable avenue to acknowledge when democratic values/political ideology are being reasserted in the face of an indefinite Constitution. Moreover, Honig demonstrates how acknowledging the necessity for democracy to overpower the limits placed by a Constitution to ensure that judiciary never dominates the legislature.

The resulting disagreement between the legislature and the judiciary, I have argued, could have been rendered more transparent through two ways, the first, by invoking the notwithstanding clause regarding ss. 4(1) and 56.1(2) of the *CDSA* to clearly demonstrate its disagreement with the Supreme Court's interpretations of the *Charter*. The second, more preferable, way would be for the legislature to offer a justification for its decision to ignore the proposed guidelines of the Supreme Court, and to instead offer guidelines for the Minister of Health that extensively focus upon public safety concerns over the potentially positive public health effects of safe injection sites. Operating along one, or both of these avenues, I maintain, would accentuate the contestation between the law-branches of the state, making it more transparent and thus democratic. While the legislature has not acted illegitimately in any of its decisions, that does not mean that the legislature could not have responded in a fashion that would have enacted similar results while showing respect for the equal authority of the judiciary to interpret the *Charter*. Making this process visible to the public supports an agonistic political model that, as argued in Chapter 1, reflects the uncertain nature of Canada's Constitution and political system.

Conclusion

This project has argued that the legislative and judicial branches of the state have equal authority to interpret the Constitution following the *Constitution Act 1982*. Providing both these branches the capacity to interpret the *Charter* in such a fashion, it has maintained, creates a potential struggle between them. Approaching the relationship between the legislative and judicial branches in such a fashion emphasizes the disagreement that takes place over the interpretation of the *Charter*. Conversely, this project has argued that not emphasizing the potential disagreement between these branches, as demonstrated in the judicial dialogue literature, obfuscates the *Charter*-interpreting process from the public, thus diminishing the transparency of the state.

The contestational approach developed within this project adds to the literature by mapping out the *Charter*-interpreting process in a way different from the current judicial dialogue literature. This is because, as argued in Chapters 1 and 2, judicial dialogue approaches heavily infer that a final interpretation of the Constitution is possible. This claim is problematic since, as Chapter 2 demonstrates, a final interpretation of the *Charter* is impossible when both the legislative and judicial branches of the state possess the capacity to respond to the other's decision. Whether it be through judicial decision, legislative amendments, or invoking the notwithstanding clause, ultimately, the other branch eventually has the capacity to respond to the *current* interpretation of the *Charter*. Presenting these branches in contest with one another simultaneously normalizes the conflict between them while making the *Charter*-interpreting process more transparent to the public, resulting in an increase in democratic accountability. Moreover, by highlighting

the contestation of the *Charter*-interpreting process, the public have additional avenues to advocate for the iteration of the *Charter* it most agrees with.

The core of this project has examined how the legislature, in its responses to the Supreme Court's decisions in *PHS* and *Bedford*, could have been more democratic. Specifically, Chapters 3 and 4 have maintained that the legislature could have emphasized the contestation between it and the judiciary by offering an adequate justification for resisting the interpretations of the Court, and/or, if Parliament felt it was urgent enough, to *formally* invoke the notwithstanding clause. In regards to the *Bedford* rebuttal, while the legislature has partially addressed the Court's decisions, the *Protection of Communities and Exploited Persons Act* has failed to address how the previous provisions were unconstitutional because they placed sex workers in situations featuring an increased risk of violence. Instead, the *PCEPA* has altered the legal objective of the law in such a way that addresses the specific issues found to violate the security of the person. Consequently, the *PCEPA* has attempted to justify the s. 7 *Charter* violations by arguing it is in the best interests of sex workers to restrict the sex trade.

Similarly, this project has maintained that the *Respect for Communities Act* demonstrates a clear disagreement with the Supreme Court's decision in *PHS*. The legislature's response specifically resisted the Court's interpretation that safe injection sites can be valid under auspices of public health, by emphasizing public safety as the central component guiding the Minister of Health's discretion to grant a safe injection site an exemption under s. 56.1(2) of the *CDSA*. Subsequently, in both of the cases studies here, this paper demonstrates how the legislature has not emphasized the contestation over the *Charter*-interpreting process by neglecting to formally invoke the override clause as well

as failing to offer the more preferable option, an adequate justification for its decision to resist the interpretations of the Supreme Court. Obfuscating the contestation over the *Charter*-interpreting process in such a manner is not illegitimate. While it is possible that the judiciary could find the legislature's responses unconstitutional, that argument is outside the scope of this project.

Combined, these two case studies demonstrate the problems in an orthodox judicial review centred approach towards analyzing the relationship between the legislative and judicial branches of the state. By not voicing its disagreement with the judiciary the legislature has failed to defend its position to the best of its ability. Drawing upon Janet Hiebert's argument, the legislature still has not fully utilized its ability to interpret the Constitution. While the legislature has resisted the judiciary's interpretation of the *Charter*, and therefore partially defended its position, by not clearly emphasizing its disagreement with the judiciary, the legislature has not expressed its interpretation as clearly as it could. Specifically, by not justifying its decision to resist the judiciary, the legislature has left itself vulnerable to the courts simply finding the new legislation unconstitutional. Ultimately, whether it be through changing the objective of legislation or adding arbitrarily cumbersome regulations, the legislature's refusal to provide an adequately detailed reason *why* they disagree with the judiciary in these cases demonstrate how the legislature *could* have tendered more democratic responses.

This project is not concerned with analyzing *who* has the legitimate authority over interpreting the Constitution, but instead *how* the *current* iteration of it comes about *between* the legislative and judicial branches. This means some topics have been left at the wayside, not because they are unimportant, but because they would take away from the

thrust of my argument. In these instances, the paper has pointed towards scholars who fill in these gaps. Understandably, this project may come across as overly unsubstantiated due to the relatively recent nature of its case studies. While the legislative response to *Bedford* came into force on December 6 2014, the legislative follow-up to *PHS* came into force on July 16 2014. As such, there has not been a substantial amount of academic literature to appear. Instead, this paper has referred to scholars writing op-eds, or reports for standing committees to demonstrate the effect of the newly passed bills. While this undoubtedly limits my project, it also strengthens it by making it contemporary. Whereas judicial review scholars, such as Dennis Baker, focus upon issues that have been settled, this project opted to target present-day issues. What my project forfeits in stability it gains in being a snapshot of the present contesting interpretations presented by the legislature and the judiciary.

Finally, my project has demonstrated how the Constitution-interpreting process is filled with contestation between the legislative and judicial branches of the state. This does not necessitate a struggle over every constitutional issue. Instead, this paper has advocated that this potential for struggle *legitimately exists* in the Canadian state. While clearly emphasizing this contestation increases the transparency of the state, it is not illegitimate for the legislature to obfuscate it. There is something to be said, however, about a system that fosters and cherishes a legitimated provocation between these branches over one that denies and even represses disagreement between them. Whereas the former, grounded in a formal acknowledgment of contestation and adequate justification makes both the political and legal systems more transparent, the latter supports concealing the inner functions of the state in such a way that runs against the grain of Canada's constitutional democracy by arbitrarily prioritizing one interpretation of the *Charter* over another.

Bibliography

Legislation

Canada *Bill C-2, An Act to amend the Controlled Drugs and Substances Act*, 2nd Sess, 41st Parl, 2015 (assented to 18 June 2015).

Canada *Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014 (assented to 6 November 2014).

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

Controlled Drugs and Substances Act (S.C. 1996, c. 19).

Criminal Code, RSC 1985, c C-46.

The Constitution Act, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Jurisprudence

Bedford v Canada (Attorney General), 2010 ONSC 4264, [2010] 102 OR (3d) 321.

Canada (Attorney General) v Bedford, 2012 ONCA 186.

Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101.

Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134.

Charkaoui v Canada (Citizenship and Immigration), [2007] 1 SCR 350, 2007 SCC 9.

Ford v Quebec (Attorney General), [1988] 2 SCR 712.

Fraser v PSSRB, [1985] 2 SCR 455.

PHS Community Services Society v Attorney General of Canada, 2008 BCSC 661.

PHS Community Services Society v Canada (Attorney General), 2010 BCCA 15.

R v Daviault [1994] 3 SCR 63.

R v Downey [1992] 2 SCR 10.

R v Hall [*2002*] 3 SCR 309, 2002 SCC 64.

R v Labaye [2005] 3 SCR 728.

R v Malmo-Levine; R. v Caine, [2003] 3 SCR 571, 2003 SCC 74.

R v Mara [1997] 2 SCR 630.

R v Mills [*1999*] 3 SCR 668

R v Morales, [*1992*] 3 SCR 711.

R v O'Connor [*1995*] 4 SCR 411.

R v Oakes [*1986*] 1 SCR 103.

R v Tremblay [1993] 2 SCR 932.

Re BC Motor Vehicle Act, [1985] 2 SCR 486.

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 SCR 1123.

RJR-MacDonald Inc. v Canada (Attorney General) [1995] 3 SCR 199.

Secondary Materials: Articles

Allan, James. "An Unashamed Majoritarian" (2004) 23 Dal LJ 537.

Allan, T. R. S. “Constitutional Dialogue and the Justification of Judicial Review” (2003) 4 *Oxford Journal of Legal Studies* 563.

———“Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review” (2010) 60 UTLJ 41.

Barthes, Roland. “Death of the Author” (1967) online: UbuWeb http://www.tbook.constantvzw.org/wp-content/death_authorbarthes.pdf>.

Bateup, Christine. “The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue” (2006) 71 Brook L Rev 1109.

Bickel, Alexander. “The New Supreme Court: Prospects and Problems” (1970) 45 Tul L Rev 229.

Billingsley, Barbara. “Section 33: The *Charter*’s Sleeping Giant” (2002) 21 Windsor YB Access Just 331.

Blakeney, Allan. “The Notwithstanding Clause, the *Charter*, and Canada’s Patriated Constitution: What I Thought We Were Doing” (2010) 19 Const Forum Const 1.

Bruckert, Chris. “Protection of Communities and Exploited Persons Act: Misogynistic Law Making in Action” (2015) 30 CJLS 1.

Campbell, Angela. “Sex Work’s Governance: Stuff and Nuisance” (2015) 23 Fem Legal Stud 23.

Canada, Department of Justice, *Technical Paper—Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts* (2014).

Casavant, Lyne & Dominique Valiquet. “Legislative Summary—Bill C-36: An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts” online: Library of Parliament http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/2/c36-e.pdf.

Chohen-Eliya, Moshe & Iddo Porat, “Proportionality and the Culture of Justification” (2011) 59 American Journal of Law Review 463.

Davies, Jacqueline M. “The Criminalization of Sexual Commerce in Canada: Context and Concepts for Critical Analysis” (2015) 24 The Canadian Journal of Human Sexuality 78.

Deveaux, Monique. “Agonism and Pluralism” (1999) 25 Philosophy & Social Criticism 1.

DiFruscio, Dominic. “Patriation, Politics and Power: The State of Balance Between the Supreme Court and Parliament after Thirty years of the *Charter*” (2014) 8 Journal of Parliamentary and Political Law 29.

Dixon, Rosalind. “The Supreme Court of Canada, *Charter* Dialogue, and Deference” (2009) 47 Osgoode Hall LJ 235.

Duranti, Francesco. “New Models of Constitutional Review” (2014) 5 Comparative Law Review 1.

Dyzenhaus, David. “Dignity in Administrative Law: Judicial Deference in a Culture of Justification” (2012) 17 Rev Const Stud 87.

———“Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 15 SAJHR 11.

Foucault, Michel. “The Subject and Power” in James D. Faubion, ed, *Michel Foucault: Power* (New York: The New Press, 2000).

Friedman, Barry. “The Politics of Judicial Review” (2005) 84 Tex L Rev 257.

Gardbaum, Stephen. “The Place of Constitutional Law in the Legal System” in Michel Rosenfeld and Andras Sajo, eds *The Oxford Handbook of Comparative Constitutional* (Oxford: Oxford University Press, 2012) 170.

Gursozlu, Fuat. “Debate: Agonisim and Deliberation—Recognizing the Difference” (2009) 17 The Journal of Political Philosophy 356.

Harel, Alon & Tsvi Kahana. “The Easy Core Case For Judicial Review” (2010) 2 Journal of Legal Analysis 227.

Harel, Alon and Adam Shinar. “Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review” (2012) 10 International Journal of Constitutional Law 950.

Hiebert, Janet. “Parliamentary Engagement with the *Charter*: Rethinking the Idea of Legislative Rights Review” (2012) 58 Sup Ct Rev 87.

———“Governing Like Judges” in Tom Campbell, K D Ewing, & Adam Tomkins, (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford, UK: Oxford University Press, 2011).

———“Compromising and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding”, in James B Kelly and Christopher P Manfredi, eds, *Contested Constitutionalism* (Victoria: University of British Columbia Press, 2009) 107.

———“Parliamentary Bills of Rights: An Alternative Model” (2006) 69 Mod L Rev 7.

———“A Relational Approach to Constitutional Interpretation: Shared Legislative and Judicial Responsibilities” (2001) 35 Journal of Canadian Studies 161.

———“Wrestling with Rights: Judges, Parliament and the Making of Social Policy” in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queens University Press, 2001) 165.

Hogg, Peter W, Allison A Bushell-Thornton, & Wade K Wright, “Charter Dialogue Revisited: Or “Much Ado About Metaphors” (2007) 45 Osgoode Hall LJ 1.

Hogg, Peter, W. & Allison A Bushell. “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75.

Honig, Bonnie. “Between Decision and Deliberation: Political Paradox in Democratic Theory” (2007) 101 The American Political Science Review 1.

———“Dead Rights, Live Futures: A Reply to Habermas’s “Constitutional Democracy”” (2001) 29 Political Theory 292.

House of Commons, Standing Committee on Legal and Constitutional Affairs, *Bill C-2 An Act to amend the Controlled Drugs and Substances Act (Respect for Communities Act): Brief for Standing Senate Committee on Legal and Constitutional Affairs* (May 2015).

Huscroft, Grant. “Constitutionalism From the Top Down” (2007) 45 Osgoode Hall LJ 91.

———“Rationalizing Judicial Power: The Mischief of Dialogue Theory” in James B. Kelly & Christopher P. Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Victoria: University of British Columbia Press, 2009) 50.

Jhappan, Radha. "*Charter* Politics and the Judiciary" in Michael Whittington & Glen Williams, eds, *Canadian Politics in the 21st Century* 5th edition (Scarborough, Ont.: Nelson Thompson Learning, 1999) 217.

Ka Hon Chu, Sandra & Rebecca Glass. "Sex Work law Reform in Canada: Considering Problems With the Nordic Model" (2013) 51 Alta L Rev 101.

Kahana, Tsvi. "The Notwithstanding Mechanism and Public Discussion: Lessons From the Ignored Practice of Section 33 of the *Charter*" (2001) 44 Canadian Public Administration 255.

———"Understanding the Notwithstanding Mechanism" (2002) 52 UTLJ 221.

Kazmierski, Vincent. "Draconian but not Despotic: The "Unwritten" Limits of Parliamentary Sovereignty in Canada" (2010) 41 Ottawa L Rev 245.

Kelly, James, B. and Christopher P. Manfredi. "Should We Cheer? Contested Constitutionalism and the Canadian *Charter* of Rights and Freedoms in James B. Kelly and Christopher P. Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 3.

Knopff, Rainer. "Courts Don't Make Good Compromises" in Paul Howe & Peter H. Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queens University Press, 2001).

Lawrence, Sonia. "Expert-Tease: Advocacy, Ideology and Experience in Bedford and Bill C-36" (2015) 30 CJLS 5.

MacDonnell, Vanessa. "The Civil Servant's Role in the Implementation of Constitutional Rights" (2015) 13 I Con 383.

Macfarlane, Emmett. *Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights* (2012) 34 International Political Science Review 39.

MacKay, Wayne. "The Legislature, the Executive, and the Courts: The Delicate Balance of Power Or Who Is Running This Country Anyway?" (2001) 24 Dal LJ 37.

Manfredi, Christopher & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall LJ 513.

———"Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures" (2001) 64 Sask L Rev 323.

McLachlin, Beverley, "The Role of the Courts in the New Democracy" in Joseph Eliot Magnet, ed, *Constitutional Law of Canada: Cases, Notes, and Materials*, vol 2 8th ed (Edmonton: Juriliber, 2000) 117.

McManus, Helen. "Enduring Agonism: Between Individuality and Plurality" (2008) 40 Polity 509.

Meyers, Emilie & Ellen Snyder. "Harm Reduction at its Best: A Case for Promoting Safe Injection Facilities" (2014) 4 University of Ottawa Medical Journal 24.

Ming-sung Kuo, "Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?" (2013) 26 Can JL & Jur 341.

Mouffe, Chantal. "Deliberative Democracy or Agonistic Pluralism?" (1999) 66 Social Research 745.

Mureinik, Etienne. "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 31.

———"Reconsidering Review: Participation and Accountability" (1993) 35 Acta Juridica 35 at 42.

Nanos, Nik. "*Charter* Values Don't Equal Canadian Values: Strong Support for Same-Sex and Property Rights" (2007) 28 Policy Options 50.
Nussbaum, Martha C. ""Whether From Reason or Prejudice": Taking Money For Bodily Services" (1998) 27 J Legal Stud 693.
Panaccio, Charles-Maxime. "Professor Waldron Goes to Canada (One More Time): The Canadian *Charter* and the Counter-Majoritarian Difficulty" (2011) 39 C L World Rev 100.
Petter, Andrew. "Legalise This: The *Charter*ing of Canadian Politics in James B. Kelly & Christopher P. Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Victoria: University of British Columbia Press, 2009) 33.
———"Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn't Such A Good Thing After All)" (2007) 45 Osgoode Hall LJ 147.
———"Rip Van Winkle in Charterland" (2005) 63 The Advocate 337 reprinted in Andrew Petter, The Politics of the Charter: The Illusive Promise of Constitutional Rights (Toronto: University of Toronto Press, 2010).
———"The Politics of the *Charter*" (1986) 8 Sup Ct L Rev 473 reprinted in Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) at 18-19.
Plaxton, Michael. "Nussbaum on Sexual Instrumentalization" (2014) *Criminal Law and Philosophy*, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377509>.
Potter, Simon V. & Emily MacKinnon *The Executive Branch: Defender of Canadian Liberties* (Presentation delivered at the Canadian Bar Association's National Constitutional and Human Rights Conference, June 27 2014), [unpublished].
Roach, Kent. "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall LJ 169.
Russell, Peter, H. "Constitution" in John C. Courtney & David E. Smith, eds, *The Oxford Handbook of Canadian Politics*, (New York: Oxford University Press, 2010) 21.
———"The *Charter* and Canadian Democracy", in James B Kelly and Christopher P Manfredi, eds, *Contested Constitutionalism* (Victoria: University of British Columbia Press, 2009) 287.
———"Learning to Live with Minority Parliaments" in Peter Russell & Lorne Sossin eds. *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).
Sampson, Laura. ""The Obscenities of This Country": Canada v. Bedford and the Reform of Canadian Prostitution Laws" (2014) 22 Duke J Gender L & Pol'y 137.
Schaap, Andrew. "Hannah Arendt and the Philosophical Repression of Politics" in Jean-Phillipe Deranty & Alison Ross, eds, *Jaques Ranciere in the Contemporary Scene: The Philosophy of Radical Equality* (London: Continuum, 2012).
———"Introduction" in Andrew Schaap, ed, *Law and Agonistic Politics* (Farnham, England: Ashgate Publishing, 2009) 1.
Sigurdson, Richard. "Left- and Right-wing *Charter*phobia in Canada: A Critique of the Critics" (1993) 35 International Journal of Canadian Studies 3.
Slattery, Brian. "A Theory of the *Charter*" (1987) 25 Osgoode Hall LJ 701.
Smith, Adrienne. "Legal Issues with Bill C-2" *Pivot Legal Society* (3 November 2014), online: <http://www.pivotlegal.org/legal_issues_with_bill_c_2>.

Snow, David. "Notwithstanding the Override: Path Dependence, Section 33, and the *Charter*" (2009) 8 *Innovations:* A Journal of Politics 1.
Sossin, Lorne. "Between the Judiciary and the Executive: The Elusive Search for a Credible and Effective Dispute-Resolution Mechanism" in Adam Dodek & Lorne Sossin (eds). *Judicial Independence in Context* (Toronto: Irwin Law, 2010).
———"Book Review: Charter Conflicts: What is Parliament's Role?, by Janet L Hiebert" (2004) 42 Osgoode Hall LJ 189.
van der Meulen, Emily & Elya Maria Durisin. "Why Decriminalize?: How Canada's Municipal and Federal Regulations Increase Sex Workers' Vulnerability" (2008) 20 CJWL 289 at 305.
Strike, Carol et al. "Increasing Public Support for Supervised Injection Facilities in Ontario, Canada" (2014) 109 Addiction 946.
Weinrib, Lorraine E. "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution" (2001) 80 Can Bar Rev 699.
———"Canada's *Charter* of Rights: Paradigm Lost?" (2001) 6 Rev Const Stud 119.

Secondary Materials: Monographs

Arendt, Hannah. *The Human Condition*, 2nd edition, (Chicago: The University of Chicago Press, 1998).
——— *Between Past and Future: Six Exercises in Political Thought* (New York: Viking Press, 1961).
Baker, Dennis. *Not Quite Supreme: The Courts and Coordinate Interpretation*, (Montreal: McGill-Queens University Press, 2010).
Cameron, Stevie. *On the Farm: Robert William Pickton and the Tragic Story of Vancouver's Missing Women* (Toronto: Knopf Canada, 2010).
Gardbaum, Stephen. *The New Commonwealth Model of Constitutionalism: Theory and Practice* (New York: Cambridge University Press, 2013).
Hiebert, Janet. *Charter Conflicts: What is Parliament's Role* (Montreal: McGill-Queens University Press, 2002).
Hogg, Peter W. *Constitutional Law of Canada*, 2003 student ed (Scarborough, Ont: Carswell, 2003).
Honig, Bonnie. *Political Theory and the Displacement of Politics* (New York: Cornell University Press, 1993).
Hugill, David. *Missing Women, Missing News: Covering Crisis in Vancouver's Downtown Eastside* (Winnipeg: Fernwood Basics, 2010).
Jochelson, Richard & Kirsten Kramar, *Sex and the Supreme Court: Obscenity and Indecency Laws in Canada* (Winnipeg: Fernwood Publishing, 2011).
Kelly, James. *Governing With the Charter: Legislative and Judicial Activism and Framer's Intent* (Vancouver: UBC Press, 2005).
Loughlin, Marin & Neil Walker eds. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).
Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada*, (Toronto: Wall & Thompson, 1989).

Manfredi, Christopher P. *Judicial Power and the Charter*, (Toronto: University of Oklahoma Press, 1993).
———*Judicial Power and the Charter*, 2nd ed (Toronto: Oxford University Press, 2001)
McCormick, Peter J. *The End of the Charter Revolution: Looking Back from the New Normal* (Toronto: University of Toronto Press, 2015).
Monahan, Patrick J. *Constitutional Law* (Toronto: Irwin Law, 2002).
Morton, F. L. & Rainer Knopff. *Charter Politics* (Scarborough, Ont.: Nelson, 1992).
———*The Charter Revolution and the Court Party* (Toronto: The University of Toronto Press, 2000).
Parekh, Bikhu. *Hannah Arendt and the Search for a New Political Philosophy* (London: Palgrave Macmillion, 1981).
Roach, Kent. *Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).
Russell, Peter H. *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987).
Stewart, Hamish. *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012).
Tushnet, Mark. *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (New Jersey: Princeton University Press, 2008).
Waldron, Jeremy. *Law and Disagreement* (New York: Oxford University Press, 1999).
Wenman, Mark. *Agonistic Democracy: Constituent Power in the Era of Globalization* (New York: Cambridge University Press, 2013).

Other Materials:

"Brief to the Standing Committee on Legal and Constitutional Affairs" *Canadian Criminal Justice Association* (8 September 2014), online: Canadian Criminal Justice Association <http://www.ccja-acjp.ca/pub/en/bill-c-36-protection-of-communities-and-exploited-persons-act/>.
"Safe Injection Site Law 'Whips Up' Tory base, May Block New Facilities" (23 June 2015) online: CBC < http://www.cbc.ca/news/politics/safe-injection-site-law-whips-up-tory-base-may-block-new-facilities-1.3123962>.
Butler, Martha & Karin Phillips. "Legislative Summary—Bill C-2: An Act to amend the Controlled Drugs and Substances Act" *Library of Parliament* (30 March 2015) online: <http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/2/c2-e.pdf>.
Canada, Federal Coordinating Committee and the Minister of Health, *Vancouver's INSITE service and other Supervised injection sites: What has been learned from the Research? Final report of the Expert Advisory Committee*, online: http://www.hc-sc.gc.ca/ahc-asc/pubs/_sites-lieux/insite/index-eng.php.
Cecile Kazatchkine, Richard Elliott, and Donald MacPherson, "An Injection of Reason: Critical Analysis of Bill C-2 (Q&A)" Canadian HIV/AIDS Legal network and Canadian Drug Policy Coalition (23 October 2014) online: <http://www.aidslaw.ca/site/an-injection-of-reason-critical-analysis-of-bill-c-2/>.
Fine, Sean. "Supreme Court Unfair to Harper Government, New Ontario Justice Wrote As Professor", *The Globe and Mail* (27 July 2015) online: The Globe and Mail

<http://www.theglobeandmail.com/news/politics/supreme-court-unfair-to-harper-government-new-ontario-justice-says/article25715590/>.

Jones, Allison. "Ontario Review Finds Ottawa's Sex Work Law Constitutional, Wynne Says" Globe and Mail, April 1 online: http://www.theglobeandmail.com/news/politics/ontario-review-finds-ottawas-sex-work-law-constitutional-wynne-says/article23734478/.

Kirkup, Kyle. "New Prostitution Laws, Same Old Harms to Sex Workers", *The Globe and Mail* (5 June 2014) online: < http://www.theglobeandmail.com/globe-debate/new-prostitution-laws-same-old-harms-to-sex-workers/article18992544/>.

Michael Plaxton, "First Impressions of Bill C-36 in Light of Bedford" (12 June 2014), online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447006>.

Senate Committee on Legal and Constitutional Affairs, September 9, 2014.

Smith, Adrienne. "Legal Issues with Bill C-2" *Pivot Legal Society* (3 November 2014), online: http://www.pivotlegal.org/legal_issues_with_bill_c_2.

Stephanie Claivaz-Loranger, "Brief to the Standing Committee on Legal and Constitutional Affairs Regarding Bill C-36, The Protection of Communities and Exploited Persons Act" (September 2014) , online: *Canadian HIV/AIDS Legal Network* http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/C-36_brief_Cdn_HIV-AIDS_E.pdf.