DISSENT AND JUDICIAL AUTHORITY IN *CHARTER* CASES

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Hard cases do not inevitably make bad law, but too often they produce multiple opinions.[1]

No topic related to the 20th anniversary of the *Charter* has inspired more comment than the role of the Canadian judiciary. Under the *Charter* courts must explicitly balance legislative goals against constitutional rights and freedoms. It seems that Canadian courts make important decisions more than they once did. It therefore matters more than ever whether a court's judgment is authoritative.

In *Newfoundland (Treasury Board) v. Newfoundland Assn. Of Public Employees*,[2] Marshall J.A. decried the Supreme Court of Canada's section 1 test first devised in *R. v. Oakes*.[3] Marshall J.A. argued that courts should not second-guess legislative policy choices, and rejected in particular the notion that courts should ever consider "other policy alternatives." Marshall J.A. pointed to the Supreme Court's five-four split in *RJR MacDonald*[4] as support for his argument that the Court "got it wrong" in *Oakes*. Marshall J.A.'s judgment suggests that consensus on a high court matters. This comment considers whether dissenting voices[5] within the

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[1] Justice R. Bader Ginsburg, "Remarks on Writing Separately" (1990) 65 Wash. Law Rev. 133 at 148.

[2] *Newfoundland (Treasury Board) v. Newfoundland Assn. Of Public Employees*, [2002] N.J. No 324 [*NAPE*].

[3] *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

[4] *RJR MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 1 [*RJR MacDonald*] (holding five to four that the *Tobacco Products Control Act* was an unjustifiable infringement of freedom of expression).

[5] A "dissent" includes any opinion in which disagreement is expressed with the reasoning or outcome of a majority decision. Thus opinions that are currently classed as "concurrences", because agreement is expressed with the result but not the reasoning of the majority, are one kind of dissent. The dissents discussed in this comment disagree with the result and the majority's legal reasoning.

Supreme Court[6] affect the authority of its *Charter* decisions.[7]

The Importance of Consensus

> Can we really afford the House of Lords as an appellate criminal court? It has frequently been split three to two...In the present case the opinion of two English and one Scottish Law Lords prevails not only over the weighty dissent of Lords Wilberforce and Edmund-Davies but also over [a] substantial body of judicial opinion [in the Court of Appeal and the Divisional Court].[8]

As a matter of common sense a court of final appeal is stronger and more authoritative when it speaks with one voice. History suggests that courts are aware of this. In the early days of the U.S. Supreme Court, Chief Justice Marshall used the power of the *per curiam* opinion[9] to cement the Court's constitutional position. Marshall C.J. believed that the appearance of a united court was necessary to secure its judicial review power. The change was noticed; after the decision in *McCulloch*

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[6] This comment discusses the Supreme Court of Canada. However, lower courts in Canada also have an important role in *Charter* jurisprudence. For example, the British Columbia Supreme Court and Court of Appeal issued conflicting judgments in the child pornography case of *R. v. Sharpe* (1999), 22 C.R. (5th) 129 (B.C.S.C.); (1999), 136 C.C.C. (3d) 97(B.C.C.A.); [2001] 1 S.C.R. 45. Ontario courts have had the final word in several important cases including *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) (striking down – on equality grounds – the definition of "spouse" in the *Family Benefits Act*); *Masse v. Ontario (Minister of Community and Social Services)* (1996), 134 D.L.R. (4th) 20, leave to appeal to Ont. C.A. refused, [1996] O.J. No. 1526, leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 373 (dismissing a challenge to cuts to social assistance benefits); *Ferrell v. Ontario (Attorney General)* (1997), 149 D.L.R. (4th) 335, (Ont. Gen Div.), aff'd (1998) 168 D.L.R. (4th) 1 (Ont. C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 79 (dismissing an equality rights claim against the 1995 repeal of the *Employment Equity Act*).

[7] The comment is limited to dissents in *Charter* cases, where the debate over the Court's role is especially robust. Constitutional law, to the extent that it represents a political decision by a people to "bind" itself with respect to future decisions, acutely engages the question of the judiciary's proper role. See, for example, Kent Roach, *The Supreme Court on Trial* (Toronto: Irwin Law, 2001); Ted Morton & Rainer Knopf, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart, 1993).

[8] J.C. Smith, "Letter" (1981) Criminal L. Rev. 392.

[9] *Per curiam* refers to a decision written "by the Court", without an identified single author. It contrasts with a unanimous opinion written by a single judge, or a series of opinions (*seriatim*) reaching the same result but written by every member of the Court.

v. Maryland[10] James Madison complained of the cessation of *seriatim* opinions, arguing, "the case was of such magnitude, in the scope given to it...[to call for] the views of the subject taken separately by [the Justices]."[11]

Though the Supreme Court of Canada rarely issues *per curiam* decisions[12] the Court values its ability to reach consensus.[13] As noted by Justice L'Heureux-Dubé (a frequent dissenter), successive Chief Justices undertook internal reforms to promote uniformity.[14] A clear effort can be observed in the Court's internal struggle over section 15 of the *Charter*. The much criticized[15] 1995 trilogy of *Egan*,[16] *Miron*,[17] and *Thibaudeau*[18] revealed serious division over such questions as what constitutes an "analogous" ground of discrimination and the relationship between section 15 and section 1. In *Law v. Canada*,[19] the Court, apparently troubled by the

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[10] *McCulloch v. Maryland* (1819) 4 Wheat (17 U.S.) 316 (holding that a Maryland statute purporting to tax the Second National Bank of the United States was unconstitutional).

[11] James Madison, Letter to Spencer Roane, September 2, 1819.

[12] Exceptions include *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 (holding that the province of Québec has no unilateral right to effect its secession from Canada, but that a clear vote in favor of Québec secession would trigger a duty in the rest of Canada to negotiate in good faith); *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 (holding that a potential father cannot legally prevent a woman from obtaining an abortion); and *United States v. Burns*, [2001] 1 S.C.R. 283 (holding that extradition of a Canadian citizen to a state where he might face capital punishment violates section 7 of the *Charter*).

[13] For example, in *R. v. Davis*, [1999] 3 S.C.R. 759, the Court took pains to present a unified approach to the defense of honest but mistaken belief in consent.

[14] Justice Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" (2000) 38 Osgoode Hall L.J. 495.

[15] See Dianne Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1995) 6 N.J.C.L. 295; Carl F. Stychin, "Novel Concepts: A Comment on *Egan and Nesbit v. The Queen*" (1995) Const. F. 101; Radha Jhappan, "The Equality Pit or the Rehabilitation of Justice" (1998) 10 C.J.W.L. 60. The trilogy was quickly followed by a string of unanimous or near-unanimous decisions, including *Benner v. Canada*, [1997] 1 S.C.R. 358; *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; and *M. v. H*, [1999] 2 S.C.R. 3; but in none of these cases was the Court required to revisit the principles on which it had divided in the trilogy.

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

[17] *Miron v. Trudel*, [1995] 2 S.C.R. 418.

[18] *Thibaudeau v. Canada (Minister of National Revenue)*, [1995] 2 S.C.R. 627.

[19] *Law v. Canada*, [1999] 4 S.C.R. 497 (holding that age restrictions on survivor benefits in the Canada Pension Plan were not discriminatory).

divergent analyses, drew the various opinions together into a "unified" approach.[20] In subsequent cases[21] the Court has adhered to the *Law* analysis with "a remarkable level of cohesion and unanimity."[22]

While dissents in Supreme Court judgments have diminished overall, in *Charter* cases they have actually increased.[23] The lack of unanimity is, perhaps, to be expected, as *Charter* adjudication requires the interpretation of vague standards and presents the Court with issues requiring Solomonic wisdom and discretion. Acknowledging that *Charter* cases provide fertile ground for dissent, two issues nonetheless arise. First, one can argue that divided decisions encourage uncertainty and instability. Second, divided decisions may damage the Court's legitimacy, particularly if members of the Court suggest that opposing opinions are unprincipled. As demonstrated by the cases below, both issues are acute if the Court splits five to four.

Dissents in *Charter* Cases

Consider sexual assault law. As noted by Chief Justice McLachlin, it has been a "vexed" area[24] and a source of frequent division. A particularly challenging issue has been defendants' access to third party (including complainants) records. In *O'Connor v. The Queen*,[25] the Court devised a common law regime[26] to govern this process. While the entire Court agreed that some process was necessary, it disagreed on the underlying relevance of third party records. On that basis the majority and dissenting opinions proposed very different regimes. The majority, accepting that

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[20] Not surprisingly, the Court's "new" approach drew elements from all of the disparate opinions. The *Law* decision has been criticized: Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2002) sec.52.7(b); Sheilah Martin, "Balancing Individual Rights and Equality Goals" (2001) 80 Can. B. Rev. 299 at 329.

[21] See, e.g., *Granovsky v. Canada*, [2000] 1 S.C.R. 703; *Lovelace v. A.G. Ontario*, [2000] 1 S.C.R. 950; *Corbière v. Canada*, [1999] 2 S.C.R. 203.

[22] Sheilah Martin, *supra* note 20 at 323.

[23] Peter McCormick, "The Supervisory Role of the Supreme Court of Canada" (1992) 3 Supreme Court L.R. (2nd series) 1 at 24-25.

[24] *R. v. Mills*, [1999] 3 S.C.R. 668 at 688 [*Mills*].

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

[26] At the time, no legislation governed the production of third party records in sexual offence proceedings.

such records would often be relevant to material issues and thus necessary to the accused's ability to make full answer and defence, set a relatively lenient threshold for the accused.[27] The dissent argued that too often, the source of any presumed "relevance" was myths and stereotypes about female complainants.[28] The dissent found that third party records generally had limited relevance, and therefore would have required the accused to satisfy a rigorous threshold even before the records were produced to the trial judge for inspection.[29]

O'Connor provoked criticism that the majority was not sufficiently attentive to policy considerations – including the need to encourage sexual offence reporting and the public interest in complainants seeking therapy – which mandated a stricter test.[30] Parliament subsequently enacted legislation that closely followed the language and tenor of the dissent.[31] Just a few years later, in *R. v. Mills*, the Court ruled that the new legislation was constitutional.[32] The Supreme Court replaced the stark division of *O'Connor* with a virtually unanimous opinion.[33] Chief Justice McLachlin and Justice Iacobucci, on opposing sides in *O'Connor*, co-authored the *Mills* decision, signaling the Court's unambiguous acceptance of the legislation.

One possible lesson of *O'Connor* and *Mills* is that divided decisions allow the legislature to respond to the Court without precisely following a majority opinion. The Supreme Court itself has asserted that the legislature and judiciary participate in a "dialogue" about constitutional rights.[34] A strongly worded dissent may

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[27] *O'Connor*, *supra* note 25 at 46.

[28] *Ibid. per* L'Heureux-Dubé at 129-30:

> This Court has recognized the pernicious role that past evidentiary rules...now regarded as discriminatory, once played in our legal system...We must be careful not to permit such practices to re-appear.

[29] *Ibid.* at 144.

[30] Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) 9 C.J.W.L. 148.

[31] *Bill C-46: An Act to Amend the Criminal Code (production of records in sexual offence proceedings)*, 2d Sess., 35th Parl., 1996 (assented to 25 April 1997, S.C. 1997, c.30).

[32] *Mills*, *supra* note 24.

[33] Chief Justice Lamer dissented in part, and would have struck down the provisions as they related to records already in the possession of the Crown. However he upheld the remainder of the legislation even though it went against his own co-authored judgment in *O'Connor*. *Mills*, *ibid per* Lamer C.J at 681-88.

[34] See Justice Iacbocucci's comments in *Vriend*, *supra* note 15 at 564.

encourage the legislature, as one party to the dialogue, to select an alternate scheme. The dissent provides some response to critics who would otherwise charge the legislature with disregard for the rule of law. The dissent also suggests that in the future the Court may reach a different result.

The Court's 2002 decision in *Sauvé v. Canada*[35] may encourage a legislative response similar to what followed *O'Connor*. In *Sauvé* the Court decided that section 51(e) of the *Elections Act*, which denies federal prisoners the right to vote, infringed section 3 of the *Charter* and was not justified under section 1. The majority found section 51(e) particularly problematic because it applied automatically to all prisoners incarcerated for two or more years. Examining the legislation's underlying rationale, the majority proclaimed that it was motivated by "bad pedagogy"; equated the right to vote with moral fitness; and undermined democratic legitimacy.[36] In contrast the dissent found that denying the right to vote on the basis of criminal convictions actually *enhanced* section 3 of the *Charter*.[37]

The Court further divided over whether committing a criminal offence could ever justify removing the right to vote. McLachlin C.J. held that if the government sought to base disenfranchisement on an offence's seriousness, the government "must demonstrate the correlation between this distinction [the gravity of particular offences] and the entitlement to vote."[38] Her majority decision implies that using the length of a sentence as a proxy for seriousness, which then triggers disenfranchisement, cannot meet the "rational connection" criterion of section 1. Gonthier J. held that disenfranchisement based on criminal behaviour does not by itself undermine the worth or dignity of prisoners.[39] Because the dissent accepted that disenfranchisement is a valid form of punishment, it was not overly concerned about establishing the gravity of particular offences before disenfranchisement could be imposed.

Given the close nature of the decision, Parliament may respond with yet another attempt to disenfranchise prisoners, perhaps by a more restrictive scheme that is limited to serious offences against the person or to cases where someone receives a

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[35] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé*].

[36] *Ibid.* at para. 30.

[37] *Ibid.* at para. 93.

[38] *Sauvé*, *ibid.* at para. 55.

[39] *Ibid.* at paras. 73-75.

sentence much longer than two years. Although the current provision has been declared unconstitutional, the legal issues may continue to be in flux.

The criticism that dissents cause uncertainty is based in part on the argument that cases like *O'Connor* and *Sauvé* produce unsettled legal terrain. The mere existence of a dissent provides an incentive for Parliament to respond to the majority decision, detrimentally affecting vulnerable groups – e.g., criminal defendants (*O'Connor*), or federal prisoners (*Sauvé*) – who rely on the Court for protection. The weakness of this criticism is that the alleged negative impact is utterly dependent on the *way* Parliament chooses to respond and, in any event, is a matter of interpretation.[40]

Alternatively the criticism could proceed from more general assertions about the need for certainty in law *per se*. The claim that law should be as certain as possible is, however, not nearly as compelling in the constitutional context. It is true that all parties are entitled to a resolution of their particular dispute. But cases like *O'Connor* and *Sauvé* do not produce that kind of uncertainty. Assuming that a majority opinion is controlling in law – which, in our system, it is – the law was clear following *O'Connor* and it is clear following *Sauvé*. *O'Connor* simply shows that the legislature may enact a different scheme that, in time, is found constitutionally sufficient in its own right. Indeed, the Court itself may eventually determine that the constitutional terrain requires a different result.[41] To argue that such developments are problematic is to argue, in essence, that constitutional law best remains fixed or frozen. Constitutional law should remain neither fixed nor frozen. It requires a

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[40] For example, while Parliament's response to *O'Connor* may have produced a regime less favorable to accused persons, Parliament was clearly motivated by the goal of protecting the constitutional rights of sexual assault complainants. The Preamble to *Bill C-46* stated *inter alia*:

> WHEREAS the Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children;
>
> WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantageous impact in the equal participation of women and children in society...

Mills, *supra* note 24 at 694.

[41] Consider the Court's developing case law on the extradition of persons to jurisdictions where they may face the death penalty. In *Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858 the Court held that the *Charter* was not violated by such an extradition. Ten years later, in *United States v. Burns*, [2001] 1 S.C.R. 283 it reversed itself relying, in part, on society's growing awareness of the risk of wrongful convictions.

measure of flexibility in order that it may respond to changes in society.[42] There is more than one way to pursue a valid legislative objective while respecting constitutionally entrenched rights. Therefore, to the extent that they may show different ways to resolve complex issues, dissents actually enhance constitutional law.

A different issue posed by dissents is institutional legitimacy. Sometimes, a dissenting opinion explicitly questions the persuasiveness or authority of a decision. In the United States, where there are deep divisions among current Supreme Court members, judicial incivility has received close attention.[43] Judges on the Supreme Court of Canada tend to maintain a higher level of respect for opposing opinions and are careful to separate honest disagreement from more pointed challenge. Still, at times it can be difficult to maintain the veneer of respect.

In *R. v. Hall*,[44] the Court held that section 515(10)(c) of the *Criminal Code* does not violate the *Charter*. The provision allows for pre-trial detention where it is deemed "necessary to maintain confidence in the administration of justice." The majority held that in some cases the bare need to maintain public confidence in the administration of justice warrants pre-trial detention even though such detention infringes the presumption of innocence. Writing in dissent, Justice Iacobucci charged that the Court had "transformed dialogue [with Parliament] into abdication"[45] and that the majority decision represented "a failure to uphold fundamental freedoms and liberty."[46] The strong language suggests that the majority shirked its judicial obligations. If, in the course of issuing a decision, a judge ignores his or her role then as a matter of fairness the decision should be vacated. By framing his dissent partly in institutional terms, Justice Iacobucci seems to say the majority did not just accept legal premises with which he disagreed, but actually misconceived its very role in the dispute.

If there is a consistent and ongoing split on a high court, the Court risks creating

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[42] See the discussion of *Burns*, *ibid.*

[43] Ginsburg, *supra* note 1 at 1191; Larry Kramer, "The Supreme Court 2000 Term Foreword: We The Court" (2001) 115 Harv. L. Rev. 4. See for example Scalia J.'s dissents in *United States v. Dickerson*, 530 U.S. 428 (2000) and in *Kryas Joel v. Grumet*, 512 U.S. 687 (1994).

[44] *R. v. Hall*, 2002 SCC 64 [*Hall*].

[45] *Ibid.* at para. 127.

[46] *Ibid.* at para. 128.

a perception that it is partisan and political. In order to overcome such a perception, a court must reassure onlookers that even divided decisions result from a process that is beyond reproach. Judges, therefore, have a responsibility to avoid attacking opposing judgments as unprincipled. There are exceptions, of course. Sometimes, a judge has a higher duty to point out a failure of principle. When a majority of the U.S. Supreme Court displayed a marked hostility to racial equality in post-Reconstruction cases, Justice Harlan's powerful dissents were highly beneficial and remain celebrated today.[47] Still, such moments are rare. In general, dissenting opinions should be carefully written so as not to diminish respect for the Court.

Dissent and Judicial Authority

Decisions like *Sauvé* and *Hall* present a possible challenge to judicial authority because the outcomes seem dependent upon something that looks very much like majority voting.[48] If only one vote separates the majority from the dissent, and if the Court remains free to revisit its decision in future, and perhaps overturn it, why obey the decision now? The problem is acute since the judicial process is supposed to safeguard all members of society against purely majoritarian outcomes. Where the Court itself is divided on issues of principle or on the proper scope of its role, it can become difficult to identify reasons for accepting its decision as legitimate.

Nonetheless, it is possible to defend the authority of a majority opinion in the face of strong dissent, provided that one accepts certain premises regarding the nature of judicial authority. The first premise is that judges' decisions are

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[47] *Plessy v. Ferguson*, 163 U.S. 537 at 550 (1896) (holding that a state law requiring the separation of races in railway cars was not contrary to the Fourteenth Amendment). Harlan J.'s dissent has become as famous as the decision itself:

> There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

See also *The Civil Rights Cases*, 109 U.S. 3 (1883).

[48] Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 2001) at 26.

"authoritative" in the sense that they replace or "pre-empt"[49] the reasons that a person may already have to decide to follow a particular course of conduct. In other words, a person accepts the legal decision, not because he or she necessarily agrees with it but because the fact that the directive is *expressed* as a judicial decision *makes* it authoritative.

The pre-emptive element of judicial authority is particularly important in understanding the authority of constitutional law decisions. While judicial decisions may share characteristics with other legally authoritative sources, they generally lack one important attribute, namely, an internal enforcement mechanism. It is possible to view judicial decisions as part of a larger legal system where cooperation by other institutions ensures that those decisions are enforced. But when judicial decisions reflect on and affect the powers of the very institutions on which the court relies for enforcement, as they do in *Charter* cases, it is worth considering what makes those institutions agree to enforce decisions against their own interests.

The most plausible explanation is that Canadian society has invested the judiciary with the responsibility to consider constitutional issues and to resolve disputes arising between the state and its citizens. This does not entail a belief in judicial supremacy, that is, that the judiciary is the only actor that can perform this role. Numerous structural features of the Canadian legal system suggest an important, complementary role for the legislature, including the notwithstanding clause[50] and Parliament's ability to seek the Supreme Court's opinion on a reference.[51] Nonetheless, the courts in fact carry out most constitutional interpretation, and this function is generally accepted as legitimate.[52] The acceptance

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[49] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at c.3 "The Justification of Authority."

[50] *Canadian Charter of Rights and Freedoms*, s.33.

[51] The reference power is found not in the Canadian constitution but in the *Supreme Court Act*, the federal statute that empowers the Supreme Court of Canada. *Supreme Court Act*, S.C. 1985 c.S-26, s.53.

[52] Kramer, *supra* note 43 at 6-7: "It seems fair to say that, as a descriptive matter, judges, lawyers, politicians and the general public today accept the principle of judicial supremacy – indeed they assume it as a matter of course." Kramer is writing in the American context, where there is even less room for legislative responses to judicial decisions. Robert Hawkins and Robert Martin, both critical of the Supreme Court of Canada, have acknowledged that the *Charter*'s adoption "induced a profound ideological and cultural transformation" in Canadians once "skeptical about judicial review." Robert Hawkins and Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1 at 6. Surveys have found that Canadians by a 2 to 1 ration believe that courts, not legislatures, should have "the final say" on controversial issues. J.F. Fletcher & P.Howe, "Canadian Attitudes Toward the Charter and the Courts in Comparative Perspective" (2000) 6:3 Choices 4.

reflects a long-held assumption that constitutional rights ought to be protected by the courts.

The second premise underlying judicial authority is that there is no requirement that a decision be objectively "right." The persuasiveness of a decision may be an important practical factor that affects social acceptance, but it is not a necessary component of judicial authority. However, the authority of a decision *is* at least partly dependent upon its ability to present reasons that explain the outcome. Reasons are part of what makes judgments authoritative,[53] because it is through reasons that a decision appears principled and not arbitrary. As noted above, society has accepted that important decisions about the relationship between the state and individuals, and between majorities and minorities, are best entrusted to the judicial rather than to the legislative process. Majority voting is seen as too callous and arbitrary to govern such decisions.[54] The requirement of non-arbitrariness promotes the link between judicial decisions and a coherent theory of legal rights, principles and relations.

Judicial decisions differ from other forms of decision-making chiefly because they rely on and reflect a pre-existing body of principles. The precise outcome matters less than the process of identifying relevant principles and applying them to the dispute at hand. If they are compatible with this process, dissents are not necessarily fatal to judicial authority. Instead, their presence may help to assure those who are expected to abide by the decision, that the process was indeed principled. That means, however, that dissents are subject to the same considerations and requirements of form, as majority opinions. As stated by former United States Supreme Court Justice Brennan:

> [W]here significant and deeply held disagreement exists, members of a Court have a responsibility to articulate it. This is why when I dissent, I always say *why* I am doing so. Simply to say, 'I dissent', will not do.[55]

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[53] It is conceded that trial judges do not have a duty to issue reasons, but are simply presumed to know and apply the law.

[54] The arbitrariness of voting is beyond the scope of this comment, but is discussed in Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991) at c.10, "Higher Lawmaking".

[55] Justice W.J. Brennan, "In Defence of Dissents" (1986) 37 Hastings L.J. 427 at 435.

The identification of competing reasons for action, and the development of a dialogue about those competing reasons, assures us that a decision approaches the highest level of dialogic reasoning. Decisions in which judges express an appreciation of, and engagement with, the analysis in an opposing opinion, contribute to the dialogic process. Examples of *Charter* cases in which the dissent promoted rather than hindered the dialogic process would include *Sauvé*, as well as *RJR Macdonald*, because in each case the majority and dissent actively engaged with each other's arguments.

Charter issues often do not admit a simple "right answer." The nature of *Charter* adjudication, in which courts must weigh the importance of a particular legislative objective against the right at stake and the severity of the right's deprivation, seems almost to invite dissent. It is unrealistic to expect judges to be of a single mind on such issues. That there is no "right answer" to a pressing legal issue, however, is not a determinative factor against assigning the judiciary a role in its resolution. Judges are well suited to remind us of our legal history, and to situate a controversy within its broader context.[56] The fuller the discussion of a case, including the identification of competing reasons, the more the process which has produced that decision can rightfully claim confidence from those who must rely on it. By demonstrating that an issue has received the fullest consideration, and by preserving any competing reasons for measure against the wisdom accumulated in future years, a *Charter* decision accompanied by a healthy dose of internal dissent can be, indeed, authoritative.

[56] Carissima Mathen, "Constitutional Dialogue in Canada and the United States" (working title) N.J.C.L. (forthcoming).