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## *In Search of Prophylactic Rules*

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Michael Plaxton\*

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Prophylactic rules are laws created by judges to prevent violations of the constitution. Unlike constitutional rules, prophylactic rules have no constitutional status of their own. Legislatures can repeal or alter prophylactic rules, provided they devise alternative strategies for meeting the requirements of the constitution.

While the United States Supreme Court has recognized prophylactic rules, the Supreme Court of Canada has yet to do so. Nevertheless, the Supreme Court has created unacknowledged prophylactic rules. Examples include the Court's requirement for a search warrant regime in *Hunter v. Southam Inc.* and its demand for independent provincial judicial salary commissions in *R. v. Campbell*. In both of these cases, the Court appears to have conflated prophylactic rules with constitutional requirements.

By failing to distinguish between constitutional and prophylactic rules, the Court has introduced confusion into several areas of constitutional law. The Court has also denied the role of Parliament and the provincial legislatures as co-interpreters of the constitution. Recognition of prophylactic rules would allow for more meaningful "dialogue" between courts and legislatures—if only in the long term.

Les règles prophylactiques sont des lois créées par les juges afin d'éviter des violations à la constitution. Cependant, contrairement aux règles constitutionnelles, les règles prophylactiques n'ont pas de statut constitutionnel propre : le pouvoir législatif peut les abroger ou les modifier, à condition de prévoir des stratégies alternatives qui répondent aux exigences de la constitution.

Bien que la Cour suprême des États-Unis ait reconnu l'existence des règles prophylactiques, la Cour Suprême du Canada ne lui a pas encore emboîté le pas. Pourtant, une analyse attentive des jugements de cette dernière nous indique que la Cour a déjà créé des règles prophylactiques, sans les reconnaître comme telles. C'est notamment le cas du régime de mandats de perquisition dans *Hunter v. Southam Inc.* et de l'exigence d'une commission indépendante sur les salaires juridiques provinciaux dans *R. v. Campbell*. Dans les deux cas, la Cour a présenté ces règles prophylactiques comme des essentiels constitutionnels.

En ne distinguant pas les règles constitutionnelles des règles prophylactiques, la Cour a fait naître la confusion dans plusieurs domaines du droit constitutionnel. La Cour refuse du même coup au Parlement et aux assemblées législatives provinciales leur rôle légitime d'interprètes de la constitution. La reconnaissance des règles prophylactiques permettrait un «échange» plus constructif entre cours de justice et corps législatifs — ne serait-ce qu'à long terme.

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## Introduction

The United States and Canada are very different in constitutional structure, history, and culture. For that reason, Canadian jurists, judges and lawyers should exercise caution when attempting to use American constitutional jurisprudence to settle Canadian constitutional problems. It might behoove Canadian jurists, however, to occasionally look to American legal scholarship and case law for concepts that help bring order to constitutional thinking, even if the substance of American case law remains something to approach warily for the purposes of transplantation.

The idea of prophylactic rules, as distinguished from constitutional rules, belongs in this category of concepts that deserve a second look. Lately, there has been a great deal of chatter in Canadian legal scholarship (as well as in the popular press and legislative assemblies) about judicial activism and whether or not the Supreme Court of Canada engages in it. More pronounced attention to prophylactic rules in Supreme Court decisions would do much to alleviate those concerns—if only in the long term.

This paper begins by briefly explaining the distinction between constitutional rules and prophylactic rules. It follows with an analysis of five cases in the Supreme Court canon: *Hunter v. Southam*,<sup>1</sup> the *Provincial Court Judges' Reference*,<sup>2</sup> *R. v. Taillefer*,<sup>3</sup> *R. v. Prosper*,<sup>4</sup> and *R. v. Mills*.<sup>5</sup> In all five cases, the Supreme Court could have facilitated greater “dialogue” with the legislature by distinguishing constitutional rules from prophylactic rules in its reasoning. By failing to use the concept of prophylactic rules, the Court has not—despite its frequent invocation of the dialogue metaphor—done nearly enough to help the other branches of government discharge their responsibilities as constitutional actors, and charges of judicial activism are inevitable.

## I. Constitutional Rules and Prophylactic Rules

When the Supreme Court says that the constitution requires the state and its agents to do something, the Court makes one of two claims. It either claims that the constitution requires the state to take a particular course of action, or it claims that the constitution requires the state to achieve a certain state of affairs and that the

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<sup>1</sup> *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [*Hunter* cited to S.C.R.].

<sup>2</sup> *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference Re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 [*Campbell* cited to S.C.R.].

<sup>3</sup> *R. v. Taillefer; R. v. Duguay*, [2003] 3 S.C.R. 307, 233 D.L.R. (4th) 227, 2003 SCC 70 [*Taillefer* cited to S.C.R.].

<sup>4</sup> [1994] 3 S.C.R. 236, 118 D.L.R. (4th) 154 [*Prosper* cited to S.C.R.].

<sup>5</sup> [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1 [*Mills* cited to S.C.R.].

government must take the step in question in order to reach that constitutional end. If the government can achieve the constitutional goal through only one course of action, the constitution requires the state to take it; there is, in effect, an implied provision in the constitution directing the government to take that step.<sup>6</sup> If, however, the course of action is just one of several possible strategies for achieving the constitutional end, the rule enunciated by the Supreme Court does not count as a constitutional rule. Its authority stems not from the constitution, but from the Supreme Court's law-making authority.<sup>7</sup> The directive has no constitutional status *per se*, since Parliament could substitute a new strategy for that devised by the Court without necessarily breaching the constitution. It has constitutional significance, though, since it cannot simply be abolished or ignored; doing so would leave the state without any means of fulfilling its obligations under the constitution.<sup>8</sup> Unless and until the state creates an alternative strategy for achieving its constitutional ends, the state must respect the directive issued by the Court—not because the Court's strategy is superior to any and all other possible mechanisms, but because the constitution will not permit a strategic vacuum. The rule, issued by the Court in recognition of the state's constitutional responsibilities, is not a constitutional rule, but a prophylactic rule—"prophylactic" since it acts as a barrier against the sort of strategic vacuum that would compromise constitutionality.<sup>9</sup>

Much hangs on the distinction. If a provision of the constitution—whether written or implied<sup>10</sup>—requires the state to adopt a certain specific course of action, the state must do so no matter how inconvenient the application of that rule may be in certain situations. Unless the courts subsequently "discover" that the constitution says

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<sup>6</sup> See *Campbell*, *supra* note 2 at para. 107. The right to disclosure may be an example of an implied derivative constitutional right. See *R. v. Carosella*, [1997] 1 S.C.R. 80, 142 D.L.R. (4th) 595 [*Carosella* cited to S.C.R.]: "It is immaterial that the right to disclosure is not explicitly listed as one of the components of the principles of fundamental justice. That is true as well of the right to make full answer and defence and other rights. The components of the right cannot be separated from the right itself" (*ibid.* at para. 138).

<sup>7</sup> Whether and to what extent such authority exists may itself be a point of controversy. One defender of this sort of law-making, in the United States, has pointed to its pervasiveness: see David A. Strauss, "Miranda, the Constitution, and Congress" (2001) 99 Mich. L. Rev. 958; David A. Strauss, "The Ubiquity of Prophylactic Rules" (1988) 55 U. Chicago L. Rev. 190.

<sup>8</sup> Unless an antinomian strategy is, under the circumstances, one of the range of strategies that could provide the minimum protection required under the constitution. This possibility is explored below in the discussion of *Prosper* accompanying note 57.

<sup>9</sup> See Brian K. Landsberg, "Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules" (1999) 66 Tenn. L. Rev. 925 at 926 (defining prophylactic rules as "risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules"); Joseph D. Grano, "Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy" (1985) 80 Nw. U.L. Rev. 100 at 105 (defining a prophylactic rule as "a rule that functions as a preventive safeguard to [e]nsure that constitutional violations will not occur").

<sup>10</sup> Though, as I argue in Part III, different considerations may be brought to bear when the constitutional rule in question is unwritten as opposed to written.

something different—either that the courts were wrong to initially interpret the constitution as they did or that the content of the constitution has changed—the rule remains static. As the accepted last word on matters of constitutional interpretation, the judiciary would effectively assume jurisdiction over any decisions concerning the survival or manipulation of the rule. The government might amend the constitution to permit or mandate a different rule, or it might, if the rule ostensibly lurks in certain provisions of the *Canadian Charter of Rights and Freedoms*,<sup>11</sup> use the notwithstanding clause. Barring such extraordinary measures, however, the final say on the issue resides with the judiciary. Furthermore, if the Supreme Court enunciates the rule, only that Court can change it. Lower courts might be obligated to apply a poorly crafted rule for many years before the Supreme Court has an opportunity to reconsider its original formulation.

A prophylactic rule, on the other hand, because it is not itself mandated by the constitution, can be tweaked to fit changing circumstances or situations not envisioned when the rule was first devised.<sup>12</sup> Such a rule, as a creation of the courts, is in a sense common law (or “constitutional common law”<sup>13</sup>), making it subject to abrogation by an ordinary Act of Parliament. Should Parliament find a better mechanism to protect constitutional interests, it may sweep away the judicially crafted rule and substitute its own. Those unhappy with the court’s rule can seek to resolve the matter through political processes rather than litigation. Meanwhile, lower courts, confronting cases not contemplated by the Supreme Court when it originally created the rule, need not wait for the Court to overrule itself or qualify its earlier holding. They can simply note the changed or unanticipated circumstances and do their best to craft an appropriate exception.<sup>14</sup>

Both the Supreme Court and the constitution itself benefit when the Court—confronted with a situation crying out for a revised prophylactic rule—need not claim that the constitution has changed, or that the Court misinterpreted the constitution the

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<sup>11</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the *Charter*].

<sup>12</sup> See e.g. *New York v. Quarles*, 467 U.S. 649 (1984), where the United States Supreme Court held that, because the rules created in *Miranda v. Arizona*, 384 U.S. 436 (1966) were prophylactic in nature, the Court could create exceptions to them; the Court proceeded to find a “‘public safety’ exception” at 655. See also *Davis v. United States*, 512 U.S. 452 at 457 (1994); *Oregon v. Elstad*, 470 U.S. 298 at 306-07 (1985). But see *Dickerson v. United States*, 530 U.S. 428 at 444 (2000), where the Court—contrary to years of jurisprudence—held that *Miranda* had enunciated a “constitutional rule”.

<sup>13</sup> See Henry Paul Monaghan, “The Supreme Court, 1974 Term—Foreword: Constitutional Common Law” (1975) 89 Harv. L. Rev. 1 at 26 (“distinguishing between *Marbury*-shielded constitutional exegesis and congressionally reversible constitutional law” at 31). But see Thomas S. Schrock & Robert C. Welsh, “Reconsidering the Constitutional Common Law” (1978) 91 Harv. L. Rev. 1117 at 1146.

<sup>14</sup> I leave aside, for now, whether lower courts should engage in this kind of “under-ruling” when it comes to fashioning prophylactic rules, bearing in mind the Supreme Court’s holding that findings of legislative fact should not be subject to appellate deference. See *RJR-MacDonald Inc. v. Canada* (A.G.), [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 [*RJR-MacDonald* cited to S.C.R.].

first time around. When one recognizes that constitutional law includes both constitutional rules and prophylactic rules, constitutional law appears more flexible and more democratic. And yet, in Canadian constitutional scholarship, one seldom sees any mention of prophylactic rules or any suggestion that there might be different kinds of judicially created rules.<sup>15</sup> This has resulted in much confusion and perhaps some needless argument concerning the proper role of courts in a democracy.

Before this paper goes any further, a word of clarification may be in order. There is some question as to whether the judiciary has the legitimate authority to create prophylactic rules, since this is a quasi-legislative activity rather than a purely interpretive one. This is a particularly sensitive issue in the United States, where article III of the constitution narrows the authority of the federal courts to deciding particular cases or controversies.<sup>16</sup> Canadian law has never emphasized the separation of powers doctrine to the same extent.<sup>17</sup> Anglo-Canadian constitutionalism conceives of the judiciary as an office of the Crown, and of members of the Supreme Court as “the official advisers of the executive.”<sup>18</sup> The executive can therefore enlist the judiciary to determine the constitutionality of various state actions. Rather than functioning as a check on the executive branch, it would be more accurate to regard the Canadian judiciary as aligned with the executive branch.<sup>19</sup> For this reason, it is

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<sup>15</sup> See, as a rare example, Cristie L. Ford, “In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Quebec *Secession Reference*” (2001) 39 *Alta. L. Rev.* 511 at 538, n. 80. Note, however, that Ford appears to regard the idea of prophylactic rules as a dead letter in Canada, whereas I would argue that they are everywhere, though not clearly identified.

<sup>16</sup> U.S. Const. art. III, § 2. A court has jurisdiction to create a rule only to the extent that one is necessary for the resolution of a particular case. See Lea Brilmayer, “The Jurisprudence of Article III: Perspectives on the ‘Case or Controversy’ Requirement” (1979) 93 *Harv. L. Rev.* 297. Thus, American federal courts are constitutionally prohibited from issuing advisory opinions: see *Muskrat v. United States*, 219 U.S. 346 at 362 (1911). See also J.F. Davison, “The Constitutionality and Utility of Advisory Opinions” (1938) 2 *U.T.L.J.* 254.

<sup>17</sup> See *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 15, 10 D.L.R. (4th) 385 [*Quebec Secession Reference* cited to S.C.R.]. Because the separation of powers issue is more, not less, troubling in the American context, I see no reason why the distinction between constitutional rules and prophylactic rules cannot be imported into the Canadian legal arena. One may argue that the Canadian attitude toward the separation of powers is not as relaxed as I make out—in the process, citing the Supreme Court’s cases touching upon prosecutorial discretion (see e.g. *R. v. Power*, [1994] 1 S.C.R. 601 at 620-25, 89 C.C.C. (3d) 1 [*Power* cited to S.C.R.])—but one would have a difficult time arguing that Canadian law is more vexed on such matters than US jurisprudence. One can say, then, that if the distinction is valid in American law, it is equally or more valid north of the border.

<sup>18</sup> *Re References by the Governor-General in Council* (1910), 43 S.C.R. 536 at 547, aff’d [1912] A.C. 571, 3 D.L.R. 509 (P.C.).

<sup>19</sup> This reading may be problematic given the Supreme Court’s decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 [*Dagenais* cited to S.C.R.] and *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 600, 33 D.L.R. (4th) 174 [*Dolphin Delivery* cited to S.C.R.], in which the Court denied that a court order is governmental action within the meaning of subsection 32(1) of the *Charter*. I think this denial should be taken with a grain of salt, since the judiciary is required to honour *Charter* values just as the legislative and executive branches are so required. Failure on the part of courts to act in accordance

less problematic to imagine that Canadian courts have a quasi-legislative power not possessed by their American counterparts. It is hardly obvious, however, that Canadian courts have the power to declare rules not directly mandated by the constitution; if they do have such a power, it is unclear that they should use it very often. This paper does not claim that courts *ought* to create prophylactic rules. Rather, it makes the more modest claim that the law already contains many examples of prophylactic rules, and that the judiciary—particularly the Supreme Court—would do better to acknowledge the place of prophylactic rules in the constitutional landscape. One can decide another day whether the Court—or Parliament, for that matter—oversteps its role when it devises policies that protect constitutional interests more than the constitution demands.

## II. Search Warrants and Disclosure

The state's duty to acquire judicial preauthorization for a search<sup>20</sup> is one example of a rule with a disputable constitutional pedigree. It can be taken for granted that section 8 of the *Charter* requires that citizens be secure against unreasonable searches and seizures and that the Crown therefore must do something to *prevent* such intrusions.<sup>21</sup> In *Hunter*, the Supreme Court decided that a warrant regime would accomplish that task. No doubt it does, to a degree. It does not logically follow, however, that the absence of a warrant regime leaves the citizen without *any* protection against unreasonable searches or without a degree of protection satisfying the constitutional requirement.

The *Charter* itself provides evidence that a warrant regime is just one of several means of protecting the constitutional interests in play. The *Charter* features a *constitutional* rule providing a deterrent: the exclusionary rule found in subsection 24(2). The *Hunter* Court plainly found that this protection did not, by itself, meet the constitutional threshold, and that an additional rule would be needed to top off the security provided by subsection 24(2). Once it is recognized, however, that the *Hunter* preauthorization requirement offers no more than a kind of protection potentially granted by other rule regimes, critical holes emerge in the Court's analysis.

First, the Court does not say how much protection section 8 requires. Perhaps subsection 24(2) offers little protection, in which case a robust backup rule is needed. But maybe subsection 24(2) provides enough deterrence on most occasions, such that

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with *Charter* values will amount to an error of law. Where certiorari is invoked to remedy the error, the reviewing court will have available the remedial powers ordinarily available under subsection 24(1) of the *Charter*. See e.g. *Dagenais*, *ibid.* at 857-58, 864-67, 943-44; *Dolphin Delivery*, *ibid.* at 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at 184, 53 C.C.C. (3d) 257; *R. v. Robinson*, [1996] 1 S.C.R. 683 at para. 47, 133 D.L.R. (4th) 42; *R. v. Rahey*, [1987] 1 S.C.R. 588 at 633, 39 D.L.R. (4th) 481. See also *British Columbia Government Employee's Union v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214 at 243-44, 53 D.L.R. (4th) 1.

<sup>20</sup> See *Hunter*, *supra* note 1.

<sup>21</sup> See *R. v. Dyment*, [1988] 2 S.C.R. 417 at 430, 55 D.L.R. (4th) 503.

the Court (or another body) must create or recognize a less vigilant or pervasive strategy, or risk subjecting the state to a level of scrutiny not justified in the constitution. On the other side of the equation, perhaps a search warrant requirement either provides insufficient protection or tends (when its effects are considered in conjunction with other deterrent regimes in place) to go too far.

Second, the Court does not seriously consider other mechanisms capable of satisfying the section 8 standard of security. There is little reason to believe that only exclusionary rules and search warrant requirements can prevent unreasonable searches. Civil remedies,<sup>22</sup> if made more accessible through legal aid or administrative processes,<sup>23</sup> could serve such a purpose today and make search warrants largely superfluous.<sup>24</sup> In *Hunter*, the Court noted that the civil law of trespass remedied invasions of property rather than privacy per se, making the traditional tort unacceptably narrow.<sup>25</sup> One can, however, imagine the Court or Parliament fashioning new civil remedies or new administrative tribunals equipped to address and remedy alleged unreasonable searches. Maybe civil remedies would generate unsatisfactory protection, but the Court does not make this clear. The Court appears to assume that only a search warrant regime would do:

[A] *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. *This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.*<sup>26</sup>

The Court's myopia leaves it unclear whether the search warrant requirement amounts to a constitutional rule or a prophylactic rule. By explicitly announcing it as a prophylactic rule, the Court would have invited Parliament to explore alternative means of preventing unreasonable searches.<sup>27</sup> Parliament might have chosen not to

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<sup>22</sup> At one time, the United States Supreme Court assumed that the common law of trespass would deter Fourth Amendment violations; later, it decided that it needed an exclusionary rule to provide the necessary counterincentive. See *California v. Acevedo*, 500 U.S. 565 at 581-85 (1991), Scalia J., concurring. See also Lawrence Lessig, "Fidelity in Translation" (1993) 71 Tex. L. Rev. 1165 at 1228-33; *Katz v. United States*, 389 U.S. 347 (1967). The Fourth Amendment—unlike section 8 of the *Charter*—specifically directs the state to employ search warrants, whatever other measures may be in place to ensure a minimum level of security from unreasonable searches and seizures. The United States Supreme Court, when deciding what sort of prophylactic rule to employ, worked from the starting point that no matter what rule it enunciated, the state could not do away with search warrants.

<sup>23</sup> See Lessig, *ibid.*

<sup>24</sup> Courts would, of course, retain jurisdiction to review the constitutionality of searches *ex post facto*, but the absence of a warrant would have no significance per se.

<sup>25</sup> See *Hunter*, *supra* note 1 at 157-58.

<sup>26</sup> *Ibid.* at 160 [emphasis added].

<sup>27</sup> For a discussion of the role of Parliament in formulating constitutional rules, see Janet L. Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal: McGill-Queen's, 2002) at c. 2-3.



accept that challenge, but then the exclusion of evidence in cases like *R. v. Feeney*<sup>28</sup> would not have threatened the Court's credibility in the eyes of the public—its own elected representatives would have spoken. *Hunter*, as a case announcing a constitutional rule, seems curious. The constitution does not explicitly demand search warrants, and nothing in *Hunter* explains why only search warrants will serve the purposes of section 8.

Consider too how the democratic process might have benefited from the fuller reasons afforded by recognition of prophylactic rules. Had the Court seriously analyzed the extent to which section 8 requires protection and the extent to which search warrant regimes and other potential prophylactic measures (if they exist) provide protection, Parliament could have used *Hunter* as a springboard for its own analysis of the issues. Parliament might have decided that the Court overestimated the level of protection demanded by section 8 and relitigated the point later. It might have decided (assuming *Hunter* claims that only search warrants will do) that the Court had underestimated the level of protection provided by other strategies or that it had failed to consider some strategies altogether.

Even if the Court had concluded that certain measures were not prophylactic at all but were in fact mandated by the constitution, by incorporating the *idea* of prophylactic rules into its judgments, the Court could have made other branches of government more invested in the process of constitutional interpretation. This sort of “dialogue” could improve constitutional law generally. Parliament, unlike the Supreme Court, can conduct in-depth social science research into the effectiveness of various deterrent measures, can consult interest groups for advice, and can otherwise collect data helpful in fashioning the appropriate measure. Though no one would deny that the Supreme Court has the institutional legitimacy to interpret the constitution, Parliament may have greater institutional competence in gathering the information necessary to interpret it properly.<sup>29</sup>

None of this is to say that judicial preauthorization is a bad thing, or that *Hunter* was wrongly decided. It is to say, rather, that the *Hunter* Court would have done more to involve Parliament in the constitutional process had it recognized a distinction between constitutional rules and prophylactic rules. In doing so, the Court would have given the public greater reason to support the rule of judicial preauthorization, even when its application leads to declarations of unconstitutionality and the exclusion of valuable evidence in criminal cases. The Court would also have encouraged other branches of government to think of themselves as responsible, to some degree, for its interpretation of the constitution.

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<sup>28</sup> [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609.

<sup>29</sup> Regarding the distinction between institutional legitimacy and institutional competence, see Patrick Macklem, “Aboriginal Rights and State Obligations” (1997) 36 Alta. L. Rev. 97 at 104-05. See also Carissima Mathen, “Constitutional Dialogue in Canada and the United States” (2002-2003) 14 N.J.C.L. 403 at 412 [Mathen, “Constitutional Dialogue”].

Consider also the Supreme Court's recent decisions concerning the Crown's duty to disclose relevant evidence in criminal cases. In *Taillefer*, the Supreme Court described the right to disclosure as "a constitutional one ... protected by s. 7 of the *Charter*."<sup>30</sup> But the case reflects muddled thinking about the distinction between constitutional rules and prophylactic rules.<sup>31</sup> In *Stinchcombe*,<sup>32</sup> Justice Sopinka noted that the duty to disclose acquires constitutional significance only because a failure to disclose impairs the accused's ability to make full answer and defence:

Apart from the practical advantages [of a Crown duty to disclose] to which I have referred, there is the *overriding concern* that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice. ... The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, Vol. 1: *Findings and Recommendations* (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play." ...<sup>33</sup>

In *Carosella*,<sup>34</sup> Justice Sopinka notes that the duty to disclose follows from the right to full answer and defence. Despite its derivative status, he treats the former as a constitutional rule, the breach of which amounts, by itself, to an infringement of section 7:

The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.<sup>35</sup>

The *Carosella* majority assumed that the right to full answer and defence could be protected only if the Crown were subjected to a duty to disclose evidence that would (a) assist the accused (however slightly) in answering the Crown's case; (b) disclose a positive defence; or (c) assist the accused in making a tactical decision. Since the right

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<sup>30</sup> *Taillefer*, *supra* note 3 at para. 61.

<sup>31</sup> To be fair, the Court says in the same breath that the right to disclosure "helps to guarantee the accused's ability to exercise the right to make full answer and defence" (*ibid.*).

<sup>32</sup> *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1992] 1 W.W.R. 97 [*Stinchcombe* cited to S.C.R.].

<sup>33</sup> *Ibid.* at 336 [emphasis added].

<sup>34</sup> *Supra* note 6 at para. 38.

<sup>35</sup> *Ibid.* at para. 37.

to full answer and defence required fulfillment of the Crown's duty to disclose, any breach of the latter responsibility suggested a violation of the broader right.

If there is a constitutional rule of disclosure, however, it is difficult to understand cases like *Dixon* and *Taillefer*, where the Court held that a failure to disclose only amounts to a constitutional problem if it actually interferes with an accused's ability to make full answer and defence.<sup>36</sup> There is no longer any presumption of prejudice flowing from a failure to disclose, and the right to disclosure therefore has no constitutional power of its own. Parliament could devise a rule prohibiting disclosure in cases where the accused's right to full answer and defence would not suffer prejudice. In cases where the accused would suffer prejudice to his or her section 7 rights as a result of Crown nondisclosure, the constitutional status of the right of disclosure is somewhat more secure. If prejudice is the touchstone though, it should matter if Parliament can find a way to mitigate it. Since the right of disclosure has no constitutional standing of its own—as it exists just to protect the right of full answer and defence—it seems that Parliament could abolish the right of disclosure altogether if it could find some alternative means of protecting the accused's broader interest in making full answer and defence. Suppose, for example, that Parliament decided to fetter the discretion of prosecutors and obligate them to call any and all witnesses with important information about the case at bar.<sup>37</sup> That sort of rule might protect the accused's rights as adequately as any disclosure obligation. So might a rule that gave prosecutors discretion over the decision to disclose or lead all relevant evidence.<sup>38</sup>

Yet the Court in *Taillefer* continues to describe the right to disclosure as “constitutional” rather than prophylactic. In the short term, that leads to a mind-bending scenario in which the Crown can breach a “constitutional rule” without violating the constitution. If the Court explicitly identified the duty to disclose as prophylactic, it could make the more sensible claim that the Crown, by failing to make timely disclosure, takes a constitutional risk (in the sense that its inaction may result in a later declaration that the accused's *Charter* rights were infringed) but does not necessarily breach the *Charter* merely because it neglects to follow the rule of disclosure. As matters stand, the Court has polluted what could be clear waters. Perhaps just as importantly, by characterizing the right of disclosure as “constitutional”, the Court has discouraged Parliament from considering alternative means of protecting the right to full answer and defence.

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<sup>36</sup> *R. v. Dixon*, [1998] 1 S.C.R. 244, 122 C.C.C. (3d) 1 [*Dixon* cited to S.C.R.]: “[W]here an accused demonstrates a *reasonable possibility* that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure” (*ibid.* at para. 22 [emphasis in original]).

<sup>37</sup> The Supreme Court in *R. v. Cook*, [1997] 1 S.C.R. 1113, 146 D.L.R. (4th) 437 [*Cook*] decided not to create such a rule—precisely because it would interfere with prosecutorial discretion—but it gave no indication that Parliament could not craft one. Indeed, the *Cook* Court stated that the need for such a rule was largely extinguished by the duty to disclose.

<sup>38</sup> See *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 217 D.L.R. (4th) 513, 2002 SCC 65.

### III. Unwritten Rules, Unnecessary Prophylactics, and *Campbell*

Ordinarily, it is clear that a given constitutional rule exists, though there may be a question about its form and texture. For example, neither the legislative nor the executive branch of government can claim that a person has no right to be free from unreasonable searches and seizures, given the language of section 8. There may be some doubt as to the meaning of that right, but executive and legislative actors are on notice that the right exists.

If the courts have not yet interpreted such a written provision, then the legislature must take steps to interpret the provision for itself, so that it can get on with the business of creating statutes and regulations that authorize searches and seizures. The written constitution introduces an element of certainty, even in the absence of judicial treatment.<sup>39</sup>

Unwritten constitutional provisions present problems inasmuch as they can be discovered only by engaging in a higher level of constitutional interpretation. One discovers their existence by reading the text of the constitution as a whole, divining its themes and overarching aims.<sup>40</sup> To do that, one first must have a working interpretation of the individual provisions and a theory about how the provisions fit together. One needs to interpret the written provisions, not just individually, but collectively. If there is room for disagreement between Parliament and the courts with respect to the proper interpretation of individual constitutional rules, then the likelihood of disagreement about the constitution's general meaning is exponentially greater. The claim that a particular unwritten constitutional rule exists at all invites dispute. Legislative and executive actors may not be aware that unwritten rules exist and need to be considered before statutes or regulations can be created or executive decisions made.

Judicial respect for Parliament as a coordinate interpretive authority requires the courts to tread carefully when declaring the existence of unwritten constitutional norms. A different interpretation of one or several written provisions may undermine the claim that a particular textual gap exists. If Parliament is entitled to consider, for itself, the proper interpretation of written constitutional provisions, it must also be entitled to consider, for itself, whether a given unwritten constitutional rule exists at all. This does not mean that the judiciary should shy away from declaring unwritten constitutional rules altogether, but it does mean that the judiciary (if it truly respects Parliament as a constitutional co-interpreter) can only declare unwritten rules that fit with multiple plausible interpretations of the various written provisions examined in isolation and as a body. By confining its declaratory power in this way, the judiciary

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<sup>39</sup> See *Campbell*, *supra* note 2 at para. 93; *Quebec Secession Reference*, *supra* note 17 at para. 53.

<sup>40</sup> See Patrick Monahan, "The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*" (1999-2000) 11 N.J.C.L. 65 at 75-77; Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67 at 83-86.

accommodates the possibility that other branches will, in the future, provide a more plausible interpretation of certain discrete textual provisions.

This, in turn, leads to two broad conclusions. First, when exposing unwritten constitutional rules, the courts must be careful to rest their reasoning not only upon their own interpretations of discrete textual provisions, but on plausible alternative interpretations offered by the Crown. When establishing the legal force of some unwritten constitutional norms, the judiciary may not need to work very hard; for example, the Crown would never dispute the claim that Canadian law is to be created democratically or that power is to be exercised in accordance with the rule of law. It may indeed be politically impossible to deny that those constitutional rules exist.<sup>41</sup> Other rules may meet with more resistance, requiring the judiciary to say why Parliament's own interpretation of textual provisions commits it to those unwritten norms.

Second, even acknowledging the possibility of interbranch agreement (though perhaps grudging agreement) about the existence of unwritten constitutional rules, branches may nonetheless disagree as to what those rules specifically demand. A holistic interpretation of the constitution will permit the recognition of a general rule. But it seems far less likely to yield a narrow, precisely tailored rule; many different variations of the general rule will be compatible with the constitution's underlying aims. Since branches will inevitably disagree as to how to flesh out the broad unwritten rule, it will be difficult to say with confidence that a statute or executive decision is positively incompatible with that general rule or that it fails to accord constitutionally sufficient attention to the rule. A statutory or regulatory scheme will therefore ordinarily survive constitutional scrutiny so long as it does not explicitly reject the values reflected in the unwritten rule; in any other case, a court can interpret the statute or regulation in light of the rule. An executive decision is in principle more vulnerable to review on the basis of unwritten rules; provided the decision maker gives reasons for exercising his or her discretion one way rather than another, the courts have a basis for saying whether unwritten constitutional norms were adequately considered.<sup>42</sup> (And if the decision maker considers the rule, the courts may find it difficult to justify the charge that he or she did not consider it enough.)

Compared to text-bound rules, unwritten constitutional rules (understood in light of a "dialogue" model of constitutional interpretation) appear to present few hurdles to legislative or executive action. Because they must, for the sake of judicial legitimacy, be read as broad norms rather than as precise requirements, a wider spectrum of prophylactic rules is available. Furthermore, since unwritten rules are discovered by examining the underlying aims of the written constitution, one would

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<sup>41</sup> See Sujit Choudhry & Robert Howse, "Constitutional Theory and the *Quebec Secession Reference*" (2000) 13 Can. J.L. & Jur. 143.

<sup>42</sup> See *Lalander v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 at paras. 170-79, 208 D.L.R. (4th) 577 (C.A.).

ordinarily expect one or more sections of the text to go some distance in protecting the unwritten constitutional rules they reveal. Unwritten constitutional rules will, then, rarely justify court-created prophylactic devices; written constitutional rules—in conjunction with the prophylactic devices devised to protect them—will often provide all the protection necessary.

*Campbell* represents a rare case where the written constitution ostensibly offered no protection for an implied constitutional rule, and the Supreme Court majority accordingly found it necessary to create a prophylactic rule that would offer the necessary safeguards. That the prophylactic rule it devised arguably went further than necessary underscores the general need to distinguish between constitutional rules and prophylactic rules.

In *Campbell*, a majority held that an unwritten postulate of the constitution (coupled with subsection 11(d) of the *Charter*) required the state to adopt measures ensuring the independence of judges. The precise text of the constitution says nothing regarding how the state must accomplish this goal, yet Chief Justice Lamer, writing for the majority, declared that provincial governments could abide by the constitution *only* if judicial salaries are determined by an independent commission:

What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions, and for the sake of convenience, we will refer to the independent body required by s. 11(d) as a commission as well. *Governments are constitutionally bound to go through the commission process.*<sup>43</sup>

The majority noted that “questions of detailed institutional design are better left to the executive and the legislature ...”<sup>44</sup> and that so long as each provincial government

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<sup>43</sup> *Campbell*, *supra* note 2 at para. 133 [emphasis added].

<sup>44</sup> *Ibid.* at para. 167. But consider para. 147, in which Chief Justice Lamer appears to determine many of these institutional “details”:

[T]he imperative of protecting the courts from political interference through economic manipulation requires that an independent body—a judicial compensation commission—be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government. As well, in order to guard against the possibility that government inaction could be used as a means of economic manipulation by allowing judges’ real salaries to fall because of inflation, and also to protect against the possibility that judges’ salaries will drop below the adequate minimum required by judicial independence, the commission must convene if a fixed period of time (e.g., three to five years) has elapsed since its last report, in order to consider the adequacy of judges’ salaries in light of the cost of living and other relevant factors.

created an independent commission, capable of discharging the constitutional responsibilities identified in *Campbell*, the constitution itself had nothing to say about the specific features of those respective bodies. Furthermore, the majority offered reasons to justify its conclusion that only an independent commission could satisfy the constitution, noting that direct bargaining between judges and the executive or legislative branch could create a reasonable apprehension of bias in cases involving the Crown.<sup>45</sup> In some respects, then, the majority appears sensitive to the need to justify its claim that the constitution itself—rather than the Court—requires provincial governments to create independent commissions.

In other respects, though, the ruling remains problematic. The constitution requires judges to act independently and impartially, implying that the Crown must erect such institutional measures as are necessary to maintain that independence and impartiality. But how much protection is necessary or constitutionally expected? Justice La Forest, dissenting in *Campbell*, noted that it is hardly obvious that reasonable people would think that just *any* reduction in the salary of provincial court judges compromises their independence:

[A] reasonable, informed person would not perceive that, in the absence of a commission process, all changes to the remuneration of provincial court judges threaten their independence. ... It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this.<sup>46</sup>

One need not assume, like Justice La Forest, that changes in judicial salaries will have no effect on judicial independence. One can assume, like the majority, that *all* such changes will have *some* adverse effect, however negligible or speculative. It still does not follow that the threat to independence violates the constitutional threshold, unless one sees judicial independence as a zero-sum game. If this view is correct—if the constitution permits *no* encroachments on judicial independence—the majority must say so and must justify that conclusion, bearing in mind that its test for judicial independence is what the reasonable person thinks, not what the paranoid skeptic thinks.<sup>47</sup> If some encroachments are constitutionally permissible, then an independent commission—as a constitutional rule—seems like overkill. As a matter of policy, a rule that makes it virtually impossible for the legislative and executive branches to interfere with judicial independence may amount to the best rule, but that does not make it a constitutionally essential one. As Justice La Forest pointed out: “While both salary commissions and a concomitant policy to avoid discussing remuneration other

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<sup>45</sup> *Ibid.* at paras. 186-87.

<sup>46</sup> *Ibid.* at para. 337. See also Jacob Ziegel, “The Supreme Court Radicalizes Judicial Compensation” (1998) 9 Const. Forum Const. 31 at 34.

<sup>47</sup> See *Campbell*, *ibid.* at para. 113.

than through the making of representations to commissions may be desirable as matters of legislative policy, they are not mandated by s. 11(d) of the *Charter*.<sup>48</sup>

*Campbell* nicely illustrates how judicial use of the idea of prophylactic rules might have rescued the courts and Parliament from politically charged confrontations. In the aftermath of *Campbell*, provincial governments did indeed erect independent commissions conforming to the dimensions prescribed by the Supreme Court. When some provincial governments disagreed with the recommendations issued by their respective commissions, they were forced to go to court and justify their refusal to implement them—to establish, per the *Campbell* majority’s specifications, that their reasons were “rational”.<sup>49</sup> Appellate courts largely seem to agree that this is not an onerous threshold,<sup>50</sup> but that misses the point: provincial governments, trying to manage their budgets, must first seek the benediction of judges (or the commission they conjured), rather than the agreement of judges as partners in a shared constitutional enterprise.<sup>51</sup>

*Campbell* diminished the role of provincial governments in an area where they would otherwise directly engage with matters of constitutional importance. Indeed, that was its object: to obligate judges and budget makers to speak to each other through a mediator and thereby reduce the possibility of overt political squabbling between branches of government. By removing the prospect of bickering, though, *Campbell* also removed the prospect of cooperation. A little bickering may not be a bad thing. Disagreement on constitutional issues—even between branches of government—may be healthy in the sense that it demonstrates that everyone in government takes the constitution seriously enough to argue about it. Since *Campbell*, provincial governments need not seriously ponder the constitutionally appropriate salary for their judges (perhaps by working directly with them). They can do no more

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<sup>48</sup> *Ibid.* at para. 329. See also *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193, 2000 SCC 69 [*Little Sisters* cited to S.C.R.], Iacobucci J., dissenting: “The constitutional is not always synonymous with the optimal ... Sometimes ‘constitutionality’ means only that an unimpressive, minimal threshold has been met” (*ibid.* at para. 271).

<sup>49</sup> *Campbell*, *ibid.* at para. 183.

<sup>50</sup> See *Alberta Provincial Judges’ Association v. Alberta* (1999), 237 A.R. 276 at paras. 32-33, 177 D.L.R. (4th) 418 (C.A.) [APJA]; *Ontario Judges’ Association v. Ontario* (2003), 67 O.R. (3d) 641 at paras. 71-72, 233 D.L.R. (4th) 711 (C.A.); *New Brunswick Provincial Judges’ Association v. New Brunswick (Minister of Justice)* (2003), 260 N.B.R. (2d) 201 at para. 113, 231 D.L.R. (4th) 38 (C.A.), leave to appeal to the S.C.C. granted; *Newfoundland Association of Provincial Court Judges v. Newfoundland* (2000), 192 Nfld. & P.E.I.R. 183 at para. 160, 191 D.L.R. (4th) 225 (C.A.). See also *Re British Columbia (Judicial Compensation Committee)* (1998), 160 D.L.R. (4th) 477 at paras. 29-32, 51 B.C.L.R. (3d) 139 (C.A.). But see *Bodner v. Alberta* (2002), 317 A.R. 112 at paras. 110-14, 222 D.L.R. (4th) 284 (C.A.); *Conférence des juges du Québec c. Québec (P.G.)*, [2000] R.J.Q. 2803 at paras. 40-43, 196 D.L.R. (4th) 533 (C.A.).

<sup>51</sup> In one case, this led to an embarrassing lecture on the fundamental tenets of logic, and accusations that the government acted in bad faith when it rejected its commission’s findings. See APJA, *ibid.*



than adopt an adversarial posture before their respective commissions, and perhaps on judicial review.

Maybe the constitution requires such a mediated relationship when it comes to judicial compensation, but this is unclear. Nowhere does the constitution explicitly say that different branches of government cannot bicker, even on matters of constitutional significance; such skirmishes ostensibly conflict with the constitution only when they undermine public confidence in judicial independence. Nor does the Court formally elevate the principle of interbranch tranquility to a *freestanding* constitutional principle warranting its own protective rule. As a derivative or tangential constitutional interest, institutional tranquility is protected by the constitution only to the extent that such tranquility helps to uphold judicial independence or some other constitutional principle. When Chief Justice Lamer discussed the need for mediated salary negotiations,<sup>52</sup> he should have said how and under what circumstances institutional discord would conflict with judicial independence. He did not.

Had the Court recognized prophylactic rules, it would have regarded itself as bound either to justify its claim that the strategy generated in *Campbell* is dictated by the terms of the constitution (knowing that its reasons would undergo scrutiny and possible challenge at a later date), or to concede that the strategy is strictly prophylactic. In making that concession, the Court would have invited provincial legislatures to examine strategies that would have fulfilled their constitutional responsibilities without guaranteeing perfect public confidence in the independence of judges. Such strategies might well have involved more direct interaction between the judiciary and the legislative branch. On the other hand, provincial legislatures might have concluded that they should have precisely the sort of commissions prescribed in *Campbell*.<sup>53</sup> That would have been their decision to make, for better or for worse.

#### IV. Disposable Rules

Recognition of prophylactic rules also brings attention to Parliament's power to abrogate some common law protections without replacing them with *anything*. The concept of prophylactic rules means that some constitutional values can be protected—albeit to greater or lesser degrees—by different regimes or rules. One strategy may be to create no rule at all. The strict requirements of the constitution may be satisfied (though imperfectly) without any rule, making a non-rule one of several viable prophylactics. In such a case, if courts create a rule designed to protect constitutional values better than the constitution demands, Parliament has the power to abrogate that rule and reinstitute the antinomian strategy that existed before. The Supreme Court has recognized that common law rules may provide protections for the

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<sup>52</sup> See *Campbell*, *supra* note 2 at paras. 186-89.

<sup>53</sup> *Ibid.* at paras. 169, 171. Some provinces had such commissions before *Campbell* was released.

accused that go beyond what is constitutionally mandated. Thus, in *R. v. Oickle*,<sup>54</sup> Justice Iacobucci observed that the common law confessions rule has a broader scope than the *Charter* provisions protecting the accused's right to silence.<sup>55</sup> He stated that

the *Charter* is not an exhaustive catalogue of rights. Instead, it represents a bare minimum below which the law must not fall. A necessary corollary of this statement is that the law, whether by statute or common law, can offer protections beyond those guaranteed by the *Charter*. The common law confessions rule is one such doctrine, and it would be a mistake to confuse it with the protections given by the *Charter*.<sup>56</sup>

The Court effectively conceded that the confessions rule was not required by the *Charter*; it is a rule that protects the right to silence, and therefore protects *Charter* values, but it is a rule that Parliament could abrogate by statute. Because it goes beyond what the *Charter* demands by way of procedural protections for accused persons, the rule may be a good one; for that same reason, it is constitutionally expendable.

The Court's judgment in *Prosper*<sup>57</sup> likewise makes sense only when one distinguishes between constitutional rules and prophylactic rules. There, a majority of the Court observed that sections 7 and 10 of the *Charter* do not require the provinces to erect a duty-counsel regime,<sup>58</sup> yet simultaneously found that the failure to create such a regime could result in "constitutional costs" in the form of exclusion of statements taken from criminal defendants.<sup>59</sup> By not pursuing a prophylactic strategy such as a duty-counsel system, the Crown risks running afoul of the constitution in a certain number of cases. It does not, however, violate the constitution just because it fails to implement that sort of regime. The constitution requires only that suspects receive access to counsel, which they can have even if no duty-counsel regime exists. The status quo, therefore, represents one of many possible strategies the Crown could implement to ensure compliance with sections 7 and 10 of the *Charter*. Suspects would have better, more reliable access to counsel if there were a duty-counsel regime, but the constitution does not demand "better, more reliable access". A duty-counsel regime offers a level of protection that the constitution does not require, though it furthers constitutional values by ensuring that more suspects receive access to counsel. It, like the status quo regime, is one of several possible means of protecting the rights enshrined in the *Charter*.

*Prosper* provides a clue as to how recognition of prophylactic rules can untie the hands of legislatures. By implicitly drawing a distinction between rules required by the constitution and rules that protect constitutional interests, the *Prosper* majority

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<sup>54</sup> [2000] 2 S.C.R. 3, 190 D.L.R. (4th) 257, 2000 SCC 38 [*Oickle*].

<sup>55</sup> *Ibid.* at para. 30.

<sup>56</sup> *Ibid.* at para. 31.

<sup>57</sup> *Supra* note 4.

<sup>58</sup> *Ibid.* at 266-68.

<sup>59</sup> *Ibid.* at 269-70, 275.

created a space in which both legislatures and courts can contribute to constitutional discourse. In such a space, it should be possible to avoid debates over which branch has interpretive supremacy and instead address questions more befitting matters of policy—namely, questions of institutional competence. The Court declined to create a duty-counsel regime—though it clearly would have preferred one to the prophylactic regime in place—because it has generally shied away from telling the Crown how to spend its money, and because the legislature is better placed to work out how to operate something so elaborate.

## V. Dialogue and Elocution

One might be tempted to reduce this paper to a simple (and somewhat trendy) appeal for “dialogue” between the courts and legislatures: courts should recognize, in their writings, the difference between constitutional rules and prophylactic rules, because in doing so they clarify the ways in which legislatures can contribute to the branches’ combined understanding of what the constitution demands. They carve out a space in which other branches can coherently debate the meaning of the constitution and devise policies that protect it. The metaphor of a dialogue between courts and legislatures has become the subject of frequent scholarly and judicial analysis over the past several years.<sup>60</sup>

The “dialogue” metaphor, however, is confused and confusing. It is all well and good to say that courts and legislatures share responsibility for interpreting the constitution, but ultimately someone must have the final say. There is one constitution, one law of the land. If the judiciary and the legislature disagree about what the constitution requires, they cannot both be correct. As a matter of constitutional convention, the Supreme Court has the last word.<sup>61</sup> But the Court says

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<sup>60</sup> See e.g. Peter Hogg & Allison Bushell, “The *Charter* Dialogue Between Courts and Legislatures” (1997) 35 Osgoode Hall L.J. 75; Peter W. Hogg & Allison A. Thornton, “Reply to ‘Six Degrees of Dialogue’” (1999) 37 Osgoode Hall L.J. 529; Mathen, “Constitutional Dialogue”, *supra* note 29; Bruce P. Elman & Jill Mason, “The Failure of Dialogue: *Winnipeg Child and Family Services (Northwest Area) v. G (D.F.)*” (1998) 36 Alta. L. Rev. 768. For a discussion of constitutional dialogues generally, see Gal Dor, “Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective” (2000) 11 Ind. Int’l & Comp. L. Rev. 1. For a skeptical treatment of the dialogue between courts and the Canadian legislature, see Christopher P. Manfredi & James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37 Osgoode Hall L. J. 513.

<sup>61</sup> The notwithstanding clause, of course, empowers Parliament to act contrary to *Charter* rights; that is, contrary to a constitutional rule. Parliament, however, does not change the constitution—or reformulate the constitutional rule—when it employs the notwithstanding clause. The clause merely gives Parliament temporary authority to act *as if* the constitutional rule did not exist, but the constitutional rule does exist and the Supreme Court has the last word with respect to defining its scope and contours. The notwithstanding clause does not allow Parliament to assert control over *Charter* interpretation; it only allows Parliament to act in certain respects “notwithstanding” the constitutional rule as interpreted by the Supreme Court. In other words, the notwithstanding clause is

all manner of things with implications for the constitution and for Parliament, and it is not always clear what Parliament can do about these pronouncements.

Recently, the Court has appeared willing to give constitutional blessing to legislation that, according to the Court's most recent "last word" on the matter, does not conform to the constitution. Consider, for example, the Court's decision in *R. v. Mills*: the Court was confronted with legislation that, according to its majority decision in *R. v. O'Connor*,<sup>62</sup> plainly violated the accused's section 7 right to full answer and defence.<sup>63</sup> The *O'Connor* majority had said that, to satisfy the constitution, Parliament could not "compel" accused persons to jump through certain hoops as a precondition to obtaining third party records. Parliament then went ahead and devised those very hoops. It was obvious that if the majority judgment in *O'Connor* accurately described the minimum requirements of the constitution (so far as section 7 was concerned), Parliament's new legislation could not survive. But the legislation did survive. So what happened?

Well, it is rather hard to tell. No one on the *Mills* Court claimed that the constitution had changed in the four years since *O'Connor*. Yet, at some point between *O'Connor* and *Mills*, the constitution's equality rights guarantees seemed to become more vulnerable and more worthy of protection. Simultaneously, the accused's right to full answer and defence appeared to become somewhat less important, or to require less protection. It seems unlikely that the constitution changed. More likely, the Court simply chose to overrule itself, to supplant the old interpretation with a fresh one (maybe based on evidence gathered by Parliament since *O'Connor* regarding the impact of that judgment on sexual assault complainants). But the *Mills* majority neither indicated that it was overruling *O'Connor*, nor presented any new arguments that could justify a new interpretation.

Perhaps *O'Connor* never laid down a constitutional rule at all; maybe the difference between the majority and the dissent was less pronounced than it seemed. Suppose the constitution requires that accused persons have *some* measure of access to third party records, short of absolute access (in recognition of the privacy interests of sexual assault complainants). Beyond that bare guideline, suppose that the constitution is silent. In that case, the majority and the dissent in *O'Connor* did not argue about what the constitution demands—they merely disagreed about the best way to protect its values. Five members of the Court came out in favour of a rule permitting wider access, whereas four members of the Court would have created a rule permitting considerably narrower access. Neither of these rules, however, could bind Parliament as would a constitutional rule—except to the extent that they

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a vehicle by which Parliament can choose to temporarily make constitutional interpretation a non-issue.

<sup>62</sup> [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235 [*O'Connor*].

<sup>63</sup> *Mills*, *supra* note 5. For an excellent treatment of dialogue, and of the Court's judgment in *Mills*, see Mathen, "Constitutional Dialogue", *supra* note 29. See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin, 2001).

assumed a baseline level of access. So long as Parliament provided the constitutionally mandated level of access to third-party records, it could ignore both of the contending rules issued by the Court.<sup>64</sup>

If the *O'Connor* majority's guidelines are only prophylactic—if they do not reflect the minimum constitutional level of protection for section 7 rights—the majority could have said that their disagreement with the dissent was not a matter of constitutional interpretation but merely a matter of policy. (Perhaps *O'Connor* would seem a stronger, more confident interpretation of section 7 if it had been presented as a unanimous judgment with respect to the requirements of that section, even if the judges diverged on policy questions.)<sup>65</sup> In making that point, the majority would necessarily have had to concede that the dissent's proposed strategy was constitutionally tenable (though perhaps ill-advised). Had it done so, the decision in *Mills* would have come as no surprise to anyone.

As matters stand, it cannot be said with any kind of certainty that the *O'Connor* opinions amounted to competing policy choices rather than constitutional interpretations. If the *O'Connor* majority's strategy was designed to reflect the constitutional minimum threshold, then the *Mills* Court, in upholding Parliament's new legislation, ought to have said why Parliament was *right* to contest the *O'Connor* Court's reading of the constitution. Parliament bears some responsibility for ensuring that all branches of government abide by the constitution—this is surely what it means to say that the judicial and legislative branches share interpretive authority. It does not fulfill that duty, however, simply by rehashing old constitutional debates ad nauseam;<sup>66</sup> that approach adds nothing to the “dialogue” and introduces uncertainty.<sup>67</sup> Unless Parliament can show that, in proposing a revised interpretation of the constitution, it has considered factors not considered by the courts, the “dialogue”

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<sup>64</sup> See Jamie Cameron, “Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills*” (2001) 38 *Alta. L. Rev.* 1051 at 1058.

<sup>65</sup> See Carissima Mathen, “Dissent and Judicial Authority in *Charter* Cases” (2003) 52 *U.N.B.L.J.* 321.

<sup>66</sup> See *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 218 D.L.R. (4th) 577: “Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of ‘if at first you don’t succeed, try, try again’” (*ibid.* at para. 17). See also *RJR-MacDonald*, *supra* note 14 at para. 136; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 232 D.L.R. (4th) 577, 2003 SCC 62 [*Doucet-Boudreau* cited to S.C.R.]: “Deference ends, however, where the constitutional rights that the courts are charged with protecting begin” (*ibid.* at para. 36).

<sup>67</sup> See Kent Roach, “Editorial: *Mills*” (2000) 43 *Crim. L.Q.* 145 at 145. See also Cameron, *supra* note 64 at 1058-67; Mathen, “Constitutional Dialogue”, *supra* note 29 at 458-60; Don Stuart, “*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost?” (2000) 28 *C.R.* (5th) 275.

metaphor should have no currency (unless one thinks that Parliament should have interpretive supremacy).<sup>68</sup>

But when the Court muddies the distinction between constitutional rules and prophylactic rules, no one can blame a legislature for crafting laws that seem to fly in the face of a court ruling. The new legislation is only improper interference with the judiciary's interpretive authority if the original rule, crafted by the Court, amounts to a constitutional rule; if the rule is prophylactic, the legislature is perfectly entitled to revisit its content to the extent permitted by the constitution. A legislature that takes seriously its responsibility as a policy-maker should be expected to take a stab at crafting a new rule when it disagrees with the one formulated by the Court. Since the legislature cannot tell whether the rule was constitutional or prophylactic, it must make an educated guess as to where the constitution ends and policy begins. If interpretive responsibility is shared by courts and legislatures, then legislatures can be expected to make that guess (with mixed results).

Courts confronting such new legislation—new rules that supplant old, judicially crafted ones—face an inevitable tension. Should they strike down the new rule because the old rule was of the constitutional variety (but not identified as such), the legislature may understandably evince frustration at having been thwarted (perhaps twice) and accuse the judiciary of activism. Should the courts uphold the new rule because the old rule was merely prophylactic (though, again, not identified as such), they seriously undermine their own status in the constitutional order.<sup>69</sup> So long as one branch cannot figure out the basis for another branch's rules, suspicion may arise.

## Conclusion

When the Supreme Court began to describe itself as engaged in a “dialogue” with Parliament, it assumed a posture of humility, suggesting that it could not by itself ensure compliance with the constitution. This deferential posture, as the Court recently noted in *Doucet-Boudreau*,<sup>70</sup> did not appear out of nowhere. The law has

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<sup>68</sup> See *Little Sisters*, *supra* note 48 at para. 268, Iacobucci J., dissenting: “This Court has frequently recognized the importance of fostering a dialogue between courts and legislatures ... Particularly where, as here, it appears that Parliament has not turned its mind to the issue at hand, striking down the legislation may encourage much needed changes” [emphasis added].

<sup>69</sup> See *R. v. Hall*, [2002] 3 S.C.R. 309, 217 D.L.R. (4th) 536, 2002 SCC 64, Iacobucci J., dissenting (claiming that the majority confused dialogue with “abdication” at paras. 127-28).

<sup>70</sup> *Doucet-Boudreau*, *supra* note 66 at para. 34:

[I]n the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of government by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.

long acknowledged that the judiciary is not as well-suited as other branches of government when it comes to certain tasks of constitutional significance. The Court does not step out of line, though, by explaining to the other branches how they should approach their constitutional responsibilities. As the body responsible for interpreting the constitution, the Court is in the best position to help everyone else figure out the nature of the tasks they should respectively perform—to act as “the official adviser of the executive”.<sup>71</sup>

In fact, it is the closeness of the judiciary and the legislature that helps the dialogue metaphor succeed in Canada. In the United States, where a rigid separation of powers model of government exerts a powerful hold, the dialogue model does not ring true; the courts and other branches seem engaged less in a common enterprise than in a tug-of-war for interpretive supremacy. Canadian law is more equivocal when it comes to the separation of powers.<sup>72</sup> This permits one to imagine a judiciary that invites the legislature to question its constitutional interpretations and, at the same time, a legislature that trusts—indeed, relies on—the judiciary to craft prophylactic rules unless and until the legislature decides a different strategy is needed. But this dialogue depends on a clear distinction between constitutional rules and prophylactic rules—a distinction that has been absent or deeply buried in constitutional jurisprudence. Now is the time for it to be uncovered.

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See e.g. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 389, 100 D.L.R. (4th) 212.

<sup>71</sup> See text accompanying note 18.

<sup>72</sup> See *Quebec Secession Reference*, *supra* note 17 at para. 15. The closer relationship between the judiciary and the other branches of government explains why the Supreme Court of Canada has not been willing to recognize anything like the American “political questions” doctrine. See *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 414, 18 D.L.R. (4th) 481.