

“Judicial Activism or Compliance? Federal Government Concessions in Charter of Rights Cases”

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The growing prominence and policy influence of the Supreme Court of Canada during the Charter era has spurred several well-known criticisms of judicial activism, such as by Morton and Knopff (2000), Martin (2003), and Leishman (2006). What has not been examined in any sustained fashion, however, is the degree to which governments appearing before the Court have *conceded* that the impugned legislation or behaviour of state officials is contrary to the Charter. Government concessions in court of unconstitutionality can take several forms. I have previously written extensively about one method, that of declining to appeal losses in the lower courts (Hennigar 2002; Hennigar 2007), but my focus here is on concessions by governments in their arguments before the Court. Such concessions implicitly blur the institutional responsibility for judicially “activist” rulings, and raise, as others (e.g. Huscroft 1995; Morton and Knopff 2000) have argued, questions about the democratic legitimacy of government lawyers failing to defend laws which have been validly enacted by parliament.²

Several law and politics commentators and the Court itself have noted this phenomenon. As evidence that government lawyers are part of the “Court Party,” Morton and Knopff cite examples of Attorneys General conceding equality rights violations in key cases involving sexual orientation (2000, 18-119). For example, Ontario Attorney General Marion Boyd conceded before the lower

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² There appears to be some confusion in the academic literature about whether legislation has the “presumption of constitutionality”; see Hogg (2003, 785-786). Although Hogg himself sides against such a presumption, his logic appears contradictory, since he concedes (following the Court’s consistent approach) that the onus is on the rights *claimant* to establish that legislation violates his or her rights. This would seem to suggest that the law is therefore presumed *not* to violate the Charter, barring such evidence.

court in *M. v. H.* [1996] that some provisions of Ontario's family law violated section 15 of the Charter because they failed to include same-sex spouses — this, following an unsuccessful attempt to reform the provisions through a free vote in the Ontario Legislature. (Notably, when the Rae government and Attorney General Boyd were replaced by Mike Harris's Progressive Conservatives, Boyd's concession was withdrawn, and replaced by an argument supporting the unreformed provisions (Jai 1997/98: 17, fn. 55).) Several authors (Edwards 1987; Scott 1989; Huscroft 1996; Jai 1997; Freiman 2002; McAllister 2002; Roach 2000, 2006) have addressed the issue of concession in the context of whether the Attorney General should be able to make such concessions "independently," over the objections of his or her own Cabinet and/or Parliament, and whether some concessions can be understood as central agency behaviour (Hennigar 2008).

In *Schachter v. Canada* [1992], Chief Justice Lamer and Justice La Forest registered their strong disapproval of the Attorney General of Canada's concession that the *Unemployment Insurance Act* was discriminatory because it denied biological fathers the same parental leave benefits as mothers and adoptive parents, on the grounds that it pre-empted and undermined the role of the court. As Lamer wrote:

I find it appropriate at the outset to register the court's dissatisfaction with the state in which this case came to us....[T]he appellants chose to concede a s.15 violation and to appeal only on the issue of remedy. This precludes this court from examining the s.15 issue on its merits....Further, the appellants' choice not to attempt a justification under s.1 at trial deprives the court of access to the kind of evidence that a s.1 analysis would have brought to light.

All of the above essentially leaves the court in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the court in a difficult position in attempting to determine what remedy is appropriate in the present context. (10-11)

Similarly, when the Attorney General of Canada conceded in *R. v. Sharpe* [2001] that *Criminal Code* prohibitions on child pornography violated the Charter's freedom of expression, Justices L'Heureux-Dubé, Gonthier and Bastarache complained that "it is unfortunate that the Crown conceded that the right to free expression was violated in this appeal in all respects, thereby depriving the Court of the opportunity to fully explore the content and scope of s. 2(b) as it applies in this case." (para. 151)

So, how much does concession actually occur? This paper—a preliminary analysis from an on-going project—measures the rate of concession by the federal government of Canada in all Supreme Court Charter cases from 1982 to 2004. As we will see in the next section, concessions can take a number of forms, including conceding right violations, conceding that a violation is not a reasonable limit, or both. The next section also elaborates on why governments might concede, and the means through which the federal government can do so, which are complicated by the particular way many federal laws—and in particular the *Criminal Code*—are enforced in Canada. The paper’s methodology will then be outlined, followed by a discussion of the findings, which are that while concessions of rights violations are not common, neither are they exceptionally rare; in contrast, the Attorney General of Canada (hereafter AG Canada) almost never concedes that federal legislation is an *unreasonable* limit on rights under section 1 analysis. Moreover, concessions are typically driven by the Court’s jurisprudence or legislative action making the concession in court moot.

Theoretical Background: Why Concede, and How?

Marion Boyd’s actions highlight one of the key reasons for conceding rights violations, namely, to realize legislative reforms that cannot be achieved through regular parliamentary channels due to opposition from within one’s own party as well as from other political parties. This might be because the issue is extremely contentious or concerns minority rights which are not supported by a majority of voters – matters involving the equality rights of gays and lesbians are a good example. While this can be achieved by conceding before any court, conceding in the Supreme Court has the added benefit of a) securing a ruling from the highest court in the land, foreclosing calls for further appeals to get that Court’s opinion, and b) establishing a strong precedent for related issues. This points to the fact that there is a complex political dynamic between governments and courts and that sometimes “losing is winning” from the government’s perspective. There are at least two other situations in which the government might opt to concede in court:

1. The government wants to change a law or policy, but wants to avoid political responsibility—in short, it wants the court to do it for them. This might be because the issue in question is so polarizing for the public that any legislative action the government takes will provoke considerable opposition, as with abortion. U.S. scholar Mark Graber (1993) calls this scenario the “nonmajoritarian difficulty.” Or, it might be an issue that would expose the government to damaging questions by Opposition Parties if dealt with in

Parliament. While legislation on controversial issues usually attract considerable public attention, concessions in court are typically “below the radar” of media and the public, making it an attractive strategy for governments trying to accomplish their policy goals more discreetly.

2. To save time and “political capital,” as changing a policy through the courts means that it might not be necessary to do so through Parliament. This is especially useful if the policy in question was adopted by a previous government of a different party, or involves a largely technical matter.

As suggested above, Charter-based challenges can be made against either a written legal provision—legislation, a bureaucratic regulation, or municipal by-law—or the behaviour of state officials,³ such as police, Customs officers, immigration agents, or cabinet ministers exercising their ministerial discretion (for example, the AG’s authority to approve the use of medicinal marijuana on an individual basis). This much is suggested by s.32(1) of the Charter, which states:

This Charter applies

- a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

This appears to exempt the judiciary from the Charter, and with it the common law and court injunctions such as those ordering publication bans or prohibiting protesters from picketing abortion clinics. This was the position initially taken by the Supreme Court in *Dolphin Delivery* [1986], but subsequently—albeit with apparent reluctance and based on inconsistent reasoning by the Justices—the common law was subjected to the Charter when a governmental actor is involved. Hogg (2003, 759-768) cites as examples a police officer executing a search or arrest pursuant to the relevant common law rules (or, warrants issued by judges), and virtually any judicial order in the context of a criminal trial (such as regarding bail, providing translation services, discovery of evidence, trial delay, etc.) since the government is present in the form of a Crown prosecutor.

³ The Charter has also been found to apply to private individuals acting “on behalf” of the state, such as private security guards or individuals making a “citizen’s arrest” (see Hogg 2003, 770).

Government “concessions” can accordingly relate to rights claims arising under any of these scenarios, although we are particularly interested here in those cases where a formal legal provision is challenged. Huscroft (1996) identifies three options government lawyers (and, potentially, their political superiors) face when presented with a Charter-based challenge to a statute or regulation. The first is a “full Charter defence,” which sees the government arguing that the law does not violate the claimant’s rights, and, should the court disagree, that the law is a “reasonable limit” under section 1 of the Charter. Section 1 permits the government to limit any of the Charter’s rights, so long as the limits are “reasonable,” explicit in the statute, and “demonstrably justified,”⁴ which the Court interpreted in *R. v. Oakes* [1986] as requiring that the government demonstrate a “pressing and substantial objective” for the violation, and that this objective be “proportional” to the violation: that is, that they be “rationally connected,” that the means used “minimally impair” rights, and that the collective benefit of the violating law outweighs the harm caused to the rights-holder(s). A government could concede under s.1 by conceding any of these parts of the *Oakes* test.

A second option is to give a “limited Charter defence,” which could mean either conceding the rights violation but not s.1, or, less commonly, contesting the rights violation but offering no s.1 defence. In the *Sauvé* [2002] case, for instance, the federal government conceded that the law – which denied the vote to prisoners sentenced to at least two years – violated the Charter’s s.3 right to vote, but offered a vigorous s.1 defence based on political philosophy (social contract theory), the importance of citizenship and voting, and the fact that the prohibition ended when the prisoner was released. An example of a case where no s.1 defence was offered is *Chaoulli* [2005], which concerned whether Quebec’s ban on private health insurance violates the Charter’s s.7 right to “life, liberty, and security of the person.” As co-defendant with Quebec, the federal government in *Chaoulli* denied that the ban violated s.7, but did not address s.1, possibly because the AG Quebec offered a full Charter defence of its law. While some violations, if found, would be difficult to justify as “reasonable,” failing to argue s.1 is usually a questionable strategy as it gives the court no choice but to find the law unconstitutional if it does find a Charter violation – which occurs much more often than a finding of unreasonableness (Hiebert 1996; Kelly 2005).

The third option is a “no Charter defense,” which entails conceding both that the law violates a Charter right and that it is unreasonable. A government

⁴ The full text of s.1 reads: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

might choose this strategy if the law was passed a long time ago (especially if before the adoption of the Charter), or if it was passed by a previous government of a different party. An example of full concession is the *Schachter* case mentioned earlier, where the federal government conceded that its discrimination against biological fathers was unreasonable on its way to challenging (successfully) the lower court's remedy of "reading in" natural fathers to the parental leave benefits program. Ottawa's concessions in *Schachter* are likely explained by the fact that the government had already extended such benefits to all parents, while cutting the amount significantly to maintain the program's overall cost.

Concessions can occur when a government is a party to the case—that is, the prosecution (in criminal cases), plaintiff or defendant (in civil cases) at the initial trial, or the appellant or respondent by the time it reaches the Supreme Court. With respect to the federal government, however, concessions regarding federal laws can also occur when the Attorney General of Canada is a third-party *intervener*. A unique feature of Canadian law is that *Criminal Code* offences—which are created by the federal Parliament—are usually enforced by provincial Crown prosecutors. This is because s.92(14) of the 1867 Constitution gives the provinces jurisdiction over the administration of justice, as does the *Criminal Code*.⁵ This division of responsibility reflects Canada's federal nature, and creates an interesting dynamic: criminal offences are created at the national level but enforced "locally," thus allowing national standards to be influenced by the values of the smaller community in which the crime took place. A similar dynamic exists with the federal *Youth Criminal Justice Act* (and its predecessor, the *Young Offenders Act*), the *Narcotics Control Act* and *Controlled Drugs and Substances Act* in Quebec (an example of "asymmetrical federalism"), and with some provincial aboriginal constables enforcing the *Indian Act* on reservations. (Notably, however, there are several offences which are usually enforced by the federal government, most notably narcotics (outside Quebec), income tax fraud,

⁵ In *R. v. Hauser* (1979), a majority of the Supreme Court agreed with the provinces that purely criminal prosecutions are properly conducted by provinces, but rejected this restrictive approach only four years later in *A.G. (Canada) v. Canadian National Transportation, Ltd.* (1983), and *R. v. Wetmore* (1983). In a striking rejection of long-standing practice, the Court stated that s.92(14) does not give provinces a monopoly over criminal prosecution, observing that this had simply been an arrangement authorized by the statutory *Criminal Code* rather than the Constitution; if the federal government wanted to change this arrangement, it could do so by simply amending the *Criminal Code* or any other quasi-criminal legislation to give itself the power to prosecute. As noted above, Ottawa has done so with respect to a number of offences. Even with these, however, provincial governments may still choose to prosecute, so the jurisdiction is effectively shared.

illegal fishing, and since 2001, terrorism⁶; historically, federal Crowns also prosecuted crimes in the Territories.) Sometimes, large differences in enforcement emerge at the provincial level. An example arose when the federal government created its gun registry, which was deeply unpopular in rural Canada where guns and hunting are common. The several provincial governments which opposed the registry, such as Alberta, Newfoundland, and Ontario, stated that they would not prosecute individuals who committed the offence of refusing to register their guns (Lindgren and Naumetz 2003, A1). In cases of provincial prosecution of federal laws, the AG Canada has a right under statute and regulatory law (but not the constitution) to intervene when the constitutionality of the law is challenged, as it can often illuminate the rationale for the law and its legislative history better than the prosecuting province (and, of course, may have a stronger incentive to do so).⁷ Although the federal Department of Justice's guidelines state, "The Attorney General of Canada intervenes in criminal cases selectively, not as a matter of routine," (2005, chapter 47.1), they also note that "The Attorney General of Canada intervenes frequently in the Supreme Court of Canada, occasionally in the other appellate courts, and very infrequently at the trial level (except, perhaps, in language and aboriginal rights cases)." (2005, chapter 47.3b)

Before proceeding to the details of this study, it is appropriate to consider briefly the question of *who decides* whether to concede a rights violation in Court. The content of federal government facta (written arguments submitted to the Court) receive extensive scrutiny by senior officials within the AG Canada's office. According to official guidelines,

Facta sent for approval to the Assistant Deputy Attorney General must receive prior approval from the Senior Regional Director. In most regional offices, such approval is given only after the factum is approved by the Regional litigation committee. In many cases, it is appropriate to consult on the contents of the factum within the Department of Justice before submitting it for approval. The factum should be sent to the Assistant

⁶ Others include anti-combines offences, war crimes, crimes against humanity, membership in a criminal organization (the "anti-gang" law), enforcement of the *Food and Drugs Act* (R.S., 1985, c. F-27), offenses involving foreign diplomats, and firearms offences.

⁷ See, for example, *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended by SOR/2006-203, s. 61(4). In non-constitutional cases, all governments must obtain the permission or "leave" of the court in which they wish to intervene. In *R. v. Osolin* [1993], the Supreme Court noted that the federal government brings a "national perspective" which prosecuting provinces cannot, giving Ottawa an advantage in its applications to intervene.

Deputy Attorney General at least 14 days before the deadline for filing.... The Litigation Committee [an Ottawa-based committee composed of several senior Justice department lawyers and invited client department representatives] approves all facta before they are filed in the Supreme Court. (2005, chapter 23.6)

We can infer from this process that concessions are quite deliberately chosen by senior officials in the AG's office. In view of my observation elsewhere (2008) that high-profile or politically-sensitive litigation is sometimes directed by political and bureaucratic officials at the centre of government, concessions may even have been ordered by the "client" minister, or the Prime Minister him- or herself.

Methodology and Data

This study examines the AG Canada's facta in every case decided by the Supreme Court in which a Charter right was claimed from 1984 (the year of the first Charter case in that court, *Law Society of Upper Canada v. Skapinker*) up to and including 2004. The AG Canada (or his or her agents) is the government's official representative in litigation involving virtually all line departments and agencies, and is therefore the logical focus of the study. It should be noted, however, that this focus excludes those cases where an institution or official of the federal state is not represented by the AG: these include those involving the Canadian International Trade Tribunal, the Judge Advocate General (National Defense), the Canadian Human Rights Commission, the Office of the Information and Privacy Commissioners, the Senate and the House of Commons (Deborah MacNair 2001, fn 10; Brunet 2000, 67).

I included appearances as both a direct party to the case (appellant, respondent, or both in cross-appeals) and as an intervener. Notably, there were 19 instances where the AG Canada filed a single factum for multiple cases (i.e., those given distinct registration numbers by the Registrar of the Supreme Court), 13 of them when intervening and 5 times as a party. For counting purposes, the study focuses on facta rather than Court decisions, as befits a project examining governmental arguments. By the same token, I count as distinct entries separate facta filed in cases the Court later consolidates into a single decision (for example, in *R. v. Seaboyer*; *R. v. Gayme* [1991]), on the grounds that the AG Canada may have had a good reason for filing separate facta. The facta were purchased (with the much-appreciated assistance of a SSHRC Standard Research

Grant) from the Court Records Office within the Registry Branch of the Supreme Court of Canada.⁸

The search parameters yielded 291 facta, with a roughly even split between the number of intervener facta (148, or 51% of the total) and facta as party (143, or 49%). Within the latter group, 102 (35% of total) were filed when the AG as the respondent, 37 (12.7%) as appellant, and 4 (1.4%) where they were both appellant and respondent due to a cross-appeal. That the AG Canada appears as a respondent nearly three times more often than as an appellant is consistent with Hennigar's (2002) finding that Ottawa enjoys a spectacularly high success rate in the penultimate courts of appeal (i.e., the provincial and federal Courts of Appeal), and so does not have the *opportunity* to appeal nearly as often as it is called to appear by another party.

The AG Canada addressed a challenge to a federal law in 141 of the facta, 67 as an intervener and 74 as a party to the case. Of these, a provision of the *Criminal Code* was challenged in 60 (90%) of the interventions, but in only 13 (18%) of the appearances as party. This pattern reflects the dynamic created by provincial prosecution of the Code, discussed above, with Ottawa rarely prosecuting the Code but having a right to intervene in such cases. As we can see in Table 1, when the AG Canada is the appellant, the case is considerably more likely to concern impugned federal legislation (23 of 37 facta, or 62%) than when Ottawa is the respondent (48 of 102, or 47%). This is not surprising, since the government has more discretion over launching an appeal than appearing as a respondent in an appeal brought by another party. Accordingly, it is reasonable to expect that governments are more likely to appeal when a piece of their legislation has been attacked. This appears to be the case.

Slightly less than half of the AG Canada's interventions concerned challenges to federal legislation (67/148) – this might surprise some, who might have expected this to be the primary motivation for intervening. However, another 25 interventions concerned matters of common-law criminal procedure, which are of direct concern to the federal government as they exercise jurisdiction over this area pursuant to s.91(27) of the Constitution. Ottawa also

⁸ I personally photocopied over 100 facta from microfilm using the publicly-accessible equipment at the Court itself—a gruelling task that took the better part of a week, even with the friendly assistance of staff in the Court Records office. I was therefore understandably happy when the staff later informed me that they could now receive document requests by email or fax, and that they would scan the documents into a digital (PDF) format, copy them to a CD-ROM, and mail them out, all at the same price as photocopying them myself at the Court. While this is not inexpensive (rates were \$0.50 per page, and recently increased to \$1.00 per page!), this greatly facilitated my research. My sincere thanks to the staff in the Records Office for their assistance.

intervened in one case (*R. v. Sheldon S.*, [1990]) regarding whether provincial governments were required to implement alternative sentencing measures under the federal *Young Offenders Act*. On the other hand, there were 43 interventions by the AG Canada where a purely *provincial* law or regulation was challenged (although in one of these, *R. v. Hufsky* [1988]—regarding random stops of motor vehicles to check for licence, insurance, vehicle fitness and drunk driving—the case concerned both the provincial *Highway Traffic Act* and the federal *Criminal Code*). Another eight interventions concerned the conduct of provincial bureaucratic officials. Federal interventions in provincial matters may reflect

Table 1: Numerical Breakdown of AG Canada Facta in Charter Cases before the SCC, 1984-2004

Case Issue	Appellant	Respondent	X-Appeals	Party Total	Intervener	Totals
Federal Law Challenged	23	48	3	74	67	141
Common Law Crim. Process	6	38	--	44	25	69
Other Federal Bureau. Conduct ⁹	8	13	1	22	--	22
Provincial Law or Exec. Action	--	1 ¹⁰	--	1	51 ¹¹	52
Other ¹²	--	2	--	1	5	7
Totals	37	102	4	143	148	291

⁹ These include the exercise of ministerial discretion in areas such as extradition and immigration, and decisions by parole boards and federal administrative tribunals.

¹⁰ Curiously, the AG Canada was named as a respondent in *A.G. Quebec v. Protestant School Board* [1984] concerning a language rights (s.23) challenge to Quebec's restrictions on English language education in Bill 101. The federal government had appeared as an intervener in support of the claimants in the lower courts, and was actively funding the challenge through the Court Challenges Program—a quintessential example of micro-constitutional (and litigated federalism) politics.

¹¹ 43 of these concerned provincial legislation or regulations, 6 concerned the conduct or discretion of provincial officials.

¹² Includes issues pertaining to purely judicial matters: contempt of court, injunctions issued but not requested by another party (regarding protesters picketing courthouses), language of court proceeding, jurisdiction to apply Charter, common law rules governing publication bans and motions for a judicial hearing.

that the Court's ruling on the legal issue in question will have an indirect effect on similar federal laws. It may also, however, indicate a fairly robust degree of "micro-constitutional politics," or attempts at constitutional rule-making through litigation. This term, coined by Manfredi, describes constitutional litigation where "the general objective...is to institutionalize specific policy preferences by manipulating and transforming existing constitutional rules without the constraints imposed by the formal amendment process" (1997, 115). This can entail an important federalism dimension, as the federal government may intervene to oppose a provincial law or program (or, vice versa). As micro-constitutional politics is typically conducted by a "repeat player" with a vested interest in the longer-term "rules of the game" (Galanter 1974), it is not surprising that the AG Canada—the "ultimate" repeat player—would be an active participant. Furthermore, intervention in cases where one's own legislation or officials' action are not at stake provides governments an excellent opportunity for micro-constitutional politics, as the AG can focus solely on the issue of constitutional interpretation before the Court.

This focus in this preliminary stage of the larger study is on concessions regarding federal statutory or regulatory provisions, as this subset of cases most closely relates to the issue of judicial activism, that is, the relationship between the judiciary and the elected branches. As noted above, the government may concede that the provision violates (*prima facie*) a Charter right, and/or concede that a law which violates a right is "unreasonable" under s.1 analysis. Concessions were determined through qualitative analysis of *facta* arguments by myself and two research assistants, which were then coded for quantitative analysis. Federal government concessions of a violation were coded as "1," rights claims that were contested were coded "0," and *facta* which did not address the rights claim were coded "9." As discussed below, while it was useful to distinguish instances of AG silence on the rights claim from explicit concessions, the failure to address a rights claim which challenges a legal provision is an implicit concession. Concessions under s.1 were coded similarly, and again, the absence of a s.1 defense ("9") is an implicit concession, since it effectively requires the Court to find the violation unreasonable (Huscroft 1996, 146). It should be noted that in some cases, the government simply stated that it did not concede s.1, but offered no argumentation or evidence to that effect; such cases were coded as "not addressed" (=9), since such an approach would clearly be insufficient to persuade the Court to uphold the law.

To determine the frequency of each of Huscroft's three litigation argumentation strategies—'Full Charter Defense,' 'Limited Charter Defense' and

'No Charter Defense' — the variables for rights concessions and s.1 concessions were recoded as follows:

- a "Full Charter Defense" was offered if the AG Canada contested both the rights claim and the s.1 analysis;
- a "Limited Charter Defense" was offered if the AG Canada EITHER contested the rights claim (=0) BUT conceded or did not address s.1 (=1 or 9), OR conceded or did not address the rights claim (=1 or 9) BUT contested s.1 (=0);
- "No Charter Defense" was offered if the rights claim was conceded or not addressed (=1 or 9) AND s.1 was conceded or not addressed (=1 or 9).

Findings and Discussion

Of 291 facta overall, the rights violation was conceded (or "supported," in cases involving provincial matters) in 39 cases (13.4%), and not addressed in another 25 (8.6%). Laws were argued to be unreasonable under section 1 in only ten facta, however, with defenses offered in 152 cases, and s.1 not addressed in 129 (the size of this last number is not surprising, as s.1 is simply unavailable in many of the cases involving police or bureaucratic conduct, where the rights violation is not "prescribed by law").

Of the 141 facta addressing a challenge to a federal law or regulation, only 19 (13.5%) conceded the Charter violation, with another one (0.7%) not addressing it. Table 2 summarizes the AG Canada's strategies in these cases, organized by its role in the case. While admittedly there is no existing benchmark for what constitutes "rare" or "frequent" concessions, it is immediately apparent that there are few full concessions ("No Charter Defense"): only 3.5% of all facta submissions over the first 20 years of Charter litigation in the Supreme Court. At five total, in other words, a complete concession is only made on average about every four years, while an average of over seven federal laws are challenged under the Charter per year. More detailed analysis reveals an even more surprising conclusion: there has only been *one case* where the AG Canada explicitly conceded a violation *and* s.1 (as opposed to implicitly conceding by not addressing one or the other): *Schachter!* That this widely-cited example is an isolated event suggests that the concession issue may be something of a "tempest in a teapot" at least as regards the federal government. At the other end of the spectrum, "Full Charter Defense" is by far the most common strategy, representing 70 per cent of the facta. Regarding the other four facta offering no Charter defense—in *R. v. Hamill* [1987], *R. v. Yorke*

[1993], *Canadian Egg Marketing Agency v. Richardson* [1998], and *R. v. Johnson* [2003]—there appear to be good (or mitigating) reasons for the decision to concede the violation and not address s.1. In anticipation of a Charter-based challenge, Parliament had already repealed the offending provisions of the *Narcotics Control Act* (which had authorized warrantless searches by “writs of assistance”) at issue in *Hamill*. In *Yorke*, the AG Canada (as Crown) had conceded at trial that the section of the *Customs Act* under which a search had been executed was unconstitutional, in light of three lower court rulings three decisions which had held that the section contravened the Charter. Ironically, the Supreme Court’s ruling in *Yorke* reversed the lower courts and upheld the provision. In *Johnson*, the AG Canada was explicit about his reasons for taking the approach he did: the AG felt the lower court had acted inappropriately in ruling on whether the *Code* provision (regarding sentencing long-term offenders) violated the Charter when no right had actually been claimed, and without formal argumentation by the parties. This proved a poor strategy in the Supreme Court, which upheld the lower court’s finding of unconstitutionality (again without the benefit of arguments by the parties!). Finally, Ottawa really only partially conceded a claim under the Charter’s s.6 mobility rights in *Canadian Egg Marketing Agency*, in that it agreed that s.6 applies to the Territories since they are creatures of federal legislation; they declined to address whether s.6 was actually violated, however, or whether such a violation might be reasonable under the *Oakes* test.

Table 2: AG Canada Litigation Strategies in Cases Challenging Federal Laws

Charter Defense	AG Canada Party					Total
	Appellant	Respondent	X-Appeals	Party Total	Intervener	
Full column %	13 56.5%	35 72.9%	1 33.3%	49 66.2%	50 74.6%	99 70.2%
Limited column %	9 39.1%	11 22.9%	2 66.7%	22 29.7%	15 22.4%	37 26.2%
None column %	1 4.3%	2 4.2%	--	3 4.1%	2 3.0%	5 3.5%
Total row %	23 16.3%	49 34.0%	3 2.1%	74 52.5%	67 47.5%	141 100%

That said, there are 37 instances of partial concessions, as indicated by the figure for “Limited Charter Defense.” In 15 of these the government conceded the rights violation but defended the law under s.1, while in the remaining 22 the right was contested but s.1 was conceded. As with the “No Charter Defense” facta, however, most of the latter group (19) were implicit concessions as s.1 was not addressed, leaving only three cases of explicit s.1 concession: *R. v. Simmons* [1988], *R. v. Zundel* [1992], and *United Nurses of Alberta v. A.G. Alberta* [1992]. At issue in *Simmons* was a s.8 challenge to the *Customs Act* provision that authorizes personal searches at the border. Ottawa conceded that if the s.8 right against “unreasonable search and seizure” was violated (which it did *not* concede), it could not advance an argument that the law was “reasonable” under s.1. A similar logic motivated the concessions in *Zundel* and *United Nurses*. Both cases concerned *Criminal Code* provisions that were arguably “void for vagueness” under s.7 of the Charter: a ban on “spreading falsehoods” and the preservation of the judicially-defined crime of contempt of court, respectively. The AG Canada disputed both claims, but conceded that if the Court found the provisions so vague as to violate s.7, no defense could be advanced under s.1 since the standards for the *Oakes* test closely overlap those for vagueness. Why implicit concessions so outnumber explicit ones is unclear, but at least one facta that did so pre-dated *Oakes* (*Hunter v. Southam* [1984]), another dealt only with draft legislation in the absence of “real” facts that would be relevant to s.1 (*Reference re Same-Sex Marriage* [2004]), a third with a referendum law that was effectively moot (*Haig v. Chief Electoral Officer of Canada* [1993]), and a fourth with such sweeping rights claims that detailed s.1 defenses were impractical and, frankly, unnecessary (*Canadian Council of Churches* [1992]). Another nine facta ignored s.1 even though it was available, instead focusing on the related criminal process issue and the exclusion of evidence, and another focussed only on the interpretation of the defense of “duress” in the *Criminal Code* (*R. v. Ruzic* [2001]).

Table 2 reveals that the government’s litigation strategy is consistent regardless of whether they are appearing as an intervener or party, with full Charter defenses being slightly more likely in interventions at the expense of limited Charter defenses. In a somewhat counter-intuitive twist, however, full defenses are slightly less likely when the AG Canada appears as an appellant (56.5%) than as a respondent (72.9%); one might assume that filing an appeal implied a strong desire to “fight.” On the other hand, a respondent government could concede a case before even going to a hearing--their refusal to do so may indicate a strong resistance to the rights claim being advanced.

Within the subset of *Criminal Code* cases, once again full Charter defenses predominate (75% of facta). Partial defenses appear in 13 interventions and 4

party facta, and no Charter defense was offered in only one intervention (*R. v. Johnson* [2003]), and never as party. These findings are summarized in Table 3.

Table 3: AG Canada Litigation Strategies in Cases Challenging Criminal Code

Charter Defense	AG Canada Party					Total
	Appellant	Respondent	X-Appeals	Party Total	Intervener	
Full column %	1 25.0%	7 87.5%	1 100.0%	9 69.2%	46 76.7%	55 75.3%
Limited column %	3 75.0%	1 12.5%	--	4 30.8%	13 21.7%	17 23.3%
None column %	--	--	--	--	1 1.7%	1 1.4%
Total row %	4 5.5%	8 11.0%	1 1.4%	13 17.8%	60 82.2%	73 100%

Having established that, although rare, concessions of rights do occur when federal laws are challenged, *which* rights are being conceded? Examining only those rights which are explicitly conceded (as opposed to claims that are not addressed), Table 4 illustrates the clear pattern: the only right Ottawa regularly concedes is s.2(b)'s freedom of expression. The reason for this is also clear: beginning in the late 1980s with its ruling in cases such as *Irwin Toy* [1989], and affirmed consistently thereafter (see, for example, *Prostitution Reference* [1990], *Zundel* [1992], *RJR-MacDonald v. Canada* [1995]) the Supreme Court took a "large, liberal" approach to free speech, defining "expression" as anything that non-violently conveys meaning, regardless of content. This definition, as the AG Canada noted in its factum in *Ramsden v. Peterborough* [1993], turns s.2(b) into a "barely policed port of entry into s.1," as virtually any restriction on free speech is a *prima facie* violation of s.2(b) which must be defended in the context of the *Oakes* test. Notwithstanding its concerns, however, the AG Canada has obviously taken a cue from the Court, and does not attempt to dispute that the right to free expression has been violated; indeed, the AG often notes that such a strategy is simply unavailable given the Court's jurisprudence. The Supreme Court itself concurs. In *R. v. Sharpe*, cited earlier, even though some of the Justices complained about the government conceding that prohibitions on child pornography violated s.2(b), they immediately wrote: "At the same time, we recognize that, at this stage, our jurisprudence leads to the conclusion that, although harmful, the content of child pornography cannot be the basis for excluding it from the scope of the s. 2(b) guarantee" (2001, para. 151). These

“concessions” should not be confused for actual support for the rights claimant, however, in view of the fact that Ottawa *never* subsequently concedes s.1.

Table 4: Charter Rights Conceded by AG Canada in Challenges to Federal Laws, Supreme Court of Canada 1984-2004

Right Conceded	# of Concessions	# Sec. 1 Conceded	# Sec. 1 Not Addressed
Free Expression (s.2b)	10	0	0
Democratic Rights (s.3)	2	0	0
Mobility Rights (s.6)	1 [†]	0	1
Life, Liberty and Sec. of Person (s.7)	1	0	1
Unreasonable Search and Seizure (s.8)	2	0	2
Presumption of Innocence/Fair Trial (s.11d)	2	0	0
Equality Rights (s.15)	1	1*	0
Total	19	1	4

[†] Only conceded application of s.6 to Territories; rights violation itself not addressed.

* *Schachter v. Canada* [1992]

Section 8’s right against unreasonable search and seizure was conceded in *Hamill* and *Yorke*, and as explained above, both times s.1 was not addressed. Violations of section 11(d)’s right to be presumed innocent were conceded in two cases, *R. v. Laba* [1994] and *R. v. Keegstra* [1996], which involved *Criminal Code* offenses entailing “reverse onus” (i.e., the accused had to prove their innocence). *Laba* concerned an offense requiring someone accused of selling precious metals to prove they were the legal owners, while *Keegstra* (in a follow-up to his failed 1990 appeal to the SCC) challenged the anti-hate speech law’s “truth” defense on the grounds that the accused had to prove “truth.” Given the Court’s well-established precedent (including in *Oakes*, which concerned narcotics trafficking) that reverse onus offenses violate s.11(d)’s presumption of innocence, the AG Canada’s concessions are not surprising. Again, however, the government defended the laws under s.1. The right to vote in s.3 was conceded twice, both in prisoner voting rights cases involving Richard Sauvé [1993 and 2002], in which the *prima facie* violation of s.3’s unambiguous right (“Every citizen of Canada has the right to vote”) was similarly unambiguous; in both, however, the violation was vigorously contested (unsuccessfully) under s.1. The Charter’s s.6 mobility rights were partly conceded in *Canadian Egg Marketing Agency*, discussed above. Finally, the only equality rights violation conceded was in *Schachter*, a case that was technically moot since the legislation in question had already been amended to address the violation, and the AG’s factum focused on the question of available judicial remedies.

Conclusions

The evidence presented here demonstrates that the concerns raised by some commentators about the practice of governments conceding that their laws violate the Charter during litigation are largely groundless, at least as regards the AG Canada before the Supreme Court of Canada. A comprehensive examination of all AG Canada facta submitted in Charter cases in that Court from 1984 to 2004 found only a single instance of both the violation and the law's unreasonableness being explicitly conceded, and in that case the law in question had already been amended by Parliament. In the four remaining cases where no Charter defense was offered, the law had already been amended in one, had not been explicitly challenged in the second, was not actually conceded as unconstitutional in the third, and was not defended in the fourth because it had already been repeatedly ruled unconstitutional in multiple lower courts. While only a "limited" or partial Charter defense was offered in a quarter of the facta, there were often good jurisprudential reasons to do so, as the Court has made it very difficult to contest *prima facie* rights violations, especially with regard to freedom of expression and the presumption of innocence. In other cases, the primary focus was on the application of a given law to police procedure, and the factum (usually via intervention) focused on that issue. Returning to the issue which opened the paper, the low frequency of government concessions does not challenge the existing assessments of judicial activism; it is simply not the case that court rulings which invalidate (or "rewrite") federal legislation are the result of concessions.

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