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SOBEYS GROUP INC. v. NOVA SCOTIA (ATTORNEY GENERAL), (2006) 248 N.S.R. (2d) 149 (S.C.)

I. INTRODUCTION

The debate over Sunday shopping in Nova Scotia, Canada's last bastion of Sunday closing laws, has polarized the province during the last half-decade. Traditionalists supported the status quo for, *inter alia*, religious reasons,¹ to reject consumerism,² or to protect workers.³ These individuals were pitted against business groups,⁴ who favoured a market-based approach to determining retail hours; and some citizens, who desired greater consumer choice.⁵

It not often that a curt first-instance decision on an application challenging the validity of an order-in-council might warrant the attention of a case comment. Nevertheless, the decision of Richard J. in *Sobeys Group Inc. v. Nova Scotia (Attorney General)*⁶, which ultimately led to the end of the enforcement of Sunday closing legislation in Nova Scotia, is one such instance. Despite the court's narrow holding – that the *Retail Business Uniform Closing Day Act*⁷ did not give the provincial cabinet the authority to craft regulations that prevented retail operations beyond a certain size from opening⁸ – the government publicly responded by permitting all stores to open on Sundays and statutory holidays.⁹ Subsequently, cabinet effected this response through an order-in-council excluding all retail operations from the ambit of the act.¹⁰

1 See e.g. "On the seventh day, Nova Scotians will ... shop" *Edmonton Journal* (17 November 2003), A2 (noting that religious leaders have opposed Sunday shopping because it would diminish the time that families are able to spend together).

2 See e.g. Mark Parent "Meaning of life: Never on a Sunday" *The Globe and Mail* (26 October 2004), A21 ("Unregulated Sunday shopping removes the symbolic bulwark of Sunday as a visible and recurring reminder that there are more important things in life than endless consumer consumption").

3 See e.g. John Jacobs, "Seven-day Shopping Won't Cure What Ails Us" (15 October 2004), online: CCPA <http://www.policyalternatives.ca/index.cfm?act=news&do=Article&call=919&pA=B56F3A15&type=2> (accessed 18 March 2007) ("Allowing wide open shopping on Sunday will contribute to the erosion of the standard workweek. The removal of Sunday as culturally accepted day off will increase pressures for broader array of services and businesses to operate 7 days a week and it will result [in] longer and more fragmented workweeks").

4 See e.g. "Spokesman for archbishop speaks out on Sunday shopping in Nova Scotia" *Canadian Press* (16 October 2003) (quoting a spokesperson for the Halifax Chamber of Commerce who argued that "[i]ndependent businesses must have the right to open as the market dictates...[w]e should deregulate shopping hours if we are to be a truly competitive province.>").

5 See e.g. Shawna Richer "Sunday may never be the same" *The Globe and Mail* (2 October 2004), F3 (quoting a small-business owner who noted "Sunday doesn't need to be a day that everything is closed...[w]e just want to the choice to be there and government should not be regulating hours. It doesn't make sense.>").

6 (2006) 248 N.S.R. (2d) 149 (S.C.) [*Sobeys*]. The decision was delivered on 4 October 2006.

7 R.S.N.S. 1989, c. 402. Unless otherwise indicated, all references to the "act", *infra*, refer to the *Retail Business Uniform Closing Day Act*.

8 The context surrounding the enactment of the impugned regulations is discussed in greater detail *infra*.

9 Nova Scotia, Premier's Office, News Release, "Province to Remove Restrictions to Sunday Shopping" (4 October 2006) online: <http://www.gov.ns.ca/news/details.asp?id=20061004007> (accessed 18 March 2006) [News Release, "Province to Remove Restrictions to Sunday Shopping"].

10 *Retail Business Uniform Closing Day Regulations*, N.S. Reg. 188/2006. The new regulation reads "[a]ll goods and services sold, offered for sale, or purchased by retail are prescribed as goods and

This comment will first provide a contextual backdrop for the decision in *Sobeys*, followed by a discussion of the court's holding. It will then review the government's response to the decision, and evaluate its implied claim that the court required the government to lift its prohibition on Sunday store openings. A discussion of the legislative-judicial dialogue, and its impact on political discourse, follows. The comment contends that while the province's response to *Sobeys* was a victory for consumer and retailer choice while eliminating a regulatory anachronism, it is nevertheless symptomatic of the willingness of legislators in the era of the *Charter of Rights and Freedoms*¹¹ to rely on judicial pronouncements as a reason to avoid making decisions on divisive public policy matters – even in instances where constitutional rights are not implicated.

II. THE CONTEXT: SUNDAY CLOSING IN NOVA SCOTIA

Until October 2006, Nova Scotia remained the only jurisdiction in Canada that prohibited the closure of most retail operations on Sundays throughout the year.¹² The following section includes a brief history of the Sunday closing debate in Nova Scotia, which culminated in the successful challenge in *Sobeys*.¹³

In 1985, filling the legislative lacuna which resulted from the Supreme Court of Canada's invalidation of the *Lord's Day Act* in *Big M*,¹⁴ Nova Scotia enacted secular Sunday closing legislation, which became known as the *Retail Business Uniform Closing Days Act*.¹⁵ While the legislation originally permitted municipalities to set hours of business, the province soon after decided to begin regulating retail hours province-wide.¹⁶

The act requires that most retail operations close on Sundays, as well as several enumerated statutory holidays.¹⁷ Nevertheless, several exemptions from

services to which Section 3 of the *Retail Business Uniform Closing Day Act* does not apply". The act and its regulations are discussed in greater detail *infra*.

11 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

12 Prince Edward Island, however, continues to permit Sunday shopping only during the Christmas season, though several classes of retail stores are exempted from the operation of the act. See *Retail Business Holidays Act*, R.S.P.E.I. 1988, c. R-13.02.

13 The Supreme Court of Canada's seminal decision in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 [*Big M*] was at least partly responsible for the liberalization of Canadian Sunday closing laws over the last two decades, and resulted in the reorientation of such statutes towards secular objectives. In *Big M*, the Court held that the federal *Lord's Day Act* – part of which prohibited the opening of retail operations on Sundays – unjustifiably violated the guarantee of religious freedom found in section 2(a) of the *Charter*. While provinces which had not done so subsequently enacted secular Sunday closing legislation, many of these restrictions were eventually relaxed and eliminated. For an overview of the history of Sunday closing legislation in Canada, see *Big M* at paras. 51-72, and see Mike Brundrett, "Demythologizing Sunday Shopping: Sunday Retail Restrictions and the Charter" (1992) 50 U. Toronto Fac. L. Rev. 1 at 6-11. For a brief review of Sunday closing jurisprudence in the aftermath of *Big M*, see Ivan F. Ivankovich, "Case Comment – *Peel v. Great Atlantic and Pacific Co. of Canada et al.*" (1991) 29 Alta. L. Rev. 724 at 726-730. For an early comparative perspective on Sunday closing laws in Canada and the United States, see Jerome Barron, "Sunday in North America" (1965) 79 Harv. L. Rev. 42.

14 *Big M*, *ibid*.

15 See *Sobeys*, *supra* note 6 at paras. 5-6.

16 *Ibid.* at para. 7.

17 *Retail Business Uniform Closing Day Act*, s. 3.1. This section of the act reads: "No person shall on a uniform closing day (a) sell, offer for sale or purchase any goods or services by retail; or (b) admit the public to any premises where a retail business is carried on except as otherwise provided

the operation of the act exist in the legislation for, *inter alia*, retailers of certain agricultural products, restaurants, and pharmacies.¹⁸ Regulations made pursuant to the act also included additional exemptions; notably, one regulation excluded grocery stores smaller than 4000 square feet from the act.

While the latter regulation still prevented large grocery stores and other retail operations from opening, one grocer, Pete's Frootique, famously circumvented the size restrictions by dividing its large grocery and produce operation into separately incorporated businesses, each one of which did not exceed the 4000 square foot limitation. In 1999, charges were eventually laid against this retailer for allegedly violating the act. However, in *R. v. Pete's Frootique*,¹⁹ an acquittal was entered. In *obiter*, the court refused to pierce the corporate veil and consider each of the businesses – which shared corporate officers – as one operation for the purposes of the act.²⁰ The court further approved of the novel structuring of the businesses, indicating that it could

...see no reason in this case to say that businesses and corporations don't have the right to structure their affairs so as to conduct their business in the way they wish and at the same time meet the strictly construed requirements of the legislation.²¹

Despite the decision in *Pete's Frootique*, major retailers did not immediately adopt similar corporate structures, and Pete's Frootique operated as an anomaly.

With the election of a minority Progressive Conservative government in 2003, Sunday shopping became a significant political issue, as each of the three parties in the provincial legislature advanced different positions on whether or not the Sunday closing law should be liberalized. The government decided to address the issue by permitting stores to open on the six Sundays prior to Christmas in 2003,²² as well as by conducting a plebiscite alongside municipal elections in October 2004 in order to determine public support for Sunday shopping.

The plebiscite provided electors two choices – the first between year-round Sunday shopping and none at all. Electors could also choose whether they desired Sunday shopping throughout the year, or only in the weeks preceding Christmas.²³ In the end, the electorate voted to maintain the status quo.²⁴ Notwithstanding the result of the plebiscite, Sunday shopping continued to be the subject of public debate; in 2006 the Progressive Conservative Party promised another plebiscite on the matter, which it proposed to hold in 2008.²⁵

in this Act.”

18 *Retail Business Uniform Closing Day Act*, s. 2.

19 [1999] N.S.J. No. 357 (QL) [*Pete's Frootique*].

20 *Ibid.* at paras. 10-13.

21 *Ibid.* at para. 11.

22 The act was amended to permit pre-Christmas Sunday Shopping in 2003: see *Retail Business Uniform Closing Day Act*, s. 3A.

23 *Retail Business Uniform Closing Day Act*, s. 10. See also *Sunday Shopping Plebiscite Regulations*, N.S. Reg. 188/2004.

24 See “Nova Scotians refuse Sunday shopping” *The Globe and Mail* (18 October 2004), A8.

25 See “Premier opens door to Sunday shopping vote” *CBC News* (11 May 2006) online: CBC News <http://www.cbc.ca/canada/nova-scotia/story/2006/05/11/nsv-sundayshopping20060511.html> (accessed 18 March 2007).

However, in the summer of 2006, Nova Scotia's two largest grocery retailers – Sobeys and Atlantic Superstore – began to open selected locations on Sundays by incorporating separate departments within their stores, comparable to the corporate structure which Pete's Frootique successfully adopted years earlier. In response, the government attempted to give effect to the results of the plebiscite, and passed new regulations which continued to prohibit the opening of stores larger than 4000 square feet, and also provided that separately incorporated businesses owned by "related persons" which were in close proximity or within the same building would be considered one business for the purposes of the act.²⁶ Interestingly, the new regulations grandfathered stores which had operated on Sundays prior to 1 June 2006 (such as Pete's Frootique). It was these regulations that Sobeys Group challenged,²⁷ the decision itself is discussed below.

III. THE DECISION AND REACTION

Unlike most challenges to Sunday closing laws since *Big M* – many of which have been based on purported violations of the *Charter* – in *Sobeys*, the applicant simply sought a declaration that cabinet did not have the statutory authority to enact the June 2006 regulations. The applicant also contended that the regulations were discriminatory as against it and other large retailers.²⁸

The court's analysis focused on statutory interpretation, and in particular, the regulation-making authority delegated to cabinet under the *Retail Business Uniform Closing Day Act*. Specifically, the act permits the cabinet to create regulations:

- (a) defining a word or expression used in this Act and not defined herein;
- (b) determining or modifying the meaning of a clause of subsection (2) of Section 3;
- (ba) permitting a retail business to operate on Sunday between one o'clock in the afternoon and six o'clock in the afternoon in order to implement the result of the plebiscite held pursuant to Section 10;

26 *Retail Business Uniform Closing Day Regulations*, N.S. Reg. 98/2006, ss. 3(1)(a), 3(2), 3(3), 3(4). The impugned regulation read:

3(1) The goods and services provided by a retail business in any of the following categories are prescribed as goods and services to which Section 3 of the Act [the provision prohibiting the opening of retail operations on uniform closing days] does not apply:

(a) a store

(i) whose principal business is selling groceries, and

(ii) that at no time operates a retail sales area greater than 4000 sq.ft.

(2) For the purposes of clause 1(a), 2 or more stores that are owned, occupied or operated by related persons are deemed to be one store if they are (a) in the same building; or (b) adjacent or in close proximity to each other.

(3) For the purposes of subsection (2), "related persons" has the same meaning as in the *Income Tax Act* (Canada).

(4) Subsection (2) does not apply to a store if that store was regularly open to the public on Sunday before June 1, 2006 [parentheses added].

27 Atlantic Superstore appeared as an intervenor at the hearing of the application in *Sobeys*.

28 *Sobeys*, *supra* note 6 at para. 4. Sobeys also argued that the regulation was invalid because it was enacted with an improper purpose and amounted to an exercise of bad faith on cabinet's part. The court declined to address this argument. See at para. 38.

(c) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.²⁹

Reviewing the rules of statutory interpretation, Richard J. highlighted the importance of the lack of subjective language in the regulation-making authority which section 8(c) of the act conferred:

It appears from this analysis that had the Minister or Cabinet (the regulating authority) been granted the power to make such regulations *as he deems necessary* then this court would be hard pressed to find the legal authority to question such decision. In the absence of such a subjective authority it is open to the Courts to objectively review the challenged regulations to determine if they were made under the authority of the Act.³⁰

Richard J. then rejected the respondent Attorney General's contention that the decision of the Supreme Court of Canada in *R. v. Edwards Books and Art Ltd.*³¹ – in which the court held that it was constitutionally acceptable for the provinces to enact secular Sunday closing legislation if they wished – was of any assistance in determining whether the impugned regulations were valid.³² His Lordship also rejected a related argument in which the respondent contended that since Nova Scotia's Sunday closing legislation was modelled on Ontario's legislation (the validity of which was generally affirmed in *Edwards Books*), the court should thus uphold the impugned regulation.³³

The court ultimately found that the impugned regulations were *ultra vires*, holding that, objectively, the enabling provisions of the act did not provide cabinet with either the express or implied authority to enact regulations concerning whether retailers of a certain size would be exempt from the act, or ones which concerned retailers' respective corporate structures.³⁴

Though invalidating the regulations, Richard J. stressed the narrow nature of the court's decision:

In order to put this entire matter in the proper perspective I will repeat, yet again, what this application is NOT about. It is not about any social or political considerations respecting the appropriateness of Sunday shopping; nor is it about the constitutional authority of the legislature to enact legislation dealing with Sunday shopping; nor is it about the protection of vulnerable retail employees being required to work on Sundays. This application is sim-

29 *Retail Business Uniform Closing Day Act*, s. 8 [Emphasis added, capitalization and parentheses in original].

30 *Sobeys*, *supra* note 6 at para. 18 [Emphasis added, italics and parenthesis in original].

31 [1986] 2 S.C.R. 713 [*Edwards Books*].

32 *Sobeys*, *supra* note 6 at paras. 25-26.

33 See generally *ibid.* at paras. 19-26.

34 *Ibid.* at paras. 37. While the court did not explicitly indicate why it felt that the impugned regulation was not, per section 8(c) of the act, "necessary or advisable to carry out effectively" its intent or purpose, one can surmise because of the grandfather provision and the focus on retailers over a certain size, that the regulation was not necessary to carry out the purpose of the act – which was to restrict the opening of retail operations on Sundays and holidays. Nevertheless, the court also found that the regulation was *ultra vires* insofar as it discriminated against the applicant Sobeys Group and others not falling within the scope of the regulation. See *ibid.* at para. 37.

ply about the scope of the authority or power granted to the Governor in Council (Cabinet) to make regulations pursuant to the Act.³⁵

It is perhaps ironic that the court's decision in *Sobeys* – one of the more restrictive and narrow holdings in two decades of Canadian Sunday closing jurisprudence – resulted in a legislative response that went well beyond what the court would have required.³⁶

Immediately following the decision, Premier Rodney MacDonald announced that all retail stores would be permitted to open on Sundays.³⁷ This was despite the fact that the regulation-making authority conferred upon cabinet was not invalidated. Days later, this intent was effected through an order-in-council.³⁸ However, the Premier's pronouncement went further, as his decision to permit stores to open was not limited to Sundays, but included all statutory holidays under the act. This made Remembrance Day, a holiday which a separate statute governs,³⁹ the only day when stores and other businesses would be required by law to close.

The opposition parties were critical of the government's volte-face. New Democratic Party Leader Darrell Dexter noted that "[t]his is a case of the premier acting extraordinarily impulsively, deciding to extend what was a very limited court decision to statutory holidays, which will inevitably affect far more people than was anticipated."⁴⁰ Interim Liberal Leader Michel Samson objected to what he viewed as amending the scope of the act through regulation rather than legislation.⁴¹

IV. ANALYSIS

By arguing that "the court's ruling was clear", as one government website contends,⁴² the provincial government, at least impliedly, claimed that it had no choice

35 *Ibid.* at para. 34 [Emphasis added; capitalization and parentheses in original]. The language which Richard J. adopted in this part of the decision mirrors almost identically the oral submissions of the applicant Sobeys Group: "what this application is about is not about social or political considerations. It's not about the appropriateness of Sunday shopping, nor is it about the power of the legislature to pass an Act dealing with Sunday shopping. This case, this application is about one fact and it is about the scope of the Cabinet's power to pass Regulations pursuant to the Act". See *ibid.* note 6 at para. 1.

36 This is especially so considering that the court and the parties before it acknowledged that the province has the constitutional ability to enact Sunday closing legislation. See *ibid.* at paras. 2, 5, & 25.

37 News Release, "Province to Remove Restrictions to Sunday Shopping", *supra* note 9.

38 *Supra* note 10. The legislature has not amended the act to broaden or change the scope of the cabinet's regulatory authority under the act since the decision in *Sobeys* was rendered. It is thus questionable whether the new regulation which exempts all retail operations from the act might not be itself *ultra vires*, following the reasoning in *Sobeys*, as one could argue that such a regulation is neither "necessary" nor "advisable" to advance the purpose of the act.

39 *Remembrance Day Act*, R.S.N.S. 1989, c. 396.

40 "N.S. premier defends decision to allow stores to open on holidays" *Canadian Press* (11 October 2006).

41 "Decision to end Sunday shopping ban in N.S. not valid – opposition" *Canadian Press* (12 October 2006).

42 Nova Scotia, Department of Finance, *Sunday Shopping Information*, online: <http://www.gov.ns.ca/finance/sundayshopping> (accessed 18 March 2007) ("the court's ruling was clear and would have meant all grocery stores could open."). The decision, of course, held that the province did not have the regulatory authority to prevent certain grocery stores from opening on the basis of their size. The court did not pronounce upon the government's ability to prohibit *all* grocery stores from opening; in fact, the authority for such a proposition is found directly in the text of the act.

but to permit Sunday shopping on account of the decision in *Sobeys*. As this comment has discussed, the cabinet's decision to effectively end the enforcement of the act went well beyond what the court in its decision. Notably, it appears that the government could have actually *further restricted* the ability of stores to open on Sundays (and arguably give effect to the spirit, if not the letter, of the electorate's decision in the 2004 plebiscite) provided it did not exempt operations based on size and, therefore, not permit any retail stores (aside from those already exempted under the act) to open on Sundays.

The government's reaction, alongside the holding in *Sobeys*, provide an opportunity to explore the scope and state of dialogue between the legislative and executive branches of government and the judiciary. Given the limited space that a case comment presents, the objective of this section is not to engage in either a full-scale survey of the development of the dialogue metaphor⁴³ or the expansive corpus of literature and jurisprudence which has discussed it. Nevertheless, *Sobeys* is a unique instance of failed dialogue outside of the constitutional context, on which most efforts to describe dialogue focus. These are discussed below.

i. "Dialogic" Judicial Review

While the notion that judicial review can be "dialogic" is not new, the first expansive account of the dialogue metaphor in the Canadian context was contained in an article which Hogg and Bushell penned in 1997.⁴⁴ In their analysis of judicial review under the *Charter*, they contended that the relationship between the legislature and the judiciary in the resolution of a constitutional issue is dialogic in instances where judicial decisions are open to a legislative response.⁴⁵ Hogg and Bushell ultimately see judicial review as the start of a dialogue on how to reconcile the values of the *Charter* with the economic and social policies which the legislature enacts,⁴⁶ as opposed to being a final pronouncement upon the propriety of state action. Hogg and Bushell find that a legislative-judicial dialogic relationship exists where "a decision is open to legislative reversal, modification, or avoidance".⁴⁷

Many proponents of dialogue argue that the ensuing discourse between the courts and the legislature can be democracy-enhancing, "by requiring legislatures clearly

43 The phrases "dialogue metaphor" and "dialogue theory" are used interchangeably in this comment.

44 Peter W. Hogg & Alison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L. J. 75 [Hogg & Bushell]. The Supreme Court of Canada has spoken approvingly of the dialogue metaphor: see e.g. *Vriend v. Alberta*, [1998] 1 S.C.R. 493, Iacobucci J. at para. 137. For a comparative analysis of dialogic judicial review in North America, see Kent Roach, "Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States" (2006) 4 Int'l J. Con. Law 347. For an American perspective on dialogue and the "counter-majoritarian difficulty", see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986). Hogg and Bushell's conclusions are critiqued in Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L. J. 513.

45 Hogg & Bushell, *ibid.* at 79.

46 *Ibid.* at 105.

47 *Ibid.* at 79. See also Kent Roach, "Dialogic Judicial Review and Its Critics" (2004) 23 S.C.L.R. (2d) 49 at 57. Those advancing a theory of dialogue with reference to the *Charter*, such as Roach, rely on both the ability of the state to justify limits on rights under section 1 of the *Charter*, as well as the potential to invoke the notwithstanding clause, as tools which the legislature can use to respond to instances where courts have invalidated legislation or state action.

to articulate, justify and be held accountable for their decisions to limit or depart from the constitutional or common law principles articulated by the Court".⁴⁸ There are some, however, who are critical of both the metaphor and its ability to promote democracy, questioning whether it is an accurate description of the interaction between courts and the legislatures. Morton, for example, argues that the discussion between the judiciary and the legislature that the *Charter* heralded is really just a court-initiated monologue, "with judges doing most of the talking and legislatures most of the listening".⁴⁹ Waldron is much more scathing in his indictment of the notion of dialogic judicial review:

...for I suspect that many who talk about 'dialogue' between courts and legislatures really have in mind a sort of one-sided monologue, in the course of which the legislature would be expected to change its position in light of the occasional lectures and reprimands it receives from the judiciary, but in which the courts, for their part, would regard any claim that there should be learning and modification of positions taken by judges on the basis of what they hear from the legislature as the height of impudence.⁵⁰

The dialogue metaphor is not, however, limited to the constitutional context – though this has attracted the attention of many Canadian scholars partly because sections 1 and 33 of the *Charter* provide overt and blunt mechanisms through which the legislature can contribute to dialogue. Drawing upon the work of Willis, Roach notes that legislative-judicial dialogue in Canada pre-dates the *Charter*, and was manifest most notably in instances of the presumptions of statutory interpretation,⁵¹ which, of course, was the focus of the court's decision in *Sobeys*.

ii. Abdicating the Legislature's Role – the Flipside of Dialogue

While legislatures have always been able to refrain from participating in dialogue with the courts, the *Charter* era has arguably made such instances far more pervasive, if only because the courts have been equipped with a more robust version of judicial review than that which existed prior to 1982 – thereby providing more opportunities for dialogic engagement.

48 Kent Roach, "Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481 at 484 [Roach, "Constitutional and Common Law Dialogues"]. A recent discussion of the democracy-enhancing character of judicial review in the Canadian context can be found in "Case Comment – *Chaoulli v. Quebec (Attorney General)*" (2005) 119 Harv. L. Rev. 677 (arguing that the limited holding of the Supreme Court of Canada in *Chaoulli* – in which the Court ruled that Quebec's ban on private health insurance unjustifiably violated the *Quebec Charter of Human Rights and Freedoms* – promotes democracy by reinvigorating public debate about Canada's single-tier health care system).

49 F.L. Morton, "Dialogue or Monologue" (April 1999) Policy Options at 26. See also F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) at 166: "what Hogg and [Bushell] describe as a dialogue is usually a monologue, with judges doing most of the talking and legislatures most of the listening".

50 Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislatures" (2004) 23 S.C.L.R. (2d) 7 at 7-8. See also Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale L.J. 1346.

51 Roach, "Constitutional and Common Law Dialogues", *supra* note 48 at 508-509: "The common law presumptions can facilitate a constructive dialogue between courts and legislatures not only about fundamental values that might otherwise be neglected in the legislative process". Roach cites the examples, *inter alia*, of the presumption of *mens rea* in the criminal context and the presumption against expropriation without compensation. See *ibid.* at 503-504.

The Nova Scotia government's reaction to *Sobeys* can be seen as part of a trend where legislatures place the burden on courts to make difficult policy decisions. This "legislative abdication"⁵² can be viewed as a failure of dialogue, not because of the limited ability of the legislature to respond to a judicial decision (which is more likely to occur in a constitutional context given the inherent constraints on legislative action), but because of the unwillingness of the legislature to engage with the courts, in order to inoculate itself from the political fallout of positioning itself on one side of a controversial issue.

Manifested in tepid non-responses to court decisions such as *Sobeys*, legislative abdication has the unfortunate consequence of undermining the democracy-enhancing nature of dialogic judicial review.⁵³ It can also result in the courts becoming the object of criticism from those who are dissatisfied with the finality of its decisions, undermining public confidence in the judiciary.⁵⁴

Hiebert cautions against over-reliance on the judiciary to solve policy disputes:

[m]y perspective...is informed by concern that excessive reliance on judicial wisdom to resolve contentious social conflicts will lead representative institutions to renege on their responsibility to make responsible decisions about how to reconcile compelling legislative purposes with the values espoused in the *Charter*.⁵⁵

While her analysis is concerned with judicial review on constitutional grounds, Hiebert's comments are still apt in the context of *Sobeys*. Since the court was only confronted with the bare legal question of whether cabinet regulations were *ultra vires* the enabling provisions of the *Retail Business Uniform Closing Day Act*, this allowed Richard J. to, rightly, refrain from considering the impact of Sunday closing legislation on other collateral matters, for example, labour relations.⁵⁶ The legislature and the cabinet were thus comparatively better placed to assess how to balance the positions of those who supported or opposed Sunday closing laws, as well as to determine how best to implement the results of its plebiscite, pending the outcome of a future vote.

However, for a government like Nova Scotia's – with a precarious hold on power either because of unpopularity or a minority of seats in the legislature – there is little incentive to bother responding to a court decision which purports to settle a divisive public policy issue, and much incentive to simply allow the resulting legis-

52 One could contend that the decision to craft new regulations exempting all stores from the ambit of the *Retail Business Uniform Closing Day Act* was a response to judicial invalidation, and thus dialogic *per se*. However, the decision did not demand that the government stop enforcing the statute, which is what the government's response accomplished through regulation. Legislative abdication occurred through the government's non-engagement of the court's decision, rather than through non-action.

53 See generally *supra* w 48. Democratic dialogue was further undermined in the government's post-*Sobeys* actions, insofar as it effectively nullified the results of the 2004 plebiscite.

54 Oliver Moore "Nova Scotia Lifts Sunday Shopping Ban" *The Globe and Mail* (5 October 2006), A7 (quoting an anti-Sunday shopping activist: "Why should the courts decide everything, I mean, why are the courts the law of the land?") ["Nova Scotia Lifts Sunday Shopping Ban"].

55 Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002) at 218.

56 See especially *Sobeys*, *supra* note 6 at para. 33.

lative lacuna to remain, while publicly stating that the legislature had “no choice” but to acquiesce to the court’s decision.

Such a result is especially ironic in *Sobeys*, as the legislature had several mechanisms by which it could continue to enforce its legislation, given that the cabinet could have enacted new regulations restricting store hours, provided they were compliant with the enabling provisions of the statute. Of course, the government could also (or alternatively) have sought to amend the *Retail Business Uniform Closing Day Act* to provide even greater latitude to the cabinet to craft regulations under the act. All that was required, according to Richard J.’s discussion of the principles of statutory interpretation, would be the addition of a subjective element to the regulation-making authority of the cabinet under the statute. In the event additional challenges arose, the reasoning of Richard J. suggests that a court would show greater deference to the regulations made pursuant to such a subjective grant of authority.⁵⁷ In *Sobeys*, the court was a willing participant in dialogue – it even provided a veritable road map to guide the government if it wished to amend its legislation or enact new regulations.

On the day of the decision, Premier MacDonald acknowledged that *Sobeys* had the effect of ending the ongoing debate concerning Sunday shopping.⁵⁸ In fact, one media outlet reported that the Premier expressed relief that this was the case.⁵⁹ But the notion of dialogue, whether within or outside of the constitutional context, demands a fruitful and continuous discussion about the bounds of state action and the need to ensure that it is compliant with norms – be they constitutional, or in the case of *Sobeys*, statutory. Through legislative abdication, the Nova Scotia government lost an opportunity to engage in dialogue, with the absurd result that a statute exists in Nova Scotia which prohibits the operation of stores on Sundays, but from which all retail operations are exempt.

V. CONCLUSION

Notwithstanding the unusual end to Nova Scotia’s Sunday closing saga, the government’s decision was a positive one, finally eliminating a retail closing regime with which every other province has dispensed, while facilitating consumer and retailer choice. Though some have vowed to continue their fight against Sunday shopping,⁶⁰ it is unclear how successful they have been.

What was, in actuality, an extremely narrow holding invalidating an order-in-council resulted in the government refusing to continue to enforce its Sunday closing legislation, ironically through the issuance of another order-in-council exempting all retail stores from the ambit of the very act *designed to restrict the opening hours of retail stores*. Whether this was because of a desire of the Nova Scotia government to simply and quickly dispose of a divisive political issue in a minority legislature, or

⁵⁷ Above note 30 and *ibid.* at para. 18.

⁵⁸ James Keller “Supreme Court ruling prompts N.S. premier to eliminate Sunday shopping ban” *Canadian Press* (4 October 2006).

⁵⁹ *Ibid.*

⁶⁰ See *e.g.* “Nova Scotia Lifts Sunday Shopping Ban”, *supra* note 54 (quoting an anti-Sunday shopping activist who promised to organize a boycott of stores that open Sunday and, failing that, push for government employees to work on weekends.).

part of a more pervasive trend of governments declining to engage in dialogue with the courts in order for the latter to have the last word on contentious public issues, is uncertain. Nevertheless, the fallout from *Sobeys* is a window into the mind of the post-*Charter* government – where the court's contribution to dialogue was relied upon by the supposed legislative partner in dialogue as the final say.

Though the Nova Scotia government made the correct policy decision in ending the enforcement of its anachronistic Sunday closing regime after *Sobeys*, it also undermined the dialogue metaphor. If dialogue failed in *Sobeys*, it was not because of judicial fiat or constitutional straitjacket, but through the simple acquiescence of a risk-averse cabinet.