

# Canada Watch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

## The Charter dialogue between courts and legislatures\*

### THE LEGITIMACY OF JUDICIAL REVIEW

Judicial review is the term that is used to describe the action of courts in striking down laws. Lawyers and political scientists, especially those employed at universities, love to debate the question whether judicial review is legitimate. The question arises because, under the *Charter of Rights and Freedoms*, the judges, who are neither

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elected to their offices nor accountable for their actions, are vested with the power to strike down laws that have

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## Judicial review in an age of legal realism The debate over judicial activism

*People have been taught to believe that when the Supreme Court speaks, it is not they who speak but the Constitution, whereas of course, in so many vital cases, it is they who speak and not the Constitution.*

— Felix Frankfurter, former Justice of the US Supreme Court, in a letter to President Franklin D. Roosevelt

### JUDICIAL ACTIVISM DEFINED AND APPLIED

The debate over judicial activism continues to grow in Canada.

BY F.L. MORTON

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Some question whether there really is anything called judicial activism. This seems a bit undue. The term has been used by American and Canadian constitutional commentators for decades. In its simple and ordinary usage, it denotes the propensity of a judge (or a

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### SPECIAL EDITION ON THE SUPREME COURT'S 1999 CONSTITUTIONAL CASES

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been made by the duly elected representatives of the people. Is this a legitimate function in a democratic society? This question also challenges the legitimacy of the Charter because it provides the authority for a much-expanded role of judicial review.

The conventional answer to the question is that judicial review is legitimate in a democratic society. The reason is based on our commitment to the rule of law. All of the institutions in our society must abide by the rule of law, and judicial review simply requires obedience by the legislative bodies to the law of the constitution. When the Supreme Court of Canada strikes down a prohibition on the advertising of cigarettes (as it did in the *RJR-MacDonald* case, 1995), it is simply forcing the Parliament of Canada to observe the Charter's guarantee of freedom of expression. When the Supreme Court of Canada adds sexual orientation to the list of prohibited grounds of discrimination in Alberta's human rights legislation (as it did in the *Vriend* case, 1998), it is simply forcing the legislature of Alberta to observe the Charter's guarantee of equality.

The difficulty with the conventional answer is that the Charter is, for the most part, couched in such broad, vague language that, in practice, the judges have a great deal of discretion in applying its provisions to laws that come before them. The process of applying the Charter inevitably involves "interpreting" its provisions into the likeness favoured by the judges. The problem has been captured in a famous American aphorism: "We are under a Constitution, but the Constitution is what the judges say it is"!

## THE CONCEPT OF "DIALOGUE"

In this article, we argue that, in considering the debate about the legitimacy of judicial review, it is helpful to think of judicial review as part of a "dialogue" between the judges and the legislatures. At first blush, the idea of a dialogue does

not seem particularly apt considering that the Supreme Court of Canada's decisions have to be obeyed by the legislatures. Can one have a dialogue between two institutions when one is so clearly subordinate to the other? The answer, we suggest, is "yes" in those cases where a judicial decision is open to reversal, modification, or avoidance by the competent legislative body. The judicial decision can cause a public debate in which Charter values are more prominent than they would have been if it were not for the judicial decision. The legislative body is then in a position to decide on a course of action—the re-enactment of the old law, the enactment of a different law, or the abandonment of the project—that is informed by the judicial decision and the public debate that followed the decision.

## SECTION 33 OF THE CHARTER

Dialogue will not work if the effect of a judicial decision is that the legislative body whose law has been struck down cannot now accomplish its legislative objective. But it nearly always will. The first reason why a legislative body is rarely disabled by a judicial decision is the existence in the Charter of the override power of s. 33. Under s. 33, a legislature need only insert a "notwithstanding" clause into a statute and this will liberate the statute from most of the provisions of the Charter, including the guarantees of freedom of expression and equality. Recall that s. 33 was added to the Charter late in the drafting process at the behest of provincial premiers who feared the impact of judicial review on their legislative agendas.

When the Supreme Court of Canada struck down a Quebec law forbidding the use of English in commercial signs on the ground that the law violated the guarantee of freedom of expression (*Ford*, 1988), Quebec followed the decision by enacting a new law that continued to ban the use of English on all outdoor signs. The new law continued to

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# The SCC's new equality test continued from page 17

and in the failure to allocate to s. 1 an appropriate role. We suggest below an alternative approach that addresses these problems.

## SIMPLIFYING THE EQUALITY TEST

Equality analysis can be greatly simplified by considering the above factors, and by returning s. 1 to a meaningful role in the analysis. An essential element of the simplification process is to allocate the analysis of the three factors identified to either s. 15 or s. 1, but not to both. Two fundamental changes to the *Law* test are necessary to accomplish this result.

First, where the classification is made on the basis of an enumerated ground, discrimination should be presumed. The text of s. 15(1) must be given some meaning, and the classifications that are specifically enumerated should be presumed to be "suspect." In these cases, once a presumption of discrimination is made, the court should proceed directly to the s. 1 analysis. There is nothing to be gained by conducting what is, in effect, a s. 1 analysis only to repeat that analysis once it has been determined that a law is discriminatory. The real battle should be waged within s. 1. The s. 1 test should focus on the three factors identified above: the pur-

pose of the law, the classification in question, and the reasonableness of the classification.

Second, the focus of the s. 15(1) analysis should be limited to two issues: analogous grounds and classification by adverse effect. Where discrimination is alleged on the basis of an analogous ground, the court should, as part of the s. 15(1) analysis, determine whether the classification in question is in fact analogous to the enumerated grounds. In this regard, the court's existing analysis of this issue is appropriate. The second area of analysis reserved for s. 15(1) is the question of whether legislation has created an enumerated or analogous classification not directly, but by adverse effect. This inquiry should be primarily factual in nature so as to avoid trenching on the ground that has been left to s. 1. Once a classification has been deemed to be analogous, or an adverse effect on an enumerated or analogous classification found, the court should move directly to the s. 1 analysis in the same manner suggested above.

## CONCLUSION

In the *Law* decision, the Supreme Court of Canada attempted to reconcile the different approaches to an equality analysis that had previously divided the court.

However, the unification of the court has been accomplished at the expense of clarity and simplicity. By simplifying the test in the manner suggested, and by according s. 1 an appropriate role, we believe that trial courts will have an easier time conducting an equality analysis. ♦

- 1 The authors wish to thank Professor Jamie Cameron for her helpful comments.
- 2 [1999] 1 S.C.R. 497. The court applied the *Law* test in two subsequent decisions, *Corbiere v. Canada*, [1999] 2 S.C.R. 203 and *M. v. H.*, [1999] 2 S.C.R. 3.
- 3 [1995] 2 S.C.R. 418.
- 4 [1995] 2 S.C.R. 513.
- 5 *Law*, above note 2, at 548.
- 6 *Corbiere*, above note 2, at 251-52.
- 7 Above note 4.
- 8 [1998] 1 S.C.R. 493.
- 9 *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, per Bastarache J.
- 10 See, generally, Tussman and tenBroek, "The Equal Protection of the Laws" (1949), 37 *Calif. L.R.* 341.
- 11 Tussman and tenBroek, *ibid.*, at 346 and 366.
- 12 *Ibid.*, at 351.

# The Charter dialogue continued from page 2

violate the guarantee of freedom of expression in the Charter, but the province protected the new law from challenge by inserting a s. 33 notwithstanding clause into the law. The Quebec legislature recognized that it was offending the freedom of expression of its Anglophone citizens, but concluded that the enhancement of the French language in the province was important enough to override the Charter value.

When the Supreme Court of Canada held that Alberta's human rights legislation violated the guarantee of equality by not providing protection for discrimination on the ground of sexual orienta-

**In considering the debate about the legitimacy of judicial review, it is helpful to think of judicial review as part of a "dialogue" between the judges and the legislatures.**

tion (*Vriend*, 1998), there was much debate in the province about reenacting the law in its old form under the protection of a s. 33 notwithstanding clause. In the end, the government of Alberta decided to live with the decision of the

court. But it was clear that this outcome was not forced on the government, but was the government's own choice based on, among other things, what the court had said about the equality guarantee in the Charter.

Both these cases are examples of the dialogue that is permitted by the override clause of s. 33 of the Charter.

## SECTION 1 OF THE CHARTER

The second element of the *Charter of Rights and Freedoms* that facilitates dialogue is s. 1. Section 1 provides that the guaranteed rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This means that the Parliament or a legislature is free to enact a law that infringes on one of the guaranteed rights, provided the law is a “reasonable limit” on the right.

The Supreme Court of Canada has established some rules to determine whether a law is a reasonable limit on a Charter right. The rules can be boiled down to two: (1) the law must pursue an objective that is sufficiently important to justify limiting a Charter right, and (2) the law must limit the Charter right no more than is necessary to accomplish the objective. In practice, the court usually holds that the first requirement is satisfied—that is, the objective of the law is sufficiently important to justify limiting a Charter right. In most cases, the area of controversy is whether the second requirement has been satisfied—that is, whether the law limits the right by a means that is the least restrictive of the right.

When a law that limits a Charter right is struck down, it normally means only that the law impairs the right more than is necessary to accomplish the legislative objective. If that is the case, then a law that accomplishes the same objective but by a means that is more respectful of the Charter right will be open to the legislature. Moreover, the reviewing court that struck down the law will have explained why the law did not satisfy the s. 1 justification tests, and that explanation will suggest to the legislative body how a new law can be drafted that will satisfy the s. 1 justification.

In the Quebec language case (*Ford*), for example, the Supreme Court of Canada acknowledged that the protection of the French language was a legis-

To be sure, the Supreme Court of Canada is a non-elected, unaccountable group of middle-aged lawyers. To be sure, from time to time the court strikes down statutes enacted by the elected, accountable, representative legislative bodies. But the decisions of the court almost always leave room for a legislative response, and they usually get a legislative response.

lative objective that was sufficiently important to justify limiting freedom of expression, but the court held that a total ban on the use of other languages in commercial signs was too drastic a means of accomplishing the objective. The court suggested that the province could make the use of French mandatory, without banning the use of other languages, and could even require that the French version be predominant. Such a law, the court implied, would be justified under s. 1. Initially, as we have explained, the province was not inclined to take this advice and simply reenacted the total ban under the protection of the s. 33 notwithstanding clause. However, five years later when language passions had died down a bit, the province did reenact the law that the Supreme Court had suggested, requiring the use of French and requiring that it be predominant, but permitting the use of other languages on commercial signs.

Many other examples could be given. The point is that s. 1 permits a dialogue to take place between the courts and the legislatures.

## QUALIFIED CHARTER RIGHTS

Several of the rights guaranteed by the Charter are expressed in qualified terms. For example, s. 8 guarantees the right to be secure from “unreasonable” search or seizure. Section 9 guarantees

the right not to be “arbitrarily” imprisoned. Section 12 guarantees against “cruel and unusual” punishment. When these rights are violated, the offending law can always be corrected by substituting a law that is not unreasonable, arbitrary, or cruel and unusual.

For example, the enforcement provisions of the *Competition Act* have been struck down on the basis that they authorized unreasonable searches and seizures contrary to s. 8 of the Charter (*Hunter*, 1984). So too have the comparable provisions of the *Income Tax Act* (*Kruger*, 1984). But the Supreme Court of Canada also laid down guidelines as to how s. 8 could be complied with. What was required was the safeguard of a warrant issued by a judge before government officials could search for evidence. Parliament immediately followed this ruling, and amended the *Competition Act* and the *Income Tax Act* so that they now authorize searches and seizures only on the basis of a warrant issued by a judge. In other words, the legislative objective is still secured, but in a way that is more respectful of the privacy of the individual.

Once again, many other examples could be given, but the point is that the qualified rights encourage a dialogue between the courts and the legislatures.

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Canada, see discussion *ibid.* A note of caution for academic writers. Dialogues internal to the community as to the desirability of pursuing spousal recognition can and will be used by conservatives, particularly as their sectarian religion-based arguments lose force. Although such critical commentary is intended to promote and further equality, if not sufficiently nuanced, it will most certainly be used for anti-equality purposes. In *M. v. H.*, the Government also argued that the court should not grant a remedy because the community was

deeply divided over the issue of spousal recognition.

32 Justice Gonthier dissented. Justice Bastarache adopted a different approach with respect to the identification of the objectives.

33 *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295; *Egan*, above note 7, at 558-59.

34 *Egan*, above note 7, at 547-48 and 596; *Miron*, above note 8, at 488; *Re K.* (1995), 23 O.R. (3d) 679 (Prov. Div), at 699; P.W. Hogg, *Constitutional Law of Canada*, 3d ed.

(Supp.) (Scarborough: Thomson Canada, 1992), at 35-18.

35 *An Act to Amend Certain Statutes because of the Supreme Court of Canada Decision in M. v. H.*, S.O. 1999.

36 Ontario Ministry of the Attorney General, *Press Release*, "Ontario protects traditional definition of spouse in legislation necessary because of Supreme Court of Canada decision in *M. v. H.*" (October 25, 1999); Legislative Assembly, *Ontario Hansard* (October 27, 1999), at 1-4.


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### CONCLUSION

The proof of the pudding is in the eating, and our researches have showed that most of the decisions of the Supreme Court of Canada in which laws have been struck down for breach of a Charter right have in fact been followed by the enactment of a new law. In a study published in 1997 (35 *Osgoode Hall Law Journal* 75), we found that there had been 66 cases in which a law had been struck down by the Supreme Court of Canada for breach of the Charter. Only 13 of these had received no legislative response at all, but they included some of the most recent cases (to which there had been little time to react) and some cases in which corrective action was under discussion. In 7 cases, the legislature simply repealed the law that had been

found to violate the Charter. In the other 46 cases, a new law was enacted to accomplish the same general objective as the law that was struck down.

It seems reasonable to conclude that the critique of the Charter based on democratic legitimacy cannot be sustained. To be sure, the Supreme Court of Canada is a non-elected, unaccountable group of middle-aged lawyers. To be sure, from time to time the court strikes down statutes enacted by the elected, accountable, representative legislative bodies. But the decisions of the court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be capable of accomplishment, albeit with some new safeguards to protect

individual rights. Judicial review is not "a veto over the politics of the nation," but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole. 

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court) to use his or her power of judicial review to overrule the policy choices of governments. Judicial activism is the opposite of judicial self-restraint: the propensity of a judge, when there are two or more equally plausible interpretations, to choose the one that upholds government policy. Since judicial activism is an empirical concept—it seeks to describe the deci-

sions of a judge or a court—it can be tested against the historical record. By this standard, there can be no disputing that since the adoption of the Charter in 1982 our Supreme Court has embarked on a decidedly more activist exercise of judicial review. Under the 1960 *Bill of Rights*, the court struck down only one statute in 22 years. Since 1982, the court has struck down

58 statutes (31 federal and 27 provincial) in just 16 years. Surely, this qualifies as a significant increase in judicial activism, and has been duly noted by many other than myself—including the recently retired Chief Justice Lamer and Professor Monahan.<sup>1</sup>

Using a more sophisticated definition of judicial activism yields a similar verdict. Judicial activism can be defined