

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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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. 

* This paper appeared in *Policy Options*, April 1999, 19, and is reproduced with the permission of the Institute for Research on Public Policy, which is the publisher of *Policy Options*. A much longer version of the paper has been published under the bylines of Peter W. Hogg and Allison Bushell (now Thornton) in (1997), 35 *Osgoode Hall Law Journal* 75.

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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.¹

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

around three related but distinct axes: policy impact (discussed above), institutional design, and interpretive discretion. Institutional design denotes the collection of judicial rules governing access to and jurisdiction of the court: mootness, standing, third-party interventions, state-action versus in-action, political questions, etc. It also encompasses the related issue of remedies.

In a series of landmark rulings, the Supreme Court has boldly swept aside old precedents and practices.² Cumulatively these decisions have dramatically increased the scope and frequency of the court's scrutiny of government policy choices. While these changes coincide with the Charter, none of them were in any legal sense required by the Charter. In effect, the court has "retooled" itself from an adjudicatory institution into a policy review board. With respect to remedies, the court has armed itself with the quasi-legislative power of "reading in"—the direct amending of legislative meaning from the bench.³ Indeed, these changes in the functional design of the court are likely to be more enduring—and thus more significant—than its year-to-year policy impact.

Indeed, these changes have made the court a de facto third branch of the legislative process. The results are reflected in the court's docket. In 22 years the court heard only 35 challenges based on the 1960 *Bill of Rights*. In the first 16 years under the Charter it heard 373. Approximately one-fifth of the hundred plus cases the Supreme Court hears annually are now Charter cases.

There are now certain policy fields—bilingualism, aboriginal issues, feminist and gay issues, criminal law, immigration—where a Charter challenge is all but guaranteed if the affected Charter constituency does not get all of what it wants from the responsible legislature. (Consider EGALE's characterization of Ontario's Bill 5—extending legal rights to same-sex couples—as a "slap in the face" because it did not redefine spouse to include same-sex couples.⁴) Indeed, I am sometimes tempted to ask if there is anything on LEAF's or EGALE's list of

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policy demands that *is not* required by the Charter?

Interpretive discretion is the third dimension of judicial activism: the freedom of a judge to change the original meaning or add new meaning to constitutional rules. Notwithstanding the recent vintage of the Charter and the clear historical record on a number of specific sections, the court quickly demoted judicial fidelity to "framers' intent" to optional status. Instead, the court embraced an approach to interpreting Charter rights that it alternately describes as "living tree . . . purposive . . . contextual . . . large and liberal." Suffice it to say that this approach allows judges to stretch the definitional boundaries of rights as broadly as suits their purpose.⁵

The result has been the production of astonishing new "constitutional rules." Thanks to the court's ingenuity, s. 7 now requires substantive as well as procedural fairness.⁶ For some like Justice Wilson, this would include the constitutional right to an abortion.⁷ As a result of *Sparrow*, s. 35 is no longer effectively limited to protecting "existing" aboriginal rights. Similarly, in *Mahé*, the court rewrote s. 23 to include a right to "control and administration" by minority language school boards.

Sometimes this form of judicial activism occurs within a context of apparent judicial self-restraint. In *Butler*, for example, the court rejected the s. 2(b) challenge to censorship of pornogra-

phy, but did so on a completely novel feminist theory of censorship. For this reason, *Butler* was hailed at the time as a great victory for feminists. Similarly, in its 1995 *Egan* decision, the court upheld the challenged legislation even as it added sexual orientation to the s. 15 list of prohibited types of discrimination. Despite the "loss" for the plaintiffs, *Egan* was a tremendous victory for the gay rights movement because it laid the groundwork for the court's subsequent activism on behalf of gay rights in *Vriend* and *M v. H*.⁸

In theory, the s. 1 "reasonable limitations" clause might have placed some limits on this discretion. As operationalized by *Oakes*, however, any s. 1 limitations on judges are self-imposed, which is to say, not very limiting. There is "strict" *Oakes*, "minimal" *Oakes*, and "middle-tier" *Oakes*. While there is no shortage of advice to the judges as to which causes or groups are entitled to which level of scrutiny, judges are free to pick. It is not by accident that s. 1 disagreements among the judges are the second highest source of dissenting opinions in the court's Charter decisions. "Reasonableness" per *Oakes* is little more than a subjective judgment masquerading as a "rule."

In sum, when we take account of dimensions of judicial activism other than policy impact, the court still appears even more activist.

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THE DEFENCES OF JUDICIAL ACTIVISM

The claim advanced by myself and others that the Supreme Court has been excessively activist in its exercise of Charter review can be challenged on two related but distinct grounds. The first line of defence consists of “legal” arguments claiming that the court’s decisions are all “required” by the Charter.⁹ The second line of defence consists of arguments that are more “political” in nature.¹⁰ That is, they tend to not so much defend the court’s activism, as impugn the motives of the critics or claim that critics exaggerate the extent of judicial activism. The Hogg-Bushell (now Thornton) “Charter dialogue” theory falls into the latter, and I will restrict my comments to it.

Hogg argues that the charge of undue judicial activism is overstated.¹¹ Courts rarely have the last word in Charter disputes. The s. 33 notwithstanding clause gives that power to any government with the political will to use it. More typically, when the courts have struck down a law, they have objected not to its purpose but to the means used to achieve it. The “means-oriented” character of Charter decisions leaves the door open for the government to redraft and re-enact the impugned statute in a manner that still achieves its original objectives.

Hogg then tests this theory against 66 court rulings (mostly Supreme Court) striking down statutes, and discovers that in 46 of them, there was indeed a “legislative sequel.” That is, in two-thirds of these cases, the government was still able “to accomplish the same general objective” through new legislation. He concludes, the Charter has not created a “judicial veto over the politics of the nation,” but rather instituted a dialogue between judges and legislatures. Within months, the Hogg dialogue theory had soared off the pages of the *Osgoode Hall Law Review* and into the *obiter dicta* of the Supreme Court—in, of all cases, the

Vriend decision—then the court’s most activist decision to date.¹²

CRITIQUE OF THE “CHARTER DIALOGUE” DEFENCE

I have made three principal criticisms of the “dialogue” argument in another forum, and only summarize them here.¹³ Similarly, I draw on Manfredi and Kelly’s more sophisticated methodological critique of the Hogg study.¹⁴

Hogg uses a self-serving definition of “dialogue.” Hogg counts as dialogue any legislative response to the judicial nullification of a statute. If a government repeals the offending legislation or amends it according to specifications laid out by the court, this counts as “dialogue.” No wonder Professor Hogg found a two-thirds incidence of dialogue! His choice of methodology virtually ensured the result.

Obeying orders is not exactly what most of us consider a dialogue. Dialogue is a two-way street. If I go to a restaurant, order a sandwich, and the waiter brings me the sandwich I ordered, I would not count this as a “dialogue.” Nor do I think this is how Premier Harris saw it, when he explained the introduction of Bill 5 as “simply obeying the Supreme Court of Canada. . . . The courts have told us we must deal with this . . . and we’ll comply.”¹⁵ Yet, according to Hogg’s methodology, this is “dialogue” pure and simple.

Manfredi and Kelly have made a similar objection to Hogg’s methodology. Dialogue, they correctly assert, implies an equality of the discussants. They re-analyzed Hogg’s cases distinguishing between “positive” and “negative” legislative sequels, and found that only one-third qualified as “dialogue” in a meaningful sense, not the two-thirds reported by Hogg.¹⁶ I would argue that even this figure is misleadingly high, since most of the legislative amendments were simply what the court said must be done to pass Charter (that is, the court’s) scrutiny. Would anyone seriously contend that in en-

acting Bill 5 in response to *M v. H*—an example of a “positive legislative sequel”—the Ontario government was still able “to accomplish [its] same general objective”?

Manfredi’s findings also contradicted a second of Hogg’s claims—that most sequels only involved minor changes to the impugned legislation. In his re-analysis of the same cases, Manfredi found that a majority involved major changes, such as repealing the whole section or replacing entire acts.

The second problem with the dialogue theory is its means/ends distinction. The means/ends distinction sounds fine in theory but breaks down in practice. Politics is as much about means as ends. Everyone wants equal employment opportunities for women and racial minorities, but not everyone favours preferential treatment or quotas as the way to achieve this goal. No respectable person is willing to defend child pornography, but many will argue that restrictions on it must be balanced with our respect for freedom of expression and privacy.

In addition, apparent disagreement about means sometimes turns out to be disagreement about ends. Everything depends on the purpose(s) a judge attributes to the statute. The broader the purpose(s), the easier it is to find that the legislation passes the “least restrictive means” test. In fact, any half-clever judge can use procedural objections as a colourable device to strike down legislation that he or she opposes for more substantive reasons. This occurred in some of the very cases used by Hogg—that is, those involving voluntary religious instruction in Ontario schools and the federal prisoner voting cases.¹⁷

Perhaps the best example of this instrumental use of procedural objections comes from the recently retired Chief Justice of Canada. In the 1988 *Morgentaler* case, Justice Lamer joined Justice Dickson in an opinion striking down the abortion provisions of the *Criminal Code* because it violated s. 7 of the Charter. The procedures required to at-

tain a legal abortion were deemed too restrictive and ambiguous. However, speaking on the tenth anniversary of the *Morgentaler* decision, Lamer told law students at the University of Toronto in 1998 that he voted to strike down the abortion law for a very different reason: because a majority of Canadians were against making it a criminal offence. Does this mean that his 1988 s. 7 objections were simply after-the-fact rationalizations to justify striking down a law that he opposed for other reasons?

Thirdly, Hogg's assertion that the availability of s. 33 counters criticisms of judicial usurpation is again more true in theory than in practice, which is to say that it is not a very accurate theory. According to Hogg, "If there is a democratic will, there will be a legislative way." If a government fails to use the tools at its disposal, that's the government's fault, not the court's. This account fails to recognize the staying power of a new, judicially created policy status quo (PSQ), especially when the issue cuts across the normal lines of partisan cleavage and divides a government caucus.

Contrary to the rhetoric of majority rule and minority rights, on most contemporary rights issues there is an unstable and unorganized majority or plurality opinion, bracketed by two opposing activist minorities. While the issue is salient for the activists on both sides, it typically is not a priority for the majority. Charter challenges are typically brought by one of the two activist minorities. Abortion is the classic example.

In terms of political process, the effect of a Supreme Court Charter ruling declaring a policy unconstitutional is to create a new PSQ that is more in line with one of the two groups of minority activists. The ruling shifts the burden of mobilizing a new majority coalition (within voters, within a government caucus, and within a legislature) from the winning minority to the losing minority.

This turns out to be difficult. The issue typically is not a priority for the government, the opposition parties, or the public. Indeed, the priority for most governments on such "moral issues" is to avoid

To re-establish the old policy status quo, Mr. Klein would be portrayed as "taking away rights" from gays, and he had no stomach for that scenario. So he did what he had done before—nothing. The staying power of the PSQ—this one judicially created—was demonstrated once again.

them as much as possible. Such issues cross-cut normal partisan cleavages and thus fracture party solidarity. Nor are they likely to win any new supporters among the (uninterested) majority.

Describing the Alberta government's decision to "live with" the *Vriend* ruling, Hogg writes: "But because 'notwithstanding' was an option, it is clear that this outcome was not forced on the government, but was the government's own choice." Hogg is only half right in this assertion. He ignores the fact that the court's decision decisively changed the government's options. The government's preferred choice was not to act at all—to simply leave the old PSQ in place. The court destroyed this and—with the clever use of the "reading in" technique—created a new PSQ.

The judicial ruling significantly raised the cost of saying "no" to the winning minority. Before the ruling, the Klein government could (and did) say that it was simply treating homosexuals the same as heterosexuals. Neither was singled out for different treatment. After the ruling, however, invoking s. 33 could and would be construed as an attack on gays; taking away rights they already had. Other things being equal, Klein would have preferred the status quo ante. But the government's pre- and post-ruling situations were not equal. To re-establish the old policy status quo, Mr. Klein would be portrayed as "taking away rights" from gays, and he had no stomach for that scenario. So he did what he had done

before—nothing. The staying power of the PSQ—this one judicially created—was demonstrated once again.

Hogg writes that judicial nullification of a statute "rarely raises an absolute barrier to the wishes of democratic institutions." He is right in his observation, but wrong in his conclusion. It does not have to be an absolute barrier. Depending on the circumstances, a small barrier may suffice to permanently alter public policy—typically displacing a "muddy middle" compromise policy with one favoured by one of two competing sets of activists.

There is a fourth and final problem with the dialogue theory: it is simultaneously apolitical and very political. It is apolitical in the sense that it ignores the central political issue of "who wins." It lumps together very different kinds of legislative sequels: "following orders" (*Hunter v. Southam*); substantial resistance (*Daviault*); and outright non-compliance through the use of s. 33 (*Ford*). Apparently, it does not matter whether the legislative or judicial view prevails. All are counted equally as "dialogue." Fair enough.

But do the legions of judges, rights activists, and academics who now instinctively invoke the "dialogue" mantra the moment they hear the word "judicial activism" show the same equanimity as Professor Hogg when it comes to equating "following orders" with the use of s. 33? Or does the popularity of the "dialogue" theory stem from the fact

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that governments have been so passive in the face of judicial activism that “following orders” is the norm? If cases like *Ford* were the norm, not the exception, would we find the same enthusiasm for “Charter dialogue”?

When Premier Klein mused publicly about invoking s. 33 in the week following *Vriend*, did the court’s defenders cheer “Dialogue, Ralph, Dialogue!” No. They described s. 33 as the “atom bomb of rights” and likened its use to the practice of “banana dictatorships.” When Ontario responded to *M. v. H.* by extending equivalent legal rights to gay couples, did gay activists cheer this as “dialogue”? No. To the contrary, Martha McCarthy said that she intends to take the Ontario government back to court for stopping short of redefining “spouse” to include same-sex partners.

Experiences like these lead me to conclude that not only is the dialogue theory inaccurate as an empirical theory, its invocation is opportunistic—when it supports the policy outcome that the court’s partisans like.

Indeed, as these two examples illustrate, the very purpose of claiming that a particular policy is a “right protected by the Charter” is to put that issue *beyond* the reach of everyday politics—that is, to force people to *stop* talking about it. This is the purpose of a “written” (as opposed to our old tradition of an “unwritten”) constitution: to stipulate that there are certain activities that are so fundamental to our conception of justice that they are placed beyond the reach of ordinary political majorities—that is, they require the supermajorities stipulated by the amending formulas. The moral premium that attaches to a successful “rights claim” is intended to terminate dialogue on that issue rather than to stimulate it. It is for this very reason that I (and others) have criticized the ascendancy of “rights talk” as a threat to the democratic tradition of public debate and consensus building.¹⁸

In the final analysis, I suggest that the legal community’s embrace of the dialogue theory is disingenuous. They

value the “dialogue theory” more for its political utility than for its empirical accuracy. It soothes the conscience of the judges and arms the court’s defenders with a ready-made defence for its next foray into the political thicket. ❁

- 1 For a detailed version of this argument, see chapter 1 of F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: Broadview Press, 2000).
- 2 See, generally, Lorne Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999).
- 3 See, generally, Kent Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 1994).
- 4 James McCarten, “Ontario extends legal rights to same sex couples,” *National Post*, October 26, 1999, A5.
- 5 See Morton and Knopff, note 1 above, chapter 2.
- 6 *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
- 7 See Wilson J.’s opinion in *Morgenstaler v. the Queen*, [1988] 1 S.C.R. 3.
- 8 For details, see Morton and Knopff, above note 1, chapter 1.
- 9 These include Weinrib’s “activist constitution” theory; the “living tree” theory; the “we didn’t ask for it” defence; the “necessarily counter-majoritarian” defence; the “rule of law”/“rights are trump” defence; and “the political disadvantage” theory of the Charter. For examples of these, see the essays by Bertha Wilson, Beverley McLachlin, and Lorraine Weinrib in *Policy Options* (April and May 1999). (These are available on-line at the Web site of the Institute for Research on Public Policy: www.irpp.org.ca.)
- 10 In addition to the “Charter dialogue” theory, these include the “nothing new” argument; the “decisions are ultimately accepted” argument; and

the “sore losers/sour grapes” charge. For examples, see the essays referred to in note 9.

- 11 Peter Hogg and Allison Bushell (now Thornton), “The Charter Dialogue Between Courts and Legislatures: Or Perhaps the Charter Isn’t Such a Bad Thing After All” (1997), 35 *Osgoode Hall Law Journal* 75-124. A condensed version of the Hogg-Bushell (now Thornton) argument appears in this issue of *Canada Watch*.
- 12 See F.L. Morton, “Vriend v. Alberta: Judicial Power at the Crossroads?” (1999), 7 *Canada Watch* 77.
- 13 F.L. Morton, “Dialogue or Monologue?” (April, 1999), *Policy Options* 23-26. (Also available on-line at: www.irpp.org.ca.)
- 14 Christopher P. Manfredi and James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell,” (1999), 37 *Osgoode Hall Law Journal* 513-27.
- 15 McCarten, “Ontario extends legal rights to same-sex couples,” above note 4.
- 16 Manfredi and Kelly redefined the concept of dialogue to apply only to those cases in which the legislature responded to a nullification “positively”—by re-enacting the law with some amendments. There were 12 such cases. “Negative” responses—which did not qualify as “dialogue”—included section repealed (n=5); section amended prior to SCC decision (n=5); act repealed and replaced (n=6); judicial amendment of legislation (n=1); and no legislative sequel (n=7). Manfredi and Kelly also excluded the 23 trial and appellate court decisions included in the Hogg study, because there was no way of knowing if they were representative of non-SCC nullifications.
- 17 See Morton, “Dialogue or Monologue?” above note 13 for details.
- 18 This argument is the focus of chapter 7 of Morton and Knopff, above note 1.