

Judicial activism and the Constitution*

As one who has seen the inside of the government decision making and legislative drafting process, I hope this article brings a different, yet useful, perspective to this issue of *Canada Watch*. This article touches on three topics:

1. the position of the present Ontario government concerning the constitution and the rule of law;
2. the essential role of the people in any constitutional dialogue.; and
3. the importance of mutual respect among all parties to the dialogue.

THE ONTARIO GOVERNMENT'S POSITION

A telling exchange occurred in 1988 while the Ontario legislature debated the Meech Lake Accord. As Mike Harris was speaking about the possibility of a court reference on the Accord, a Liberal backbencher interrupted. *Hansard* records the following exchange:

Mr. Miller (Norfolk): This is the highest court, right here.

Mr. Johnston (Scarborough West): I wish it were true. . . .

Mr. Harris: This is no longer the highest court in the land, as the member for Scarborough West has pointed out. By virtue of our Charter and our constitution, we have given that to the Supreme Court of Canada.¹

The present Ontario government supports the constitution, supports the rule of law, and supports the role of the judiciary (particularly the Supreme Court of Canada) in upholding the law and Constitution.

Last May, when the Supreme Court released its reasons for judgment in *M. v. H.*, Premier Harris issued an official statement that I'd like to quote in its entirety:

The case in question has made its way through due process, and has

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been ruled upon by the highest court in Canada. There is no further avenue of appeal. The Province of Ontario will respect the Supreme Court's ruling. Ontario respects the constitution of Canada.²

Although since 1995 the Ontario government had argued with vigour a different position, immediately upon release of the ruling its response was one of conformity and compliance.

The Ontario government respects not only that the constitution is the "supreme law of Canada" but also that the Supreme Court of Canada is the ultimate arbiter of its meaning.

Out of respect for constitutional rights, the government quickly rejected any suggestion that it would introduce legislation to invoke s. 33 of the Charter—the notwithstanding clause. "I'm not a fan of the notwithstanding clause at the best of times," the premier was

quoted as saying.³ That's not a new policy. Indeed, it's been his position for as long as I can recall.

Section 1 already contemplates the imposition of "reasonable limits" on Charter rights and freedoms. For a legislature to go further and impose restrictions not saved by s. 1—by definition, *unreasonable* limits—while technically permitted by s. 33, is inconsistent with respect for those very rights and freedoms. This perspective closely accords with the political reality that section 33 is difficult to invoke. Government bills that employ the notwithstanding clause have been introduced only in four jurisdictions, passed only in three, and brought into force only in two.

Respect for the Constitution also requires respect for the judiciary that upholds it. After all, as Professor Ian Hunter has said, "constitutions are not self-interpreting."⁴ The amount of interpretation required depends partly on the precision of the constitutional drafters. The *Constitution Act, 1982*, while containing some very precise sections (such as references to first ministers' conferences), describes rights and freedoms in very general language. Perhaps that explains why in a little under 18 years (18 years less 8 days, to be exact), a *Charter of Rights of Freedoms* of some 2,200 words has generated more jurisprudence than a constitution of more than 11,000 words has produced during a century and one-third.

The importance of judicial interpretation is also the reason why the Ontario government has sought to open a dialogue on the appointment of Supreme Court judges.

Last October, Ontario's minister of intergovernmental affairs, the Hon. Norm Sterling, wrote the federal attorney general, urging "a more public debate on the process of appointments at

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the federal level.”⁵ Noting public demand for “more transparency and accountability by all levels of government,” the letter cited a 1999 survey indicating that only 8 percent of Canadians accept the current system of prime ministerial appointments to the Supreme Court.

Since the Hon. Anne McLellan didn’t reply,⁶ the federal government seems unwilling to entertain that debate. Its position appears to be that this issue went away with the deaths of the Meech Lake and Charlottetown accords.

The reform proposed by Meech Lake and Charlottetown was modest—namely, that the federal Cabinet choose puisne Supreme Court justices from lists of provincial nominees. This was not a new idea, having been included in constitutional reform proposals dating back to 1971.

Twelve years ago, the Ontario legislature went much further, when on a vote of 112:8 it adopted a select committee report critical of the lack of public participation in appointments and calling for “a further opening up of the process . . . in the post-Charter era.”⁷ (As a matter of historical curiosity, that select committee included among its membership the current premier and deputy premier.)

A LIVING TREE

My second observation is that, for dialogue to be truly meaningful, it must involve the public, both directly and through its elected representatives.

During the 1968 constitutional conference, as then-Justice Minister Pierre Trudeau was trying to allay provincial fears about a constitutionally entrenched bill of rights, this is what he said:

[T]here is no suggestion that the federal government is seeking any power at the expense of the provinces. We are stating that we are willing to surrender some of our power to the people of Canada, and we are suggesting that the provincial governments surrender some of their power to the people in their respective provinces. [Emphasis added.]⁸

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He saw a constitutionally entrenched charter not just as *protection* of the public, but as *empowerment* of the public. His approach looked on the constitution not as something *for* the people, but *of* the people.

A corollary is that both the content and the interpretation of such a constitution must embody public sentiment and values.

Professor Hogg’s 1997 paper on dialogue refers to the legislative bodies as “subordinate” to the courts. While, in the sense he meant it, that description is accurate, in another sense, legislators, judges, and the constitution itself are subordinate to the interests of the public they serve. If this is truly *the people’s* Constitution, then the public has a particular stake in decisions that expand the Charter beyond what was contemplated in 1981 and 1982.

Very early, in *Big M Drug Mart*,⁹ Chief Justice Dickson wrote that the *Charter* was intended not just as a present but as a *future* standard, and that s. 2 freedoms could not be determined solely by the degree to which they were enjoyed pre-Charter.

In the Saskatchewan *Reference re Provincial Electoral Boundaries*,¹⁰ Justice McLachlin picked up the theme, saying:

[T]he past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, but must be capable of growth to meet the future.

Her Ladyship relied on the aphorism of Lord Sankey, that the constitu-

tion is a “a living tree capable of growth and expansion within its natural limits.”¹¹ Two comments about the “living tree” metaphor are apposite. First, the last four words of Sankey’s dictum are often forgotten—*within its natural limits*. The language hints at interpretations that fill the interstices rather than take off in an entirely new direction. Second, acceptance that the constitution must expand into the future begs the question of whose values will guide that growth. Presumably, those of the Canadian people.

Consider the circumstances surrounding the case in which the “living tree” judgment was rendered: the so-called *Persons Case* of 1929.

Voters had already been electing women to the House of Commons and provincial legislatures for some time. Prime Ministers Meighen and King both promised to appoint a woman to the Senate, but the former was defeated in 1921 before he could keep the promise, and the latter was told by Justice Department lawyers that the constitution prevented him from doing so. King’s attorney general, Ernest Lapointe, promised a constitutional amendment if necessary, and the duly elected government supported the petitioners’ position before the Judicial Committee of the Privy Council.

To the extent that newspaper editorials were a barometer of public opinion, the appointment of women to the Senate enjoyed popular support. Thus, the Privy Council’s judgment merely allowed the constitution to expand in a direction that the Canadian people had already moved. The “living tree” princi-

ple was that the constitution can grow in step with the country, not ahead of it.

As Justice Iacobucci implied in *Vriend*,¹² making value judgments and upholding the constitution are *different* exercises. Most of us agree with the majority in *Vriend* that democracy means more than majority rule. Most agree, too, that dignity of the person, equality, pluralism, and the other principles listed by Chief Justice Dickson in *Oakes*¹³ are important to Canadians. Yet none of that resolves the question of *whose* principles should breathe life into constitutional text.

MUTUAL RESPECT

My third and final comment is that any dialogue must be based on mutual respect among all participants. I have noted earlier that the present government respects both the constitution and the judiciary that interprets it. The case law suggests that, from the judiciary's perspective, that respect is mutual. Justice Iacobucci's reasons in *Vriend*, in which he endorsed the "dialogue" thesis, say precisely that.

According to the court, respect for the legislature entails some degree of deference. Deference is not a complete bar to Charter scrutiny, but it is relevant to both the s. 1 analysis and the choice of remedy under s. 52.

In choosing a remedy for Charter breaches, the courts are concerned about minimal interference with legislative purposes—and often the analysis turns on guess work as to what the legislature might have done.

For example, in *Schachter*,¹⁴ referring to what Parliament *would have wanted* to enact, Chief Justice Lamer used the word "assume" or "assumption" 18 times.

In *Miron v. Trudel*,¹⁵ the majority imposed a definition, saying it was "what the Legislature would have done had it been forced to face the problem the appellants raise."

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spond. The public is also a participant in this dialogue, and is worthy of equal respect. And as participants in this dialogue, sometimes the public applauds, and sometimes it disagrees—strongly.

I work for a politician, so I know something about public criticism. It can be uncomfortable. It can be unfair. But not only is criticism the people's right, it also serves to strengthen our public institutions. The Supreme Court itself has recognized the importance of public debate, even when it turns to criticism.

In the *PEI Reference*¹⁶ on judges' remuneration, Chief Justice Lamer cited with approval the 1938 observation of Chief Justice Duff that our democratic institutions

derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals.¹⁷

Far from weakening the nation's institutions, public debate, even public criticism, are what make democracy strong. That type of public participation makes our institutions accountable and grants them legitimacy. However discomfiting, however inconvenient, that sort of public participation comes with the territory called "democracy," and we should welcome it. ❀

* The comments in this article are my own; they do not reflect the views of Premier Harris or his government.

- 1 *Debates*, Legislative Assembly of Ontario, June 28, 1988, 4758.
- 2 Office of the Premier, *News Release*, May 20, 1999.
- 3 "Ontario's 3 leaders will honour new ruling," *Toronto Star*, May 21, 1999.
- 4 Ian Hunter, "Taking the law in vain," *National Post*, July 29, 1999.
- 5 Norman W. Sterling, letter to Anne McLellan, October 22, 1999.
- 6 As of the date of this presentation, April 7, 2000. A reply ultimately was sent on May 12, 2000.
- 7 Select Committee on Constitutional Reform (Ontario), "Report on the Constitution Amendment 1987" (June 1998), 51.
- 8 Pierre Elliott Trudeau, remarks during Constitutional Conference, February 5-7, 1968, quoted in *Conversation with Canadians* (Toronto: University of Toronto Press, 1972), 90-91.
- 9 [1985] 1 S.C.R. 295.
- 10 [1991] 2 S.C.R. 158.
- 11 *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at 136.
- 12 *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
- 13 *R. v. Oakes*, [1986] 1 S.C.R. 103, at 136.
- 14 *Schachter v. Canada*, [1992] 2 S.C.R. 679.
- 15 *Miron v. Trudel*, [1995] 2 S.C.R. 418.
- 16 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.
- 17 *Reference re Alberta Statutes*, [1938] S.C.R. 100, at 133.