

The Charter and equality rights: The Vriend case

BY MARY EBERTS

Mary Eberts is a partner in the law firm of Eberts Symes Street & Corbett, Toronto.

In the Vriend case, the Supreme Court dealt with what was perhaps the inevitable outcome of its policy of judicial deference to the legislature in Charter matters. The deference had, before Vriend, become so pronounced that it almost seemed to make the Charter disappear. Parliamentary sovereignty, thought to have been confined by means of the entrenched Charter, had been clearly on the rebound. In Vriend, the government of Alberta and the majority in the Alberta Court of Appeal took an unabashed parliamentary sovereignty position and, in response, the Supreme Court had to pull back from the brink and articulate a Constitution-based theory of the relationship between courts and legislatures. This theory is neither radical nor innovative; it draws heavily on wisdom developed long before the Charter, from the courts' traditional supervision of administrative action by means of the prerogative writs. However, while not radical, the theory is timely, and its timeliness bestows upon it great importance. In fact, the court's illumination of the appropriate relationship between courts and legislature, and its foundation of that view upon the constitution itself and not some notion of political reality, is "just-in-time." Had there been any further delay in making these matters clear, there was some real danger that the Charter would have been, *de facto*, unentrenched.

The foundations for the court's policy of deference are, particularly, the *Edwards Books*, *Irwin Toy*, and *McKinney* cases. The mainspring of that policy is the idea that legislatures are, with regard to certain kinds of legislation, balancing the claims of competing groups. This function is distinguished from situations where the legislature is acting on behalf of the whole commu-

nity. The dichotomy is set out quite plainly in the oft-quoted passage from the judgment of Chief Justice Lamer and Justice Wilson:

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for those difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy." ...

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such cir-

cumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the justice system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen. ... The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources. [993-994]

Read closely, this passage can be seen to relate to difficulties in second-guessing legislative line drawing in the "balancing" type of case. It is as much an argument involving the courts' institutional capacity, as the courts' appropriate role. Yet this line of thinking also clearly addresses role. We can see that, for example, in the remarks of the Chief Justice in *Edwards Books*: "The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line." [782] In *Irwin Toy*, the majority judgment states: "[I]f the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another." [990]

The basis for the deference here is a pragmatic one. Courts are seen as no better than legislatures in weighing complex or contradictory scientific evidence for the purposes of making resource allocation decisions. Interestingly, in these foundational cases about judicial deference in the "balancing" type of case, the resources that were

being allocated by the legislature were not financial or fiscal. Rather, the legislature was deciding who should be protected against certain kinds of conduct (for example, advertising directed at children or the requirement of Sunday work). The resource being allocated was protection of the vulnerable. The court is saying in these cases that the legislature may decide how much protection of the vulnerable it will allocate, given the claims of non-vulnerable groups that the vulnerable not be protected, and that the court will defer to any "reasonable" decision about that resource allocation.

This, in my view, is a highly problematic formulation. Assessing and weighing complex, contradictory evidence is, in fact, what courts are known to do well. It is central to their function. While allocation of fiscal resources raised from taxation of the public may be squarely within the legislative domain (recall the staunch reservation of money bills for the Commons and the centrality of money bills to, for example, whether the government maintains the confidence of the House), it is not so clearly the legislature's sole domain to decide who merits the "resource" of protection for the vulnerable, and how much of that resource should be allocated to whom. Rather, one would have thought, protection of the vulnerable is, in the first instance, the function of a constitution or of quasi-constitutional instruments, interpreted and applied by the courts.

The judicial deference to legislative decision making in the interests of the vulnerable, which we find in cases like *Edwards Books* and *Irwin Toy*, does not appear to be explicitly based on any rationale found in the constitution itself. Rather, it is founded on unusual notions of institutional capacity (the legislature is a better judge of evidence as the court, or at least as good as it), and a very broad definition of the kinds of resource allocation decisions that are within the proper sphere of the legislature.

In this reasoning, the legislature is seen as a kind of broker, considering

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the competing claims for its benevolence and effecting trade-offs and deals that will satisfy a number of interests to a sufficient degree. The court, in effect, gives the legislature a zone of tolerance within which to carry on this brokerage activity. The test of the limits of that zone is a reasonableness test.

In *McKinney*, dealing with allegations that it was contrary to the Charter's equality guarantees for *Human Rights Code* protections against discrimination in employment to end at age 65, Mr. Justice LaForest articulates quite clearly the reasonable broker theory. He is not prepared to say that the course adopted by the legislature, in the social and historical context through which we are now passing, is not one that reasonably balances the competing social demands that our society must address. The fact that other jurisdictions have taken a different view proves only that legislatures there adopted a different balance to a complex set of competing values. [314] LaForest J. identifies certain "conflicting pressures" faced by the legislature: if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some, and attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. "There is no perfect scenario in which the rights of all can be equally protected." [315]

In the circumstances, a legislature must be given reasonable room to ma-

noeuvre to meet these conflicting pressures. What a court needs to consider is "whether, on the available evidence, the Legislature may reasonably conclude that the protection it accords one group does not unreasonably interfere with a guaranteed right." [315]

LaForest J. refers to the "macro-economic and social concerns of extending this protection beyond 65," which prompted the legislature not to extend protections in employment beyond that age, and states, "The effect, of course, was to deny equal protection of the law for those over 65." [316] In language that seems to bear little resemblance to any test in the Charter itself, he continues, characterizing the legislature's action: it "sought to provide protection for a group which it perceived to be most in need and did not include others for rational and serious considerations that, it had reasonable grounds to believe, would seriously affect the rights of others." [317]

This partial approach is acceptable. A legislature, states Justice LaForest, should not be obliged to deal with all aspects of a problem at once: "It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequities under the law against other inequities resulting from the adoption of a course of action, and to take account of the

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difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety, assuming such problems can ever be perceived in their entirety." [317]

Justice LaForest does find a Charter-based rationale for this policy of broad deference to legislative choices. He states that the Charter was not meant to apply to private conduct, leaving the task of regulating and advancing human rights in the private sector to the legislative branch. "This invites a measure of deference for legislative choice." While emphasizing that the courts should not stand idly by in the face of a breach of human rights in the Code itself, as happened in *Blainey*, he states:

But generally, the courts should not lightly use the Charter to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but ... the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person. [318-319]

McKinney, then, is really a ringing endorsement of a policy of gradualism in developing human rights protection. It proceeds from the assumption that unless one is gentle with the legislatures, and encourages even their tiniest steps in the right direction, they might balk and do nothing. There is little in this attitude that reflects the court's understanding in *Andrews* of how developments in human rights legislation led the way toward the Charter's equality guarantees, little that reflects the quasi-

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constitutional status given human rights legislation in a series of Supreme Court decisions. There is astonishing judicial deference to the realpolitik that it is often difficult to secure human rights protections because of competing social and economic concerns, which concerns may or may not have constitutional protection or status. In short, the decision in *McKinney* signals the court's abdication of the field of human rights protection, in favour of any gradual or incremental action at the legislative level that politicians may find possible.

The results of this policy of thoroughgoing judicial deference to legislative priority setting appear with clarity in the reasons of Justice Sopinka in *Egan*. The swing vote in that case, Sopinka J. agreed that failure to provide to same-sex couples the spousal allowance under the Old Age Security Act was a violation of the Charter's guarantees of equality under s. 15. However, he found that the denial was justified under s. 1. In doing so, he relied upon the *Irwin Toy* typology to characterize this legislation as "the kind of socio-economic question in respect of which the government is required to mediate between competing groups rather than being the protagonist of an individual." [575] In such circumstances, the court will be more reluctant to second-guess the choice that Parliament has made. [576] Again, the legislature is seen as a broker between roughly equal claimants for its re-

sources, and the role of the court is that, not of principled reviewer of legislative brokerage, but rather of uninformed "second-guesser" of the policy choices made. This perspective totally strips the court of its role as reviewer of legislative action in light of the standards established in the constitution. It accedes to a conception of the court's role as, at most, a rival policy maker, looking at the same brokerage decisions from the same perspective, and not to be preferred to the original.

Faced with the legislative history—namely, that the legislation had first been passed in 1975, and no steps had been taken since then to include same-sex couples in its ambit, Sopinka J. remarks:

It may be suggested that the time has expired for the government to proceed to extend the benefits to same-sex couples and that it cannot justify a delay since 1975 to include same-sex couples. While there is some force in this suggestion, it is necessary to keep in mind that only in recent years have lower courts recognized sexual orientation as an analogous ground, and this court will have done so for the first time in this case. While it is true, as Cory J. observes, that many provincial legislatures have amended human rights legislation to prohibit discrimination on the basis of sexual orientation, these amendments are of recent

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origin. Moreover, human rights legislation operates in the field of employment, housing, use of public facilities and the like. This can hardly be equated with the problems faced by the federal government which must assess the impact of extending the benefits in some 50 federal statutes. Given the fact that equating same-sex couples with hetero-sexual spouses, either married or common law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date the government has disentitled itself to rely on s. 1 of the Charter. [576]

Iacobucci J. describes this approach as "extremely deferential." [617] He distinguishes *McKinney* from the facts in *Egan* on several bases, and also takes direct issue with the philosophical underpinning of Justice Sopinka's position—namely, that protection for gays and lesbians is of relatively recent origin, and regarded as a novel concept, and that the government can justify discriminatory legislation because of the possibility that it can take an incremental approach in providing state benefits.

He characterizes both ideas for introducing two unprecedented and potentially undefinable criteria into s. 1 analysis, and permitting s. 1 to be used in "an unduly deferential manner well beyond anything found in the prior jurisprudence of this Court." He cautions: "The very real possibility emerges that the government will always be able to uphold legislation that selectively and discriminatorily allocates resources." This would, he says, "undercut the values of the Charter and belittle its purpose." [619]

Although Cory and Iacobucci JJ. were dissenting in the *Egan* decision, the warning they sound in their judgment about excessive judicial deference was badly needed. I do not agree with them that the reasons of Sopinka J. go well beyond anything found in previous cases. In my view, his reasons build on what had gone before, and

carry the prior observations to their natural conclusion. In *Egan*, in fact, Sopinka J. applied the previous reasoning to a situation more obviously meant for it, because in *Egan* there actually was a resource allocation decision underlying the legislation. *Egan* did not just deal with a situation where the legislature had brokered minority rights protections against other interests, but concerned real resource allocation by government.

It was the resource allocation aspect of *Egan* that allowed the trial court and Court of Appeal of Ontario to distinguish Justice Sopinka's remarks in the subsequent case of *M. v. H.*, a case dealing with the province's *Family Law Act*. This statute, created to regulate matters between spouses upon the dissolution of the relationship, was seen by the Ontario courts as one essentially dealing with private relations between the parties, not state spending decisions. The trial judge also refused to follow Sopinka J. as a matter of principle.

Epstein J. in *M. v. H.* described the concept of "legislative leeway" as one that applies simply to accommodate the time the government requires to respond to demands arising from changing social needs. It takes time for the legislature to identify the need, gather information about it, craft the appropriate response, and, on occasion, test the will of the people. It may be, observes the judge, that in appropriate circumstances a s. 15 violation should be tolerated in anticipation of, and to allow for, future amendments necessary to further the legislative intent. [616] She refused to apply even that form of judicial deference, however, to the case at bar, given the decades of endemic discrimination endured by gays and lesbians, the fact that Ontario had amended certain legislation to extend them protection, and especially the fact that "it is clear that the Ontario legislature cannot (or will not) move forward with such an initiative". [617] The justice cited the position of the attorney general of Ontario in the

M. v. H. case itself as "a demonstration of the inability of the parties to look to their elected representatives to remedy legislation which violates a constitutionally guaranteed right." In the first instance, the attorney general had intervened and filed a detailed brief in support of the plaintiff's position, but after the 1995 election, the new attorney general intervened in support of the defendant. Epstein J. concludes, "It is simply not realistic to regard the current state of Ontario law pertaining to spousal support as merely part of the process of legislative reform." [617]

Epstein J. addresses directly the issue of judicial role. She states that it is difficult for the legislature to change the law in a particularly unpopular way, even if to do so would enhance a constitutionally protected right. It is for precisely this reason that an independent judiciary must take appropriate action, a task that was assigned to judges by the elected representatives who promulgated the Charter. She cites the observations of Chief Justice Lamer that "many of the toughest issues we have had to deal with have been left to us by the democratic process." [617-618]

In the Court of Appeal, Charon J.A. similarly rejects the judicial deference argument in light of the legislature's own inactivity. In responding to the attorney general's argument that implementing something like a partnership registration scheme is a policy choice for the government and not a constitutional issue for the court, she remarks:

Perhaps the Attorney General might have been in a better position to make this argument if the legislature had indeed made some policy choices with a view of redressing the discrimination. But it did not. It chose inaction. It is not open to the court to simply avoid the issue on the ground that legislative reform could provide a superior remedy. Nor is it open to the court to defer the issue until further information becomes available. [458]

In *Vriend*, the court deals in an authoritative way with what was becoming a crisis of judicial authority, because of the extremely deferential approach to legislative power that had culminated in the reasons of Justice Sopinka in *Egan*, after building through the reasons of the court in *Edwards Books*, *Irwin Toy*, and *McKinney*. Had they not dealt, at last, firmly with the issue, and rather allowed to prevail the arguments of the Attorney General of Alberta and the Alberta Court of Appeal majority, then it is no exaggeration to say that for all intents and purposes the human rights vigour and capacity of the Charter would have been exhausted. The Alberta arguments were a fully mounted attack on the legitimacy of the Charter and judicial review under the Charter. Such arguments could have been encouraged only by the extreme deference to legislative power shown in the line of cases I have discussed.

The legitimacy of the Charter and of judicial review under it were put at issue in several different ways in *Vriend*. Such issues arise in the context of arguments about the applicability of the Charter to legislative omissions, in light of s. 32 of the Charter; in the discussion of whether a violation of s. 15 has occurred; in the court's discussion of the object of the *Individual's Rights Protection Act*; in the rational connection and minimal impairment analyses under s. 1; and in the discussion of remedy. In most Charter cases, the deference issues may arise in one or two of these contexts, usually rational connection or minimal impairment and remedy. The fact that they are so pervasive in this judgment shows, in my view, how close to a crisis in these areas the jurisprudence had come, and how massive was the assault on the judicial role mounted in the *Vriend* case.

SECTION 32

The Alberta government argued that because the case concerned a legislative omission, s. 15 of the Charter should not apply pursuant to s. 32. The argument put forward the position that courts

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must defer to a decision of the legislature not to enact a particular provision, and that the scope of the Charter review should be restricted so that such decisions will be unchallenged. This effort to elevate s. 32 into a powerful threshold test of what would, in effect, be justiciable under the Charter, was rejected. Cory J. opts instead for a simple test under section 32, whether there is some "matter within the authority of the legislature" that is the proper subject of a Charter analysis. [529]

In his reasons, Cory J. deals with the argument of McClung J.A. that application of the Charter to a legislative omission is an encroachment on legislative autonomy. The Charter is not to be used to extract legislation from the provinces, but rather to police it once, and if, it is proclaimed. In the view of McClung J.A., the legislative decision not to legislate on a particular matter within its jurisdiction, particularly a controversial one, should not be open to review by the judiciary. [530]

Cory J. denies that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to disallow those laws or "dictate" that certain matters should be included in those laws. He states that it is not the courts that limit the legislatures, but rather the constitution, which must be interpreted by the courts. When a citizen brings a proper challenge to the constitutionality of a law, the courts must deal with it. To de-

cline to do so would be to undermine the constitution and the rule of law. And in doing so, they do not impose their view of "ideal" legislation, but rather determine whether the challenged act or omission is constitutional or not. Cory J. states that the language of s. 32 does not cover only positive acts of the legislature, and that it is only in the analysis under s. 15 that it can be determined whether an omission is neutral—that is, has no effect on equality. Such neutrality cannot be assumed. [531-532]

SECTION 15

One of Alberta's s. 15 arguments was that a successful appeal would mean that human rights legislation would always have to "mirror" the Charter by including all of the enumerated and analogous grounds. Cory J. observes that human rights legislation, like all other legislation, must conform to the requirements of the Charter, but that the determination of whether a particular exclusion complies with s. 15 would not be made through a mechanical application of a mirror principle, but rather by means of a s. 15 analysis, which considers the nature of the exclusion, the type of legislation, and the context in which it was enacted. If a legislature chooses to take legislative measures that do not include all of the enumerated and analogous grounds of the Charter, deference may be shown to this choice, so long as the tests for

justification under s. 1, including rational connection, are satisfied. [553]

SECTION 1: RATIONAL CONNECTION

The respondents relied on Justice Sopinka's incrementalism argument under this head of the case, to submit that a rational connection to the purpose of a statute can be achieved through the use of incremental means that, over time, expand the scope of the legislation to all those whom the legislature determines to be in need of statutory protection. Cory J. addresses that argument with the same sense of realism brought to a similar argument by the two courts in *M. v. H.* [558] He states that the inclusion of sexual orientation in the *Individual's Rights Protection Act* has been repeatedly rejected by the Alberta legislature, so that it is difficult to see that any principle of incrementalism is at play. He also distinguishes *Egan* on the basis that it concerned a government expenditure program; in doing so, he restores some balance to the *Irwin Toy*, *McKinney* line of reasoning about balancing claims to scarce "resources." *Egan* was a "resources" case. *Vriend*, like *Edwards Books*, *Irwin Toy*, and *McKinney*, is not. Happily, the court in *Vriend* does not commit the fallacy of regarding human rights protection as a "resource" that may be brokered by the legislature.

Cory J. also returns to his and Iacobucci J.'s earlier denunciation on principle of the incrementalism defence:

[G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the *Charter* will be reduced to little more than empty words. [559-560]

Cory J. here returns the focus to the Charter and its minority rights guarantees. This is an appropriate shift away from the highly deferential "art of the possible" approach of LaForest J. in *McKinney*—an approach that showed little awareness of the essentially coercive power of the law in a proper case, and none at all of the provisions and effect of s. 52 of the *Constitution Act, 1982*.

SECTION 1: MINIMAL IMPAIRMENT

The respondents had argued that the IRPA is the type of social policy legislation that requires the Alberta legislature to mediate between competing groups or interests, these being in *Vriend* religious freedom and homosexuality. Such a characterization is, of course, an attempt to trigger the high degree of judicial deference to the legislative broker that we see in *McKinney* and *Irwin Toy*, among others.

Cory J. flatly rejects the legislature as broker characterization. [560] He usefully points out that, to the extent that there may arise a conflict between these two interests, the IRPA itself contains internal mechanisms for mediating it. Because these mechanisms allow conflicts to be balanced and mediated on a case-by-case basis, it is not necessary for the legislature to refuse to confer rights on one group because of potential conflicts. A complete solution to any such conflict already exists within the legislation. [560-561]

At the level of principle, Cory J. usefully collects authorities for the proposition that although legislatures ought to be accorded some leeway when making choices between competing social concerns, judicial deference is not without limits. Madam Justice McLachlin in *RJR-MacDonald* has observed that care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden that the Charter places

upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament's role is to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have their role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the constitution. She observes:

To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and nation is founded. [561]

Cory J. finds that the government of Alberta had failed to demonstrate that it had a reasonable basis for excluding sexual orientation from the IRPA. In the circumstances, the call for judicial deference was found to be inappropriate. [561-562]

REMEDY

It is in this part of the combined Cory and Iacobucci reasons for judgment that we find the strongest statements rehabilitating or reclaiming a judicial role under the Charter. In this section of the reasons, there are strong statements reaffirming that judges adjudicating Charter cases are not simply, as had been alleged, putting their power up against that of the legislatures, but rather acting pursuant to a role assigned by the constitution, and bringing to bear constitutional standards, not personal views, on the issues at hand. In doing so, the reasons reassert that this is a constitutional democracy, characterized by constitutional rather than parliamentary supremacy.

The reasons emphasize the democratic origins of the judicial role under the Charter:

We should recall that it was the deliberate choice of our provincial and

federal legislatures in adopting the *Charter* to assign an interpretative role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid. [563]

[I]t should be emphasized ... that our *Charter's* introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of the redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.

So courts in their trustee ... role must ... scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. [564]

The limitations on the role of the courts in this new regime are expressed in terms similar to those used to define their role in more traditional judicial review contexts: courts are not to second-guess legislatures and executives and make value judgments on what they regard as the proper policy choice. This indeed restores to its proper perspective the commentary in *Irwin Toy*, *Edwards Books*, and *McKinney* about line-drawing. Respect for the legislative function can well mean that courts will not second-guess policy choices, but respect for the judicial function means that all actors in the system must proceed on the basis that courts will apply constitutional standards to legislation, whether that legislation embodies policy choices or not.

The reasons go on to articulate an approach of mutual respect and dialogue, or dynamic interaction, between the branches of government. In reviewing legislative enactments and executive

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decisions to ensure constitutional validity, the courts speak to those branches of government. In enacting new legislation to accomplish similar objectives, without the constitutional flaws, the legislature responds to the courts. [565] This dialogue was noticeable between courts and legislatures in administrative law and federalism cases, long before the entrenchment of the constitution. That its vigour was suspended for a time following the enactment of the *Charter* has to reflect a period of considerable discomfort on the part of the court with its new role. To see the court finding its feet again, as it were, and embracing the task assigned to it by the constitution, is a positive development.

Along with the reaffirmation of the constitutional role of the courts, these

reasons for judgment make observations on the nature of democracy that parallel those made in the *Secession Reference*. It seems that in this substantive area, too, the court is finding new confidence about its role in the context of our representative democracy. The reasons observe, "Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In interpreting legislation in light of section 1 of the *Charter*, the court must inevitably delineate some of the attributes of a democratic society; when legislatures and the executive fail to take these wider democratic values into account, the court should stand ready to intervene to protect them." [567]

Here, the reasons adopt the forceful statement, "judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*." [567]

In my view, the catch in this reasoning, is that it cannot be only the courts that define and delineate what these democratic principles are. For the court's dialogue theory to work, and have integrity as a foundation of its constitution-based role in judicial review, it cannot be applying ideas about democracy generated only by itself. In the original *Oakes* case, where Chief Justice Dickson articulates a sketch of some fundamental democratic principles, through *Vriend* and the *Secession Reference*, one is left wondering how the court informs itself about what are the democratic principles to which its interpretative functions must resonate. While I do not agree with the general trend of the court's reasoning here, in that I believe that both the constitution and principles of democracy can and should support the court's oversight of legislation, and can and should demark

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a limited sphere for judicial deference to legislative will, it remains the case that the court-legislature dialogue remarked upon by Iacobucci J. in his reasons does not seem at this time to have produced a hardy consensus about our fundamental democratic principles. At least, however, as the court now articulates these principles, a broader dialogue among the court, legislatures, the academy, and the public can ensue about their durability and reliability as insights into our democratic character.

In actually performing his remedies analysis, Iacobucci J. exhibits the same realistic approach to what the Alberta legislature actually did that we found in the Ontario Court, General Division and Court of Appeal in *M. v. H.* Lack of excessive deference is clearly sharpening the court's acuity of observation and willingness to call it as it is. Iacobucci J. mentions that in 1993 the Alberta legislature appointed the Alberta Human Rights Review Panel to conduct a public review of the IRPA and the Alberta Human Rights Commission. The panel issued a report making several recommendations, including the inclusion of sexual orientation as a prohibited ground of discrimination in all areas covered by the Act. The government responded to the recommendation by deferring the decision to the judiciary, citing the current court case *Vriend v. The Queen*. Iacobucci J. observes that this statement is a clear indication that in light of the controversy surrounding the protection of gay men and lesbians under the IRPA, it was the intention of the Alberta legislature to defer to the courts on this issue. He interprets the statement as "an express invitation for the courts to read sexual orientation into the IRPA in the event that its exclusion from the legislation is found to violate the provisions of the Charter." On this basis, he finds that the remedy of reading in is entirely consistent with legislative intention. [575-576]

Similarly, Iacobucci J. identifies the democratic principles that underpin his

In a country where legislatures seem all too often to have forgotten the essence of democracy and to have abandoned the self-restraint and self-starting deference to constitutional principle that characterizes a country with a largely unwritten constitution, it is timely and welcome that the court wishes to embark upon a dialogue about the nature of our democracy.

decision. In his view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, judicial intervention is warranted to correct a democratic process that has acted improperly. [577] And, referring again to his dialogue concept, he concludes on the note that when a court reads in, it is not the end of the legislative process because the legislature can either pass new legislation in response to the court's decision or use s. 33 of the Charter to override that decision.

CONCLUSION

I am heartened that the court has come back from the brink of a potentially disastrous policy of undue judicial deference to legislative action—a policy that essentially ignored the constitutional base of judicial review, and confused legitimate legislative balancing of resources with a permissive approach to legislatures approaching difficult social and economic tasks. This rethinking of

judicial deference is promising in that it is constitution based and calls for an analysis of democratic principles. In a country where legislatures seem all too often to have forgotten the essence of democracy and to have abandoned the self-restraint and self-starting deference to constitutional principle that characterizes a country with a largely unwritten constitution, it is timely and welcome that the court wishes to embark upon a dialogue about the nature of our democracy. Such a dialogue should continue to be carried on within the strong framework of the written constitution, and continue to call for legislatures, courts, and citizens to reflect on the nature of our democracy. We should remember in this dialogue that it is not just about power, or the power of legislatures and the power of courts, simpliciter, but rather about the proper demarcation of roles within a constitutional and representative democracy. The Supreme Court was right in *Vriend* to call the dialogue back onto constitutional terrain. The dialogue having been opened, it is up to us to continue it, with rigour, and expectations that both courts and legislatures will make observations on principle, and not on realpolitik, or the politics of the possible. ♦