Parliament and the Courts – Who's Legislating Whom?

by Philip Kaye

In early 1998 the Supreme Court of Canada in Vriend v. Alberta referred to the continuing "debate" over the legitimacy of the courts invalidating legislation. This paper looks at two opposing views on this issue. One side argues that the courts have a key responsibility to protect the rights of Canadians within a system of constitutional supremacy. The other side argues that the courts have inappropriately come to act as legislators. Among other things the paper looks at the role of the courts as protectors of "democratic values"; the approach the courts should take in the case of omissions from legislation; and the general nature of the relationship between courts—especially the Supreme Court of Canada—and legislatures under the Charter of Rights. Is it appropriate, for instance, to characterize that relationship as a "dialogue"?

The *Canadian Charter of Rights and Freedoms* (section 1) guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section contemplates a two-stage process for the judicial review of legislation under the *Charter*. In the first stage, the court must determine whether the challenged law infringes a guaranteed right or freedom. If the court finds that no such infringement has occurred, the inquiry under the *Charter* ends; however, if a right or freedom has been violated, the court proceeds to the next stage.

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In this next stage, s. 1 of the *Charter* is invoked. The court must decide whether the violation is a reasonable one that can be demonstrably justified in a free and democratic society. If the test of justifiability (explained below) is met, the law will be saved. Otherwise, the court may choose, as one remedy, to strike down the provisions in question.[1]

The Supreme Court has laid down four criteria to be applied during the second stage—that is, for determining whether an infringement of the *Charter* can be justified in a free and democratic society.[2] These criteria, especially the fourth one, have been expressed by the Supreme Court in very general language. They first took shape in 1986 and may be categorized in the following way:

Objectives: The challenged law must pursue an objective that is sufficiently important to warrant overriding a *Charter* right. At a minimum, the objective must relate to concerns which are "pressing and substantial" in a free and democratic society;

Proportionality: If a sufficiently significant objective has been recognized, the following so-called "proportionality test", containing the second, third, and fourth criteria, must be satisfied:

Rational Connection. The law must be rationally connected to the pressing and substantial objective—in other words, it must be carefully designed to achieve it. Under this criterion, the law cannot be arbitrary, unfair, or based on irrational considerations;

Minimal Impairment. The law should impair "as little as possible" the right or freedom in question. The idea is that the least drastic means should be used to pursue the legislative objective; and

Proportionate Effect. There must be proportionality both between the objective and the "deleterious effects" of the statutory restrictions in question, and between the "deleterious" and "salutary effects" of those restrictions. This requirement necessitates a balancing of the objective sought by the law against the infringement of the civil liberty. It asks whether the contravention of the *Charter* is too high a price to pay for the benefit of the law.

Professor Peter Hogg has written that nearly all s. 1 cases have centred upon the third criterion above: is the *Charter* right impaired no more than is necessary to accomplish the legislative objective?

As mentioned earlier, upon finding a violation of the *Charter* which is not upheld by s. 1, the court may strike down the offending legislation. The declaration of invalidity might take effect immediately or it might be suspended to give the Legislature an opportunity to bring the impugned provisions into line with the *Charter*.[3]

One of the other remedies invoked by the courts has been described as "reading in". The power to "read in" is a relatively recent remedy, having been enunciated for the first time by the Supreme Court of Canada in 1992 in *Schachter v. Canada*,[4] which was a case involving parental benefits under the *Unemployment Insurance Act*. The Supreme Court derived this remedy from s. 52 of the *Constitution Act, 1982*, which states that any law which is inconsistent with the Constitution of Canada is, to the extent of the inconsistency, of no force or effect. In the case of reading in, the constitutional inconsistency is defined as what the legislation wrongly excludes, rather than what it wrongly includes. Reading in has the effect of extending the ambit of legislation by including the excluded group within the legislative scheme.

In *Schachter*, Chief Justice Lamer said that reading in would be appropriate only in "the clearest of cases". The purpose of using it was "to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature."

Vriend v. Alberta was a case where the courts explicitly addressed the issue of the Court-Legislature relationship under the *Charter*. In this case, the Supreme Court of Canada ruled that *Alberta's Individual Rights Protection Act*[5] violated the guarantee of equality rights in s. 15(1) of the *Charter* by failing to include sexual orientation as a prohibited ground of discrimination. The Court then determined that the violation was not demonstrably justified as a reasonable limit pursuant to s. 1 of the *Charter*. All of the Justices, apart from Justice Major, concluded that reading sexual orientation into the Alberta Act was the appropriate remedy. Justice Major favoured a declaration of invalidity, but suspending its application for one year.

The Courts as Interpreters of the Constitution

The majority judgment in *Vriend* stressed the limits placed upon legislatures by the Constitution. Justice Iacobucci argued that upon the introduction of the *Charter* Canada went from a system of Parliamentary supremacy to constitutional supremacy. Simply put, the *Charter* meant that each Canadian now had rights and freedoms which governments and legislatures could not take away. However, since rights and freedoms were not absolute, governments and legislatures could justify qualifications and infringements of them under s. 1. Justice Iacobucci continued that disputes would inevitably arise over the meaning of these rights and their justification; it was the role of the judiciary to resolve them.[6]

In a similar vein, Justice Cory said that

> Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures.[7]

In *Vriend*, Justice Iacobucci wrote that when adopting the *Charter*, the provincial and federal legislatures deliberately chose to assign an interpretive role to the courts, and to command them to declare unconstitutional legislation invalid. The introduction of the *Charter*, combined with this "remedial role" of the court, were part of a redefinition of our democracy; they represented choices of the Canadian people through their elected representatives.[8]

Similar views were expressed by Chief Justice Lamer last year at the time of the 15th anniversary of the *Charter*. He described the above-mentioned s. 52 of the *Constitution Act, 1982*, which renders invalid those laws which

are inconsistent with the Constitution, as a "command from the elected. We're heeding the command of the elected." He added:

> It is, I agree, a system under which very fundamental issues of great importance to the kind of society we want are being made by unelected persons, but that's their doing, that's not ours. The only answer would be, 'Well, the elected didn't really know what the hell they were doing.'[9]

In *Vriend* Justice Iacobucci referred to the role of the courts to protect "democratic values". He remarked that although the invalidation of legislation by the courts usually involved negating the will of the majority, the concept of democracy was broader than the notion of majority rule.[10] As stated in another case, courts had to be guided by the values and principles essential to a free and democratic society (e.g. respect for the inherent dignity of the human person).[11] They had to stand ready to intervene to protect democratic values as appropriate.

These views of democracy required legislators to take into account the interests of majorities and minorities alike. Where the interests of a minority were denied consideration, especially where that group had historically been the target of prejudice and discrimination, judicial intervention was warranted "to correct a democratic process that has acted improperly."[12]

Justice Cory acknowledged that critics have argued that the courts must defer to a decision of a legislature not to enact a particular provision and that such decisions should be excluded from the scope of *Charter* review. He responded that under the *Charter* the deference which was "very properly due" to legislative choices would be taken into account in deciding whether a limit was justified under s. 1. Furthermore, that deference to the legislature would be a factor in determining the appropriate remedy for a *Charter* breach. He also felt that the exclusion of omissions from *Charter* scrutiny would produce unfair results. He explained:

> If an omission were not subject to the *Charter*, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from *Charter* challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair.[13]

Legislative omissions were the subject of comment by Justice Iacobucci as well. He felt that by definition *Charter* scrutiny, whether it involved such omissions or not, would always entail some interference with the legislative will. Whether a court chose to read provisions into legislation or to strike it down, legislative intent was necessarily interfered with to some degree. Consequently, the closest a court could come to respecting legislative intention was to determine what the legislature would likely have done if it had known that its chosen measures would be ruled unconstitutional.

Professor Allan Hutchinson of Osgoode Hall Law School has argued that under the *Charter*, the Supreme Court of Canada cannot but act politically; its only choice is to decide how it is going to do so. Whether it upholds legislation, strikes it down, or reads in provisions, the Court is engaging in equally political conduct in that it is imposing its own solution over that of a legislature's initial response. But whatever remedial option is taken, a legislature still has the option of utilizing the notwithstanding clause (outlined below) and to redraft the legislation in question.[14]

The notion of a *Charter* dialogue between courts and legislatures is raised in an article by Professor Peter Hogg and Allison Bushell who surveyed 65 cases where legislation was invalidated for a breach of the *Charter*, including all of the decisions of the Supreme Court of Canada in which a law was struck down on this basis.[15] They found that 52 (80 percent) of the decisions generated a legislative response, whether it be the amendment, repeal, or overriding of the impugned law. They consider this situation as representing a "dialogue", defined as follows:

> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue.[16]

Hogg and Bushell ask, in effect, the following question: why is it usually possible for a legislature to respond to (or overcome if it wishes) a court decision striking down a law as contrary to the *Charter?* Their answer cites four features of the *Charter*:

The notwithstanding clause (section 33):

The override power found in s. 33 of the *Charter* is the most obvious and direct way of overcoming a judicial decision striking down a law for the breach of certain *Charter* rights. S. 33 permits a legislature to re-enact the original law without interference from the courts. Accordingly, it has been characterized by Justice Strayer of the Federal Court of Appeal as the "ultimate protection of legislative supremacy." S. 33 also avoids the need for constitutional amendments to overcome a judgment—a

function highlighted by Prime Minister Chrétien in 1981 when he served as federal Minister of Justice.

Section 1 of the Charter:

As mentioned earlier, when a law is struck down for violating the *Charter*, it almost always means that the law did not pursue its objective through the least restrictive means available. As pointed out by Hogg and Bushell, when a court strikes down a law for this reason under s. 1, it will explain the less restrictive alternative law that would have satisfied the requirements of s. 1. "That alternative law is available to the enacting body and will generally be upheld";[17]

Qualified Charter rights:

Several of the guaranteed rights under the *Charter* are expressed in qualified terms (for example, s. 9 guarantees the right not to be "arbitrarily" detained or imprisoned). Hogg and Bushell say that even if s.1 has no application to these qualified rights, the nature of the qualifications allows for possible corrective action by a legislature when a law has been struck down for breaching one of these rights. For instance, s. 8 prohibits only "unreasonable" search and seizure. A court decision that a law authorizing a search and seizure is unreasonable can always be met by a new law that complies with the court's standards of reasonableness;[18]

Equality rights:

Typically, where a law is found to violate the guarantee of equality rights in s. 15(1) of the *Charter*, the problem lies in the law's underinclusiveness; persons have a constitutional right to be included in the legislative scheme, but are excluded. Hogg and Bushell write that in this situation, there are a number of ways a legislature can satisfy s. 15(1) and still set its own priorities. The most obvious solution is the extension of the benefit of the underinclusive law to the excluded group. Another option is to provide reduced benefits to all the persons who have a constitutional right to be included.

Courts as Legislators

A very different perspective of the existing relationship between courts and legislatures sees the courts as a legislative body, and is held for example by Professor Rob Martin of the University of Western Ontario. Martin defines the real issue in *Vriend*, as soon as it went to court, as not whether human rights legislation should prohibit discrimination on the basis of sexual orientation (a prohibition which he favours), but rather who should make that decision. Should authority to do so rest with the courts or legislatures?[19]

Martin describes as "patent nonsense" the notion that it is the Constitution, not the courts, which limits legislatures. He agrees that judges are enjoined to interpret the Constitution; however, "what the Constitution does not do is tell the judges how to interpret the Constitution." He contends that the way the judges of the Supreme Court currently interpret the Constitution "was devised entirely by them."[20]

Martin believes the Supreme Court "invented" the remedy of reading in six years ago so as to enable it to rewrite statutes. As well, he feels that the Court has decided that it can rewrite the Constitution itself. In this regard, he refers to *Re Provincial Court Judges*[21] a case arising from pay disputes between provincial court judges and various provincial governments. The majority judgment in that case (delivered by Chief Justice Lamer in September 1997) stated that the courts could fill in "gaps" in the Constitution as follows:

> The preamble [to the *Constitution Act, 1867*] identifies the organizing principles [of the Act] . . . and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.[22]

In *Re Provincial Court Judges* the Chief Justice held that financial security was a core characteristic of judicial independence and that it had to satisfy certain constitutional requirements. Martin feels that in listing these requirements, the Chief Justice "legislated for several pages."[23] The alleged lawmaking included the following comments by the Chief Justice respecting judicial compensation commissions:

> ...as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen....However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body [often referred to as commissions]. ...Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision — if need be, in a court of law....[24]

Martin does not agree that the adoption of the *Charter* was an act of the elected representatives of the people at the federal and provincial levels. He observes that the *Charter* was enacted by the Parliament of the United Kingdom following the passage of a constitutional resolution by the House of Commons and Senate, and that "the provincial legislatures had no part in the process." (Technically, the federal-provincial agreement of November 1981, which was signed by nine Premiers and which led to the adoption of the *Charter of Rights*, was voted upon by two Legislatures. It was approved by the Alberta Legislature in November 1981 and disapproved by the Quebec National Assembly the following month.)

Martin interprets the Supreme Court's remarks on democracy and "democratic values" in *Vriend* as in effect saying that "democracy is acceptable as long as the people make the right decisions"; otherwise the courts will step in and quash those decisions.

In his opinion the Supreme Court fails to grasp that in a democracy "the people will not always get the answers right." This problem with democracy is one reason periodic elections are held—to allow the people to correct mistakes. But he adds:

> ... our Constitution does not grant law-making authority to the people's representatives on condition that they make only 'good' laws.[25]

The application of the *Charter* to legislative omissions was the subject of extensive comment by Justice McClung, who was one of the two majority judges in the Alberta Court of Appeal decision in *Vriend*. Unlike the Supreme Court of Canada, the Court of Appeal ruled that the omission of the words "sexual orientation" in Alberta's *Individual's Rights Protection Act* did not violate the *Charter of Rights*.[26]

Justice McClung opposed the use of the remedy of "reading in". Although a statute which was clearly bad had to be judicially condemned, the preferred approach was to return it to the legislature in question for "representative, constitutional overhaul".[27] Accordingly, judges should not choose "to privateer in parliamentary sea lanes."[28]

He stressed that provincial legislatures had to be allowed the latitude to exercise their lawmaking powers under the *Constitution Act, 1867*. In the case of omissions, they were accountable to the electorate. He explained:

> When they choose silence provincial legislatures need not march to the *Charter* drum. In a constitutional sense they need not march at all. That is hardly to say that the governments of the day will not have to answer later to the voters for such a stance. That is as it should be.[29]

Applying these principles to his own province, the Order Paper of the Alberta Legislature was "not to be dictated ... by federally appointed judges brandishing the *Charter*;" rather, the province's legislative calendar had to be set by the representatives of the electorate.

Dialogue between Courts and Legislatures

Some critics question if there really is a "dialogue" between courts and legislatures. Jeffrey Simpson of the *Globe and Mail*, for instance, characterizes this dialogue as a one-way conversation in which the courts talk and legislatures listen. It is his view that although the courts can tell legislatures they are wrong, governments are reluctant to do the same to the courts. The notwithstanding clause is available, but "governments have been loath to use it in part because judges enjoy much higher standing in society than politicians."[30]

Even leading proponents of the dialogue concept acknowledge that in some circumstances the courts may, by necessity, have the final word. For example, some of the rights protected under the *Charter* are expressed so specifically that there may be no room for Parliament or a provincial legislature to impose "reasonable limits" on them. This was the position which in fact was taken by the Supreme Court of Canada in respect of minority language education rights in its very first *Charter* case.[31]

Notes

1. See Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf ed. (Toronto: Carswell, 1997), vol. 2, sections 35.1 and 37.1; and Bernard W. Funston and Eugene Meehan, *Canada's Constitutional Law in a Nutshell* (Toronto: Carswell, 1994), p. 159.
2. The criteria are discussed in Hogg, vol. 2, sections 35.8-35.12, and were first presented in *R. v. Oakes*, [1986] 1 S.C.R. 103. Clarifications have been made–most recently in *Vriend v. Alberta*, [1998] 1 S.C.R. 493."
3. See the discussion of remedies in Hogg, vol. 2, section 37.1.
4. [1992] 2 S.C.R. 679.
5. R.S.A. 1980, c. I-2. This Act is now known as the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7.
6. *Vriend v. Alberta*, para. 131.
7. *Ibid.*, para. 56.
8. *Ibid.*, paras. 132 and 134.
9. See Stephen Bindman, " 'Thank God for the charter': Top judge staunchly defends Charter of Rights on its 15th anniversary," *Ottawa Citizen*, 17 April 1997, p. A1.
10. *Vriend v. Alberta*, para. 140.

11. Justice Iacobucci here quoted Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.
12. *Vriend v. Alberta*, para. 176.
13. *Ibid.*, para. 61.
14. Allan Hutchinson, "What Supreme Court said, and didn't say, on gay rights", *Toronto Star*, 20 April 1998, p. A15.
15. Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)", *Osgoode Hall Law Journal*, 35:1 (Spring 1997): 75-124.
16. *Ibid.*, p. 79.
17. *Ibid.*, p. 85.
18. *Ibid.*, p. 88.
19. Rob Martin, "Martin's Creed[:] The Charter made them do it?", *Law Times*, June 1-7, 1998, p. 8.
20. *Ibid.*
21. [1997] 3 S.C.R. 3.
22. *Ibid.*, para. 105.
23. Martin, p. 8; see also Rob Martin, "Martin's Creed[:] Subversion in the Supreme Court?", *Law Times*, November 3-9, 1997.
24. *Re Provincial Court Judges*, para. 133.
25. Martin, "The Charter made them do it?", p. 8.
26. [1996] 132 D.L.R. (4th) 595.
27. *Ibid.*, p. 619.
28. *Ibid.*
29. *Ibid,*. p. 605.
30. Jeffrey Simpson, "Is Supreme Court bound to interpret Charter and laws as passed?", *Globe and Mail*, 8 April 1998, p. A14.
31. Hogg and Bushell, p. 92. That case before the Supreme Court–*A.G. Que. v. Que. Protestant School Bds.*, [1984] 2 S.C.R. 66–concerned provisions in Quebec's language legislation, which limited attendance at English-language schools to those children whose parents had been educated in the English language in Quebec. S. 23(1)(b) of the Charter, however, explicitly states otherwise. In particular, parents who are Canadian citizens and Quebec residents, and who have received their primary education in English in any part of Canada, are entitled to have their children educated in the English language in Quebec. In striking down the law, the Court said that since it was in direct contradiction of the terms of the Charter, there was no possibility of justifying the law under s. 1. In this case, it was not possible for the Quebec National Assembly to invoke the notwithstanding clause to override the Court's decision. The challenged law involved minority language educational rights and such rights cannot be overridden. (The notwithstanding clause can be invoked only with respect to the fundamental freedoms, legal rights, and equality rights.)