

# THE CHARTER DIALOGUE BETWEEN COURTS AND LEGISLATURES

*Critics of judicial review are at least partly right: Under the Charter, the law is in large part what judges say it is. On the other hand, the notwithstanding clause gives legislatures a powerful tool for overriding what judges say, while the record of Charter cases suggests that what goes on in practice is a dialogue between the nominated judges and elected legislators.*

*Les critiques de l'examen judiciaire ont au moins partiellement raison : en vertu de la Charte, la loi est en grande partie dictée par les juges. Par ailleurs, la clause dérogatoire fournit aux législatures un outil puissant pour casser les décisions des juges. Mais la jurisprudence découlant de la Charte semble indiquer qu'il s'agit en fait d'un dialogue entre les juges nommés et les législateurs élus.*

**Peter W. Hogg and Allison A. Thornton**

Judicial review is the term 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 of whether judicial review is legitimate. In Canada, the question arises because our Charter of Rights vests judges, who are neither elected to their offices nor accountable for their actions, with the power to strike down laws that have been made by the duly elected representatives of the people. Is this a legitimate function in a democratic society? Is the Charter of Rights itself legitimate, inasmuch as it provides the authority for a much expanded role for judicial review?

The conventional answer to these questions is that judicial review is legitimate in a democratic society because of our commitment to the rule of law. All of the institutions in our society must abide by the rule of law, and judicial review simply requires obedience by the

legislative bodies to the law of the Constitution. When, for example, the Supreme Court of Canada strikes down a prohibition on the advertising of cigarettes (as it did in the *RJR-MacDonald* case, 1995), it is simply forcing the Parliament of Canada to abide by the Charter's guarantee of freedom of expression. Similarly, when the Court adds sexual orientation to the list of prohibited grounds of discrimination in Alberta's human rights legislation (as it did in the *Vriend* case, 1998), it is simply forcing the Legislature of Alberta to observe the Charter's guarantee of equality.

The difficulty with this conventional answer is that the Charter of Rights is for the most part couched in such broad, vague language that in practice judges have a great deal of discretion in applying its provisions to laws that come before them. The process of applying the Charter inevitably involves "interpreting" its provisions into the likeness favoured by the judges. This

problem has been captured in a famous American aphorism: “We are under a Constitution, but the Constitution is what the judges say it is!”

In this article, we argue that, in considering the legitimacy of judicial review, it is helpful to think of such review as part of a “dialogue” between judges and legislatures. At first blush, this concept of dialogue may not seem particularly apt. Given that the Supreme Court of Canada’s decisions must be obeyed by the legislatures, one may ask whether a dialogue between judicial and legislative institutions is really possible. Can a legislature “speak” when its laws are subject to the constitutional views of the highest Court? The answer, we suggest, is “Yes, it can,” certainly in the vast majority of cases where a judicial decision is open to reversal, modification or avoidance by the competent legislative body. Thus a judgment can spark a public debate in which Charter values are more prominent than they would have been otherwise. The legislative body is then in a position to decide on a course of action — the re-enactment of the old law, the enactment of a different law, or the abandonment of the project — that is informed by both the judgment and the public debate that followed it.

Dialogue will not work, of course, if the effect of a judicial decision is to prevent the legislative body whose law has been struck down from pursuing its legislative objective. But this is seldom the case. The first reason why a legislative body is rarely disabled by a judicial decision is the existence in the Charter of

Rights of the override power of s. 33, under which a legislature can simply insert a “notwithstanding” clause into a statute and thereby liberate the statute from most of the provisions of the Charter, including the guarantees of freedom of expression (s. 2(b)) and equality (s. 15). Section 33 was added to the Charter of Rights late in the drafting process at the behest of provincial premiers who feared the impact of judicial review on their legislative agendas, and it is the most powerful tool legislatures can use to overcome a Charter decision they do not accept.

When the Supreme Court of Canada struck down a Quebec law forbidding the use of English in commercial signs on the ground that the law violated the guarantee of freedom of expression (*Ford*, 1988), Quebec answered by enacting a law that continued to ban the use of English on all outdoor signs. The new law violated the Charter’s guarantee of freedom of expression as much as the previous one had, but the province protected it from challenge by inserting a s. 33 notwithstanding clause into it. The Quebec National Assembly recognized that it was restricting the freedom of expression of its anglophone citizens, but concluded that the enhancement of the French language in the province was important enough to justify overriding the Charter value.

More recently, when the Supreme Court of Canada held that Alberta’s human rights legislation violated the guarantee of equality by not providing protection for discrimination on the ground of sexual orientation (*Vriend*, 1998), there was much debate in the province about re-enacting the law in its old form under the pro-

### The notwithstanding clause

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

tection of a s. 33 notwithstanding clause. In the end, the Alberta government decided to live with the decision of the Court. But because using the notwithstanding clause to override the decision had been an option, it is clear that this outcome was not forced on the government, but rather was its own choice based on, among other things, what the Court had said about the equality guarantee in the Charter of Rights.

Both these cases are examples of the dialogue that s. 33 permits. Admittedly, because of the political climate of resistance to the use of the clause, “notwithstanding” is a tough word for a legislature to use. But making tough political decisions is part of a legislature’s job. In the dialogue between courts and legislatures, “notwithstanding” is therefore at least a possible legislative response to most judicial decisions.

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

Since 1982, the Supreme Court has established rules for determining whether a law is such a reasonable limit. The rules can be boiled down to: (1) The law must pursue an objective that is sufficiently important to justify limiting a Charter right, and (2) it must limit the right no more than is necessary to accomplish the objective. In practice, the Court usually holds that the first requirement is satisfied — that is, the objective of the law is sufficiently important to justify limiting a Charter right — and in most cases the area of controversy concerns the second requirement, whether the law limits the right by a means that is the least restrictive of the right.

When a law is struck down because it impairs a Charter right more than is necessary to accomplish the legislative objective, then it is obviously open to the legislature to fashion a new law that accomplishes the same objective with provisions that are more respectful of the Charter right. Moreover, since the reviewing court that struck down the original law will have explained why the law did not satisfy the s. 1 justification tests, the court’s explanation will often suggest to the legislative body exactly how a new law can be drafted that will pursue the desired ends by Charter-justified means.

In the Quebec language case, for example, the Supreme Court acknowledged that protection of the French language was a legislative objective that was

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sufficiently important to justify limiting freedom of expression. However, the Court also held that a complete ban on the use of other languages in commercial signs was too drastic a means of accomplishing the objective, and it suggested that the province could make the use of French mandatory without banning other languages, and could even require that the French wording be predominant on the sign. Such a law, the Court implied, would be justified under s. 1.

As we have explained, the province was not initially inclined to follow this suggestion and simply re-enacted the outright ban under the protection of the notwithstanding clause. However, five years later, when language passions had died down a bit, the province did enact a law of the sort the Supreme Court had suggested, requiring that French be used on commercial signs and be predominant, but permitting the use of other languages.

Many other examples could be given of laws which have been modified and re-enacted following a Charter decision. The point is that s. 1 allows dialogue to take place between the courts and the legislatures. Section 1 dialogue facilitates compromise between legislative goals and the courts’ judgment on what the Charter requires.

**S**everal of the rights guaranteed by the Charter are expressed in qualified terms. For example, s. 8 guarantees the right to be secure from “unreasonable” search or seizure. Section 9 guarantees the right not to be “arbitrarily” imprisoned. Section 12 guarantees against “cruel and unusual” punishment. When these rights are violated, the offending law can always be corrected by substituting a law that is not unreasonable, arbitrary, or cruel and unusual.

For example, the enforcement provisions of the *Competition Act* have been struck down on the grounds that they authorized unreasonable searches and seizures contrary to s. 8 of the Charter (*Hunter*, 1984). So have the comparable provisions of the Income Tax Act (*Kruger*, 1984). But in both cases the Supreme Court also laid down guidelines as to how s. 8 could be complied with. What was required was the safeguard

of a warrant issued by a judge before government officials could search for evidence. Parliament immediately followed this advice and amended both acts so that they now authorize searches and seizures only on the basis of a warrant issued by a judge. The legislative objective is still achieved, but in a way that is more respectful of the privacy of the individual.

Once again, many other examples could be given, but the essential point is that the very language of the qualified rights encourages a continuing dialogue between the courts and the legislatures.

The proof of the pudding is in the eating, and our research has indicated 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 in the *Osgoode Hall Law Journal*, 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 of Rights and Freedoms*. Only 13 of these had prompted no legislative response at all, and these 13 included both recent cases, in which there may have been little time to react, and cases in which corrective action was under discussion. In seven of the 66 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 struck down.

A critique of the Charter of Rights based on its supposed usurpation of democratic legitimacy simply 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 elected, accountable, representative legislative bodies. But the decisions of the Court almost always leave room for a legislative response, and they usually receive a legislative response. In the end, if the democratic will is there, a legislative way will be found to achieve the objective, 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 on how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies enacted for the benefit of the community as a whole.

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## Les tribunaux et le pouvoir législatif

Certains articles font partie d'un projet de recherche plus vaste intitulé « Tribunaux et législatures » dont les résultats seront publiés dans la série *Choix*. Voici un aperçu des titres à paraître au cours des prochains mois.

- Fred Vaughan (University of Guelph), *Judicial Activism in Canada: Patterns and Trends*;
- Kate Malleson (London School of Economics), *A British Bill of Rights: Incorporating the European Convention on Human Rights*;
- Janet Hiebert (Queen's University), *Wrestling with Rights: Judges, Parliament and the Making of Social Policy*;
- Jacob Ziegel (University of Toronto), *Merit Selection and Democratization of Appointments to the Supreme Court of Canada*;
- Joseph Fletcher (University of Toronto) et Paul Howe (IRPP), *Canadian Public Opinion on the Courts and the Charter: Results of a National Survey*;
- Greg Hein (McMaster University), *Interest Group Litigation In Canada, 1988-1998*.

De nombreux collaborateurs au dossier participeront à une conférence organisée par l'IRPP et intitulée *Le rôle du droit à l'aube du XXI<sup>e</sup> siècle*, qui aura lieu les 16 et 17 avril 1999 à l'Université d'Ottawa. La principale conférencière invitée sera Madame le juge Beverley McLachlin, de la Cour suprême du Canada, qui nous fera part de ses réflexions sur le rôle du pouvoir judiciaire à l'heure de la Charte des droits et libertés. Pour obtenir d'autres précisions sur la conférence, cliquez sur le lien <http://www.irpp.org/fr/archive/courtsf.html> ou communiquez avec Suzanne McIntyre à l'IRPP 514-985-2461.