

Vriend v. Alberta - The Legitimacy of Judicial Review

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Argued: November 4, 1997 Decided: April 2, 1998

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka (took no part in the judgment), Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.

On appeal from the Court of Appeal for Alberta

IACOBUCCI J.:

The Relationship Between the Legislatures and the Courts Under the Charter

. . . Much was made in argument before us about the inadvisability of the Court interfering with or otherwise meddling in what is regarded as the proper role of the legislature, which in this case was to decide whether or not sexual orientation would be added to Alberta's human rights legislation. Indeed, it seems that hardly a day goes by without some comment or criticism to the effect that under the *Charter* courts are wrongfully usurping the role of the legislatures. I believe this allegation misunderstands what took place and what was intended when our country adopted the *Charter* in 1981-82.

When the *Charter* was introduced, Canada went, in the words of former Chief Justice Brian Dickson, from a system of parliamentary supremacy to constitutional supremacy. Simply put, each Canadian was given individual rights and freedoms which no government or legislature could take away. However, as rights and freedoms are not absolute, governments and legislatures could justify the qualification or infringement of these constitutional rights under s. 1 . . . Inevitably disputes over the meaning of the rights and their justification would have to be settled and here the role of the judiciary enters to resolve these disputes. Many countries have assigned the important role of judicial review to their supreme or constitutional.

We should recall that it was the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid.

However, giving courts the power and commandment to invalidate legislation where necessary has not eliminated the debate over the “legitimacy” of courts taking such action. As eloquently put by A. M. Bickel in his outstanding work *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, “it thwarts the will of representatives of the . . . people.” So judicial review, it is alleged, is illegitimate because it is anti-democratic in that unelected officials (judges) are overruling elected representatives (legislators) (see e.g. A. A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (1996); R. Knopff and F. L. Morton, *Charter Politics* (1992); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994)).

To respond, it should be emphasized again 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 a 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 or arbiter role must perforce 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. All of this is implied in the power given to the courts under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*.

Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others’ role and the role of the courts.

This mutual respect is in some ways expressed in the provisions of our constitution as shown by the wording of certain of the constitutional rights themselves. For example, s. 7 of the *Charter* speaks of no denial of the rights therein except in accordance with the principles of fundamental justice, which include the process of law and legislative action. Section 1 and the jurisprudence under it are also important to ensure respect for legislative action and the collective or societal interests represented by legislation. In addition, as will be discussed below, in fashioning a remedy with regard to a *Charter* violation, a court must be mindful of the role of the legislature. Moreover, s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts.

As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a “dialogue” by some. In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives. By doing this, the legislature responds to the courts; hence the dialogue among the branches.

To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.

There is also another aspect of judicial review that promotes democratic values. 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 this respect, we would do well to heed the words of Dickson C.J. in *Oakes*:

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

So, for example, when a court interprets legislation alleged to be a reasonable limitation in a free and democratic society as stated in s. 1 of the *Charter*, the court must inevitably delineate some of the attributes of a democratic society. Although it is not necessary to articulate the complete list of democratic attributes in these remarks, Dickson C.J.’s comments remain instructive.

Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate. As others have so forcefully stated, 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*.