Charter Conflicts: What is Parliament's Role?

by Janet L. Hiebert,
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THE ROLE OF PARLIAMENT IS TO PASS LEGISLATION, the role of the courts is to interpret this legislation. So apparently simple was the constitutional distribution of labour prior to the arrival of the *Charter*.[1] This is, of course, not only a gross oversimplification, it is also revisionist history. There are some well-known and spectacular pre-*Charter* cases where courts found other constitutional grounds to strike down legislation that seemed to violate some fundamental principle of justice as perceived at the time. These need not be rehashed. There are many other cases, less spectacular, and therefore less known, wherein judges construed laws narrowly or simply refused to make the findings of fact that would have made the application of an unpalatable law inevitable. It is difficult to determine how often this occurred then, or even how often this still occurs, but the idea that the application of laws is ever a neutral, objective and anything but value-laden exercise is now widely understood to be absurd.

This has long caused some theorists considerable anxiety. The politics of those theorists have changed over time. Courts were at one point primarily attacked for being staunch supporters of the well-heeled and the political status quo. Now, there is at least an equal number of critics from the other end of the spectrum—people concerned that the courts have given minority and leftist views too much airtime. The advent of the *Charter* has given focus to this anxiety. The legitimacy debate has now raged for two decades; and in the name of the debate, courts as institutions, and judges as people and as office holders have found themselves on the receiving end of much public scrutiny and increasingly fierce partisan rhetoric. All of this is well-documented and, in the view of this writer, not worth revisiting.

It is, therefore, refreshing to find that someone would devote a book to the role Parliament is supposed to play in this brave, no longer novel *Charter* world. Janet Hiebert, in her book *Charter Conflicts: What Is Parliament's Role?*, promises to focus on the role of Parliament in advancing our collective understanding of the scope and meaning of *Charter* rights.

It is somewhat disappointing that this promise is only partially fulfilled. In sheer quantitative terms, over half of the book is dedicated to discussion of court decisions, court processes and academic criticism of courts. Much of the rest is given over to a discussion of the Department of Justice and the executive branch of government generally. There is surprisingly little about parliamentary committees and parliamentary debate for a book ostensibly focused on Parliament. Perhaps this says more about the diminishing role of Parliament vis-à-vis the Executive than it says about Professor Hiebert. A notable omission is any reference to the Standing Joint Committee for the Scrutiny of Regulations or the duty

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

of the Clerk of the Privy Council to review statutory instruments for *Charter* compliance on an ongoing basis.[2]

Hiebert argues that Parliament plays and should play a more important role in shaping Canadian rights discourse than is commonly attributed by both liberal *Charter* critics and progressive minority rights advocates. She does so from a political science perspective, which turns out to be quite different from the *Charter* discourse that tends to dominate law faculties. It is notably less cynical, more optimistic about the political process than many lawyers and legal academics tend to be. It is, however, no less critical of the courts, sometimes with justification, and sometimes, regrettably, based on serious misapprehensions about the nature of courts and how they operate.

In the first three chapters of the book, Hiebert provides a thorough review of the Canadian legitimacy debate and advances her own theory about the proper respective roles of Parliament and the courts. She gives insight into internal *Charter* review that the federal Department of Justice carries out in the course of developing legislation, which is not generally understood by the public.

The main part of the book, in chapters four through nine, is made up of separate, independent case studies ranging from tobacco legislation to sexual assault trials and the equality rights journey of gays and lesbians.

Before providing a summary of the argument, I want to note my surprise that all case studies involve policy areas where the courts have either taken the lead or have at least taken up a major role in the discourse. I note this surprise because as Hiebert herself points out, the vast majority of parliamentary policy initiatives never become the subject of *Charter* challenges and are therefore left entirely to legislative decision-making. In a book that inquires into the role of Parliament in the constitutional discourse, it would have seemed desirable to consider in detail some policy areas that have so far stayed out of the court arena.

The first case study involves the attempt of the federal government to prohibit tobacco advertising only to find that this outright ban failed in the Supreme Court on freedom of expression grounds.[3] Hiebert is clearly of the view that the Supreme Court was completely wrong in so ruling, and advances two main arguments for this. First of all, she argues that advertising should receive only marginal if any constitutional protection because it does not relate to the philosophical underpinnings of the freedom of expression guarantee. Secondly, she is critical of the defeat of what she considers to be a thoroughly worthy government objective based on (coming back to the first argument) an overly broad interpretation of freedom of expression. She takes particular issue with McLachlin's J. (as she then was) inference that government studies dealing with less intrusive means that the government had withheld must have contained evidence that something less than a total ban would be equally effective. Furthermore, she finds the suggestion contained in the majority judgment that it would be sufficient to ban only "lifestyle" advertising to be without factual foundation, and argues that the Court contradicts itself when it demands solid evidence from the government, but then relies

2. *Statutory Instruments Act*, R.S.C. 1985, c. S-22, ss. 3(2)(c) and 19 respectively.
3. *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1.

on factually unsupported inferences to bolster its judgment.

Based on this negative view of the decision (a view widely shared by the Canadian public at the time), Hiebert then argues that the decision of the government to respond to this judicial defeat by watering down the legislation is regrettable and shows that a judicial-centric view of *Charter* interpretation has prevailed.

The next case study deals with a line of cases that deal with the admissibility of past sexual history evidence of complainants in sexual assault trials. By the standard established in the discussion of the *RJR* decision, this exchange between Parliament and the Supreme Court was much more successful. Following *Seaboyer*,[4] Parliament did not back down but rather adopted the minority judgment, and was subsequently able to persuade the Court that this view passed constitutional muster.[5] Similarly, following the highly controversial decision on intoxication as a defence to sexual assault in *Daviault*,[6] Parliament succeeded in defending its view and overriding the Supreme Court without having to resort to s. 33 of the *Charter*.

Following the judicial theme of trial fairness, chapter six deals with DNA warrants, this time juxtaposed with parliamentary efforts to promote effective law enforcement, in addition to social policy implementation discussed in the previous chapter. The jumping-off point is the decision of the Supreme Court in *Stillman*,[7] which was decided under the common law rules applicable to bodily searches, as was the case in the earlier decision of *Borden*,[8] also discussed in this chapter. Again, the author is critical of the Supreme Court's preoccupation with procedural fairness, and particularly with the expansion of the concept of conscription beyond inculpatory statements. In this context, Hiebert reserves her strongest criticism for lawyers from the Department of Justice. She argues that legal opinions provided by the Department of Justice were used by the government to defeat opposition amendments to the subsequently introduced DNA warrant provisions. These amendments would have been less restrictive on law enforcement than the scheme ultimately enacted. The government defended its draft legislation by pointing to a number of legal opinions, initially produced in-house, later also from eminent ex-judges that supported the constitutionality of the government draft, but were critical of amendments as likely being unconstitutional. Hiebert is critical not only of the use to which these legal opinions were put, but also, at least implicitly, of their content. This criticism is focused on what she calls "incomplete jurisprudence" on the point. This means that the Supreme Court had yet to rule on many questions that were important to the DNA warrant scheme, and that any legal opinion was therefore largely speculative.

The fair trial theme is explored in one more variation in a discussion of the decision of the Supreme Court in *Feeney*.[9] Again, Hiebert disagrees with the majority of the Supreme Court, and again, she is in line with much of public opin-

4. *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193.
5. *R. v. Darrach*, [2000] 2 S.C.R. 443, 191 D.L.R. (4th) 539.
6. *R. v. Daviault*, [1994] 3 S.C.R. 63, 118 D.L.R. (4th) 469.
7. *R. v. Stillman*, [1997] 1 S.C.R. 607, 144 D.L.R (4th) 193.
8. *R. v. Borden*, [1994] 3 S.C.R. 145, 119 D.L.R. (4th) 74.
9. *R. v. Feeney*, [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609.

ion as expressed in the media at the time of the decision. Most of the chapter is taken up with a discussion of the difficult circumstances in which Parliament found itself trying to respond to this decision. These difficulties were the fact that a federal election had just been held, and there was considerable time pressure insofar as a six month suspension of the judgment had been granted by the Court on motion of a number of provincial attorneys general. Hiebert argues that the Court put Parliament into a position where there could be only very limited debate on the *Charter* implications and countervailing policy concerns because of the undue haste imposed by the Court. This meant that the necessary and equally valid views of Parliament on the important issues raised by *Feeney* could not be adequately developed or heard.

The last case study extends over chapters eight and nine, and stands completely separate from the preceding chapters. It deals with the struggle of gays and lesbians for equality rights. The study is not only thematically distinct from the rest of the book, it also approaches the problem from a different perspective – *i.e.* that of the rights claimants. In the preceding chapters, the rights of the public, women or accused persons appear only as far as they are reflected by parliamentary or judicial concern. In this chapter, the rights claimants' perspective is *the* focus. Hiebert acknowledges that gays and lesbians do not speak with a single voice in the debate over how equality can be best accomplished or whether the goal is misconceived. From this, she concludes that legislatures, and not courts, are best placed to deal with the issue of equality for gays and lesbians, but that courts have been provoked into action by the slow pace with which legislators have taken up the task. The concluding chapter in the study is ambiguous and appears to contradict many of the themes previously established. Clearly, Hiebert is of the view that the change in the legal landscape that has been forged by a long line of gay and lesbian equality jurisprudence is a positive change. However, she has to acknowledge that this change has been brought about not because the legislatures took a proactive role in the *Charter* discourse as she advocates. Rather, the success of the rights claimants in these cases has been attributable to courts occasionally doing the right thing, and also, in no small part, to the public education role that this highly visible line of jurisprudence has played. This leads her to the conclusion at page 217 that, "The Charter may be effective in protecting rights claims that initially lack broad support when it is used to encourage or compel the polity to re-examine existing practices and reform these to adhere to the normative values around which fundamental consensus exists."

The concluding chapter reiterates the need for Parliament to take seriously its role in giving scope and meaning to the *Charter* and not to leave this task to the judiciary alone. It is a summary of the book's thesis, and fails to take the argument to a different level of analysis. This is somewhat indicative of an overall weakness of the book, *i.e.* the chapters are not very well integrated and it might have been preferable to simply publish it as a collection of essays. There is no particular reason why the reader should progress through the book in any particular order, which may be a blessing for busy readers who want to read only one of the case studies. Given that it is published as a monograph, a less summary conclusion and more integration between and across chapters would have been desirable.

The book's second, and in my view, much more serious weakness lies in the fact that Hiebert does not really seem to understand court decisions as anything other than civics essays. While she occasionally talks about the facts underlying a case, this only serves to give colour to the argument that the policy expressed by the court, usually the Supreme Court, is unpalatable, *e.g.* because the case involves a particularly grisly rape or murder or both. As indicated above, Hiebert writes as a political scientist. I am a practicing lawyer and a former law clerk, so, clearly, our biases differ. Having said that, it seems to me that it is misplaced to criticize courts on the one hand when they usurp law-making functions and behave like legislatures and on the other hand criticize them when they behave like courts and adjudicate disputes based on the evidence before them. Let me explain by example. Hiebert criticizes the Supreme Court for the short grace period given by the Court in the wake of the *Feeney* decision. However, it was the provincial attorneys general who brought a motion to have the judgment suspended, and they asked for six months, not more. It would have been open to the federal government to bring its own motion; explain the circumstances and how much time was needed to address the problem. There is no reason apparent from Hiebert's description of the facts (which I am treating as accurate) that such a motion would have been denied. It is crucial, however, to understand that courts do very few things at their own initiative. The government may have had its own reasons not to ask, but fault for that decision cannot be placed at the feet of the Supreme Court. Similarly, Hiebert finds it inappropriate that the Court does not give notice of a constitutional question where the constitutionality of a common law rule is challenged or where the Court is considering changing a common law rule to bring it in line with the *Charter*. Again, this misconstrues court process. It is always open to the federal Attorney General to seek leave to intervene and such leave would not likely be withheld. This criticism is particularly misplaced in the context of a criminal case where a provincial Crown is by necessity a party and would have the opportunity to advise its federal counterpart of any need to intervene. It is certainly not up to the Court to add to the misery of an individual accused by stacking the hearing with governmental spokespersons.

This problem in Hiebert's analysis goes beyond the merely procedural. Her criticism of the *RJR* decision lacks understanding of the adjudicative nature of the Court's task. This time, the task arises squarely from constitutional language. If Parliament wants to interfere with *Charter* rights, it bears the onus of proving its justification. For this, it is simply not enough to have a worthy objective. The legislation did not fail for want of a worthy objective. Rather, it failed for proof of Parliament having chosen the least intrusive means. Hiebert argues elsewhere that Parliament and the Department of Justice should further engage in developing a legislative record of alternative measures and their effectiveness and *Charter* implications. It appears that this was done for the tobacco legislation. *RJR* shows, however, that Parliament may be unable to keep this kind of record out of the courts on penalty of losing the legislation. Is that bad? In my view, it is not, because if the studies reveal alternative less intrusive means of equal efficacy (as McLachlin J. suspected), then Parliament was wrong to make the law in the way it did. If the studies in that case did not reveal such means, then government

lawyers made a tactical error in not disclosing them. So the error, whichever one it was, ultimately lies with either the Department of Justice for presenting the case the way it did or Parliament for enacting the legislation based on the evidence it had. I would also take issue with the notion that advertising is necessarily constitutionally of marginal import. We should remind ourselves that there is no useful constitutional distinction between advertising for products we like and advertising for products we do not like. There is a useful distinction between advertising for products that are legal and those that are not, there is a useful distinction between false advertising and non-misleading advertising (much in issue in the case of tobacco and life-style ads), but the constitutional concern should not be piggy-backed onto the dislike for the product. I would agree with Hiebert (as, incidentally, does the Court in *RJR*) that tobacco advertising is a public policy issue on which legislatures are much better positioned to make judgments and should be afforded considerable deference. However, once the matter comes before the courts as a dispute between parties, it is not open to judges to find in favour of a party who bears the onus on an issue in the absence of that party's coming forward with the requisite evidence.

Hiebert loses the perspective on relative expertise between Parliament and the courts when it comes to fair trial issues. Just as polycentric policy issues are clearly more within the expertise of legislatures, courts are much better placed to recognize violations of fair trial principles.

In the same vein, Hiebert is ready to recognize the privacy interests of sexual assault victims in their therapeutic records and is critical of the reluctance of courts to protect that privacy. But when it comes to the privacy interest of a suspect in his own home, a right of considerable ancestry in the common law, she accuses the Court of inventing a right. The right to privacy of one's therapeutic records, important as it is, is of relatively recent vintage and was developed in analogy to privacy rights in medical records. The right not to have police intrude into the privacy of one's home without overriding justification predates not only the extension of privacy rights from medical to therapeutic records, but probably the very existence of medical records. Politically, it may be expedient to argue for the one and against the other. However, the luxury of expediency or public favour is not generally open to courts. Such is the problem of adjudication. In the words of Justice Scalia (dissenting) in the recent U.S. Supreme Court decision of *Lawrence v. Texas*,

> One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike the courts, need not carry things to their logical conclusion.[10]

So much on the shortcomings of legal analysis. Another shortcoming of legal process is that it creates, in Hiebert's words, "incomplete jurisprudence." This is not an exception that invalidates legal opinions, it is a rule that courts break at their peril. This is true for trial courts, but it is particularly true for appellate courts who have to live with, or rather, adjudicate based on, the record of the case

10. 539 U.S. 1, 41 S.W. 3d 349 (2003).

before them. Since courts, unlike legislatures, cannot go on fact-finding missions and call witnesses of their own, they are to a great extent at the mercy of the parties. This is acceptable only as long as the decision maintains some reasonable relationship with the scope of the record.

In all, Hiebert should have spent less time criticizing the courts (others have been doing that for years and are often better at it) and more time analyzing that part of the relationship or dialogue that is in so much need of exploration.

The promise of the book is that we should come away with a new appreciation of the role of Parliament in the constitutional relationship with the courts. Hiebert's book is helpful in its overview of the literature on the legitimacy debate. Her own answer is strategically placed between the extremes of the debate. I have noted throughout that her evaluations of court decisions are similar to public opinion as found in the media at the time the decisions were rendered. This is equally true for her general thesis. As one participant in a government consultation recently remarked: "Why do we have to wait until the Supreme Court tells us what the law is?"[11] Her book responds to a frequently expressed desire to see Parliament take back the reins on major policy issues.

Ultimately, I take no issue with the overall thesis of the book—that it would be desirable if our elected representatives took more initiative and spent more time and effort in contributing to one of Canada's grand national projects, the *Charter*. However, I do not believe that Hiebert has provided me with an analysis of why Parliament is currently not performing its proper role nor any reason to suspect that a change for the better is imminent in this regard. And it is not clear from her book where the political pressure for such a change should originate. Absent such a theory, the thesis becomes a plea and I remain unconvinced that the plea will be heard.

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11. Canada, *Report of Minister's Roundtable on Criminal Law* (Ottawa: Department of Justice, 2002) at 4.