R. v. *CORBETT*; R. v. *HOLMES*

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The author examines the possibilities of applying the interpretive principles of reading down of legislation in order to avoid the necessity of declaring legislation ultra vires in the event of a potential Charter breach.

There is an alternative to declaring an apparently unconstitutional law invalid: a court can simply give the law an interpretation which does not run afoul of the Constitution. "Reading down", the canon of construction which was employed prior to the enactment of the Charter of Rights and Freedoms[1] in order to save provincial or federal laws from being struck down as *ultra vires* under sections 91 or 92 of the Constitution Act, 1867, can apply equally in the Charter era. That rule of interpretation advises that where a statute is susceptible of two interpretations, one which is valid and the other which is not, the former should be chosen. The rule is derived from a presumption of constitutionality, based on the belief that the legislative body could not have intended to act beyond its own constitutional authority.[2]

In *R.* v. *Corbett*,[3] the Supreme Court of Canada upheld section 12 of the Canada Evidence Act[4] insofar as it allows the Crown to question an accused upon his prior criminal convictions. Dickson C.J. found that there are cases where it is appropriate for the trial judge to exercise his discretion to allow such questioning.[5] The facts in *Corbett* were ideal: the case turned on the credibility of the Crown witnesses as against the credibility of the accused, who chose to testify. The defence had vigorously attacked Crown witnesses all of whom had lengthy criminal records including convictions for serious offences. For the Chief Justice, disallowing the accused's record to be revealed would have given the jury an imbalanced impression of the credibility of the various witnesses before it, and the injustice from such a false impression would have far outweighed any prejudice to the accused in having his criminal record elicited.[6] Beetz J., in a concurring judgment of one paragraph, pointed out that s.12 would surely have run afoul of the Charter right to be presumed innocent (s.11(d)), had the Chief Justice not interpreted section 12 as impliedly providing a discretion in the trial judge over when to allow the Crown to question an accused on prior criminal convictions.[7]

Similarly, in *R.* v. *Holmes*,[8] McIntyre J. upheld the constitutionality of what was then s.309 of the Criminal Code,[9] which defines the offence of possession of break-in instruments. The section provides that the accused will be guilty if found in possession of an instrument "suitable for the purpose of breaking into any place . . . under circumstances that give rise to a reasonable inference" that the

1. Constitution Act, 1982, as enacted by Canada Act 1982 (U.K.) C.11.
2. See P. Hogg, *Constitutional Law of Canada* (2nd ed., 1985) 327-329.
3. [1988] 1 S.C.R. 670.
4. R.S.C. 1970, c.E.-10.
5. *Supra*, note 3 at 692 and at 697-698.
6. *Id.* at 690.
7. *Id.* at 699.
8. [1988] 1 S.C.R. 914.
9. R.S.C. 1970, c.C-34.

instrument was intended to be used for such a nefarious purpose where the accused is so found "without lawful excuse, the proof of which lies upon him". McIntyre J. held (Dickson C.J. dissenting on this very point) that this last phrase did not amount to an unconstitutional reverse onus because it only became applicable after the Crown had established a *prima facie* case against the accused, beyond a reasonable doubt.[10]

Dickson C.J.C. interpreted this excuse clause as requiring the accused to prove any excuse (including common law defences) on a balance of probabilities. To rebut the Chief Justice's suggestion, McIntyre J. relied on authority from former Chief Justice Laskin that such statutory exculpatory clauses must be construed as allowing the accused additional excuses beyond those provided by the common law (as for example the common law defence of necessity) and not as affecting those defences in any way.[11] Laforest J., in concurring comments which form a short paragraph, noted that McIntyre J.'s interpretation of the section saved it from breaching the presumption of innocence in s.11(d).[12]

The Court has always been able to save legislation by employing the permissive wording of section one of the Charter, but clearly, there is another formula for saving legislation than the application of the test set out in *R.* v. *Oakes*.[13] Where, as is often the case, there is more than one possible interpretation of a legislative provision, and the choice of one such interpretation will save the legislation from the cutting blow of s.52, the courts can simply choose to follow the interpretation which does not yield Charter breaches. It is neither duplicitous nor sly to follow such a procedure, since in so doing, the law thereafter is curtailed; it does not continue to empower the government or its agencies to breach Charter rights. Because legislation is so costly and time-consuming to pass, where the courts are faced with two interpretations it seems sensible that the courts should exercise a rule of construction which requires them to reach for an interpretation which will save the impugned legislation, and save the public a great expense at the same time. Such a rule of construction is most applicable to the Supreme Court of Canada, where an interpretation of a statutory provision becomes the law of the entire country, binding upon all courts, and in effect has the status of legislation. Surely where, as in *Holmes*, there may be more compelling interpretations, the Court works a greater good by yielding to a perhaps logically inferior interpretation where to do so has the advantage of sparing a statutory provision. Because of the Court's pre-eminent position in the legal hierarchy, any interpretation they give, even if not of the most chilling and clear logic, will nevertheless have the force of law. Therefore there remains no possibility of the law being used in a manner which runs contrary to the Charter. If Parliament or a legislature does not like the words which the Court graciously puts in its mouth, they can amend the law to make it more precise.

One might assume that in the early years of judicial interpretation the Supreme Court was anxious to exercise its power vigorously so as to ensure that the Charter would not share the fate of the Bill of Rights. Perhaps now the Court will feel sufficiently secure in its power so as to become a little more solicitous to preserve legislation wherever possible. Even if the Court pares down a statutory provision to a

10. *Supra* note 8 at 944-945.

11. *Brownridge* v. *The Queen*, [1972] S.C.R. 926 at 950, per Laskin J.

12. *Supra* note 8 at 949.

13. [1986] 1 S.C.R. 103.

pale shade of its former self, the Country or Province is at least left with some form of legislation until the legislative body can move through the slow and costly process (if it chooses to do so at all) of amendment. The Court may thereby be making legislation, just as it does every day when it alters or creates common law, but in so doing, it leaves the jurisdiction affected with some law to govern the area.

The Charter of Rights creates a further limit on the power of the legislature and Parliament. Just as the Constitution Act 1867 has provided criteria by which statutes have been read down, so too the Charter rights might add a further set of criteria according to which this canon of construction will operate. Charter rights must still have full force against statutes, but they would be applied more constructively in the form of rules of statutory interpretation.