

# From Drafting Instructions to Judicial Decisions and Back Again

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Richard G. MOSLEY\*

When I was first approached by John Mark Keyes to speak on the role of judges in prompting legislative changes, I proposed a number of somewhat facetious titles for this talk. “Confessions of a Policy Wonk turned Judge” was one example. I didn’t think he took me seriously but a variant of that proposal seems to have made its way onto the program.

I didn’t get into the legislative policy field with any particular background, training or aptitude for the work. As a young prosecutor with the AG of Ontario I made the mistake of presenting a paper at a conference which criticized a piece of recently enacted legislation. Senior Justice officials who had been responsible for that bill were in the audience. They said if you think you can do better join us for a while and give it a try. I agreed to one year. After that year I was asked to take over management of the Criminal Law Amendments Section on a temporary basis. Just a few months I was told. In the result, I stayed for another twenty years.

When I arrived at Justice I was given an office, a brief case, some pencils and paper and an equally naïve secretary. I was plunged almost immediately into legislative committee hearings. Some years later I discovered that when I was heading out during the day, and suffused with self-importance, told my secretary that I was going to the “House,” she informed callers that I had gone home for the day. God knows what they must have thought of my work habits.

My learning curve was steep at the outset. I had only a rudimentary understanding of the legislative process, and virtually no appreciation of the interplay between the legislative, executive and judicial branches of government, despite an undergraduate degree in political science. The drafting of legislation was a mystery to me. I had

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\* Justice, Federal Court of Canada, Ottawa, Ontario.

no idea how policy was translated into an enactment. I knew that periodically the statutes would be revised but how that was done, I couldn't tell you. I had never heard of the Statute Law Revision Commission, now defunct, or of the Uniform Law Conference, happily still alive. The Miscellaneous Statute Law Amendment program was a treasure still to be discovered.

Dick Pound writes in his biography of W.R. Jockett, later Chief Justice of the Federal Court, that when he went to work for the Department of Justice, Jockett was advised that at least once a month one should read the Interpretation Act.<sup>1</sup> I wish someone had given me similar advice. Like many practitioners, I was only vaguely aware of that statute and its interplay with other federal laws.

But it was an exciting time to become involved in justice policy work. There was a tremendous amount of law reform underway. The Charter was about to be brought into effect, albeit with uncertain implications. The Law Reform Commission of Canada was producing reams of studies, working papers and reports on a broad range of topics. Similar work was underway in the provinces with respect to areas of provincial jurisdiction. Federal and provincial Attorneys General had undertaken a fundamental review of the criminal law. The Minister of Justice, Jean Chrétien, issued a policy statement entitled "*The Criminal Law in Canadian Society*," which declared that henceforth, restraint and proportionality would be the guiding principles for our penal law.

There was a great deal of optimism at the time that the result of all of this activity would lead to the general improvement of the statutes through reforms led by the executive with the legislatures playing their role and the courts contributing through a newly strengthened judicial review function.

The courts had just been given the extraordinary constitutional duty to declare of no force or effect laws enacted by Parliament or the provincial legislatures that are inconsistent with the rights and freedoms guaranteed by the *Charter*. As you know, before the *Charter* came into effect, judicial review of legislation was largely limited to determining whether enactments fell within the scope of federal or provincial authority under the division of powers set out in the BNA Act of 1867. The Bill of

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<sup>1</sup> Pound, R. *Chief Justice Jockett, By the Law of the Land* (1999, Osgoode Society) p.54.

Rights adopted in 1960 was of some value for interpretive purposes but lacked the teeth of an entrenched constitutional document.

This expanded role was not one that the Canadian judges sought out. As the late and revered Chief Justice Brian Dickson said on one occasion, the judges did not ask for the enactment of the *Charter* and the role of applying it was thrust upon them.

I think it fair to say that there was considerable unease in government circles in the early 1980s about how the Courts would employ this new power, particularly the remedies, based on the US experience with their Bill of Rights and the exclusion of material evidence.

I was part of a group convened by the federal and provincial attorneys general to prepare strategies to attempt to influence the direction in which *Charter* jurisprudence would develop. This resulted in the infamous “Black book” as it was characterized by those suspicious of these efforts. The Black book was simply a four ring binder containing analyses of each section of the *Charter* and potential interpretations based on Canadian and American jurisprudence. Its shelf life was I think about six months as the courts began to demonstrate that they would not slavishly follow American constitutional precedents.

I also think that the inherent conservatism of the courts had been underestimated. But gradually, the Courts began to exercise the authority with which they had been vested. Ten years of experience with *Charter* jurisprudence led two of Canada’s leading criminal defence counsel, Allan Gold and Michele Fuerst, now Madame Justice Fuerst of the Superior Court of Ontario, to describe the *Charter*’s effects as “the stuff that dreams are made of.”<sup>2</sup>

Some Canadian judges were less enamoured of their new function than others. One of the more colourful expressions of *Charter* scepticism was this statement, by Mr. Justice John Scollin of the Manitoba Court of Queen’s Bench.

“Oppression did not stalk the land until midnight on April 16, 1982 and we should be on guard against *Charter* inspired paranoia

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<sup>2</sup> “The Stuff that Dreams Are Made Of! Criminal Law and the Charter of Rights” (1992) 24 Ottawa L. Rev. 13.

that sees any restraint as the Bastille or the Lubyanka and hears the parliamentarian speak with the voice of the tyrant.”<sup>3</sup>

Lest you think that he was against progress, John Scollin was the principal architect of the Bail Reform Act enacted in the mid-1970s. But I suspect that having been schooled in Scots law, he remained a fervent believer in the principle of Parliamentary supremacy and a strong supporter of codification.

The worst fears of the *Charter* skeptics did not materialize. But there have been some surprises in how the *Charter* was interpreted and applied by the courts and in particular by the Supreme Court of Canada.

It had not been anticipated, for example, that the Court would read substantive rights into what had been meant to be a procedural due process clause or that the evidence of what had been intended by the *Charter's* drafters would be brushed aside as being of little or no value in constitutional interpretation.<sup>4</sup>

This may have offended some of those who worked so hard on bringing the *Charter* into fruition but much of what has been achieved in the ensuing years may not have been accomplished if the originators' intentions had remained fixed in place. In preparing for this talk, I came across these comments in Pierre-André Côté's text on interpretation:

“The law is often wiser than its makers.” [Gustave Radbruch] [translation]

“[O]ne cannot insist enough on this: there is no true meaning of a text. No author's authority. Whatever he may have wanted to say, he wrote what he wrote. Once published, a text is like an implement that everyone can use as he chooses and according to his means: it is not certain that the maker could use it better than someone else.” [Paul Valéry] [translation]<sup>5</sup>

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<sup>3</sup> *Thwaites v. Health Sciences Centre* (1986), 33 DLR (4<sup>th</sup>) 549, rev'd (1988), 48 DLR (4<sup>th</sup>) 338.

<sup>4</sup> *Reference re s.94(2) of the Motor Vehicle Act* [1985] 2 S.C.R. 486.

<sup>5</sup> Both cited in Pierre-André Côté, *Interprétation des lois*, 3rd ed., (Montréal, Éditions Thémis, 1999), p.29.

These words may serve as a useful reminder for a judge who has been involved in the legislative process not to claim pride of authorship of legislative texts that eventually require close judicial scrutiny. What you meant may not be what was enacted, as the Parliamentary intent is interpreted.

Of course, another approach may be to duck the issue entirely. As Lord Justice Scrutton said in *Green v. Premier Glynrhonwy Slate Co. Ltd.*, [1928] 1 K.B. 561 at 566.

“If I am asked whether I have arrived at the meaning of the words which Parliament intended I say frankly I have not the slightest idea.”

Coming back to the reformist drive that was underway at the beginning of the 1980s, what happened? I think it is arguable that it was supplanted, to a considerable extent, by a new focus on the courts as the means to achieve substantive and procedural change and the exchanges that ensued between the courts and the legislatures. Clearly, governments lost interest in funding fundamental law reform activities. The Law Reform Commission of Canada, for example, was killed as a budgetary measure without prior notice to the Minister of Justice of the day. Similar reductions took place in the provinces.

Some law reform efforts struggled on. At the federal level, we continued until the mid-nineties to attempt to have a new general part of the Criminal Code enacted to rationalize the principles of liability and exculpation applicable to all offences. Those efforts failed largely because of the opposition of various groups including the Provincial attorneys general. They had lost their appetite for the fundamental review which they had launched in 1978 with Sen. Jacques Flynn, Minister of Justice during the Clark government.

At the last federal provincial and territorial meeting of attorneys general and ministers of justice at which recodification was raised the Attorney General of a certain Western province declared “I thought we had whacked that Gopher back into its hole.” When the laughter died down, it was clear that was to be the last of those efforts.

That view of the reformist efforts was also frequently encountered from senior members of the judiciary with whom we consulted in the early ‘90s. A certain provincial Chief Justice was fond of reciting this prayer whenever I raised the subject of law reform with him: “God protect us from the reformers. Things are bad enough.”

A considerable amount of the Law Reform Commission's recommendations found their way into the statutes through incremental amendments. However, much work was left undone. Any criminal court judge will tell you that the self-defense provisions of the Criminal Code are largely incomprehensible and that it is difficult to deliver a coherent charge to a jury in terms which they can understand and which will withstand appellate review. Why hasn't it been addressed by Parliament? I expect that it is because of the constant pressure on MP's to tackle issues of current concern to the public. Reform of the General Part of the Code is dry stuff which can't compete with the hot button issues of the day.

Some of these issues, of course, may arise from judicial decisions. This is by no means a new phenomenon:

It will have been observed that in the case of nearly every Act to which we have referred, the reason of the enactment lies in some recent [judicial] decision. That many of the enactments are most beneficial cannot be denied; but it is a matter for serious consideration whether or not is it a safe and satisfactory policy to make such rapid changes in the law .... The statutes are too hurriedly drawn, and in many cases evidently the result of impulsive desires rather than of thoughtful deliberation. Instead of setting at rest doubtful questions they only give rise to new and harassing doubts.<sup>6</sup>

This was an editorial penned in 1885. The author was decrying the hurried introduction of legislative responses to judgments without careful consideration of whether the change was needed or not.

A similar perspective on this subject was expressed at the same time by the great English jurist Sir Frederick Pollock in his *Essays on Jurisprudence and Ethics* which I will also share with you.

Parliament generally changes law for the worse, and the business of the judges is to keep the mischief of its interference within the narrowest bounds.<sup>7</sup>

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<sup>6</sup> 5 Canadian Law Times, p.248 1885. I am grateful to the Hon. Mr. Justice John deP. Wright of the Ontario Superior Court of Justice for several of these quotes.

<sup>7</sup> Sir Frederic Pollock, *Essays On Jurisprudence And Ethics* (1882) 85.

I suspect that was the view held by many judges and lawyers in the common law world for many years. Here is another comment in the same vein expressed by the Law Times in 1902:

No man's life, liberty or property is safe while the Legislature is in session.<sup>8</sup>

The Criminal Code of Canada has been the subject of almost constant amendment between its adoption in 1892 and the present day. One of my former colleagues at the Department of Justice prepared a doctoral thesis on that topic which, unfortunately was never published. I was given a copy when I joined the department. But it was fascinating to read how in virtually every session, including during war-time, Parliament was preoccupied with the minutiae of the criminal law.

This process is how we ended up with provisions in the Code which were likely unenforceable from the outset, including the prohibition against the publication and sale of crime comics, such as the Batman series, which remains in the statute (s.163(1)).

This is not unique to Canada, of course, as I was reminded at an international conference in Dublin in July where one of the topics of discussion was how to avoid cluttering the statute books with specific offenses when laws of general application were sufficient to deal with the perceived problem.

We generated a great deal of legislation at the Department of Justice in the 1980s and 90s. For most of that period, the Minister of Justice was second only to the Minister of Finance as the sponsor of public law bills presented to Parliament. It was not unusual, in any given session, to have five or more criminal law bills on the Order Paper. Only a small proportion of these stemmed directly from judicial decisions overturning existing statutes under the *Charter*. A greater proportion related to issues raised by interest groups and law enforcement agencies. The interests of victims and witnesses involved in the criminal justice system had also been ignored for many years and were the subject of much of this activity.

A great deal of this legislation originated with the Uniform Law Conference. Some proposals resulted from judicial decisions that went

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<sup>8</sup> (1902) 22 Can Law Times, p.227.

against the Crown. My favourite example was a proposal to deem day as night to get around an adverse interpretation of the trespassing by night offence. Many of the proposals were sensible, of course, and were subsequently enacted.

We were also actively involved in a number of international fora which dealt with matters such as mutual legal assistance and transnational organized crime that required implementation through legislative change at the domestic level.

The *Charter* was always a major consideration in this policy development work. No policy documents went forward to Ministers without a *Charter* impact analysis by human rights specialists. And no government public bill could be introduced in Parliament without certification by the Minister of Justice that it had been examined for compliance with the *Charter*.

Some have argued that these efforts and the internal controls that were put in place caused a chill in policy development as options considered to pose a risk of *Charter* infringement were not put forward for consideration by Cabinet or Parliament.

This view, expressed among others by a former Minister of Justice,<sup>9</sup> may suggest that legislators are willing to consider making laws that may violate fundamental rights. That was not my experience. Rather, the parliamentarians that I encountered expected that careful analysis had been done to ensure that the legislation would not breach constitutional protections.

Others described these systemic efforts as unwelcome attempts to “Charter-proof” the legislation.<sup>10</sup> This may be taken to infer that there is something inherently wrong in seeking to be in compliance with *Charter* standards and that Parliament should be aiming for some higher level of virtue. These critics have said that Parliament has responded to *Charter* decisions with “in your face” legislation that, in effect, dares the courts to intervene again.

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<sup>9</sup> E.g., Victor Toews, former Minister of Justice and opposition justice critic, in ‘The Charter in Canadian Society’ in *The Canadian Charter of Rights and Freedoms: Reflections on the Charter after Twenty Years* (LexisNexis: 2003).

<sup>10</sup> Kent Roach, “The Dangers of a *Charter*-proof and Crime-based Approach to Terrorism” in Daniels et al. *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).



You are all familiar with the concept of a continuing exchange between the courts and legislatures which Peter Hogg and colleagues at Osgoode Hall Law School described as a “*Charter* dialogue” in a 1997 paper, probably the most discussed and cited journal article in Canadian legal history.<sup>11</sup> The authors’ intent was to challenge objections to the legitimacy of judicial review stemming from the view that it is undemocratic to allow un-elected and un-accountable judges to strike down laws enacted by the duly elected representatives of the people.

In outlining their idea of a *Charter* dialogue, Hogg and his fellow authors undertook a review of the cases that had resulted in an enactment being quashed as infringing *Charter* rights and had not been saved by the section 1 justification clause. They found that in two-thirds of the cases a new law was substituted for the old one, adding civil libertarian safeguards but maintaining the legislative purpose. Thus Parliament or the provincial legislatures still had the last word.

What Hogg et al., meant by the dialogue metaphor was that *Charter* decisions left sufficient room for a legislative response and there usually was one. They concluded that the *Charter*’s influence was less direct than had been assumed by the critics of judicial review. While there were at least two “voices” translating *Charter* requirements into laws, in their view the most important of those remained that of the competent legislature.

As was stated by the Honourable Mr Justice Frank Iacobucci:

“The Court does not determine what legislation should or should not be passed or what the content of that legislation should be, but rather, determines whether or not that legislation is consistent with the rule of law and the *Charter*.”<sup>12</sup>

From my perspective, based on the two decades in which I was involved in the development of legislative policy and now as a judge, this new relationship between Parliament and the courts, while occasionally bumpy, works rather well overall.

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<sup>11</sup> “The Charter Dialogue Between Courts and Legislatures,” (1997) 35 *Osgoode Hall L.J.* 75.

<sup>12</sup> “The Charter: Twenty Years Later” in *The Canadian Charter of Rights and Freedoms: Reflections on the Charter after Twenty Years* (LexisNexis: 2003).

*Charter* decisions may support reforms that Ministers agree with but are unable to advance for lack of support within Parliament. In other instances, projects may be underway and the decision provides a justification for moving the time-table forward. One example would be the reform of the Code's provisions dealing with mentally disordered offenders, the catalyst for which was the Supreme Court's decision in *R. v. Swain*.<sup>13</sup>

*Charter* decisions have helped Parliament clear out deadwood from the Code, such as the old vagrancy provision, used as an arbitrary control measure, that the legislators might not otherwise have turned their minds to.<sup>14</sup> In response to the *Heywood* decision striking down the vagrancy law, Parliament adopted a more focused measure, to be applied under judicial supervision, restricting access by sex offenders to areas where children congregate.

The emergence of victims' issues as a major governmental and parliamentary concern led to a series of decisions and responding legislation in the 1990s which illustrates Hogg's notion of a judicial and parliamentary dialogue. An example would be the *Seaboyer* decision which struck down the rape shield law enacted in 1983.<sup>15</sup>

The replacement law enacted a few months later was subsequently upheld by the Supreme Court in *Darrach*.<sup>16</sup> The new legislation balanced the accused's rights with those of the complainant and society's interests in encouraging the reporting of sexual assaults.

In a related area, the Supreme Court quashed a provision restricting access to a complainant's private records.<sup>17</sup> The *O'Connor* decision required the trial judge to balance the accused's rights with the complainant's privacy interests and equality rights. But Parliament was not content with how that balance had been struck by the Court. Its legislative response to *O'Connor* called for more restrictive standards to control access to the records.

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<sup>13</sup> *R. v. Swain*, [1991] 1 S.C.R. 933.

<sup>14</sup> *R. v. Heywood*, [1994] 3 S.C.R. 761.

<sup>15</sup> *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

<sup>16</sup> *R. v. Darrach*, [2000] 2 S.C.R. 443.

<sup>17</sup> *R. v. O'Connor*, [1995] 4 S.C.R. 411.

When the new legislation came back before the Court for review it was upheld on the ground that it was for Parliament to draw the line between the competing interests.<sup>18</sup> In *Mills*, the Court recognized that extensive consultations had taken place before the legislation was introduced. *O'Connor* had not been a rigid constitutional template and it remained open to Parliament to make different choices as to how to achieve the proper balance between the interests at stake than those outlined by the Court.

This process of dialogue has not always been successful from the Parliamentary perspective. In *Morales*,<sup>19</sup> a provision permitting the denial of bail on the public interest ground was struck down in 1993 as being vague and overbroad. Parliament amended the Code with new language in 1997. When it came back before the Supreme Court in 2002, the Court unanimously found the 'new language' of a general nature also unconstitutional, but upheld a more specific phrase on a five-four split.<sup>20</sup> In that instance, the minority suggested that dialogue had become an abdication of the Court's judicial review responsibility. But that was, I think, a rare negative comment on what has otherwise been a healthy process.

In my view, this notion of a dialogue respects the separation of powers which is at the heart of our constitutional scheme of government. The Courts have not abused the jurisdiction thrust upon them with the adoption of the *Charter*, and the legislatures have not abused their right to respond with new enactments. Both institutions have demonstrated respect for the rule of law and their roles in a constitutional democracy.

The Courts have exercised restraint when striking down laws that are found to infringe constitutional guarantees. Justice Robert Sharpe of the Ontario Court of Appeal cites two examples of this when he lectures

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<sup>18</sup> *R. v. Mills* [1999] 3 S.C.R. 668.

<sup>19</sup> *R. v. Morales* [1992] 3 S.C.R. 711.

<sup>20</sup> *R. v. Hall* [2002] 3 S.C.R. 309.

to judges on hearing and deciding *Charter* issues<sup>21</sup> and in his text on the *Charter* written with Professor Kent Roach of the University of Toronto.<sup>22</sup>

The *Morgentaler*<sup>23</sup> decision, which Justice Sharpe cites, may be not the first example that would come to mind as an example of judicial restraint. I can tell you that when I was involved in developing the legislative response to that decision we would have been much happier if the Court had exercised even greater caution, given the challenges that we faced in dealing with the issue.

But in *Morgentaler* the Court adroitly avoided the controversy generated by *Roe v. Wade* in the United States. Quite apart from the debate over the social issue that *Roe* ignited and which remains active today, the judgment imported a substantive right to privacy that had not previously been recognized under the US constitution and which has effectively precluded further legislative action by Congress. Many legal scholars in the US, including many of those who support a woman's right to choose abortion services as a matter of public policy, believe that *Roe v. Wade* was wrongly decided. And the decision has been characterized as fueling the debate in the US over judicial activism which, to this day, contributes to the opposition to progressive measures.

In contrast, the Supreme Court of Canada's decision in *Morgentaler* made it clear that it remained open for Parliament to come back with a new law that would have established a better procedure to ensure a more even and fair application of restrictions on access. After consulting broadly, including with leading constitutional law experts, we thought we had come up with such a bill. It passed the House of Commons but fell short in the Senate by one vote. As you know, the matter has been left to rest since then. But that was not for want of a legislative avenue to pursue foreclosed by the Court.

The second example of judicial restraint which Justice Sharpe cites is the Supreme Court's refusal to interfere with Quebec's use of the

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<sup>21</sup> Robert J. Sharpe, "The Role of the Courts in a Constitutional Democracy"; paper presented to the National Judicial Institute *Charter* conference, June, 2007, Whistler, B.C.

<sup>22</sup> R. Sharpe and K. Roach, *The Charter of Rights and Freedoms*, 3d ed. (Toronto: Irwin Law, 2005).

<sup>23</sup> *R. v. Morgentaler* [1988] 1 S.C.R. 30.

notwithstanding clause in the *Ford* case.<sup>24</sup> As you will recall, Quebec had enacted a general notwithstanding clause that exempted all of its legislation in protest over the repatriation of the constitution and adoption of the *Charter*. This was struck down by the Quebec Court of Appeal but the Supreme Court of Canada took the contrary position that it remained a valid exercise of the override power.

This use of the override made it deeply unpopular. As Professor Adam Dodek of the University of Ottawa recently commented in the *Law Times*,<sup>25</sup> a convention seems to have developed against its use and it may be going the way of other constitutional powers such as disallowance and reservation, obsolete but not yet unenforceable.

Dodek suggests that a different political context might have been created around the override had its first use arisen to uphold the rape-shield law in response to the *Seaboyer* decision, of which I spoke earlier. Having been present throughout those discussions, I can tell you that it was never actively considered by the government of the day, despite the prevailing view that matters could not be left to stand as they were in the wake of the Court's decision.

In my present incarnation as a judge, I regard the judicial review function imposed by the *Charter* as an awesome responsibility. Within six months of my appointment, I was invited to strike down a provision of the *Citizenship Act* on the ground that it discriminated on the basis of gender and breached section 15's equality rights. My task was made somewhat easier by the fact that the parties were agreed that the section had to go, based on a Supreme Court precedent, and in fact had prepared a draft order for my signature.

In my enthusiasm, I went further and struck down another provision that wasn't part of the deal. That led to a joint motion for reconsideration and a revised order. Somewhat chastened by the experience, I have learned to be more cautious about these matters, but I must confess that my interest in a case is heightened when there are *Charter* issues at stake.

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<sup>24</sup> *Ford v. Quebec*, [1988] 2 S.C.R. 712.

<sup>25</sup> Citing Professor Chris Manfredi of McGill as his source for the idea.

Looking back from to-day, it is hard to imagine what Canadian society would be like without the *Charter*. It stands firmly within the hearts and minds of Canadians as a statement of our shared values and as an effective instrument to control abuses of our fundamental rights and freedoms. That is not to say that every *Charter* decision is broadly accepted. Indeed there continues to be a debate about the legitimacy of judicial review in the context of difficult social policy issues. But while the public may have a jaundiced view of many institutions, including the courts, opinion polls consistently show that their support for the *Charter* is unwavering.

To close, I will leave you with the solution found by an ancient Greek city state to curtail the proliferation of new legislative proposals, as reported by Sir Edward Gibbon in his epic tale of the Decline and Fall of the Roman Empire. The solution was drastic but no doubt it had the effect of concentrating the mind on the merits of one's proposed legislative measure.

A Locrian, who proposed any new law, stood forth in the assembly of the people with a cord round his neck, and if the law was rejected, the innovator was instantly strangled.<sup>26</sup>

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<sup>26</sup> Edward Gibbon, *The Decline and Fall of the Roman Empire*, Vol. 4 p.307.