

Address

on

Charter of Rights: Government by Judges

by

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My task this morning is to say a few words about Canada's new Charter of Rights and Freedoms and how it may effect the independence of the judiciary.

Those who interpret government to the public -the media- have been discovering what those of us in the know knew all along: namely, that entrenching rights and freedoms increases the power of the judiciary. As they watch judges under the mantle of the Charter strike down the old Lords Day Act but uphold modern Sunday-closing legislation, require hearings for those whose claim for refugee status is questioned by the Canadian government, and consider the equity of compulsory retirement at age 65, they trumpet to their readers and viewers that Canada is being transformed into a regime of government by judges.¹

One cannot blame journalists for speaking in such terms. They live from cataclysm to cataclysm. If they avoided hyperbole and used the grey, mealy-mouthed language of academics, no one would read them. But the grey mealy-mouthed truth is that the journalists do exaggerate -grossly. There can be no doubt that the Charter increases the responsibilities of the judiciary in the Canadian scheme of government. These responsibilities, however, were already significant before the Charter. In shaping the common law which regulates so many of the relationships in our commercial and family life, in elaborating the doctrines underlying Quebec's Civil Code, in putting flesh on the skeleton

of statute law passed by legislatures, in determining within the very broad parameters set by Parliament the appropriate sentence for criminal offenders, in supervizing the legality of administrative bodies, in adjudicating the most contentious federal-provincial disputes from mineral rights to the power to amend the Constitution and in interpreting the language rights in Canada's original Constitution -in these and other ways the Canadian judiciary has had a great influence on how Canada is governed.²

Important as the judiciary's role in governance has become, it has not by any means come to exercise power equal to that of the huge public and private bureaucracies over the every day lifes of citizens. Nor is the judiciary noticeably less accountable than those power centres. However much the Charter of Rights has increased the judiciary's power, we are still a very long way from a judicial imperium in Canada.

Just how much the Charter has increased the power of Canadian judges will depend very much on the judges and their response to the Charter. The five years experience we have had with the Charter indicate that the judicial response is likely to be fluctuating in nature.³ Here I will speak only of the Supreme Court of Canada. Lower courts across Canada have taken and will continue to take important initiatives in applying the Charter but, given the Supreme Court's authority in our appellate system,

it will be the pace setter in determining judicial treatment of the Charter. And what an interesting pace-setter it has been!

The Supreme Court's initial response to the Charter was extremely positive and liberal. In the first 12 cases in which the Court adjudicated Charter claims, it upheld the Charter claim in 9 of these cases. In these early cases, the Court made it clear that the Canadian judiciary was to take the Charter seriously. Legislative and executive acts which clearly violated its provisions and for which government offered no reasoned policy defence were to be rendered null and void. The rights and freedoms in the Charter were to be interpreted broadly- "purposively"- and not in a narrow or technical manner. On these propositions the Court was unanimous. In these early cases the Court was signaling to Canadians its sense that a Constitutional Charter of Rights and Freedoms gave the Canadian judiciary a much stronger mandate to review and strike down offending acts of government than had come with the Canadian Bill of Rights.⁴

But this was just the Supreme Court's initial response. It was not long before the Court -some of its members more than others- began to indicate that, while in the override clause there was a democratic safety valve on the judiciary's mandate, the judiciary itself should develop some self-imposed restraints. After an initial 75% success rate for Charter claims in the Court's first dozen decisions, in all but 3 of the court's next

20 decisions Charter claims were rejected.⁵ More significant are the doctrinal positions and cleavages that began to appear.

The Court's decision in Operation Dismantle⁶ was a disincentive to public interest groups to use charter litigation as a means of attacking alleged deficiencies of government in providing for collective security. While the Court's decision in the B.C. Motor Vehicle Act Reference⁷ to treat the section 7 guarantee of "fundamental justice" as substantive and not simply procedural shocked some commentators as dangerously "activist", the majority opinion, expressing an awareness of public concern about the court becoming a "super-legislature", stated that the guarantee of substantive justice did not apply to all fields of public policy. "Principles of fundamental justice", wrote Justice Lamer "do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system."⁸

In Dolphin Delivery The Supreme Court took another major step to limit the impact of the Charter.⁹ The Charter would not apply to common law rulings of courts in private litigation involving no action by governments. Treating the courts as one of the three fundamental branches of government was, said Justice McIntyre, "probably acceptable" for political science but not for the purposes of charter application.¹⁰ In three recent decisions denying constitutional protection to the right to strike and

other collective bargaining activities of labour unions, the court's majority sounded a clear and loud note of judicial self-restraint.¹¹ "If the right to strike is constitutionalized," Justice McIntyre argued, "This would inevitably throw the courts back into the field of labour relations" a field in which they lack the "always helpful and sometimes necessary" expert knowledge.¹² Further if the right to strike or lock out were included as elements of freedom of association, in case after case courts would be required, under section 1 of the charter to assess the social and economic arguments for interfering with free collective bargaining, and this said Justice McIntyre, "is a legislative function into which the courts should not intrude."¹³

Self-restraint has also marked the Supreme Court's approach to the Charter issue which bears most directly on the judiciary's relationship with the other branches of government -namely, the guarantee of judicial independence in section 11(d). In Valente, Justice Le Dain limited the aspects of court administration which must be under judicial control to matters directly affecting adjudication such as the "assignment of judges, sittings of the court and court lists -as well as the related matters of allocation of court rooms and direction of the administrative staff carrying out these functions."¹⁴ Extending judicial control beyond these limits as advocated by the Deschênes report may be desirable, said Justice Le Dain, but was not to be obtained through a judicial declaration of constitutional right.

These decisions indicate that a debate has been going on within the Supreme Court on the proper scope and application of the Charter - on how much government by judges should result from the Charter. This debate, I suspect, has been going on within lower courts all across Canada and within the heads of many individual judges. In this debate there is a measure of judicial accountability. While Canada's judges know that the Charter has given them a mandate to intervene more actively on the part of those abused by government authority, they must also sense that they have not been given a blank cheque - so to speak - on which they are free to write any value whatsoever. How far they should go in giving effect to the Charter will depend, to a considerable extent, on the judiciary's sense of public expectations and its own institutional capacity.

The experience of other countries with constitutional bills of rights, especially, but not only the United States, as well as our own experience after only five years of the Charter, clearly demonstrates that this setting of the bounds of judicial power is a dynamic process in which action is followed by reaction. Already in Canada we have had a period of "all systems go" followed by one in which a majority of Supreme Court justices are trying to "put the breaks on". In this dynamic process the only thing we can be sure about is that each stage of the process will be controversial. Here Russell's law comes into play:

entrenching rights and freedoms in the Constitution tends to "judicialize politics and politicize the judiciary".¹⁵ The Supreme Court is now, for instance, coming under attack from the left in Canada because business corporations benefited from some of its early activist decisions (for example, Southam newspapers¹⁶ and Big M Drug Mart¹⁷) while the Charter claims of labor unions were casualties of its more recent self-restraint.

There can be no avoiding public criticism of these Charter decisions and of the judges who make them. So many of the issues arising under the Charter are divisive issues in our society. No matter which way the decisions go there will be winners and losers -angry, vocal losers. And Canadian judges will have to go to bed at night with the words of their critics ringing in their ears. Wherever judges have been charged with the responsibility of deciding disputes about constitutional rights and freedoms, their decisions have aroused considerable political controversy. That, as we know, has certainly been the case in the United States. But it is also true of West Germany, India, Ireland, Italy and most recently France where the Conseil Constitutionnel has become extremely active in reviewing legislation before it is enacted.¹⁸ This kind of controversy simply goes with the turf: it was, it is, an inevitable consequence of adopting a constitutional Charter of Rights in Canada.

Distasteful as this feature of charterland may be to some of

you I do not think it threatens the essential conditions of judicial independence. Those conditions so far as the individual judge is concerned, and as identified by the Supreme Court in Valente, are security of office and financial security. For superior court judges these essential conditions of independence are explicitly secured in our original constitution and for most other judges, at least all those who conduct criminal trials, these conditions are part of the guarantee of judicial independence included in section 11 (d) of the Charter.¹⁹ But all together aside from this formal constitutional protection there is an even more fundamental political protection. Today in Canada it is beyond the pale -politically speaking- for politicians to risk the public wrath they would incur were they to remove a judge or reduce his or her remuneration in response to an adverse Charter decision.

In the Beauregard case Chief Justice Dickson suggested that with a constitutional Charter of Rights judicial independence becomes even more important in Canada than it is in the United Kingdom.²⁰ The Chief Justice's observation is surely correct. The Charter raises the stakes of judicial independence: the other branches of government and the political interests which support them have more to lose before judges deciding the permissible bounds of legislative and executive activity. But although now, because of the Charter, Canadians have more at stake in maintaining judicial independence, I do not believe they

are more at risk in having what have traditionally been looked upon as the essential conditions of judicial independence undermined.

Besides the protection afforded by the constitution and our political culture, a safety valve -what I have referred to as a democratic safety valve- has been built into the Charter. I refer to section 33, the "notwithstanding" or "legislature override" clause. Political leaders who believe judicial application of the Charter has been unwise and unfair can superimpose their own position over that of the judiciary's for a five year period. This provision of the Charter shocks American observers and seems at odds with their absolutist conception of constitutional rights. Frequent use of the override clause would, no doubt, make a mock of the Charter. But this has not occurred in Canada. Aside from Quebec's entirely symbolic and unconstitutional blanket use of the override,²¹ to the best of my knowledge it has been used only once -and this once in Saskatchewan to legislate striking public servants back to work.²² As it turns out this legislation did not encroach upon a Charter right as the Supreme Court has ruled that the right to strike is not included in the constitutionally protected freedom of association. Canada, it would seem, prefers to retain the possibility of a sharing of responsibility between the judicial and popular branches of government in making decisions about the acceptable limits of rights and freedoms.²³ The override clause

stands as a check and a balance on judicial power.

Fears have been expressed that plunging the judiciary into political controversy could be fatal to the legitimacy of the courts. Such fears have, perhaps, been the rationale for maintaining that branch of the law of contempt which punishes people for "scandalizing the courts". I have entertained such fears myself. But now I question their validity if a consequence of the courts losing legitimacy is that people stop using them. I can see no evidence of such a loss of legitimacy in the United States where the judiciary has been politically controversial for a great many years -where folks drive around the country with bumper stickers calling for the impeachment of their judicial bêtes noirs. Americans continue to flock to their courts for all kinds of purposes. Perhaps the advertising industry can best explain this phenomenon. Some years ago when I mentioned a particularly offensive beer advertisement to a friend in the industry, he said "ah, good, you noticed it, you remembered it." He was not at all concerned that I didn't like the "ad". Perhaps that is happening to the Canadian judiciary. As its power is unmasked, it may lose in popularity but gain in public respect for its power. Citizens may become more inclined to resort to the courts and endeavour to use judicial power for their own ends.

Those who are offended by judicial decisions on The Charter

will attempt to revise their losses not by directly interfering with judicial decision-making nor by boycotting the courts, but by trying to reshape the judiciary through the appointment process. It is in the appointing process that the judiciary is most immediately vulnerable to the partisan and ideological politics of the country. Judges -at least in the common law world- do not appoint themselves. In our democratic system they are appointed by politicians.

In our own history and that of other countries which share our general method of appointing judges two kinds of political appointments to the bench have been manifest. The first is old-fashioned patronage- rewarding the party faithful. In the past we have had plenty of that in Canada at both the federal and provincial levels.²⁴ Fortunately it has been on the decline in Canada. The recent Report of the Canadian Bar Association's Committee on the Appointment of Judges in Canada, however, shows that "political favoritism" of this kind is far from dead- particularly in certain parts of this country.²⁵ The bad feature of this practice is that it introduces an irrelevant factor- service to the governing party- into the selection process with the result that some people who are poorly qualified in a professional and personal sense are appointed while other well qualified persons are excluded from the judiciary.

But from the perspective of judicial independence a second

kind of political appointment raises a more serious problem. This is what is sometimes referred to as an ideological appointment. A judicial appointment is ideological when the politicians whom control the appointing process choose a person who they have reason to believe will interpret and shape the law in a way that conforms with their own political ideology. The distinction I am making between old fashioned patronage and ideological appointments is not a black and white one. To some limited extent appointing persons because of their service to the government party may tend in a very general way to foster a particular point of view - a liberal or conservative or, much more rarely, social democratic or pequiste orientation- on the bench. But this is a far cry from selecting a judge because of his or her views on some specific issues of great concern to the appointing authorities -such as abortion, or police power, or gender discrimination.

Up to now ideological appointments have not played much of a role in staffing the judicial branch of government in Canada. Rummaging through the archives, James Snell and Frederick Vaughan in preparing their history of the Supreme Court of Canada found a little evidence of a concern on the part of politicians in the early days to fill vacancies with persons who were reliably centralist on federal issues. John A. Macdonald, for instance put it this way: "We must endeavour to get a good man who will not throw Dominion rights away".²⁶ But I do not see any evidence

in the pattern of federal appointments in more recent times of a policy of selecting judges on the basis of their attitude to federal issues or any other issues.

In the United States, however, federal judicial appointments have become increasingly ideological since Franklin Roosevelt's effort to reverse his losses in the Supreme Court. Under Nixon, Carter and now Reagan it has become a systematic policy. These presidents have all had an ideological litmus test which candidates for judicial office must pass in order to receive a presidential nomination. The Chief Justice of the United States, William Rehnquist, in his new book on the United States Supreme Court, regards this practice as a means of reconciling the power of an appointed judiciary with democracy: "A president who sets out to pack the Court does nothing more than seek to appoint people to the Court who are sympathetic to his political or philosophical principles."²⁷ This approach, in his view, gives the citizenry, who have elected the President, an indirect voice in selecting an otherwise undemocratic branch of government.

The trouble with this view is that the President is elected for four years whereas the judges he appoints may remain in office for decades and the ideology which the President hopes his appointees will bring to bear on the cutting edge of the law represents at best only half of the national political community. Only the swing of the national political pendulum has saved the

United States from an ideologically unbalanced federal judiciary.

Some Canadian observers of this American practice have taken comfort in the fact that on occasion judges have not conformed with the ideological expectations of the President who appointed them. The legendary examples are Felix Frankfurter's conservatism which may have disappointed F.D.R. and Earl Warren's liberalism which must have surprised Eisenhower. But data reported in Judicature, the journal of the American Judicature Society, suggests that these famous examples may be quite exceptional. The evidence shows that since the Kennedy presidency among the hundreds of federal court justices appointed there is a marked and predictable ideological contrast between the way judges appointed by Democratic and Republican presidents decide cases dealing with civil liberties.²⁸

The Charter of Rights increases the likelihood of ideological judicial appointments in Canada. Judicial decisions on the Charter -whether liberal or conservative, activist or restrained- are bound to touch upon issues of vital importance to politically active citizens who will try to secure the triumph of their point of view by urging politicians to appoint judges whom they regard as "ideologically sound". It would be naive and inappropriate to respond to this prospect by trying to remove politics from the appointment process. Given the very large role

our courts now have in governing us, our democratic ethos requires that elected politicians should have the final say in deciding who are to be our judges. But we can -we must- try to reform our system of appointing judges so that there is a reasonable balance in the political interests that influence the selection process and these political interests do not obliterate professional considerations.

The Meech Lake proposals by giving provincial governments a role in the selection of Supreme Court judges would introduce an important check and balance into the appointment process. But these proposals are not enough. In addition, the federal and provincial governments must put in place advisory nominating committees along the lines recommended by the Canadian Bar Association and the Canadian Association of Law Teachers.²⁹ Such committees made up of representatives of both levels of government, appropriate chief justices, representatives of the bar and the general public, are needed for all federal judicial appointments. It is these committees which can serve as the vehicle for broadening and balancing the professional and political considerations which shape the pool of judicial candidates from which politicians make the final selection.

As we come to terms with the reality of judicial power in our society we cannot expect and, as democrats, should not want our third branch of government to be completely insulated from

the body politic. But what we can and should look for is a judiciary that is a fair reflection of the social and political pluralism of the society it has such a hand in governing.

End Notes

1. See, for instance, Robert Fulford, "The Charter of Wrongs", Saturday Night, Dec. 1986, and Marcel Adam, "Du prétendu gouvernement des juges", La Presse, Jan. 6, 1987.
2. For an estimate of the extent to which the Charter might increase judicial power in Canada, see Peter H. Russell, "The Effect of the Charter of Rights on the Policy-Making Role of Canadian Courts", Canadian Public Administration, 1982, 1.
3. For an estimate of the Charter's overall impact on the country in its first five years, see F.L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms", Canadian Journal of Political Science, 1987, 31.
4. This was explicitly acknowledged by Justice Bertha Wilson in Singh et al v. M.E.I. [1985] 1 S.C.R. 177, at p. 209.
5. The decisions considered in making this calculation are those reported in The Supreme Court Reports up to and including R. v. Rahey [1987] 1 S.C.R. 588.
6. [1985] 1 S.C.R. 441

7. [1985] 2 S.C.R. 486
8. Ibid., at p. 503
9. [1986] 2 S.C.R. 573
10. Ibid., at p. 600
11. Reference re Public Service Employee Relations Act (Alta.)
[1987] 1 S.C.R. 313; Public Service Alliance of Canada v.
The Queen [1987] 1 S.C.R. 424; Saskatchewan v. Retail,
Wholesale and Dept. Store Union [1987] 1 S.C.R. 460.
12. Reference re Public Service Employee Relations Act (Alta.),
at p. 416.
13. Ibid., p. 420
14. [1985] 2 S.C.R. 673, at p. 709
15. Peter H. Russell, "The Political Purposes of the Canadian
Charter of Rights and Freedoms", Canadian Bar Review, 1983,
30, at pp. 51-2.
16. Hunter et al. v. Southam Inc. [1984] 2 S.C.R. 145.

17. R. v. Big M Drug Mart [1985] 1 S.C.R. 295.
18. See Alec Stone, "In the Shadow of the Constitutional Council: The Juridicization of the Legislative Process in France", paper delivered at meeting of the International Political Science Association Research Committee on Comparative Judicial Studies, Rotterdam, Aug. 12, 1987. (forthcoming in West European Politics, July 1988).
19. See, in particular, Reference re Justices of the Peace Act (1984), 16 C.C.C. (3d) 193, and Walton v. Hebb, judgment rendered by Justice de Weerdt of the Supreme Court of the Northwest Territories, Oct. 11, 1984.
20. [1986] 2 S.C.R. 56
21. In Alliance des Professeurs de Montreal et al (1985), 21 D.L.R. (4th) 354, The Quebec Court of Appeal held that Quebec legislation re-enacting all previous Quebec statutes and adding to each one a section that it is to operate notwithstanding ss. 2 and 7 to 15 of the Charter, does not meet the requirements of section 33 of the Charter.
22. See F.L. Morton, op. cit., at pp. 46-7.
23. For an exposition of the political theory underlying the

- override clause see Paul C. Weiler, "Rights and Judges in a Democracy: A New Canadian Version", University of Michigan Journal of Law Reform, 1984, 51.
24. For a summary of research on judicial appointments, see Peter H. Russell, The Judiciary in Canada: The Third Branch of Government, McGraw-Hill/Ryerson, 1987, ch. 5.
25. The Appointment of Judges in Canada, Canadian Bar Association, Ottawa, 1985.
26. Quoted in James Snell and Frederick Vaughan, The Supreme Court of Canada: History of the Institution, The Osgoode Society, 1985, at p. 46.
27. William H. Rehnquist, The Supreme Court: How It Was, How It Is, William Morrow & Co., 1987.
28. See Jon Gottschall, "Carter's Judicial Appointments: the influence of affirmative action and merit selection on voting in the U.S. Courts of Appeals," Judicature, 1983, 164; Sheldon Goldman, "Reaganizing the Judiciary", Judicature, 1985, 313.
29. The Report of the Canadian Bar Association Committee on the Supreme Court of Canada (Ottawa, 1987) urges this course of

action in implementing The Meech Lake proposals._