

GAVIN SINCLAIR
IS A SECOND YEAR
LAW STUDENT AT
THE UNIVERSITY OF
VICTORIA. HE
COMPLETED HIS
BACHELOR OF
SCIENCE AT MCGILL
UNIVERSITY.

The Courts Under Siege: How the New Charter Politics are Affecting the Judiciary

In the spring of 1998, Alan G. Gold, president of the Criminal Lawyers' Association wrote an open letter to the press. In it, the lawyer argued that recent criticism of the Supreme Court of Canada was an "ill-conceived and misguided application of parliamentary supremacy doctrine and an unfair attack on an institution that cannot as a matter of law defend itself."¹ Gold's letter was sparked by a Reform Party initiative in which the party conducted a systematic parliamentary examination of Supreme Court decisions based on the Charter of Rights and Freedoms² — an imperative of Reform's program to stop the growing usurpation of the role of elected politicians by judges.³

Such exchanges are growing more frequent as academics, the media and the public debate the role of the judiciary in Canada. In recent years, the enactment of the Charter and a shift in ideology among the Supreme Court justices have altered the role of the judiciary and increased the relative importance of policy considerations in litigation. However, despite the rhetoric of supporters of parliamentary supremacy and the often defensive posture of the courts, it is unlikely that the judiciary can or will revert to the less interventionist decision-making model of the past. The new judicial activism and the corresponding criticism that has been levelled at the courts are an inevitable result of the Charter and the broad, purposive approach that the judiciary has developed to aid in the protection of the rights that it enshrines.

The Supreme Court of Canada — Pre-Charter

Although the Supreme Court was created in 1875, it only replaced the Judicial Committee of the Privy Council as Canada's ultimate constitutional arbiter in 1949, when the Statute of Westminster was passed. At that time, the doctrine of parliamentary supremacy guided the decisions of the Supreme Court. Only procedural and administrative rules constrained the law-making powers of Parliament or the legislatures, as long as they stayed within their respective jurisdictions. Therefore, the majority of the Court's constitutional decisions involved striking down laws that violated the division of powers between Ottawa and the provinces, enumerated in sections 91 and 92 of the Constitution.⁴ For the most part, this arrangement meant that the Supreme Court left evaluations of the substantive merits of legislation to elected legislators and concerned itself with "declaring" the law to interested parties.⁵

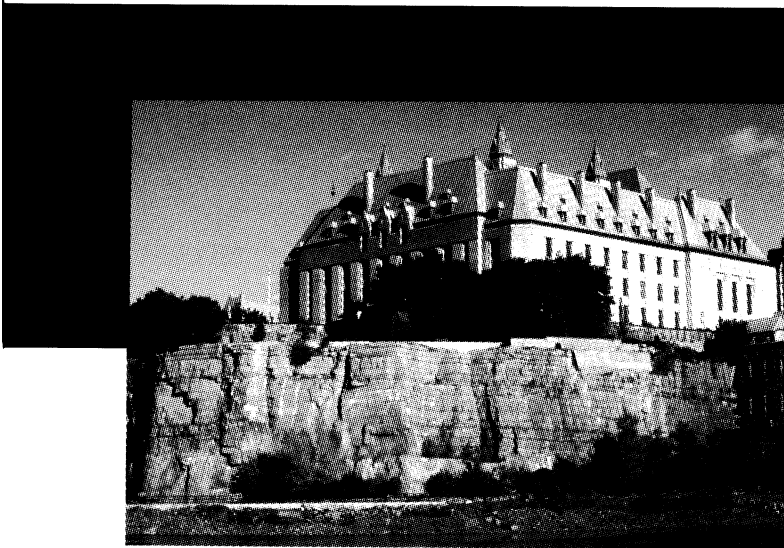
1 "Judge Not, Lest Ye Be Judged," *The Ottawa Sun* (July 5, 1998) C2.

2 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; hereinafter referred to as "the Charter."

3 Gabrielle St-Hilaire, "Constitutionally Ripe Entitlement: Chipping Away at the Definition of Spouse in *Rosenberg v. Canada*" (1997-98) 8 *Canadian Current Tax* 117 at 124.

4 Constitution Act, 1982, see note 2.

5 Peter Hogg, *Constitutional Law of Canada* (Toronto, ON: Carswell, 1997) at 122.



SUPREME
COURT OF
CANADA

Two Models of Judicial Decision Making

In his renowned 1968 article, Paul Weiler describes two models of judicial decision making.⁶ The “declaratory” model of judicial dispute resolution competes with the “policy-making” approach. The declaratory model embodies the traditional perspective Canadian courts had of their role in the legal process. The model conceives of the judge as an adjudicator of specific, concrete disputes. It mandates that judges decide cases by the mechanical application of legal rules, which they find already established in the legal system. These rules are binding on judges — a judge’s personal opinion as to a rule’s wisdom is irrelevant.⁷ Inherent to the model is an acceptance that the judge’s task is to settle present disputes, not engage in future oriented debates over general policy questions. For the model to function properly, it is essential that there be an existing framework of applicable standards. This ensures a consensus between the judge and the litigants that the judge, in settling the dispute, will apply only those rules that could reasonably be anticipated by the parties to govern their conduct. When these requirements are met, the parties can expect both a reasonable certainty in the law and the way in which it will be applied by courts.

The principles of certainty and judicial restraint are much less central in the “policy-making” approach. Instead, this second approach is founded on American legal realism which posits that the mechanical application of rigid, automatic rules (i.e. strict *stare decisis*) cannot adequately dispose of individual cases. The policy-making model contemplates judges as, “political actors, continuously engaged in the formulation of policy for society” and therefore judges make policy, or *legislate*, through essentially the same reasoning as other actors in the governmental system.⁸ Moreover, at least for some judges, such political action is becoming their primary concern and, consequently, adjudicating specific disputes is subordinated.⁹

The trouble with the policy-making model is clear. The Legislature’s policy-making power has traditionally been distinguished from that of the court because of the authority and legitimacy given to politicians by the electorate. The Anglo-Canadian parliamentary model of government stresses that only the representative legislator can “make law” because

6 Paul Weiler, “Two Models of Judicial Decision Making” (1968) 46 *Canadian Bar Review* 407.

7 See above at 410.

8 See above at 411.

9 See above.

10 John Locke, *Of the Extent of Legislative Power*, The Second Treatise (Cambridge and New York: Cambridge University Press, 1960).

11 *Harrison v. Carswell*, [1976] 2 Supreme Court Reports 200; hereinafter referred to as "Harrison."

12 See above at 236.

13 See above at 236.

14 See above 206.

15 E.L. Morton, *Law, Politics and the Judicial Process in Canada*, (Calgary: University of Calgary Press, 1994).

16 Curiously, Dickson seems to have changed his mind in later years. After the enactment of the Charter, Dickson advocated a broad purposive approach rather than a narrow, restrictive interpretation. Perhaps he felt that the Charter could be interpreted in a way that embraced the canvassing of difficult policy issues. See "Dickson Discourages Mechanical Legalism" *Globe and Mail* (5 October, 1985).

17 So too for the other superior courts. Some commentators have suggested that the Charter has not resulted in a redistribution of power from the state to individuals, or from privileged groups in society to disadvantaged ones. Rather, the redistribution is institutional, from representative bodies to the courts. See Gareth Morley, "A Just Measure of Pain? Sentencing and Sentencing Reform in the Era of the Charter" (1997) 55 *University of Toronto Faculty of Law Review* 269 at 271.

18 Part VII of the Constitution Act, 1982, see note 2.

19 *Hunter v. Southam*, [1984] 2 Supreme Court Reports 145 at 169. It has been argued however, that the approach taken by some Supreme Court justices has so extended the reach of the Charter that the Court has in effect been acting as the "author of the Constitution." See Robert E. Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 *McGill Law Journal* 1 at 13.

only elected legislators have the consent of the people to govern.¹⁰ For this reason, it is theoretically unjust for judges to engage in political decisions since they are neither representative of, nor responsible to, the Canadian citizen.

These issues were examined by the Supreme Court of Canada in *Harrison v. Carswell*.¹¹ In that 1976 case, the Court was asked to balance the traditional right to private property with the right to strike. The case raised fundamental questions as to the role of the Court under the Constitution and the extent to which it should decide policy questions. Justice Dickson, writing for the majority, expressed the view that:

I do not for a moment doubt the power of the Court to act creatively. . . but manifestly one must ask — what are the limits of the judicial function? Cardozo, *The Nature of the Judicial Process* (1921) p. 141 recognised that the freedom of the judge is not absolute: A judge may not innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles.¹²

Justice Dickson went on to conclude that substantial changes in the law should be made by the enacting institution (the Legislature), which is a representative of the people and designed to manifest the political will, and not by the Court.¹³ In a strong dissent however, Chief Justice Laskin wrote that the Supreme Court of Canada should not pay a mechanical deference to *stare decisis* but instead could play a progressive, balancing role, without yielding place to the Legislature. Justice Laskin argued, "this Court, above all others in the country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to them."¹⁴

It is interesting that the differences between Justice Dickson's majority opinion and Justice Laskin's dissent do not stem from legal issues but instead centre on the limits of the Supreme Court's authority. The two judges agreed that there was a serious legal problem raised by the *Harrison* case; however, Laskin argued that the Supreme Court should solve it, while Dickson maintained that law reform should be the business of the Legislatures, not the courts.¹⁵ Despite the decision in *Harrison*, it is evident that Laskin's more interventionist approach eventually succeeded.¹⁶ Courts now routinely decide difficult policy questions that may have significant political ramifications. In large part, the success of this approach may be attributed to the augmented powers conferred on the courts by the Charter.

The Supreme Court of Canada — Post-Charter

The Charter fundamentally altered the Supreme Court of Canada's constitutional mandate from mere interpretation of division of power disputes to the more complicated task of striking down legislation that violated the Charter rights of Canadians.¹⁷ Section 52 of the Constitution states that it is the supreme law of Canada and that "any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."¹⁸ Section 52 has impelled the Supreme Court of Canada to declare that its paramount duty is to be the "Guardian of the Constitution."¹⁹

Guarding Charter values, that are often vaguely defined, has required the Supreme Court to rely much more heavily on policy considerations and consequently, ushered in a new era of "judicial activism." Constitutional scholar Professor Peter Hogg writes:

The major effect of the Charter has been the expansion of judicial review. Not only

are Charter cases more numerous than federalism (division of power) cases were, they are also much more policy laden. This is because many of the Charter rights are expressed in exceedingly vague terms, and all of the rights come into conflict with other values respected in Canadian society. The result is that judicial review under the Charter involves a much higher component of policy than any other line of judicial work.²⁰

Courts quickly applied the Charter to wield new authority. In November 1982, Jules Deschenes, then Chief Justice of the Quebec Superior Court, stated: “when lawmakers don’t pass laws that are in keeping with changing social conditions, it is up to judges to exercise their legislative power and change the law to suit the time.”²¹ In the early years after the enactment of the Charter it seemed as if the courts’ more interventionist approach would go unchallenged. Indeed, Professor Hogg comments:

Curiously, judicial activism has not been accompanied by the public controversy that has now become the standard fare of politics in the United States. It is not clear whether this was because Canadians are more respectful of their Court or because they are less disturbed by the liberal outcomes.²²

Recent events, however, suggest that the subject of judicial activism has become much more of a media and political issue. In particular, the Supreme Court’s use of the controversial remedy of “reading-in” has precipitated considerable debate.

“Reading-in”: A Reasonable Remedy for Unconstitutional Legislation?

Section 52(1) of the Constitution has overriding effect against any unconstitutional laws of Canada and is the chief source of remedies available for violations of the Constitution.²³ Read strictly, section 52(1) appears to contemplate that only a holding of invalidity will serve as a remedy for an inconsistency between the Constitution and a statute. In practice however, the Supreme Court has developed a number of variations on the simple declaration of invalidity.²⁴ These remedies range from nullification (striking down) and severance (removing the offending section without striking down the entire statute) to the most interventionist remedy of “reading-in.”

The Supreme Court assumed the power to “read-in”, or add words to a statute to make it constitutional, in *Schacter v. Canada*.²⁵ In *Schacter*, biological parents claimed child care benefits that were conferred only on adoptive parents by the Unemployment Insurance Act. The Act treated adoptive parents more generously than biological parents and the Court found that this violated section 15 of the Charter, the provision guaranteeing equality. The most obvious remedy was to strike down the Act; however, this would have resulted in the denial of benefits to all parents. Therefore, the Court held that it possessed the power not only to sever language from a statute but also to “read-in” new language in order to remedy a constitutional defect. The Court acknowledged that reading-in would constitute a substantial intrusion into the legislative domain and stated that the remedy would only be used in the clearest of cases such as:

- 1) where the addition of the excluded words were consistent with the legislative objective;
- 2) there seemed to be little choice as to how to cure the constitutional defect;
- 3) the reading-in would not involve a substantial change in the cost or nature of the legislative scheme;

20 See note 5 at 630.

21 *Globe and Mail* (12 November, 1982) A16.

22 See note 5 at 631.

23 The Charter possesses its own remedy clause (section 21(1)) but it is only applicable to Charter breaches while section 52(1) applies to the entire Constitution.

24 See note 5 at 745.

25 *Schacter v. Canada*, [1992] 2 Supreme Court Reports 679; hereinafter referred to as “*Schacter*.”

- 4) the alternative of striking down the under-inclusive provision would be an inferior remedy.²⁶

Ultimately in *Schacter*, the Supreme Court did not read-in, but instead declared the Unemployment Insurance Act invalid and suspended the application of the judgment for a sufficient time to enable Parliament to amend the Act.²⁷

Perhaps the most controversial example of reading-in occurred in the recent decision of the Supreme Court of Canada in *Vriend v. Alberta*.²⁸ Vriend challenged the Alberta Individual Rights Protection Act. He argued that the omission of sexual orientation as a ground of discrimination violated section 15 of the Charter. The Supreme Court agreed that the Charter was violated but was divided over the appropriate remedy. Justice Iacobucci held:

In my view, the process by which the Alberta Legislature decided to exclude sexual orientation from the IRPA was inconsistent with democratic principles. . . I believe that judicial intervention is warranted to correct a democratic process that has acted improperly. Therefore, I conclude that reading sexual orientation into the impugned provisions of the IRPA is the most appropriate way of remedying this underinclusive legislation.²⁹

Justice Major disagreed on the remedy that was applied by the majority. Major was of the view that the reading-in was only appropriate where it could be safely assumed that the Legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group. He found, however, that the Legislature's opposition to including sexual orientation as a prohibited ground of discrimination was abundantly clear on the record and concluded:

Except in the clearest of cases, courts should not dictate how underinclusive legislation must be amended. . . I would therefore order that the declaration of invalidity be suspended for one year to allow the Legislature an opportunity to bring the impugned provisions into line with its constitutional obligations.³⁰

The decision of the Court to read provisions into the Act came under intense criticism, especially by commentators who construed the decision as an example of the Court acting in a legislative capacity contrary to the intent of the provincial government.³¹ The Edmonton Sun newspaper wrote that the decision demonstrated that:

Judges are one of the most powerful forces in the country. . . . And they're getting more powerful by the day as a new wave of groovy '90s judges shed their solemn role as arbiters of the law to become bench crusaders for various left-wing and self-interest causes.³²

Criticism of the Judiciary — The Judges React

Recent comments by Chief Justice Antonio Lamer show that the judiciary is well aware of the increasing attacks on the Supreme Court and its vulnerability to such criticism. In July 1998, Justice Lamer lamented that "judges have no voice and no champion to defend them against unfair criticism."³³ The Chief Justice stressed that the judiciary is very, very fragile and noted, "we must be careful not to bash it too hard. Criticize it, watch it, control it properly, yes. But judge-bashing must stop."³⁴ It is clear however, that while judges are concerned about ongoing public and media criticism, they have different opinions on how to deal with it.

Some judges assert that undue media criticism is taking an unfair toll. Justice Brossard of the Quebec Court of Appeal has stated that "judge-bashing has now become a national sport,"³⁵ and warned the media that by criticising the judiciary it only winds up

26 See above at 718.
 27 This remedy can accomplish the same effect as reading-in to a statute although the result is delayed. It is unclear why the Supreme Court decides to read-in. There are a number of other cases where the Court has decided to temporarily suspend the application of an order as opposed to reading-in. See *Re Manitoba Language Rights*, [1985] 1 Supreme Court Reports 721; *R. v. Mercure*, [1988] 1 Supreme Court Reports 234; *Sinclair v. Paquette* [1992] 1 Supreme Court Reports 579.
 28 *Vriend v. Alberta*, [1998] 1 Supreme Court Reports 493; hereinafter referred to as "Vriend."
 29 See above at 592.
 30 See above at 597.
 31 Some commentators have posited that there is no conflict between judicial review and democracy when there are indications that a legislative decision was not reached in accordance with democratic principles. If so, there has been a systematic malfunction of the democratic process. Judicial intervention can be justified therefore, as a correction of that malfunction rather than as the overturning of a truly democratic choice. See W. Black, "Vriend, Rights and Democracy" (1996) 7 Constitutional Forum 126 at 128. Of course, this rationalization assumes that judges are better able than elected politicians to determine what is "truly democratic."
 32 "Justice Takes a Giant Step Forward," *The Edmonton Sun* (29 September, 1998) p.11.
 33 "CBA Moves to Battle 'Judge-bashing,'" *The Lawyers' Weekly* (14 September, 1998) XXX.
 34 See above.
 35 "Quebec Jurist Slams 'Judge Bashing' Media," *The Toronto Star* (23 February, 1994) A15.

hurting itself because ultimately, it is judges who safeguard press freedoms. Justice Brossard commented:

If you destroy the Canadian judicial system by systemically attacking its integrity, you are, in the long term, and please don't ever forget it, destroying your own basic fundamental right to freedom of expression which encompasses freedom of the press.³⁶

Brossard's opinions are in contrast to those of Justice Trafford of the Ontario Court of Justice, General Division. Trafford has commented that the freedom of individuals to discuss information about the institutions of government is crucial to democratic rule and the liberty to criticize and express dissenting views has long been regarded as a safeguard against state tyranny and corruption. Consequently, "as a result of the significant role the courts play in any democratic society, they and their processes must be open to public scrutiny and public criticism. Public review is critical to the rule of law."³⁷

It is becoming evident, though, that judges, at least on an individual level, feel that the examination to which their decisions are subjected and their relationship with the public have become somewhat unbalanced. Indeed, Chief Justice Lamer has recently gone so far as to suggest the judiciary's strong tradition of silence may have to be revisited and that judges might begin to participate in public debate to defend their decisions.³⁸ According to Lamer, judicial silence sometimes means that the public misses out on a full understanding of what the courts are doing and why. Therefore, public debate on issues that come before the courts, and indeed on the role of the judiciary itself, is not as full as it should be because the perspective of the judiciary is usually absent.³⁹ Recently, the Chief Justice wrote:

I don't blame anyone for the fact that the tradition of support for the judiciary has faded. It strikes me that it may be another inevitable by-product of the Charter. Perhaps as judicial decisions have become more entwined with political issues, the more difficult it has become for public figures and lawyers themselves to speak up [in order to defend the courts].⁴⁰

Conclusion

It is unlikely that the judiciary will fully regain the deference that many of its members feel it has lost. The Charter has undoubtedly increased the authority of the courts and the extent to which their decisions reach into the lives of everyday Canadians. It appears however, that this new clout comes with a corresponding cost. In an article printed in *The Globe and Mail* weeks before his death, Supreme Court Justice John Sopinka examined the growing criticism of the courts. He remarked that the Charter had politicized the court and made it vulnerable on two main fronts: special interest groups who seek to influence the courts' decisions and elected politicians who, spurred on by public clamour, indulge themselves in public criticism of judges and even demands for discipline. Sopinka noted:

The paradox created by the Charter is that it was adopted by means of a democratic process to protect the individual against an abuse of power by the majority, but many feel that it is undemocratic for unelected judges to overrule the majority. . . The unfortunate fact is that the Charter has turned the court into the messenger who is likely to get shot for bringing bad news.⁴¹

Ultimately, this paradox created by the Charter is probably intractable. Like so many of the decisions that it is applied to, the inherent process of even applying the Charter requires a weighing of disparate interests to achieve a reasonable balance. In the end, the new politics of litigation mean that politicians will have to get used to reduced authority and the judges will have to accept being treated like publicly accountable officials.

36 See above.

37 *The Toronto Star* (26 February, 1998) A22.

38 Other judges seem to disagree with Justice Lamer. Justice Esson of the British Columbia Court of Appeal has commented, "I agree with those who say that judges should stay out of public debates and should accept narrow constraints on their freedom of speech. We all come to the bench as captives, in some degree, of our backgrounds. . . our duty is to do justice according to the law. That requires that we decide the cases before us without allowing our personal views to enter into the process of making decisions. We will be better able to do that if we refrain from publicly expressing personal views." See "The Judiciary and Freedom of Expression" (1985) 23 *University of Western Ontario Law Review* 159 at 160.

39 See above at 35.

40 See above at 30.

41 *The Globe and Mail* (28 November, 1997) A21.