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Alf Hales Research Award

In recognition of the valuable educational experience that the Parliamentary Internship Programme provides, the Institute On Governance created The Alf Hales Research Award in 1999. The award, which seeks to promote research excellence and young people's understanding of governance issues, is handed out annually to the best Intern essay on a particular aspect of the Parliamentary system.

The 2003 winning paper, on exploring Parliamentary-Judiciary Tension by Jane Swann, reflects the originality and spirit that Alf Hales demonstrated when he created the Programme 30 years ago.

Jane Swann

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Abstract

Parliament and the courts have cultivated a relationship that is at once functional and contentious, conciliatory and authoritative. The authority of the courts to interpret laws and their separation from the legislature have launched a significant, and inevitable, skepticism towards the role of the court and its "activist" judgements, occasionally perceived to encroach into the domain of policy-making. Can a judgement be 'political'? Are rights-based judgements especially susceptible to this charge? Recent court decisions and the Parliamentary and the media reactions they spurred seem to suggest so.

The Charter of Rights and Freedoms has undeniably affected policy development in Canada, and detractors of the judiciary have alluded to the possibility that an unintended consequence of the Charter has been the stifling of Parliamentary independence and of policy effectiveness. In addition to examining two of the current contentious court decisions exemplifying the court-Parliament relationship, this paper discusses some of the proposed suggestions for judicial reform in terms of the selection of judges and the role of Parliament in judicial review, measures which could placate vocal opponents of a perceived demise of Parliamentary authority.

Introduction

Integral to a well-functioning democracy is the effective distribution of powers between the branches of government. Since the Canadian Charter of Rights and Freedoms codified our country’s fundamental values in the Constitution Act, 1982, a particular tension has developed between the legislative and judicial branches, as parliamentary supremacy has found itself supplanted by constitutional supremacy. This tension, in turn, generates the quandary of how to balance the needs and rights of society with those of the individual, as well as how to reconcile the concepts of morality and democracy.

Courts, charged with the responsibility of applying the abstractions of legislation to particular cases, have frequently been plunged into the litigious moral debates not addressed in the legislature. Despite its constitutional obligation to do so, the court’s authority to overturn government legislation found to unjustifiably violate Charter rights has incited concern regarding the interpretive leeway of this transfer from theory to practice. Further controversy arises from the question of the courts’ siphoning of social policy development from the jurisprudence of Parliament.

Can a judgement be ‘political”? Are Charter, or rights-based judgements especially susceptible to this charge? Recent court decisions and the Parliamentary and the media reactions they spurred seem to suggest so. This perception of “activist” judges and rulings has called into question its impact on representative democracy and created an atmosphere in which many members of both the public and Parliament feel palpably disenfranchised, an atmosphere explored in this discussion with respect to both its root causes and implications for Canada’s system of government.
The Charter: Effects of Implementation

The Canadian Charter of Rights and Freedoms, the first 34 sections of the Constitution Act 1982, spawned a rights revolution and an expansion of democracy. It introduced “the post-war honouring of individual conscience and equal human dignity as intrinsic to the modern democratic state.” By appealing to the human dignity of citizens, and promising to uphold and defend this dignity against infractions, the Charter mobilized these citizens to act upon such infractions. The courts have, in fact, become another, more viable legislature for interest groups who feel their rights have been ignored by the majority representatives in Parliament. Supreme Court Chief Justice Beverly McLachlin explains the growing momentum of post-Charter charges of judicial activism as natural in a world which “increasingly accepts that while the will of the people as expressed through their elected representatives must be paramount, that will should always respect the fundamental norms upon which the very notion of democracy and a civil society repose.” Queen’s University Professor Janet Hiebert believes that as one immediate effect of the Charter, governments “are constrained in their ability to pursue legislative priorities, even where legislation is considered to represent a compelling public interest.” Through the influences of different groups, empowered, as certified McLachlin, by the testament to their rights, the Charter has influenced the government’s policy process and legislative choices.

Technicalities of the Charter

Much Charter discussion centres around section 15, which guarantees equality for all under the law. Kent Roach declares the Charter “a decidedly non-absolutist approach to rights.” In a May group interview with the Parliamentary Interns, Supreme Court Justice Ian Binnie also cited the fact that the law as written by Parliament often conflicts with the law as applied by the courts as the seemingly perpetual crux of the Charter conflict. With the adoption of the Charter, the court’s instructions became clearer, and their interpretation of Charter rights was necessarily broad to give these rights meaning. Section 33, the notwithstanding clause, allowing legislatures to pass laws with exemptions from section 2 or sections 7 to 15 of the Charter, was added to placate provincial concerns about the diminished supremacy of elected governments.

The government’s ability to respond to judicial decisions under section 1, wherein the legislature can limit rights in cases where these limits “can be demonstrably justified in a free and democratic society,” along with section 33, assist in making the document more palatable to a...

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5 The Honourable Mr. Justice William Ian Cornell Binnie, group interview, 15 May 2003.
public wary of judicial interpretations; indeed, with the knowledge that Parliament can override or limit these rights, the balance of perceived authority shifts in favour of the legislature. Because it is composed of the people’s elected representatives in government, the legislature’s supremacy and its ‘last word’ advantage in terms of the court-Parliament dialogue is much more readily acceptable than would be the prospect of these powers in the hands of an unelected court.

**Charter Politics: A New Morality?**

The Charter is, according to University of Toronto Professor Lorraine Eisenstat Weinrib, “unequivocal in departing from the values of a stable, hierarchical, paternalistic and patriarchal society.” It favours freedoms, open and evolving with a changing society, and therefore attracts the scorn of conservative critics when judges interpret it ‘liberally’. The perception that judges, because they are insulated from public opinion, are more willing and free to make decisions that politicians, acutely sensitive to public opinion, try to avoid, corresponds with F.L. Morton’s claim that in Parliament, moral issues “cross-cut normal partisan cleavages and thus fracture party solidarity.”

For this reason, Morton argues, it is easier for Parliament to allow the Court to pronounce itself first on difficult issues, perhaps because the judiciary offers a convenient scapegoat for decisions on issues contentious or unpalatable to certain voters. Parliament’s treatment of the question of same-sex unions falls in line with this argument, and is explored later on in this discussion.

Supreme Court Justice Gonthier spoke to the Parliamentary Interns about the increasing pull of the Judiciary into areas of morality, which, in the past, were left to individuals, families, or communities. The Charter itself is the manifestation of this abstract concept of ‘morality,’ said Gonthier, in that it is a statement of our society’s moral principles. This skeleton outline of the concepts of morality central to Canadians, then, has been offered to the court as a starting point from which to gage claims of rights violations. The court is charged with the responsibility of putting “flesh” on this statement of moral principles in applying it to specific cases. It is, however, these very generalities in the Charter that appear to arouse suspicions because the criteria for court decisions which overturn legislation are thus intangible.

It is because of a perceived reluctance of Parliament to address issues where morality is concerned, that critics claim many gay rights court challenges have been successful. “Ottawa has virtually invited the courts to rule in favour of gay rights claims against federal laws,” write F.L. Morton and Rainer Knopff, attributing 1998 Liberal Justice Minister Anne McLellan’s decision not to appeal an “Ontario Court of Appeal’s pro-gay rights ruling against the federal Income Tax Act” to this reasoning. “McLellan’s failure to appeal Rosenberg to the Supreme Court…signalled her government’s willingness to let the courts legislate on gay rights.”

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8 Weinrib 28.


10 The Honourable Mr. Justice Charles Doherty Gonthier, group interview, 8 April 2003.

Janet Hiebert suggests, conversely, that Parliament cannot merely pass over difficult questions of morality to the courts. She maintains that “many social conflicts are political in the sense that they invoke differing philosophical assumptions about which values are important, what priorities should be attached to conflicting rights, and what the role of the state should be in defining and responding to pressing social and cultural concerns.” Rights debates are not exclusively legal problems, she says, and should thus not be ignored by legislators, despite the inherent danger of political costs in addressing them.

F.L. Morton and Rainer Knopff, too, warn that as “the morality of rights displaces the morality of consent, the politics of coercion replaces the politics of persuasion.” Morton and Knopff suggest that this phenomenon threatens to demean the democratic process with the spectre of rights advocates imposing their will without the vehicle of democratic debate.

**Judicial Justification**

The judges themselves remain indignant at the suggestion of impropriety in their judicial conduct. The court of Chief Justice Antonio Lamer, who presided over the Supreme Court from 1989-1999, attracted generous use of the ‘activist’ label. Chief Justice Lamer makes an interesting comment regarding the change, claiming that, “The kinds of problems we've been getting are issues that 25 years ago went to Members of Parliament…It's not for me or any judge to decide which laws should be passed, but if legislatures choose not to legislate, where else can people go except the courts?”

The courts, then, have become an alternate route for plaintiffs to make an appeal for rights they feel Parliament is not accommodating or will not recognize, though Lamer is careful to delineate the distinction between the improper exercise of judicial power and the correct path of democratic will. Justice Ian Binnie concurs with former Chief Justice Lamer, referring to the activist question as a “political football,” brought out and tossed from party to party when politically expedient to do so. He described the contrasting perceptions of Canadian courts, characterized as both “strict instructionists” by academics and “wildly activist” by conservatives. Binnie maintains that the court, in its dissenting reports, is frequently split along different lines than those suggested by simplistic liberal/conservative factions.

**Opposing Judicial Activism: The Critics’ Concerns**

The authority of the courts to interpret laws as well as their separation from the legislature have both launched a significant, and, it would seem, inevitable scepticism towards the role of the court and its “activist” judgements. Kent Roach makes reference to a plethora of possible definitions of this term, which seem to centre on the “distinction between judges finding

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12 Janet Hiebert 4.

13 F.L. Morton and Rainer Knopff 166.


15 The Honourable Mr. Justice William Ian Corneil Binnie, group interview, 15 May 2003.
the law in the clear words and intent of the legislators or making the law by acting in a legislative fashion.”16 He agrees with Morton and Knopff that “the range of reply options is an important component of the degree of judicial activism.”17

Roach describes four facets of judicial activism, beginning with the concept of judge-made law. This is the common definition espoused by those who “see any exercise of judicial creativity as an illegitimate imposition of the will of judges.”18 This creativity gives way to fears that a judge can, where the law is unclear, rely on his or her personal opinions for judgment support, resulting in an unrestrained glut of court-prescribed laws.

His second version focuses on judges who are eager to “make and impose the law,”19 while his third corresponds to Justices Binnie and Gonthier’s musings about the changes the Charter has evoked on the Canadian judiciary system. Roach raises concerns as to “the willingness, once the right has been defined, for the Court to consider the government’s case for limiting that right because of competing social interests and rights.”20 Section 1 of the Charter enables Parliament to provide the courts with reasonable cause for rights limitations on its legislative objectives. The fate of the legislation, though, depends on how “demonstrably justifiable” Parliament’s case is, as perceived by the court.

Roach’s final version of “judicial activism” is “the extent to which judicial decisions permanently displace policies established by other arms of government,”21 which relates directly to the concept described earlier of gauging the degree of “activism” by the number of options available for the legislature to respond to a judgement. The implications of a judgement forcing a legislature to alter policy initiatives depend on the status of the policy to be amended. Were it relatively new or central to government platform, the political fallout would be inevitable and potentially severe.

F.L. Morton is sceptical of the ‘dialogue’ metaphor employed by Professor Peter Hogg concerning judicial review. Merely obeying the orders of the Court and distorting its policy to comply does not create dialogue, argues Morton. If, as he says, “politics is as much about means as ends,” then “apparent disagreement about means sometimes turns out to be disagreement about ends.”22 He notes the federal voting for inmates case, examined later on in this discussion, as one in which “the means/ends distinction becomes a charade for substantive disagreement about public policy.”23

16 Roach 98.
17 Roach 105.
18 Roach 107.
19 Roach 107.
20 Roach 109.
21 Roach 109.
22 Morton 24.
23 Morton 24.
Gregory Hein makes an argument against the role of interest groups, mobilized by the Charter as Chief Justice McLachlan suggested, in making public policy. These “judicial democrats,” he says, drawn together by the cohesive sense of identity common ‘rights’ can bestow, believe appealing to judicial authority in contesting discriminatory legislation will enhance our democratic system. “The consequences can be unsettling, even for Canadians who admire the Charter…Decisions can rearrange legislative agendas that reflect public concerns, strain regulatory regimes…alter spending priorities…and spark violent reactions that divide communities.” These groups seek to achieve social redefinition and “build alternative systems of meaning” in challenging accepted norms and bypassing the legislature to go directly to the courts to do so.

F.L. Morton and Rainer Knopff have written extensively about their opposition to the rise of the “Court Party” fostered by the arrival of the Charter. For Morton and Knopff, the Supreme Court “sees itself as the authoritative oracle of the constitution,” and wades freely into the realm of policy development. Indeed, for Morton and Knopff, the Charter has severely limited Canada’s ability to become a sovereign, democratic nation: “A people prepared to treat political opponents as legitimate surely needs to make government by discussion a leading means of settling political differences. To the extent that the Charter represents a flight from this kind of politics, it can be understood as threatening rather than promoting the unity necessary to a sovereign people.” The fact that Britain and the United States both refrained from institutionalizing concepts of rights adds fervour to this argument that “representative democracy, not judicialized politics, is mainly how a sovereign people should protect rights.”

The authors also introduce a theory regarding populism, particularly plausible with the rise of Western populism the Reform/Canadian Alliance Party brought to the House of Commons. Morton and Knopff declare Canada’s democracy threatened by the growth of both populism, whose right-wing supporters decry judicial activism, and of constitutional rights, whose champion, the Court Party, opposes “the tyranny of the majority entailed by populism.” Both factions call for the immediate recall of legislation deemed unacceptable for their purposes, the populists through referenda and the Court Party through litigation. In such a picture of upheaval


\[25\] Hein 14.

\[26\] Hein 10.

\[27\] F.L. Morton and Rainer Knopff 24.

\[28\] F.L. Morton and Rainer Knopff 54.

\[29\] F.L. Morton and Rainer Knopff 150.

\[30\] F.L. Morton and Rainer Knopff 151.

\[31\] F.L. Morton and Rainer Knopff 154.
and dissent, one wonders as to the position of the ordinary, non-faction-committed Canadian in the face of this almost circular contest for clout between opposing extremes.

**Dispelling the Activist Myth: Proponents of an Enhanced Judicial Role**

The interpretive leeway feared by critics loses its sinister attributes when tempered with Roach’s reminder that “it is a creativity that is constrained and guided by the text of the constitution, legal traditions, and precedents.” As such, the section 11 Charter provision impels the courts to consider the reasons put forth by Parliament when a rights limitation occurs, and an ‘activist’ court would simply dismiss these reasons. In fact, the options available to Parliament in its responses to court decisions, which relate to how severely ‘activist’ critics will consider said decision, can often enhance the possibilities of positive democratic interplay between the two institutions. At one end is the option of amending the constitution, such that the court’s verdict would no longer hold ground as the specific rights provision it would be purported to uphold would change. The range of options includes that of enacting new legislation under section 1 to continue with its original goal, and extends to the less extreme possibility of altering the offending policy to make it acceptable to the court. This prospect, however, could admittedly have a significant impact on the current government’s policy plans.

Peter Hogg supports the argument that judicial review facilitates a dialogue between judges and the legislature. He believes “a judgement can spark a public debate in which Charter values are more prominent than they would have been otherwise.” Parliament is then, Hogg believes, empowered to act as it sees fit in terms of its options and the public sentiment surrounding the issue. Democracy is ultimately served with a more holistic approach to rights via this dialogue. For Hogg, a dialogue makes feasible a compromise between the majority rights Parliament is required to represent for the country and the minority rights which must be respected for its citizens. Roach remains confident, nevertheless, that a compromise of authority is possible in a balanced legislative-judicial relationship where it is “conducive to a self-critical and robust democracy to have both judicial activism and legislative activism.” In this model, the question of rights jurisdiction would be decided with courts bearing responsibility for minority-rights protections, a subject to be discussed further in this study, and with legislatures using its Charter-bestowed powers to limit or disregard the rights which the courts recognized.

With a similar view, James Kelly and Michael Murphy argue “the proper structural safeguards” of the constitution “render the likelihood of unchecked judicial supremacy marginal at best.”

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32 Roach 107.


34 Roach 111.

They challenge the idea that the judiciary’s constitutional interpretations threaten democracy, suggesting instead that the checks and balances and the separation of governmental powers are necessary to curb appetites for expanded authority, and also that “the same human tendency to grasp after power which poses such a threat to democracy and liberty is used as a means of motivating each of the branches to counteract incursions by the other.”

Such an argument explains the occasional pre-emptive responses Parliament offers to the courts in an attempt to pronounce itself before a final Supreme Court ruling behoves it to do so. Rather than functioning as a democratic detractor, then, in this way Charter review “has strengthened liberal constitutionalism and led to the proper functioning of constitutional supremacy in Canada.” This concept of “constitutional supremacy” for these advocates supplants the arguments both for parliamentary and for judicial supremacy and replaces them with a framework where Canada’s constitutionally-entrenched rights reign sovereign.

Despite his tally of the interest groups poised to incite social revolutions through the courts, Gregory Hein concedes that “we now have a judicial system that responds to a diverse range of interests…That so many groups are able to advance their claims through the courts is an accomplishment that Canadians should celebrate.”

The Parliamentary-Judiciary ‘Dialogue’

Opinions differ as to how accurately the term ‘dialogue’ applies to this issue and as to whether or not any ‘dialogue’ is even viable. Roach’s vision of a successful brand of democracy, enhanced by the dual activism of the courts and the legislature is somewhat discounted by the important role politics plays in this assessment. Theoretical conclusions often need adaptation in order to work in the political arena, where public image is paramount and politicians are held accountable by the public and in the public by the press for their actions and decisions. The section 33 override clause in the Charter carries sizeable political costs along with it when one considers the optics of a government disregarding the decision of a court to uphold certain rights to forge ahead with its original, now ruled discriminatory, agenda.

It is understandable, then, that Roach’s fourth dimension of the activism definition, when judges have the last word over Parliament, carries such weight with the judiciary’s sceptics. Though the Charter does provide the legislature with options, the political price of using them, particularly in sensitive cases which place fundamental values under debate, as with abortion, perhaps explains the reluctance of the government to revisit issues of contention. Roach points to the frequent use of the “delayed declaration of invalidity,” as further proof that dialogue is encouraged and facilitated by court initiatives, since this verdict grants the legislature a set

36 James B. Kelly and Michael Murphy 7.
37 James B. Kelly and Michael Murphy 23.
38 Hein 25.
39 Roach 193
40 Roach 200
amount of time to rectify the rights infraction while minimizing the possible policy damage a verdict demanding immediate results could entail.

Morton and Knopff concur that the dialogue metaphor applies in certain circumstances, but qualify this opinion with the reminder that the government’s response options to the judiciary depend on the status the policy in question has in its arsenal of legislative initiatives. A central, integral policy in its program would surely elicit a strong governmental response, though “when public opinion is fragmented between a relatively indifferent middle bracketed by two opposing groups of policy activists, the judicial creation of a new rights-based policy status quo may suffice to tip the balance in favour of the winning minority interest over that of their adversaries.”\footnote{F.L. Morton and Rainer Knopff 165.} This theory coincides with the supposition that governments naturally prefer to leave courts with the responsibility to pronounce upon controversial, often morally-based dilemmas.

James Kelly and Christopher Manfredi believe an “ability to manufacture and sustain a relationship between equals is critical to a genuine Charter dialogue between the Supreme Court and legislators,”\footnote{Christopher P. Manfredi and James Kelly 525.} thus what they term “negative legislative sequels,”\footnote{Christopher P. Manfredi and James Kelly 521.} or legislative compliance with court decisions, “facilitates a hierarchical relationship”\footnote{Alexander Hamilton, John Jay, and James Madison, The Federalist Papers No.78 25 Dec. 1996, Thomas: Legislative Information on the Internet, Library of Congress, Washington, 3 May 2003\<http://memory.loc.gov/const/fed/fedpapers.html>\footnotemark{45} \footnotemark{45}} between the two branches and undermines the possibility of achieving such a balance of equals.

**A Constitutional Court Authority**

A common thread in the statements of judges defending their roles emerges in the fact that the constitution system directs them to act in the way for which they have been criticized. Says James Madison in The Federalist Papers, “No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.”\footnote{Alexander Hamilton, John Jay, and James Madison, The Federalist Papers No.78 25 Dec. 1996, Thomas: Legislative Information on the Internet, Library of Congress, Washington, 3 May 2003\<http://memory.loc.gov/const/fed/fedpapers.html>\footnotemark{45}} Madison suggests that a judge who would let his own personal will be his guide rather than the constitution would destroy the balance of governmental power.

**Representing the People’s Will: The Peculiar Position of Legislators**

In his classification of political players in the framework he constructs, Montesquieu declares, “the spirit of moderation should be that of the legislator; the political good, like the moral good,
is always found between two limits." The legislator does indeed represent a middle ground, generally trying to make decisions he or she believes are in the best possible interests of the largest possible number of people, recognizing that not everyone will be pleased with their actions. As seen in critics’ impressions of judicial activism, however, when the courts intervene in the work of legislators, they must reassess the position of those whom their legislation neglects or treats unfairly.

Is this perceived imbalance of power symptomatic of the ‘democratic deficit’ expounded upon by lead politicians in this country? Rainer Knopff decries “the apparent decline of checks and balances in the legislature,” wherein “Inter-institutional dialogue between legislatures and courts supposedly can substitute for intra-institutional dialogue within legislatures.” In this scenario, party discipline and the arguable lack of a viable opposition in government have resulted in a “‘dialogue’ of the unaccountable.”

The Reform Party included increased democratic control over judicial power in its election platform, making its position vis à vis controversy about the judiciary quite transparent where other parties refrained from doing so, a fact possibly related to Morton and Knopff’s theory about populists’ socially conservative mores. Now the Canadian Alliance maintains the Reform Party’s scepticism of judicial review, and the C.A. Declaration of Policy states, “we also believe it is the role of Parliament, not the courts, to debate and balance the conflicting rights inherent in developing public policy. Final responsibility for public policy must rest with Parliament instead of unaccountable judges and human rights officials.” On May 8th, 2003, Mr. Vic Toews, the party’s Chief Justice Critic, sponsored the following motion in the House of Commons on a day of supply for the Opposition:

**Mr. Toews:** “That this House call upon the Government to bring in measures to protect and reassert the will of Parliament against certain court decisions that: a) threaten the traditional definition of marriage as decided by the House as, ‘the union of one man and one women to the exclusion of all others’; b) grant house arrest to child sexual predators and make it easier for child sexual predators to produce and possess child pornography; and c) grant prisoners the right to vote.”

“All three of these issues are areas of the law that have traditionally been the exclusive jurisdiction of Parliament. However, under the assumed authority of the Charter of Rights and Freedoms, the courts have increasingly expanded their right to make political choices in substitution for the decisions of elected politicians,” Toews explained.

His call for Parliament to reassert itself met with guffaws from the Government House Leader, who called the deliberately non-votable motion “out of step with reality” and declared it “could

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49 Canadian Alliance Home Page, Canadian Alliance, 10 May 2003 <http://www.canadianalliance.ca/english/index.asp>.

risk damaging the credibility of the institution of the Canadian courts and the public’s confidence in our system of justice as a whole.”51 The Honourable Don Boudria extolled judicial review as a protection rather than an enemy of democracy, and Richard Marceau of the Bloc Québécois similarly rejected the motion, explaining his party’s position that the “principle of judicial review forms the very foundation of how our democracy operates.”52 Elsie Wayne, however, from the Progressive Conservative Party, spoke in favour of the motion with an inflammatory speech infused with her socially conservative values: “It is pathetic that with all the problems we have in this country from coast to coast we would be spending this time discussing this sort of thing…I thought we were the ones who brought in how our country was going to grow and how our people were going to live, but now the courts dictate to us and that is wrong.”53

Speaking on the side of the government, Mr. John McKay, an often vocal critic of the courts, remarked,

Everything we do in this place is a charter lens. Sometimes that lens enhances and sometimes that lens distorts…it has led to some egregious effects on the use and abuse of courts to find section 15 discrimination. Laws by definition are discriminatory…all it was intended to do was create a difference or a distinction.54

In the event a court finds a law in violation of section 15, McKay stated, it is a difficult task for Parliament to declare it ‘demonstrably justifiable’ when the justification exists in a long-held system of values, such that “it leaves Parliament with no manoeuvring room. We are stuck with an either-or decision.”55 McKay’s thoughts are interesting with respect to Morton and Knopff’s predictions of democratic debate transformed into coercion by judicial review: “It is quite, I would submit, an illiberal pluralism and the courts are wittingly or unwittingly forcing values, convergent on a population that did not elect them and barely knows them.”56 McKay concluded by affirming that this lack of manoeuvring room constrains legislators as they create public policy with the spectre of judicial authority hovering overhead.

The Independence of the Judiciary

A common criticism of the judiciary stems from the position of the courts as isolated from the pulse of societal concerns and unaccountable to the general public as opposed to their elected counterparts in the House of Commons, who are responsible for representing the views of their constituents in their actions in Parliament. Ironically, the independence integral to the effective functioning of their democratic role is also paradoxically the frequent reason for their condemnation.

Judicial Appointment Process

Critics fear the idea of a politicized judiciary, which they believe compromises the independence of judges, a cornerstone of the effective functioning of the three levels of government. On May 6, 2003, Richard Marceau of the Bloc Québécois introduced a Private Member’s Motion: “That the Standing Committee on Justice and Human Rights study the process by which judges are appointed to Courts of Appeal and to the Supreme Court of Canada.” The federal judicial appointment process is frequently under fire, particularly in critiques of Prime Ministerial power. Many feel the selection process, in which provincial and territorial advisory committees examine nominees’ credentials then make their recommendations to the Minister of Justice who then makes appointment recommendations before Cabinet, should be open for public scrutiny. Skepticism of the court does not appear to be limited to Parliamentarians. A recent Ipsos-Reid poll reported in the Ottawa Citizen on May 12, 2003, revealed that “2 in 3 Canadians now believe the court’s decisions are influenced by partisan politics.”

John Herron of the Progressive Conservative Party supported Marceau’s motion, admitting, “Although I categorically support the charter, we all know that there are issues that have become problematic from time to time where the intent of Parliament has had to withstand that particular litmus test.” More public scrutiny on the selection of judges, Herron feels, would “possibly allow for a greater recognition or reflection of present day values.” Though adamant regarding the necessity of an independent judiciary, the Opposition parties seem to agree that the process should not be directed by the Prime Minister himself. It would, however, seem the idea of ‘true independence’ for judges is unattainable, as every supporter of system reform would prefer a hand in the process in order to produce the ‘right’ kind of independence.

Preston Manning’s Reform Party, for instance, sought in its party platform to introduce the provincial nomination of judges, with public hearings before elected legislators in the case of Supreme Court Justice candidates. “At the end of the day,” Manning asks, “who makes law in Canada? The men and women from all walks of life whom we elect to Parliament and the provincial legislatures or the appointed and unaccountable judges?”

The frontrunner in the Liberal Party leadership race, Paul Martin, has also addressed the appointment process issue in his platform, because “it is also important for Martin to give Parliament the right to reject any and all government appointments — particularly judges — to help create more balance and fairness in the decision-making process.”

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The Question of Minority Rights

In speaking to the perpetual conflict between majority and minority rights, Justice Gonthier describes a standoff between the competing concepts of human beings as individuals and human beings as social individuals. The community-oriented aspect of human nature is “as much integral to our individual personalities” as that individualistic aspect. Thus, the judiciary’s task of interpreting and applying the law would appear to entail the attempted reconciliation of the competing elements governing the human condition. The task becomes problematic when one considers that the laws intended to govern the actions and respect the rights of an individual citizen are in fact created to govern groups of individuals.

The Danger of Majority Rule Over Minority Rights

When rights are in conflict, which rights should lawfully prevail? This question relates back to a theory Roach presented of Charter rights trumping other competing interests. Morton and Knopff are wary of minority rights gaining precedence through litigation, overshadowing the majority interests represented in Parliament in the process: “Liberal democracy works only when majorities rather than minorities rule, and when it is obvious to all that ruling majorities are themselves coalitions of minorities in a pluralistic society…Representative institutions facilitate this fundamental democratic disposition; judicial power undermines it.” The authors believe Canada’s representative democracy, ruled by the pockets of minorities that make up a diverse society, is under attack by the hegemony of ‘jurocrats’ promoting minority precedence.

Conversely, Madison reaffirms the protection the judiciary offers for minority rights:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which...have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Madison warns of the harmful implications of rash or ill-advised legislative decision-making, even if these decisions are seemingly supported by majority will. In order for minority protection to occur, a judiciary of independent authority would seem indispensable.

The Department of Justice

Janet Hiebert details the internal scrutiny process of the Department of Justice in producing legislation that is Charter-compatible. The Justice Minister is required to report any inconsistencies a proposed Bill has with respect to the Charter to Parliament, though Hiebert

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64 The Honourable Mr. Justice Charles Doherty Gonthier, group interview, 8 April 2003.
65 Roach 109.
66 F.L. Morton and Rainer Knopff 149.
affirms that no such report has ever been made, likely because of the unfavourable political climate that would naturally follow such a disclosure. In 1982, to coincide with the implementation of the Charter, the Department established the Human Rights Law Section to provide ongoing consultation on the potential Charter conflicts which might exist in proposed legislation. In this section, something of a Departmental liaison to elucidate the courts’ judgments and on the Charter challenges government legislation could face, 20 lawyers try to predict court action and provide advice accordingly.

Far from admiring the government’s initiatives to ensure Charter compliance, Morton and Knopff declare, however, that the enhanced role the Justice Department now plays in policy development, “has turned the Federal Justice Department and its Ontario counterparts into central agencies like the Privy Council Office or Treasury Board,” exceeding their previous level of influence. Such an opinion hints that the prospect of court challenge haunts legislation at its very conception and incites the caution of its drafters.

A recent meeting of the Standing Committee on Justice and Human Rights, in fact, further illustrated this caution, as the Solicitor General of Canada, appearing before the committee to discuss Bill C-23, a bill to establish a National Sex-Offender Registry. He explained that this registry would not be retroactive to register sex offenders currently incarcerated. Although Ontario’s registry is retroactive, the federal registry would not be, because, “When this legislation is enacted, we want it to stand up to the test of the courts and therefore we do not want to raise the Charter risk.” The Solicitor General’s decision to alter the policy, arguably making it less effective, to avoid Charter risks has frustrated the majority of witnesses appearing before the Committee on this issue. They have warned of the inevitable risk to future victims this non-retroactive registry could pose.

The Standing Committee on Justice and Human Rights

Philip Rosen, research counsel for the Standing Committee on Justice and Human Rights, described the committee’s typical process of first conducting a study on subject matter often brought forth by committee members, then reporting to Parliament with their findings, such that the government then has the option of developing policy and legislation on the issue as directed by the committee’s report. He put forth victim rights, impaired driving, and crime prevention as examples of issues in the past which, having followed this path, resulted in the enactment of government legislation from the Committee’s recommendations.

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68 Hiebert 6.


70 F.L. Morton and Rainer Knopff 123.


The agenda of the Standing Committee on Justice and Human Rights has never been tedious, especially since January, 2003 when it began its hearings on same-sex unions. Sharing in common the fodder to exacerbate questions of morality and conservative values, the cases currently before the Committee are embodiments of the various scenarios possible when the courts become involved either in areas of policy not yet addressed by Parliament, or not supported by Parliament.

The court decisions, then, have acted as policy directives for the government, fueling its legislative agenda with remedies designed perhaps to curtail further court-legislature dialogue or to circumvent pending court decisions which would eventually compel Parliament to act upon them anyway. How do Committee members feel about court rulings that thwart their legislative initiatives, or, as in this case with same-sex unions, dictate their work plans? At a recent Committee meeting, Canadian Alliance M.P. Kevin Sorenson articulated the sentiment some non-lawyer Members had expressed in previous meetings:

Mr. Kevin Sorenson (Crowfoot, Canadian Alliance):

I remember on another debate, on another day, Mr. O'Brien's response, and I think he pretty well hit the nail on the head when he--this is a very loose paraphrase—said that he doesn't understand the law to the degree that other people around here do. I'm in the same boat as him, but Mr. O'Brien says, but I do understand my constituents…people who have a concern, or a lack of confidence, and I'll be the first to admit, a lack of confidence in the court system; a lot of individuals who are afraid that what may happen and what may be said, even here, will be interpreted in a different light, maybe next year, maybe ten years down the road by a court. Three years ago a member of parliament voted 216 to 55 in favour of a motion brought forward keeping the definition of marriage the same…and now we're going through the whole exercise again…the concern in a lot of the general public out there is that regardless of what happens in this court here of parliament, that there is another court who will step up to advocate something perhaps quite different.

Mr. Sorenson’s statement reveals a patent mistrust of the legal system and its inconsistencies, regarding which he feels as disillusioned and detached as his constituents.

The committee, then, must act as a liaison between the Department of Justice and Parliament, and thoughts of the judicial interpretations which may evolve from their work are omnipresent in their deliberations.

**Same-Sex Unions: The Contentious Debate**

A highly topical example of the “remedial dialogue” cited by Roach, the issue of same-sex unions and the definition of marriage has dominated the agenda of the Standing Committee on Justice and Human Rights during the second half of this Parliamentary session. The legislative and judicial preamble to the consideration of full marital status for same-sex couples has been fairly extensive in terms of Parliament’s steady acknowledgement of equal rights for homosexual Canadians. For example, in April 2000 the House of Commons passed the *Modernization of Benefits and Obligations Act*, amending 68 federal statutes for their equal application to both common-law opposite-sex and same-sex couples.

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74 Roach 200.
Nevertheless, to assuage the concerns of opponents, the government added section 1.1 which verified that “the amendments made by this Act do not affect the meaning of the word ‘marriage,’ that is, the lawful union of one man and one woman to the exclusion of all others.”

Not all of Parliament’s decisions can be expected to remain fixed indefinitely, however, and some Parliamentarians, as Mr. Sorenson expressed above, are displeased at “being forced to live with the sobering thought that their policy preferences reflect no more than the will of a transient majority.” An Ontario Divisional court gave Parliament until July 2004 to pronounce itself on the issue, and ruled that the definition of marriage, as it stands currently, is discriminatory to gays and lesbians under section 15 of the Charter. Three provincial-level courts have ruled on the same case with conflicting decisions. Ontario and Quebec deemed the definition of marriage a violation of Charter rights while British Columbia’s divisional court rejected this conclusion.

Since these rulings, there has been significant court action this session, with the government appearing before the Ontario Court of Appeal to argue its case and the British Columbia Court of Appeal decision overturning that of the lower court.

It is an issue, said Gonthier, on which Parliament has not yet pronounced itself, and the courts who have ruled on this issue have had to look for the aforementioned ‘moral consensus’ in their judgements. Now, in keeping with the idea of dialogue, it is Parliament’s opportunity to respond to these rulings. The very nature of the Charter as a limiting document is such that it requires judges to expand upon the basic rights it declares as society changes, hence the court’s decision to adapt what they viewed as an archaic definition of marriage in the modern world. In this particular case, and in light of these court decisions, on November 17, 2002, the Honourable Martin Cauchon, Minister of Justice and Attorney General of Canada, referred the following question to the Standing Committee on Justice and Human Rights: “Given our constitutional framework and the traditional meaning of marriage, should Parliament take measures to recognize same-sex unions and, if so, what should they be?” To accompany this question, the Minister also produced a discussion paper detailing the options available to the government on this issue to be considered by the committee in their final recommendations.

One of the main causes of concern regarding the question of same-sex unions seems to go back to the 216-55 result of a vote in 1999 in support of a Reform Party resolution that “marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps to preserve this definition of marriage in Canada.” Mr. Sorenson is not the only MP and committee member currently frustrated with the impermanence

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76 Rainer Knopff 166.

77 The Honourable Mr. Justice Charles Doherty Gonthier, group interview, 8 April 2003.

of parliamentary authority due to the subject’s return to the parliamentary agenda because of recent court rulings, in seeming disregard of this vote just 4 years ago. Indeed, John McKay spoke to this frustration in responding to Mr. Toew’s May 8, 2003 Opposition Day motion: “Twice in the last few years Parliament has spoken forcefully and unequivocally. Yet our system is such that the courts hold the ultimate trump card.” Mr. McKay’s speech also addressed another common argument introduced by witnesses during the hearings, one of a more anthropological nature, regarding marriage as the “bedrock of our society. As one witness has put it, ‘marriage is society’s parent. It is not society’s child,’” calling on the committee to conduct its deliberations carefully before recommending any changes to the institution.

Outside the committee hearings, Parliament has also been the stage for recent debate on this subject. In response to the aforementioned Opposition motion regarding recent court decisions, one of which referred to court rulings striking down the opposite-sex definition of marriage, Richard Marceau accused the Canadian Alliance of “trying to set aside the work of the committee…the Standing Committee on Justice is addressing this very issue…this is an obvious example of the Alliance’s lack of respect for this committee’s work.”

Alexa McDonough of the NDP likewise expressed her satisfaction that the government has chosen to address this issue, and praised the courts for providing the initiative to engage the Justice Committee in hearings on same-sex marriage: “It was the Supreme Court of Canada, bringing in repeated decisions, that acknowledged that gays and lesbians are being discriminated against. This has finally forced the government to begin to address the issue. This is the system of checks and balances.” McDonough’s criticism of the unabashedly right wing Canadian Alliance, a party with strong populist leanings, is an illustration of the Morton and Knopff paradigm. It exemplifies representative democracy floundering at the hands of the left-right tension between constitutional rights advocates suspicious of majority claims and the socially conservative populists, often considered representative of this “tyrannical majority,” who oppose what they perceive as an overly liberal judiciary.

Mr. Paul Macklin, the Minister of Justice’s Parliamentary Secretary, likewise defended court rulings regarding same-sex unions, suggesting, “these decisions specifically acknowledge the essential role that Parliament has to play in deciding important social questions such as these.” Now in the process of preparing the report on the hearings for the committee, Mr. Rosen affirmed that the committee will first vote to adopt its final version. The report is meant to clarify the position of the majority of Committee members, while the dissenting factions may

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74 F.L. Morton and Rainer Knopff 154.
produce their own minority reports. The government then has 150 days to respond with its
decided course of action.85

During the May 28th committee meeting, MPs discussed the possibility of urging the Minister to
appeal the unanimous May 1st B.C. Court of Appeal ruling declaring the opposite-sex
requirement for marriage unconstitutional. Parliament has until July 1st to appeal the decision,
and in doing so, would initiate the sort of court-legislature dialogue Hogg cites as pivotal to
democracy, facilitated by the separation of government branches. The Committee disagreed on
the prudence of this action, some fearing the negative message such a move would send to
Canadians before the Committee report and recommendations regarding the issue were released.
Richard Marceau considered the move counterproductive, as people want their elected
representatives to decide on this issue, and an appeal would send a signal that Parliament has no
role in the debate and that the ultimate power to decide on matters of social policy lies with the
Supreme Court and not with Parliament. Conversely, proponents of the idea retorted that if no
attempt to appeal were made, the Committee’s report would have no purpose. Filing the appeal
would not preclude the government from dropping it later if the Committee report and the
Minister so indicate before the deadline, but missing the appeal deadline would prevent this
dialogue from proceeding. Would Canadians not be wondering whether Parliament was really in
control of its agenda?

John McKay stated that the court decisions surrounding the issue have tied the Committee into a
“legal straightjacket,” which he called “lousy social policy,”86 presumably commenting on the
threat of redundancy which court verdicts have sent spiralling overhead of the Committee’s
study on same-sex unions. He reported that it was his understanding that Paul Martin has
refused to use the notwithstanding clause on this issue should it be pronounced upon by the
Supreme Court, a move which committee member Pat O’Brien and several other members feel is
crucial towards understanding the full legal picture of the issue. A single committee meeting
thus embodied the conflicting perceptions of the court-Parliament relationship among members,
who share in conflicting senses of either frustration or faith in the judiciary and its authority.

Addendum: Recent developments, however, have pre-empted the committee’s reporting, as the
June 10 Ontario Court of Appeal ruling declared the current definition of marriage
unconstitutional. Following debate during a Cabinet retreat, Prime Minister Jean Chrétien
announced on June 17th that the federal government would not appeal the ruling, and would
introduce legislation which will both include same-sex couples in marriage and protect the
rights of religious groups to choose whom they wish to marry.

The Case of Richard Sauvé: The Charter-granted Voting Rights of
Inmates

Philip Rosen referred to the case of Richard Sauvé and the question of prisoner voting rights as
an example of the court-legislature dialogue, one which is currently hanging open-ended, as it is
Parliament’s turn to reply. The case has demanded that the public and Parliament, justify why,

85 See page 31 for addendum addressing recent developments concerning this case.
86 John McKay, Canada, Standing Committee on Justice and Human Rights Debates, evidence 49, 2nd
in their minds, convicted felons should be deprived of the rights of the non-incarcerated with respect to federal elections.

Involved in a murder in 1978 while he was a member of a biker gang, Sauvé’s quest for voting rights began in 1993, when the Supreme Court declared Canada’s exclusion of inmates from section 3 of the Charter, guaranteeing that “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” The Court did not find that Parliament’s denial of voting rights under section 51(e) of the Canada Elections Act was justified under section 1 and declared its terms too broad. Parliament enacted new legislation, Bill C-114 to restrict all inmates serving sentences of two years or more from voting, even before the Supreme Court delivered its verdict, successfully nullifying the effect of the court decision by producing more precise legislation.

The Sauvé 1995 case found the terms of C-114 unconstitutional in the Federal Court Trial Division, then on government appeal, the Federal Court of Appeal overturned this ruling, which, on plaintiff appeal to the Supreme Court, was then overruled. The concerns which underlie this case are demonstrative of the ubiquitous quandary of minority versus majority rights, and which institution should prioritize which group. The courts, typically, given their mandate, upheld the rights of a minority group which was not widely popular with the general public and thus not a likely candidate for the consideration of the public’s elected representatives, hence Parliament’s hesitation to uphold the same rights.

“Minorities are not always at a disadvantage in the legislative process,” reiterates Roach, “but the truly unpopular and powerless ones are… elected parliamentarians have an incentive to disregard the rights of perhaps the most unpopular and vilified citizens in Canada and to score cheap political points by appearing to be tough not only on crime but on criminals.” Here again, politics played a decisive role in the interplay between the courts and the legislature.

On October 31, 2002, by a 5-4 margin, the Supreme Court of Canada found that the government could not justify with any social objective this infraction of the Charter. Chief Justice Beverly McLachlan wrote for the majority, maintaining that “Parliament cannot use lofty objectives to shield legislation from Charter scrutiny. Here, s.51 (e) is not justified under s.1 of the Charter.”

Justice Gonthier was of the dissenting party of judges, for reasons differing starkly with McLachlan’s regarding reasonable limitations: “Section 1 of the Charter does not constrain

87 Roach 187-189.
90 Roach 188.
91 Sauvé v. Canada (Chief Electoral Officer), SCC 68, 2002.
Parliament or authorize this Court to prioritize one reasonable social or political philosophy over reasonable others.”

Unlike McLachlin, Gonthier felt the disenfranchisement of prisoners did not present a serious infringement on the Charter rights of those inmates serving sentences longer than two years, and he supported Parliament’s original legislation. Gonthier’s dissent respects the authority of Parliament and its electoral policy to define the limits of the citizen groups to whom it wishes to extend the right to vote.

The Chief Justice disagreed, and the ongoing dialogue between the courts and Parliament regarding the voter rights issue ended, for the second time, at the final Court of Appeal, the Supreme Court of Canada, but the differing rationalizations of the Justices involved spring from differing perceptions of the provisions of section 1 of the Charter and the ability of Parliament to reconcile competing social, in fact majority versus minority, interests.

Following the Sauvé decision, Canadian Alliance Justice Critic Vic Toews called on the Justice Minister to amend the constitution and reverse the decision, tabling a motion to restrict prisoner’s voting rights. “Providing convicted murderers with this privilege undermines the legitimacy of democratic government and the rule of law…While the Charter was clearly intended to require Parliament to respect the rights and freedoms set out in the charter, it was also clear that the courts should exercise that power in the context of Canadian values and traditions,” explained Toews, advising the need for concern that, in his view, courts have recently been acting beyond the limits of their constitutional jurisdiction.

The Minister of Justice, in consultation with Cabinet, must now adopt a response position, after which point he would direct the Department of Justice to develop the appropriate legislation. The difficult position of the legislature is further enhanced by the fact that the override clause of the Charter only applies to sections 2 and 7-15, and the Sauvé case involves section 3, guaranteeing the right to vote.

Reform on the Horizon?

Advocates of judicial reform call for an increased parliamentary role in the selection of judges; they similarly support the de-stigmatized use of the override clause on a more regular basis. Peter Russell praises Preston Manning’s Reform Party as the first political party to develop positions regarding the judiciary in their platform. Manning’s proposal included a “judicial review” House of Commons committee to study potential Supreme Court appointees and review Supreme Court decisions requiring action from Parliament, namely to decide if Parliament should invoke the notwithstanding clause. “Systematic parliamentary review of judicial review would increase both government’s and opposition’s accountability for the positions they take on rights issues,”

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95 Russell 13.
Russell agrees, though he feels a parliamentary committee should look at laws before enactment for Charter discrepancies. Manning’s response to this suggestion, however, is that though the Minister of Justice is required to report Charter inconsistencies to the House, this has not stopped legislation from being “found wanting by the courts.”

Janet Hiebert echoes the need for such a pre-enactment review committee, believing that the addition of a parliamentary Charter committee, which would receive direction from the Minister of Justice in the referral of legislative intentions with a potential Charter risk, should complement the scrutiny which already occurs within the executive. Such a committee “would be to provide a foundation for Parliament’s collective and principled judgement about whether policies are important and responsible in light of the Charter and consistent with the values of a free and democratic society.” Hiebert proposes an additional government measure, then, as a mechanism to incorporate a dimension of the judicial role into Parliamentary proceedings that would allow for public debate. This mechanism could, in fact, act to temper the strong criticisms attracted by the judiciary, making Parliament a proactive participant in judiciary dialogue, rather than a mere reactive one. This would improve public perception of Parliament’s authority with respect to the judicial branch, and would enhance an implicit sense of dialogue between the two branches; such a measure could placate vocal opponents of a perceived demise of Parliamentary authority.

**Working Towards a Balance**

Parliament and the courts have cultivated a relationship that is at once functional and contentious, conciliatory and authoritative. The Charter of Rights and Freedoms has thus undeniably affected policy development in Canada, as it exists suspended in a complicated network of rival tensions, and has altered the balance of the nodes of power connecting the intricate channels of the legislative, executive, and judicial branches of government. Within this elected microcosm of competing interests are the individuals struggling for influence in a system where the common superior is a constitution whose broad linguistic brushstrokes sketch out a framework of rights designed to structure our society.

Many detractors of the judiciary have alluded to the possibility that an unintended consequence of the Charter has been the effective stifling of parliamentary independence and the dilution of policy effectiveness, making the issue more complex than a mere question of moral disagreement over a verdict. Perhaps, as Morton and Knopff suggest, our society should fear the growing judicial presence in public policy and the implications such judicialized politics have on transparent democracy, where conflicting sides enter into public debate on issues of contention before making decisions for society.

Nonetheless, in a troubling era of ‘democratic deficit’ with political apathy rampant among disillusioned voters and particularly entrenched in disinterested youth, the volatility engendered by ‘judicial activism’ is valuable. It forces engagement, since in touching the delicate pulse of our moral fibres and our visions for the future of our country, it forces us to defend our

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90 Manning 15.

97 Hiebert 28.
arguments and to ask ourselves difficult questions concerning the foundations of our concepts of morality. The type of fixed, morally static world Weinrib assigns to the judicial critic tarnishes the vision of Canada as a progressive nation, one which engages its citizens in the progress towards a future promising greater liberties and greater trust in the potential of the human condition.
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