

**THE CHANGING ROLE
OF THE SUPREME COURT OF CANADA AND ITS JUDGES**

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by

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The past decade has seen the Supreme Court of Canada change profoundly: from a court of private concern to a court of public concern; from a court of precedent to a court of principle; from a court of correction of error to a court of formulation of fundamental legal principle. Today, I propose to detail the changing role of the Court and comment on the impact these changes have on its judges and their work.

THE REASONS FOR THE CHANGE IN THE ROLE OF THE COURT

It is often said that the main reason for the change in the role of the Supreme Court of Canada is the adoption in 1982 of the *Canadian Charter of Rights and Freedoms*. While there is much truth to this assertion, it would be wrong to see the *Charter* as the only catalyst behind the Court's recent evolution. I view the *Charter* as only one of several factors relevant to the Court's emerging role.

The first factor behind the Court's new role is simply the increasing size and diversity of our population and the impact of values and ideas only a short time ago quite foreign to our way of seeing the world. During the nineteenth and for a large part of the twentieth century, Canada could best be described as a small, agricultural, caucasian, Christian society. Its structures rested on a virtually unquestioned core of shared

common values. A certain amount of cultural diversity was accepted, but only so long as it conformed to the fundamental ethic of hard-working, God-fearing self-reliance. Men and women occupied strictly defined roles in the family and the workplace, respectively, and established hierarchies stood unchallenged. While French Canada and English Canada enjoyed their differences -- language, the Church and attitudes toward Great Britain to mention three -- even these cultures shared a large store of common values. Both societies were white, male-dominated, Christian, and given to a view of free enterprise which offered limited legal protection to minorities and the disadvantaged.

In recent decades, this view of Canada has been radically altered. For a start, we are no longer small. We are, as these things are ranked in the world, a middle power. If we do not wield unlimited power or boast unlimited wealth, we are for all that wealthy and powerful. And we are increasingly numerous. Our population has doubled since the second world war.¹ This increased population cannot but have an increased impact on the courts.

Nor are we any longer predominantly agricultural. We are increasingly industrialized, increasingly concerned with the processing of resources and secondary products, with modern high technology, with the

¹ Between 1941 and 1986, the population of Canada increased from 11,506,655 to 25,354,064, an increase of 120%. Source: *Canada Year Book 1990*, Statistics Canada, pp. 2-19.

provision of services. These changes bring with them new problems, new values and, inevitably, new legal questions.

We are no longer an essentially caucasian country. One has only to walk the streets of our major cities -- Montreal, Toronto, Vancouver and Ottawa -- to realize that we are a country of mixed race. In this newly cosmopolitan Canada, issues arising from divergences of race and culture increasingly find their way into our legal system.

Nor are we any longer an essentially Christian society. Just as we are a society of mixed race, we are a society of mixed religion and culture. This fact, too, gives rise to new tensions, and their product, legal challenges.

Finally, we are a country increasingly affected by the major international social and intellectual currents that circulate throughout the western world. The result is the undermining of the old social hierarchies. The traditional roles of men and women have been vastly altered. Women are regarded as equal and independent, and when the reality does not match the ideal, they find redress in the courts. Minorities and the disadvantaged are regarded as entitled to remedies; this, too, forms part of the new moral consciousness.

In sum, Canadian society has experienced a revolution in recent decades, however quiet and incipient may have been its passage. Our

society is large, diverse and multi-faceted. It is no longer homogeneous. While we can still speak of shared values, we find ourselves increasingly confronted by conflict between divergent sets of shared values.

The impact on the legal system of this change is apparent. The new developments create new problems and new issues for the courts. The increasing diversity means increasing incidents of conflict, peaceful and otherwise, which too find their way before the courts. Changing roles and expectations for women and minorities too in train a host of legal questions. Quite apart from the *Charter*, these changes in our society would have mandated a new and different role for the Supreme Court of Canada.

A second and related factor impacting on the Court's changing role is the expansion of the law into new areas hitherto unknown or regulated by other institutions. Only a few decades ago, the principal pre-occupations of the law were the resolution of private disputes in accordance with the law of tort, contract and wills, and the maintenance of law and order through the criminal law. It could fairly be said that the decisions of the Supreme Court of Canada scarcely touched the lives of most ordinary Canadians. While these fundamental pre-occupations remain important, our courts are now inundated with a plethora of new issues and areas of legal dispute and doctrine. Quite apart from the *Charter*, which has introduced a new jurisprudence of individual rights, our courts are now engaged in regulating large areas of family life, new bio-medical and environmental

concerns, and the increasingly important issue of aboriginal rights. If such issues fell to be dealt with at all in past eras, it was not by the courts, but by other institutions like the church. Now it is to the courts that people turn for answers on the difficult social and moral issues related to sterilization, in-vitro fertilization, abortion, the environment, and the situation of our native population.

A third factor mandating a new role for the courts is the increasing litigiousness of our society. We still do not start as many lawsuits per capita as the Americans, but we are far ahead of societies like Japan and even England. And our litigiousness appears to be increasing. It is sometimes observed that like our cousins to the south, we increasingly live in a "me society", a society of individuals narcissistically preoccupied with getting that to which they are entitled or would like to become entitled. The result is more litigation on new and diverse issues.

Finally, I come to the *Charter*. The *Charter of Rights and Freedoms* has dramatically affected the role of courts in general and the Supreme Court in particular in two ways. First, as already observed, it has vastly increased the range of litigable subject-matter. Matters which were formerly largely unlitigible -- democratic rights, a whole range of free expression issues, liberties in the justice system and equality -- are now ready grist for the judicial mill. The result has been an increase in the work of the Supreme Court and a change in quality of the work done by

the Court. We are increasingly a constitutional court, concerned with public questions of national, constitutional import.

The second way in which the *Charter* has impacted on the role of the Court is through the new legal process which it introduces. The *Charter* gave birth to a new form of judicial decision-making -- one in which precedent matters less and general principle and the judge's value judgments matter more. The lack of available precedent on *Charter* questions; the less conclusive role of precedent in a principle-driven document; the open-textured language of the document; the unavoidability of making value judgments under s. 1 where the Court is required to balance the limit on the right against the public interest in effecting the limit; finally, the new remedies conferred by s. 24(2) and s. 52 of the *Charter* -- all these characteristics cannot but give rise to a radically altered role for the Court on *Charter* questions.

To summarize, a variety of factors have led to a new role for all courts, and in particular for the Supreme Court of Canada. The changing nature of our society, the expansion of the law into new domains, the increasing tendency of Canadians to litigate, and finally the *Canadian Charter of Rights and Freedoms*, have radically and unalterably changed our judicial system. I turn now to the nature of those changes.

THE NEW ROLE OF THE COURT VIS-A-VIS OTHER GOVERNMENT INSTITUTIONS

The changes which I have discussed have heightened the importance of our legal system and our courts. Our courts are deciding more cases on a wider variety of issues. They are touching the lives of ordinary Canadians more than ever before. This new centrality is augmented by the new constitutional duties and powers which the *Charter* has conferred on our courts. In many cases, the courts are the final arbiters of what stands as the law of the land. Parliament and the Legislatures propose, but the courts have no choice but to measure what they propose against the fundamental principles in the *Charter* and to declare legislation or government action invalid where it fails to meet these standards. Without derogating from the legislative function of Parliament and the Legislatures, it must be accepted that our courts are playing and will continue to play a more important, central and powerful role in our society than they have heretofore.

The role of Canadian courts, and of the Supreme Court of Canada in particular, is to accept this heightened responsibility for review, all the while bearing in mind that it is essential not to encroach on the right of Parliament and the Legislatures to propose and enact. The role of the courts has been enlarged, but it remains limited. In the months and years to come we can expect further refinement on the question of where the role of the court stops and that of the legislative and executive branches

takes precedence. To what extent, for example, should the Court grant remedies under the *Charter* equality provisions which require governments to expend large amounts of money? To what extent should the Court become involved in details of formulating and administering the changes in institutions necessary to bring them into harmony with the principles of the *Charter*?

In the United States, courts have adopted activist stances that involve considerable trenchment on what can be argued to be legislative or administrative functions. This was manifestly the case with the anti-discrimination rulings of the Supreme Court. States found their budgets tripled because of edicts relating to schooling.² Where states did not voluntarily comply, judges themselves in some cases took over the running of schools, down to ordering tennis balls in one case.³

It can be argued that the American courts were forced to adopt an activist stance because of the refusal of these branches of government and even lower courts to comply with the law which the Supreme Court had laid down, that the courts had little alternative. It can also be argued that in the long run the courts and more importantly, the rule of law, prevailed. Still, the example is one to be avoided, if at all possible. There

² In particular, *Brown v. Board of Education* (1954), 347 U.S. 483, (1955), 349 U.S. 294.

³ L. Baum, *The Supreme Court*, 3rd ed. (Washington: Congressional Quarterly Press, 1989) at 206-207.

can be no doubt that it exacerbated if not created a legacy of stress that resulted in much delay and wasted energy.

In Canada, we have the beginnings of a different tradition -- a tradition which emphasizes separation of powers less and cooperation more. Legislatures tend to regard the courts more as their adjuncts than as their enemies. The long tradition of constitutional references, in which the legislative branch refers questions for advice to the courts, attests to this tradition. There is also a tradition in Parliament and the Legislatures of responding positively to advice by the courts by rectifying offending legislation. As Chief Justice Nemetz stated in *Hoogbruin*:

If any law is inconsistent with the provisions of the *Charter*, it is the Courts' duty, to the extent of such inconsistency, to declare it to be of no force or effect (s. 52(1)).

Before the *Charter*, the Courts could and did declare legislation invalid on the division of powers grounds. When they did so, we know of no recent occasion when the legislative branch of government did not faithfully attempt to correct the impugned legislation. Likewise, when this Court declares a statute or portion thereof to be "of no force or effect" where it is inconsistent with the *Charter*, it is for the Legislature to decide what remedial steps should be taken in view of that declaration. Section 24(1) of the *Charter* empowers the Courts to grant citizens remedies where their guaranteed rights are infringed or denied It would be anomalous, indeed, if such powers were reserved only for cases where limitations are expressly enacted and not for cases where an

unconstitutional limitation results because of an omission in a statute.⁴

Recent examples of the cooperative spirit that exists between the judicial and legislative branch are not hard to find. In *Re Manitoba Language Rights* this Court avoided a confrontational model by inviting Manitoba to make representations on an ample period of time to translate its laws into French instead of striking them out summarily or fixing a date peremptorily. The result was that the Province proceeded with dispatch to bring its laws into conformity with the Constitution.⁵ Another example is the *Dixon* case where I found the electoral boundaries of the province of British Columbia violated the *Charter* guarantee of the right to vote. Again, I rejected the draconian remedy of simply striking down the law in favour of a time period during which a new Act could be passed. The government, which had an obvious interest in maintaining the existing boundaries, decided to accept the ruling and acted promptly to introduce legislation which rectified the situation⁶.

I maintain that we have in examples such as these the beginnings of a tradition of co-operation which will avoid the conflict between the courts and other branches of government which has occurred in the United

⁴ *Hoogbruin v. Attorney General of British Columbia*, [1986] 2 W.W.R. 700 at 704-705, 70 B.C.L.R. 1 at 5-6, 24 D.L.R. (4th) 718 at 722-23 (B.C.C.A.).

⁵ *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1.

⁶ *Dixon v. Attorney General of British Columbia* (1989), 35 B.C.L.R. (2d) 273, 59 D.L.R. (4th) 247.

States. The role of the courts and of the Supreme Court in particular will be central and important in the governance of our country. But it will be a role defined not by conflict but by cooperation.

THE IMPACT OF THE CHANGING ROLE OF THE SUPREME COURT ON ITS CHARACTER AND ITS JUDGES VIS-A-VIS THE PUBLIC

I turn from the Supreme Court's relations with other branches of government in its new and emerging role, to its relations with the public and the profession. The new Court will be, I predict, more national, more socially involved, more public, and more subject to comment and criticism. Let me elaborate.

The role of the Supreme Court of Canada is undeniably increasingly national in character. By national I refer to identification with the country as a whole as opposed to its several regions. When one joins the Supreme Court of Canada, one is immediately struck by its national character. Apart from the heavy volume of its workload, it is this feature which chiefly distinguishes our Court from the other courts in the country. The national character of the Supreme Court reflects itself in diverse ways. For example, we are nationally representative in composition. Not only do our members come from all parts of the country, they represent a diversity of origins. We have, as you know, three women. The ethnic background of our members includes not only French and Anglo-Saxon, but German, Ukrainian, Irish and Scottish strains. We are also national in our work. We sit in two languages, and our jurisdiction extends to virtually every

area of law in the country. In the civil domain, we apply two quite different systems of law. One of the most interesting challenges to confront a new member of the Court is learning to deal with a new system of civil responsibility. Not only the rules may differ. The methodology employed in deciding cases under the *Civil Code* of Quebec is quite different from that used at common law. Under the *Code*, principles not cases are of prime importance, and academic writers -- "la doctrine" -- are paramount. This is the exact reverse of the situation prevailing at common law, where the doctrine of precedent and case-law is fundamental. Thus, the Supreme Court is national in composition, jurisdiction and function. And the national character of the Court is growing. The *Charter*, uniting all parts of Canada under a single code of fundamental rights and freedoms, has further enhanced the national character of the Supreme Court. Roughly thirty per cent of our work is *Charter* work -- work necessarily surpassing local boundaries and interests.

Not only is the Supreme Court increasingly national in character -- it is increasingly involved in social issues touching the lives of ordinary Canadians. The Court has changed from a forum dominated by that unlikely combination that has traditionally occupied judges' time -- the economic elite and criminals -- to a forum vitally concerned with issues important to ordinary men and women. The *Charter*, combined with changing social values and an increasing concern with minorities and the under-advantaged, has introduced a new strata-straddling relevance to the Supreme Court's proceedings. In recent months we have heard cases on

abortion, the status of a foetus, sexual harassment, the right to use airports for political expression, roadside stops, delay in criminal proceedings and mandatory retirement, to mention only a few issues that impact forcefully on ordinary men and women in our society.

One consequence of these developments is that the Supreme Court has become more public. Our proceedings have always been open to the public. But often in the past they attracted little public attention. That is no longer the case. When one joins the Supreme Court one becomes to some extent a public figure. (I realized this to my chagrin when shortly after my appointment I was reported in the press as having been caught jogging along the banks of the Ottawa River. It was not the fact of my jogging that attracted attention so much, it seemed, as the colour of my jogging suit -- pink.) The fact is that the public is interested in the Court and the people on it because they are perceived as exercising considerable power. The public wants to know and arguably is entitled to know what sort of people occupy the Bench of the country's highest Court. The bench and bar in different areas of the country similarly want to find out what these ciphers so important to their professional lives are really like. So we find ourselves travelling more, giving more speeches, even occasionally submitting to interviews. All this is a far cry from the old days when a judge of the Supreme Court rarely ventured outside the building except to go home or down the street to the Rideau Club.

