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Where do we draw the line?

CANADIAN COURTS' ROLE IN PUBLIC POLICY HAS NEVER BEEN GREATER. IN THE last year, in constitutional cases alone, the Supreme Court has ruled on Employment Insurance benefits for parental and maternity leave, deportation of immigrants convicted of serious criminal offences, the ability of juries to use silence as evidence of guilt, provincial tobacco litigation statutes, remuneration for provincial court judges, Aboriginal logging rights and the right to participate in provincial resource decisions, pension rights for common-law spouses, media access to search warrants, roadside screening tests, the French-language education provisions of the Charter of Rights and Freedoms, whether government should fund certain treatments for autism, the legality of private health insurance, and the colour of margarine.

In the same year, a same-sex marriage bill, action on which was supposedly required by the courts, and a bill on judicial compensation, which was in fact required by the courts, occupied the legislative agenda of Prime Minister Paul Martin's minority government. And arguably the most important decisions of Martin's first

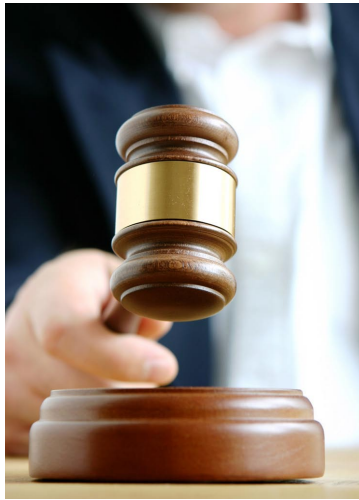
elected term will not be legislation, tax cuts or social programs, but his appointment of Justices Louise Charron and Rosalie Abella, and his likely appointment of a replacement for Justice John Major, who steps down in December 2005.

This rise in the power of the judiciary is a byproduct of decisions made a generation ago. In April 1982, Canada's fundamental legal framework jumped the Atlantic. Canada's first ministers, with the notable exception of Quebec's René Lévesque, had agreed to a constitutional package that included a Charter of Rights and Freedoms. The British tradition of parliamentary sovereignty, constrained by political and conventional understandings, was abandoned for a list of enumerated rights embedded in an American-style written constitution.

In the United States, the Constitution was 14 years old before the Supreme Court, under Chief Justice John Marshall, relied on it to overrule the elected government and Congress. *Marbury*¹ was an ingeniously worded decision, but one thoroughly mired in the politics of the day. What *Marbury* established in 1803 was that the Court, and not Congress or the administration, would decide whether legislation and the manner in which it was implemented was consistent with its understanding of the Constitution and therefore legitimate.²

Many of the major developments of subsequent American history involved institutional struggles between the courts and elected politicians. In *Dred Scott*,³ Chief Justice Roger Taney wrote that “being a Negro of African descent,” Scott could not be a citizen and that Congress could not prohibit slavery in U.S. territories. The decision helped fan the flames that that brought on the Civil War, and the eventual defeat of the South made the Fourteenth Amendment possible, allowing the federal judiciary to strike down state laws that violated the equal protection and due process clauses of the Bill of Rights.

The Fourteenth Amendment did not prevent the rise of Jim Crow.⁴ However, federal restraint on state action did grow, notably through *Lochner*⁵ and subsequent Court



decisions. These decisions brought on a Progressive attack on the principle of judicial review, which culminated in Franklin D. Roosevelt’s 1937 attempt to stack the Court to protect New Deal legislation.⁶ A generation later, a liberal

Court used judicial review for other purposes, barring school segregation,⁷ extending voting rights,⁸ revolutionizing criminal procedure and pushing the boundaries of free speech in ways not contemplated elsewhere before or since. The liberal high water mark was reached with the *Furman* and *Roe* cases in the early 1970s,⁹ which struck down all state death penalty and abortion statutes respectively.

But just as the *Lochner* line of cases generated a Progressive reaction, the *Furman* and *Roe* decisions in particular spurred a conservative countermovement. Still, three decades of mostly Republican presidents, while helping to remake the federal judiciary, have not yet brought conservative legal triumph. *Furman* was quickly abandoned,¹⁰ although the issue of when application of the death penalty is cruel and unusual continues to haunt the Court.¹¹ On the other hand, an all-Republican-appointed Court narrowly reaffirmed *Roe* in 1992.¹²

In Canada, the Charter was proclaimed against the background of this long and contentious American debate. Initially at least, the Supreme Court of Canada was unfazed.

From the Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

1. The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms:
 - a) freedom of conscience and religion;
 - b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - c) freedom of peaceful assembly; and
 - d) freedom of association ...
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice ...
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability ...
33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration ...

In 1985, three years after the proclamation of the Charter, the Court articulated an untroubled conception of its own role. In *B.C. Motor Vehicle Act Reference*¹³ the question was whether it was legitimate for provincial legislation to include language that defined guilt for driving without a valid driver's licence, whether or not the accused was aware of an administrative suspension. The provinces had argued the Court was in no position to decide:

*The judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.*¹⁴

The Supreme Court rejected this note of caution, claiming that the issue of legitimacy had been settled with the political choice to entrench a Charter in the first place:

*The historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.*¹⁵

In the years since, numerous and controversial Court decisions have failed to seriously dent the Charter's popularity. It has arguably attained an iconic status few other Canadian symbols can claim. Even in Quebec, the still-festering sore of the unresolved manner of the Charter's enactment is not reflected in distaste for the document itself. But "lingering doubts" remain, and neither judges nor politicians are able completely to ignore them.

On the judicial side, these doubts can be seen even in *Chaoulli*,¹⁶ the recent case in which the Supreme Court entered forcefully into the health care debate. While the majority on the Court ruled that Quebec, and possibly other provinces, must either cut wait times or allow individuals to buy health insurance privately, three justices dissented, arguing that in doing so the Court had exceeded its institutional competence. In their view, the Court had raced headlong across the line between law and provincial policymaking.

Elected politicians are similarly unable to dispense with lingering doubts about where the border between law and politics should lie. The federal parties differ on the accept-

The 1982 Constitution handed great power to Canada's courts, but we did not go as far as the United States, where there is no final check on the Court other than its institutional need not to let its reach exceed its grasp.

ability of using the notwithstanding clause to overrule judicial decisions on controversial social questions. Arguably, the Conservative Party suffered because of candidate Randy White's frank "The heck with the courts, eh?" statement in the 2004 election. But as American experience shows, there can be political advantage in running against the courts. Explicitly antimajoritarian institutions can be difficult to justify in the face of a populist onslaught, and voters are not always tolerant of the "rights talk" that seeks to expand, through the courts, the degree to which minorities might exact freedoms for themselves that legislative majorities would not otherwise recognize.

And Canadians have a majoritarian “out” if they become dissatisfied with judicial review. Our Constitution includes the notwithstanding clause, section 33, that permits governments to impose whatever law they see fit, even though it might offend the Charter’s other civil liberties sections, provided the legislation explicitly invokes the clause and is renewed every five years.

Although invoking the notwithstanding clause is politically treacherous in English Canada today, and therefore rarely done, the clause nevertheless gives politicians the highest trump card. While judicial review of legislation, specifically the power

If the appointment process is opened up to genuine legislative scrutiny, will a Gorbachev-like reform of process turn into a Gorbachev-like surrender of control of executive authority?

ultimately to declare a law invalid on civil rights grounds, is within the purview of the Supreme Court, a wilful legislature may simply sidestep it. The 1982 Constitution handed great power to Canada’s courts, but we did not go as far as the United States, where there is no final check on the Court other than its institutional need not to let its reach exceed its grasp.

Meanwhile, politics and the law necessarily interact, sometimes violently, in the judicial appointment process, where politicians get to choose who may overrule them. The process is fraught. Prime Minister Paul Martin, when he sought his party’s leadership, campaigned as a repairer of the “democratic deficit” who would permit decisions on Supreme Court appointments to be more popularly based than the prime ministerial announcements of the past. Still,

the perceived need of the Prime Minister’s Office to jealously guard executive power won out: all that Martin conceded, in the end, was that the House of Commons Justice Committee might briefly question the justice minister about the prime minister’s appointments. With the new vacancy created by Justice Major’s pending retirement, and given a minority government, will Paul Martin continue to succeed in appointing justices without parliamentary scrutiny or provincial input? If not – if the appointment process is opened up to genuine legislative scrutiny – will a Gorbachev-like reform of process turn into a Gorbachev-like surrender of control of executive authority?

Whatever the answer, Canada has so far avoided the partisan spectacles that many pundits see as besmirching the dignity of the U.S. appointment process, which requires committee advice and Senate consent. As we write, the nomination of a new Chief Justice (John Roberts) has been secured, but President George W. Bush’s nomination of Harriet Miers to replace Justice Sandra Day O’Connor has been withdrawn. The long-standing divisions among judicial conservatives came to the fore, with social conservatives such as former District of Columbia Circuit Court of Appeals Judge Robert Bork, who argues for an “originalist” approach to interpretation and deference to legislative majorities,¹⁷ seeing Miers’s nomination as a disaster. Conservative or libertarian natural rights theorists, who are polar opposites of originalists and would like to see the courts become more active in defending property rights, freedom of contract and state autonomy,¹⁸ also opposed Miers; presumably her replacement will have to do a better job of pleasing both sides.

The Miers nomination's failure should give pause for a breath for Canadian and American critics of the partisan process in the United States. In Justice Roberts, the process has produced a controversial but well qualified Chief Justice whose views are understood and approved by a broad swath of the American community. It is not at all clear that such a claim could be made on behalf of Miers. The implication – correct or not – is that of the two, Roberts will be better placed to maintain the dignity of the institution of the Court, which is essential if the Court's views are to have their full force among the other branches of government and among the public; after all, like the pope, the Court has no armies. The corollary of the failure, of little comfort to left or right, is that the harsh partisan light on the process will have produced a better Court.

This is a politically and socially divisive field, and one in which the action is currently fast-paced in North America. In light of all this, Inroads is delighted to have gleaned thoughts from Allan Blakeney, former Premier of Saskatchewan and an architect of the constitutional compromise that led to the proclamation of the Charter, and from Patrick Monahan, Dean of Osgoode Hall Law School and one of Canada's leading constitutional experts. In conversations with us during the summer, each reflected on Canada's quarter century of experience with judicially enforced constitutional rights.

— Gareth Morley and Finn Poschmann

Notes

¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

² The Court was clear and blunt: "In declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not

the laws of the United States generally, but those only which shall be made in pursuance of the constitution ... a law repugnant to the constitution is void."

³ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("separate but equal" public accommodations did not violate equal protection provisions).

⁵ *Lochner v. New York*, 198 U.S. 45 (1905) (maximum hours of work statute violating due process clause).

⁶ *United States v. Carolene Products*, 304 U.S. 144 (1938) (federal law banning interstate shipment of filled milk not violating due process).

⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁸ *Baker v. Carr*, 369 U.S. 186 (1962).

⁹ *Furman v. Georgia*, 408 U.S. 238 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰ *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹¹ *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of the mentally retarded unconstitutional); *Roper v. Simmons*, SCOTUS No. 03-633 (March 1, 2005) (execution of juveniles unconstitutional).

¹² *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹³ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

¹⁴ *Ibid.*, at paragraph 16.

¹⁵ *Ibid.*, at paragraph 16.

¹⁶ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.

¹⁷ Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1998).

¹⁸ Richard Epstein, *Takings: Private Property under the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985); Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2005).

Judges: Canada's new aristocracy

An interview with Allan Blakeney



The Hon. Allan Blakeney, PC, OC, QC, was a member of the Saskatchewan legislature from 1960 to 1988, leader of the Saskatchewan NDP from 1970 to 1987 and Premier of Saskatchewan from 1971 to 1982. As Minister of Health under Premier Woodrow Lloyd in the early 1960s, he oversaw the introduction of medicare. As Premier, he played a central role in the debates and negotiations concerning the patriation of Canada's constitution in 1980–82. He is a past president of the Canadian Civil Liberties Association, and is now a Visiting Scholar at the University of Saskatchewan, College of Law. Vancouver lawyer and frequent Inroads contributor Gareth Morley interviewed him for Inroads in the summer of 2005.

GARETH MORLEY: You have long been known for being sceptical about constitutionally entrenched bills of rights, like Canada's Charter of Rights and Freedoms. In 1981, you joined with seven other premiers in resisting Pierre Trudeau's plan to unilaterally repatriate the constitution with a judicially enforced charter. Saskatchewan was instrumental in putting the "notwithstanding clause" into the Charter, allowing Parliament and provincial legislatures to override judicial

interpretations of most rights in the Charter as we now have it. What are your concerns about letting judges strike down laws on the grounds that they infringe Canadians' fundamental rights and freedoms?

ALLAN BLAKENEY: We cannot be sure that a charter or bill of rights will improve respect for human rights and civil liberties. The United Kingdom has never had a written constitutional bill of rights and Canada did not have one until 1982. Neither country

has been perfect in respecting civil liberties or human rights, but comparatively, Canada's record was, and the U.K.'s record continues to be, as good as anywhere. The United States of America has had a Bill of Rights since shortly after it was founded, but for 70 years this Bill of Rights coexisted with chattel slavery. So we can't say that a country will respect human rights more just because it has rights written into its constitutional document.

What we can say for sure is that any written bill of rights transfers power from voters and governments to judges. Constitutional provisions do not interpret themselves: judges do. Almost all the difficult questions can be considered as conflicts between one group's rights and another group's or individual's. A written bill of rights means that more of the decisions as to whose rights will prevail in a particular situation will be made by judges and fewer by elected politicians.

Judges may be more respectful of human rights than politicians, and they may be less. Judges are drawn from lawyers, indeed from the legal elite. Without overgeneralizing, I think I can say that you become a part of the elite of the legal profession by being a handmaiden of the business establishment. When I practised law, my work came from business. For the most part, it was small business because big business didn't look upon me, as a former CCF cabinet minister, with favour. Some small businessmen didn't care. But still, my clientele was hardly a cross section of the electorate.

So judges are members of the legal elite, and therefore handmaidens of the business establishment, who are then appointed by the same politicians we are supposed to be suspicious of.

Judges are not accountable to the public. They are not *supposed* to be accountable to the public: that is what judicial independence means. They make their decisions on the basis of information provided to them by the parties to a particular lawsuit. That information is *supposed* to be narrowly focused on the disagreements between the parties to the suit.

Government's core functions, on the other hand, are to make and enforce laws, to raise taxes and spend them. You can always say that the way they do these things infringes somebody's rights. If we have waiting lists for surgery in Quebec, then someone might die. You can say that will infringe their right to life or their security of person. But if you spend more on health care, you spend less on highway maintenance or on prisons. And guess what? Spending less on highway maintenance means someone will die. Spending less on prisons means someone will die. If you gave me \$50 million to spend solely on saving lives, I certainly wouldn't spend it on the health care system.

The people deciding what to spend money on, and what laws to make and enforce, need to consider what the tradeoffs are. And they need to consider what the people want. For some reason, there is a lot of criticism of governments' looking at polls to see what the people want. Well, in my opinion, what the people want is very relevant to what should be done. It is far from definitive, but it is relevant.

Even if the courts make the "right" decision, it breeds distrust of the political process. It trains the public to think that if you want change, you go to the courts. And disengagement from the political process is a real problem for Canadian democracy. Even

if change comes more slowly through the political process, it is more secure.

GARETH MORLEY: Do you see a positive role for court supervision of governments?

ALLAN BLAKENEY: Absolutely. Courts can check governments in at least five ways.

First, they can supervise the police and minor judicial officials to ensure that they are respecting the civil rights of people caught up in the criminal justice system. Second, they can supervise public officials – bureaucrats – to make sure they act within the powers the law gives them. Third, they can supervise slips or unconscious infringements of someone's rights that legislatures make from time to time. Fourth, and most difficult, they can apply a check on the political process when it mistreats unpopular or isolated minorities who cannot defend themselves in the ordinary democratic system. Fifth, they can employ a substantive political theory of rights to second guess the major policy decisions of government – what laws to make, who and how much to tax, what to spend money on.

The first four functions are appropriate for courts, in my opinion, and were what we tried to make possible in the Charter; the fifth, however tempting for courts that see something they think is wrong, is illegitimate and dangerous.

GARETH MORLEY: In 1980–82, your opposition to strong judicial review of legislation put you at odds with a lot of people on the Canadian left. It still does. How do your views fit with your democratic socialist principles?

ALLAN BLAKENEY: I was strongly influenced by Franklin Roosevelt's struggle with the

U.S. Supreme Court over the constitutionality of the New Deal.

Thirty years before Roosevelt was elected, the U.S. Supreme Court struck down a New York state law that limited the hours of work in bakeries.¹ The Fourteenth Amendment provided that no state could deprive any person of life, liberty or property without due process of law. The law limited the ability of employers and employees to agree to any terms of employment they "wanted." The U.S. Supreme Court held that it therefore violated freedom of contract, and therefore "liberty" and, I believe, the "property" right to make contracts. And the judges then said that the law, although properly enacted in accordance with the rules of the state legislature of New York, lacked "substantive due process." So they struck it down. And for the next few decades, they struck down a number of progressive laws using the same reasoning. Roosevelt had to threaten to stack the Supreme Court or the New Deal would have been considered unconstitutional.

I argued that with Tommy Douglas and David Lewis in 1981. I asked them why they wanted to be on the side of Herbert Hoover and against Franklin Roosevelt.

The Charter is inspired by 18th-century models: the American Bill of Rights and the French Declaration of the Rights of Man. These documents were based on the premise that the only dangerous source of power was the government. In the 19th and 20th centuries, it became clear that powerful private interests could be just as big a threat to people's freedom as governments. And, as the mass of people got the vote, the left arose as a political movement to try to limit that private power. They tried to use government as a counterbalance. But the Charter ignores all centres of power other than government.

It does not impose any obligations on private interests whatsoever.

We need to protect people from everyone who has power, including corporations, professional bodies, etc. The only effective way to do this is to use the power of government. Excessive use of the Charter, by discrediting the political process and limiting the options of government, will leave people more exposed to these powerful private interests.

Franklin Roosevelt identified four freedoms: freedom of speech, freedom of religion, freedom from fear and freedom from want. The Charter can usefully support freedom of speech and freedom of religion. It may be able to do something about freedom from fear, providing that what we fear is the government. But what can it do about freedom from want? That is a very important freedom for the left.

GARETH MORLEY: You had differences with the federal NDP during the patriation debate.

ALLAN BLAKENEY: We had no differences on the desirability of patriation. Everyone in the NDP – everyone in the country – wanted the Constitution to be Canadian and not to have to be amended in Westminster. We had no differences in clarifying provincial jurisdiction over resources: the federal NDP helped us get what became section 92A of the Constitution Act, 1867. And we had no differences over Aboriginal and treaty rights – which became section 35 of the Constitution Act, 1982.

Where we differed was on the merits of a charter and a notwithstanding clause. The federal NDP were strongly for a charter and lukewarm about a notwithstanding clause. We were against a charter without a notwithstanding clause.

My view then was that the legitimate functions of the judiciary in supervising government could be accomplished through legislation, without constitutional entrenchment. The federal government had the Diefenbaker Bill of Rights; every province had a human rights statute of some kind. These statutes guaranteed fundamental rights and prohibited discrimination against disadvantaged minorities. They let the courts supervise the police and bureaucrats. Most of them allowed the courts to declare other laws invalid, subject to a notwithstanding clause. I thought these statutes could be used to improve human rights within the British parliamentary system, and still leave the final word to Parliament and the legislatures.

Judges are not accountable to the public. They are not *supposed* to be accountable to the public: that is what judicial independence means.

The problem, if there was one, was that the judges of that era [between 1960 and 1982] were perhaps too strongly respectful of parliamentary government. So, except for the *Drybones* decision,² they never held federal legislation to be contrary to the Bill of Rights.³ Quite a contrast to today.⁴ But I didn't see why we needed to convulse the country in a constitutional debate just to persuade the judges to be more active. We could have changed the Bill of Rights and its provincial equivalents. We could have had organic growth.

On the other hand, I wasn't hostile to the idea of a constitutional charter, as long as it made clear that on major policy issues the



A TALE OF TWO HOUSES “The conventional wisdom is that our splendid parliamentary system, with a wise electorate, somehow elects only fools and knaves ...”

courts would not interfere with the decisions of Parliament or the legislatures. I could see that a charter might have a valuable educational function. I concluded that we could retain the ultimate supremacy of the legislature, while getting the educational benefits of a charter with a notwithstanding clause allowing Parliament or the provincial legislature to say, explicitly, that its law would operate whatever the courts had said.

GARETH MORLEY: What accounted for the differences with the federal NDP?

ALLAN BLAKENEY: There were differences in the amount of confidence in the British parliamentary system to produce a fair degree of civil liberties. Perhaps they viewed the world from the point of view of an op-

position party; I viewed it more from the perspective of government.

As I said, I talked to both David Lewis and Tommy Douglas about this issue at the time. They both considered it important to prevent another [Maurice] Duplessis [Premier of Quebec 1936–39 and 1944–59]. I thought the best remedy for a Duplessis was to get rid of him in an election.

Ultimately, I think the people, for all their faults, need to be the guardians of their rights. We have had some major failures. Think of the incarceration of the Japanese Canadians during World War II. Their rights were grievously denied. But the same thing happened in the United States, which had a Bill of Rights, and the Supreme Court of the United States accepted it.⁵ I see this today. Since 9/11, we have had a serious reduction



A TALE OF TWO HOUSES “... Fools and knaves who appoint judges who are wise. But the day will come when the public will want more decision-making power back.” PHOTO: PHILIPPE LANDREVILLE/SUPREME COURT OF CANADA

in our civil liberties in this country. What have the courts done about it? Not much. A charter or bill of rights does not amount to much in a serious crisis.

The federal NDP was also influenced by the undoubted achievement of the U.S. federal courts in taking the lead in desegregation against state governments.⁶ They equated Maurice Duplessis with George Wallace [segregationist Governor of Alabama in the 1960s], which I think was mistaken, but inevitable. Canadians will interpret their Charter in an American way. It is unconscious, but it is part of the influence of *Law and Order* (a good show, by the way) and TV shows like that. I deplore it, but I recognize it as inevitable.

GARETH MORLEY: How did your initial scepticism about a bill of rights lead to the

formation of the “Gang of Eight” with the other provinces except for New Brunswick and Ontario?

ALLAN BLAKENEY: In September 1980, Trudeau seriously proposed patriation with a charter. I believed that the Canadian political class owed it to the Canadian people to try to patriate the constitution. However, from the beginning, the eight protesting premiers, including me, thought it was wholly inappropriate for the Prime Minister and the federal Parliament to attempt to change the constitution without substantial provincial consent. In principle, a prime minister with the ability to pass a resolution in the House of Commons could abolish the Province of Ontario, or, more likely at the time, the Province of Alberta. The [U.K.] Parliament

in Westminster would feel obliged to do it. That could not be right.

Initially, Saskatchewan attempted to build a “consensus in the middle.” Trudeau was claiming he just needed a resolution of the House of Commons. [Ontario Premier Bill] Davis was prepared to go along with it, although to be fair to him, he thought it was just for that one time, and then there would be a Canadian amending formula. [Quebec Premier René] Lévesque, [Alberta Premier Peter] Lougheed and [Manitoba Premier Sterling] Lyon were on the other extreme, saying that the Constitution could not be patriated without agreement of *all* the provinces.

The problem, if there was one, was that the judges of that era were perhaps too strongly respectful of parliamentary government. But I didn't see why we needed to convulse the country in a constitutional debate just to persuade the judges to be more active.

We in Saskatchewan talked to British Columbia, Nova Scotia and Ontario, and tried to negotiate with Trudeau. Unfortunately, maybe understandably, Trudeau was negotiating with multiple parties at the same time. When we talked to him, he had promised the Senate that there would be no effect on its powers, which was unacceptable to us. So the negotiations broke down, and we became part of the “Gang of Eight.”

We weren't sure that there was a *legal* impediment to Trudeau acting as he did. In pure law perhaps the House of Commons could pass any resolution it wanted and the U.K. Parliament could do what it liked. We thought that there was a consti-

tutional *convention* requiring substantial provincial consent to major constitutional amendments. We thought the Westminster Parliament should pay attention to that convention, although I had it on good authority that they would feel bound to pass whatever Ottawa sent them.

GARETH MORLEY: Can you explain the difference between a legal constitutional principle and a constitutional convention?

ALLAN BLAKENEY: Well, what I usually do is ask students who the most important person in the Canadian political system is. And they will say “the prime minister.” Then I point out that the text of the Constitution barely mentions the prime minister. It talks a lot about the governor general, who has the legal power to appoint the prime minister. She chooses the prime minister. But why can't she choose whom she likes? She has to choose the person who can command a majority in the House of Commons, which is normally the leader of the political party with the most seats. But there is nothing in the Constitution about political parties or how you form a government or defeat a government.

All there is is the preamble to the original Constitution which includes the phrase “a Constitution similar in principle to that of the United Kingdom.” In the United Kingdom, the whole system is based on conventions, which are not written down, but are every bit as important as what is written.

In 1981, Canada's Constitution was still, *legally*, a number of acts of the United Kingdom's Parliament. In reality, Canada was an independent country, so Trudeau would argue that the United Kingdom's Parliament had to adopt whatever resolution the House of Commons passed. Our argument was

that Canada was also a federal country, so if there was a convention binding the U.K. Parliament to respect Canada's independence, there was also a convention binding our House of Commons not to act without substantial provincial consent.

We made that argument to the Supreme Court of Canada.⁷ The majority essentially adopted Saskatchewan's position.

GARETH MORLEY: Do you think it was appropriate for the Supreme Court of Canada, as a court, to pronounce on constitutional conventions? Do you think that created a precedent for the future?

ALLAN BLAKENEY: I don't think judges should make legal rulings based on constitutional conventions. Conventions are up to the political system to enforce. That's why they are conventions, not laws. But when we went to the Court in 1981, it wasn't for a legal ruling. It was a reference, an advisory opinion. The Court was, in effect, telling the folks in Westminster what our constitution was.

But constitutional conventions are not established as canons for overturning written parts of the Constitution. In the *Quebec Secession* reference,⁸ the Court announced a number of principles – democracy, federalism, rule of law, respect for minorities – and somehow derived from them that the secession of Quebec could be legally accomplished using a different amending formula from the one in Part V of the written Constitution. I think that decision was legally bizarre. If the Court could do that in 1998, why couldn't it have just created an amending formula in the decades before 1982? Were [former Chief Justices of Canada] Lyman Duff, Bora Laskin and Brian Dickson legally challenged?

Politicians between 1867 and 1997 were aware of those principles – of democracy, federalism and so on. But they were there in a conventional sense, not in a legal sense except as canons of interpretation. It was not up to the courts to enforce them. It was novel, in 1981, for the Supreme Court to say what the conventional principles were, but it is a different matter if they do so on an advisory basis after being specifically asked. So, I think the Court did the right thing in 1981, but went outside its role in the *Secession Reference*.

GARETH MORLEY: After the Court ruled that there was a convention requiring substantial provincial consent, Trudeau reopened negotiations. Those negotiations resulted in the November 1981 deal, which you and Roy Romanow for Saskatchewan helped broker, and which all the provinces except Quebec agreed to. Why did Saskatchewan sign on to the patriation deal?

ALLAN BLAKENEY: We had to come up with a deal. The public expected it. We all wanted to see the Constitution patriated and an end to the constitutional debate. Saskatchewan's primary objectives – clarification of provincial jurisdiction over resources and a notwithstanding clause – had been met. The conventional wisdom now is that Quebec was excluded. It wasn't as clear then. All but two of Quebec's federal MPs supported the constitutional deal.

Sometimes I wonder whether it would not have been better if the Supreme Court of Canada had responded only to the "legal" issue in the *Patriation Reference*, and had just said that the federal government could unilaterally patriate the constitution with a bill of rights and its own amending formula. Then Trudeau would have done so,

with eight of the provinces against him. We would have been mad as hell, but Quebec would not have been isolated. There would have been eight provinces mad as hell instead of one. It might have been better for the country in the long run. But that is just a “might have been.”

GARETH MORLEY: Before we discuss the Charter of Rights that you and the other first ministers agreed to, I want to ask you how much you think it matters. How much should the courts be bound by what the politicians thought they were doing at the time?

ALLAN BLAKENEY: Quite a bit at first, and decreasingly over time. We are all in favour

The conventional wisdom now is that Quebec was excluded. It wasn't as clear then. All but two of Quebec's federal MPs supported the constitutional deal.

of treating the Constitution as a “living tree.”⁹ But I don't think it is right for the courts to decide that they don't like the tree we planted, dig it up and transplant another species. The speed with which the Court renounced what the politicians and, I would argue, the public, thought it meant was astounding.

The most important example is section 7 [see p. 26]. *Everyone* involved was very clear that they did not want this to include the concept of “substantive due process,” the concept the American courts before Roosevelt had used to strike down progressive legislation. We were prepared to countenance the judges' deciding whether the process governments use when they

affect liberty or security of the person was adequate, but not to second guess whether legislation was substantively fair or just.

Judges, as lawyers, have some insights into what kind of processes should be put in place – whether to require cross-examination, how to determine bias and so on. But, as lawyers, they have no particular insight into the substantive reasons for legislation. Under the Diefenbaker Bill of Rights, “principles of fundamental justice” were held to be purely procedural.¹⁰

The federal government could not have been clearer that the principles of fundamental justice were purely procedural. The main federal drafter was Barry Strayer, now Mr. Justice Barry Strayer of the Federal Court of Appeal. He repeatedly said that this was not going to include substantive due process. It was going to just be procedural due process.

Unfortunately, as Chief Justice Hughes of the U.S. Supreme Court said when he was a lowly politician, “The courts are bound by the Constitution, but the Constitution is whatever the courts say it is.” Within a very few years, the Canadian Supreme Court decided that they were not going to be second-class judges and section 7 was going to include substantive due process.¹¹

We can now see where this ends up. The latest decision about private medical insurance in Quebec¹² is an excellent example of the Court making a decision outside its proper ambit. The Court said that government should not stop someone from obtaining private health care insurance because this may risk life and infringe security of the person.

I make the obvious point that decisions about health care are not the only decisions



SEAT OF POWER “As Chief Justice Hughes of the U.S. Supreme Court said when he was a lowly politician, ‘The courts are bound by the Constitution, but the Constitution is whatever the courts say it is.’”

PHOTO: PHILIPPE LANDREVILLE/SUPREME COURT OF CANADA

made by provincial legislatures which risk the lives and security of citizens. Many decisions of government threaten lives. Should there be more police? Should speed limits on highways be lowered or raised? Should a two-lane highway be expanded to a four-lane highway? Should housing be provided for low-income people? These decisions and many more can be shown to risk the lives and security of citizens. If I read the

judgement correctly the court believes that these decisions would “engage section 7” and require governments to justify in court why the decisions were made. This is not a rational approach to government.

The essence of government is making choices. Legislatures make laws and enforce them. They raise taxes and they spend them. How you do that is what politics is all about. Well, after this decision, these choices are no

longer to be left to those accountable to the voters. If we have private care, it will inevitably affect the public system. Who is going to provide the private care? Are they going to use public hospitals? Are they going to use doctors trained at public expense? These are surely questions that affect all the people of Quebec. There might well be a place for private health insurance. But these issues have to be addressed.

The question about how to reform our health system has hardly gone unnoticed at election time. People who want private health insurance are not a helpless minority, like the ones protected by section 15 of the Charter [see p. 26]. The Court should not have gotten involved.

GARETH MORLEY: What about the fundamental freedoms, of expression and religion and so on, set out in section 2. Do you think the Court's decisions with respect to those freedoms are consistent with the 1981 deal?

ALLAN BLAKENEY: Not entirely, no. We did not intend to constitutionalize commercial advertising.¹³ Again, we wanted to avoid having the courts decide matters of economic policy. That is why I persuaded Trudeau to drop property rights (he did not really care about it one way or the other). I was vigorous on that score. Not because we wanted to see the government take somebody's home without paying for it – which is not a problem in Canada. But because, inevitably, property rights involve issues like the boundaries of intellectual property and revenues from resource tenures and other issues that should be decided democratically and politically.

I believe we thought that the fundamental freedoms were there to protect political

and ideological diversity and debate – in a broad sense, certainly including artistic and cultural expression. There is obviously room for reasonable people to disagree about the exact scope of these things, but I wanted the courts to stay out of economic decision-making. The courts said that “freedom of association” does not include the right to strike.¹⁴ Well, all right, I agree that the labour movement should be left to its resources in the political arena, but I think the same should go for corporate marketing departments.

I am absolutely certain that none of us would have imagined a decision like the Supreme Court's tobacco case.¹⁵ I am certain that when the drafters included “freedom of expression” as a fundamental freedom they did not mean commercial advertising for a harmful product. The Court purported to believe, in that case, that the cigarette companies advertised just to increase market share against each other, and not to increase the number of smokers. If I had been prime minister, I would have invoked the notwithstanding clause immediately.

GARETH MORLEY: What about other sections? What did you see the Charter as trying to accomplish?

ALLAN BLAKENEY: If you go through it, I think it fits with the limited vision of court review I tried to sketch out. The purpose of the Charter ought to be to reinforce the democratic process, not to judge public policy against a standard of rights as intellectual propositions. Principles should not be divorced from who interprets them and decides on how they interact with other principles.

The Democratic Rights let the courts make sure that everyone got in on the po-

litical process. They decided that prisoners have the right to vote.¹⁶ Mobility Rights (section 6) and Official Language Rights (sections 16–23) are not something you will see in a lot of other constitutions: they were the core of what Trudeau wanted politically out of a charter. The Legal Rights (sections 7–14) embody one of the functions of the judiciary I always thought was legitimate: supervising the police and criminal justice system. I may disagree with individual decisions, and I have no problem with Parliament using the notwithstanding clause if it thinks they got it wrong, but the courts have every right to be in the area.

Equality Rights raise the most difficult, and important, questions. I was in favour of section 15, including section 15(2) which allows for affirmative action [see p. 26]. You don't want to say that governments should not differentiate. All policy distinguishes between people – discriminates in the positive sense. We hope that our taste in wine or books is discriminating. Discrimination in a bad sense does not mean treating people differently: it means treating people differently on grounds that cannot be defended. Most groups – lawyers, doctors, oil companies, organized labour, people who want private health insurance – can fight it out in the political process. Democratic politics, in my experience, is pretty receptive to the interests of organized minorities and, when it isn't, there is usually a reason.

Some minorities, though, are too unpopular or isolated to defend themselves in the political process. So, in that case, I think it is good to have the courts ask whether the majority's grounds for treating those groups differently are “justified.” That is a value judgement, and it can be dangerous, but it needs to be done.

GARETH MORLEY: How should courts define the groups that need protection from the political process?

ALLAN BLAKENEY: I think it is important that they have regard to social, and economic, reality. There is no purely doctrinal basis. I think the Court has done a pretty good job reflecting what we were getting at in section 15.¹⁷ They avoided either saying that oil companies are a protected minority, on the one hand, or making the section a dead letter on the other. What they have done is both within the contemplation of the parties to the 1981 constitutional agreement and of benefit to Canada.

GARETH MORLEY: Would protection of those with a minority sexual orientation be among

We are all in favour of treating the Constitution as a “living tree.” But I don't think it is right for the courts to decide that they don't like the tree we planted, dig it up and transplant another species.

the things the first ministers would have envisioned the courts doing back in 1981?

ALLAN BLAKENEY: I don't know. We didn't think much about homosexual rights back in 1981. But we knew the list of protected groups was not comprehensive. I don't have any problem with what the courts have done to promote equality between same-sex couples and others.

GARETH MORLEY: How did Aboriginal and treaty rights get into the Constitution?

ALLAN BLAKENEY: As you know, Aboriginal and treaty rights were not part of what the first ministers other than Lévesque agreed



PAUL MARTIN “The current Prime Minister talks about how ministers of the crown are creating a ‘democratic deficit’ by usurping Parliament’s functions. But isn’t it just as bad for what are, after all, just ‘red-robed patronage appointees of the prime minister’ to usurp Parliament’s functions?”

to in Ottawa in November 1981. I told the Aboriginal leaders that, if the deal could be opened up again, we would push to include treaty and Aboriginal rights. I didn’t think it was likely, but then the women’s groups objected to the loss of a fairly symbolic provision that guaranteed all the rights in the Charter equally to men and women [section 28: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”]. I thought that it might be a problem for affirmative action, and was generally unnecessary, but it was important to them symbolically, and they got the Charter opened up for discussion. So, we pushed to have treaty and Aboriginal rights in as well.

Alberta and British Columbia were worried about the implications, but Lougheed agreed if we put the word “existing” in. So we got what is now section 35 [“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”].

All my lawyer instincts said we shouldn’t do this – we should leave Aboriginal and treaty rights for another day. We did not know what section 35 meant, and, as a lawyer, I did not like having language when we did not know what it meant. But my politician instinct, which was dominant, was the opposite. I don’t mean I thought that section 35 would be good for the government of Saskatchewan – it would cause every government trouble. But I felt that the condition of Aboriginal people in Canada was one

of the worst things about our society, and we needed to give Aboriginal people some weapons against the political establishment, including us.

GARETH MORLEY: How do you think section 35 has worked out in retrospect?

ALLAN BLAKENEY: Mixed. There is no doubt that it has opened things up and made Aboriginal concerns a bigger issue on the public agenda.

Unfortunately, I think that judicializing the problems of Aboriginal people gives leaders an opportunity to give the appearance of doing something in the relatively sanitary forum of the courts, while not dealing with the social and educational issues, not dealing with the urban issues. I don't blame that on the Constitution. Well, not all on the Constitution. But I would like to see Aboriginal people get more involved in the mainstream economic and political process.

GARETH MORLEY: You are concerned about the constitutionalization of commercial advertising and substantive due process. In what other cases do you think the Court overreached?

ALLAN BLAKENEY: The *Provincial Judges* salary case¹⁸ is maybe the worst. The Court, using "unwritten principles," laid out a process it said was constitutionally necessary to decide how provincial court judges would get paid. The Court purported to direct, not just what the decision would be, but the process by which the legislature reached a decision: there would have to be a commission, and so on.

First off, the reasoning does not stand up. If you ask somebody in a bar if they think judges are independent of government, they will say, "They are all appointed

by the government, aren't they?" If there is a problem of "perception of bias," it arises out of how judges are appointed, not how they get paid.

More important, it is completely beyond the rightful scope of the courts to tell the legislatures *how* they go about deciding things. Charles I got his head cut off for attempting to tell the English Parliament how to run its affairs. I don't suppose the courts would tolerate Parliament or the legislature telling them how they were to come up with their decisions, requiring them to have three conferences or such. The whole struggle for 300 years has been to make Parliament independent of the Crown, including the Crown's judges.

It is completely beyond the rightful scope of the courts to tell the legislatures *how* they go about deciding things. Charles I got his head cut off for attempting to tell the English Parliament how to run its affairs.

The current Prime Minister talks about how ministers of the crown (who are responsible to Parliament) are creating a "democratic deficit" by usurping Parliament's functions. I agree with him. But isn't it just as bad for what are, after all, just "red-robed patronage appointees of the prime minister" to usurp Parliament's functions? I could go on, but it would become a bit of a rant.

GARETH MORLEY: What do you say to people who argue we need decisions about fundamental rights to be made by people who are insulated from political pressure to protect minorities and individuals from the tyranny of the majority?

ALLAN BLAKENEY: I agree it is part of the role of the courts to protect unpopular minorities. That is what section 15 is for. But I do not think even that job is one we can completely delegate to the courts: the key is to have a culture of tolerance. If there were a major terrorist incident in Canada, the courts would not be able to prevent mistreatment of people of (for example) Pakistani descent if the public mood was the opposite, any more than the American courts protected Japanese Americans in World War II.

More generally, I think there is a mistake in thinking that the real issues about fundamental rights can be decided best by experts. There will always be folks who say you can't trust the electorate. But the whole development of democracy is predicated on the belief that the people, for all their warts, can be trusted better than any elite.

If someone needs to make a final decision, the question is who. Your choices are democracy, aristocracy or meritocracy. Fifty years ago, you could hear people go on about the merits of technocracy. What we needed was specialized experts to make the decision. The new aristocracy is to be judges. This is folly. It has never worked. Judges should measure laws and government acts against a measured standard. The fundamental decisions should be left to the public.

GARETH MORLEY: How do your ideas differ from those of conservative critics of Charter review, like Professors Rainer Knopff and Ted Morton at the University of Calgary,¹⁹ or Stephen Harper?

ALLAN BLAKENEY: We fear different things. Conservative critics are fearful that judicial activism will substantially affect social deci-

sions that should be up to the majority. My fear is that judicial activism will substantially affect economic decisions. The courts have given conservatives reasons to be fearful: abortion,²⁰ gay rights²¹ and so on. The courts have made a few decisions in the economic sphere. Not a lot, although if *Chaoulli* is the beginning of a trend, then there is a real problem.

I think the difference is that, in 1982, we consciously gave the courts the power to say something about social questions, at least social questions involving the interests of minorities, where minorities could not expect to get justice in the regular political process. We did not give them the power to adjudicate economic policy or social programs.

GARETH MORLEY: Do you think the conservatives have grounds for complaint, for instance, with *Morgentaler*?

ALLAN BLAKENEY: I think that is a difficult one. I am personally in favour of regulated freedom of choice. But I have difficulties on the institutional issue of who should implement this. The Court used section 7 to strike down the abortion law, rather than equality rights, which was troubling. In *Morgentaler*, the majority did restrict themselves to procedural problems with the old hospital committee system, and those problems existed. Parliament had a kick at it, as the Court left it the ability to do, and was not able to agree. So I think the issue really ended up in the political sphere, where it should be.

Reliance on some elite will produce results whereby major issues of public policy will be determined by who is appointed to the Supreme Court of Canada rather than by a public debate involving the public and legislators. I rather think we are about

to see issues surrounding pro-life and pro-choice debated at second hand in the United States when a successor to Justice [Sandra Day] O'Connor is selected. That is not my idea of the best functioning of a democratic system.

GARETH MORLEY: Some commentators – including Peter Hogg [former Dean of Osgoode Hall Law School in Toronto and one of Canada's leading constitutional experts] – argue that Court review does not really detract from legislative authority because, under section 1 of the Charter, the Court gives Parliament or the legislature the ability to pick its policy goals, and only strikes down legislation that goes further than those goals require. He argues that the effect is a “dialogue” between the courts and the legislature.²² People like Professor Hogg point out that the courts often talk about “deference” to the legislature. What do you think of that argument?

ALLAN BLAKENEY: Talk about deference does not matter that much: what matters is who makes the choices. I would be happy if the legislatures gave the courts all the deference, as long as legislatures were free to make the major governmental decisions.

GARETH MORLEY: But isn't it true that governments have often reacted to Charter decisions by finding some other way to obtain their policy goals? For instance, after the tobacco case, the federal government came out with legislation that was arguably even harder-line than what had been struck down.

ALLAN BLAKENEY: It is true that the politicians often decide it isn't worth it to have a big conflict with the courts. They find some other way to achieve their “policy goals,” as

you put it. I would prefer that they took on the courts on principle.

GARETH MORLEY: Canadian politicians rarely use the notwithstanding clause. They find other ways to get what they want. There does not seem to be a big public demand to use the notwithstanding clause. Why isn't that an equally legitimate result of the democratic political process?

ALLAN BLAKENEY: Yes, politicians tend to avoid the notwithstanding clause. In Quebec, there is no stigma attached to it. Lévesque used to use it routinely. In Saskatchewan, I don't think there is a stigma. It was used once by the Conservative government to defend back-to-work legislation.²³

The new aristocracy is to be judges. This is folly. It has never worked. Judges should measure laws and government acts against a measured standard. The fundamental decisions should be left to the public.

I was in opposition, so I could have made much of that, since it was against a union. I didn't because it was a legitimate use of the clause.

The federal government and the government of Ontario consider using the notwithstanding clause to have more of a stigma. The public right now is willing to accept a fair amount of judicial intervention.

GARETH MORLEY: Would you encourage politicians to run against the Court?

ALLAN BLAKENEY: If I were premier of Quebec, I would be on the campaign trail against the Court right now. I would argue, “How come Chief Justice McLachlin, from British

Columbia, and Justice Major, from Alberta, decide what is best for the people of Quebec? Two of the judges who might know something about the situation – Justice Fish and Justice LeBel – were against striking down the National Assembly’s law.”

Right now, the conventional wisdom is that our splendid parliamentary system, with a wise electorate, somehow elects only fools and knaves. Fools and knaves who appoint judges who are wise. Jean Chrétien is often portrayed as a fool and a knave, except somehow the judges – most of whom he appointed – are invested with superhuman wisdom. But these things come in waves. The day will come when the public will want more decision-making power back. ■

Notes

¹ *Lochner v. New York*, 198 U.S. 45 (1905) [“*Lochner*”] (New York statute limiting bakers’ hours of work contrary to 14th Amendment).

² *R. v. Drybones*, [1970] S.C.R. 282 (Indian Act offence of being an Indian intoxicated off a reserve inoperative for violating equality provisions of Canadian Bill of Rights).

³ *Robertson and Rosteanni v. R.*, [1963] S.C.R. 651 (Lord’s Day Act not offending guarantee of freedom of religion in Bill); *Canada v. Lavell*, [1974] S.C.R. 1349 (Indian Act removed status of Indian woman marrying non-Indian man, but not Indian man marrying non-Indian woman; not contrary to equality guarantee); *Canada v. Canard*, [1976] 1 S.C.R. 170 (special succession laws for property of Indians on reserve not contrary to equality guarantee); *R. v. Miller and Cockirell*, [1977] 2 S.C.R. 680 (death penalty not “cruel and unusual punishment” under Bill of Rights); *Bliss v. Canada*, [1979] 1 S.C.R. 183 (denial of regular Unemployment Insurance benefits for employment interrupted by pregnancy not contrary to equality guarantee).

⁴ *R. v. Big “M” Drug Mart*, [1985] 1 S.C.R. 295 (Lord’s Day Act offending guarantee of freedom of religion under Charter); *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (absolute liability offence with possibility of imprisonment unconstitutional; “principles of fundamental justice” include substantive, as well as procedural principles); *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (refugees entitled to oral hearing); *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (overruling *Bliss*); *United States v. Burns*, [2001] 1 S.C.R. 283 (death penalty engages values of “cruel and unusual punishment”; extradition without assurance that death penalty will not be used unconstitutional).

⁵ *Korematsu v. United States*, 323 U.S. 214 (1944) [“*Korematsu*”] (wartime incarceration of persons of Japanese descent upheld under “strict scrutiny”).

⁶ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (racial segregation of schools unconstitutional).

⁷ *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 [“*Patriation Reference*”] (joint resolution of the House of Commons and Senate according with constitutional law, but not constitutional convention).

⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Quebec not having unilateral right to secede under either Canadian constitution or international law, but clear question with a clear majority giving rise to a duty on other governments to negotiate potential act of secession as well as its possible terms).

⁹ From *Edwards v. A.G. of Canada*, [1930] A.C. 124 (P.C.) [“*Persons Case*”] (Women legally “persons” and therefore eligible to be senators, despite meaning of “person” in 1867).

¹⁰ *Duke v. The Queen*, [1972] S.C.R. 917 (failure of police to provide breathalyser sample to accused not contrary to principles of fundamental justice).

¹¹ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (imprisonment for absolute liability offence contrary to principles of fundamental justice).

¹² *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.

¹³ *Ford v. Quebec*, [1988] 2 S.C.R. 712 (restrictions on language of commercial signs contrary to freedom of expression; predominance of French reasonable limit, but not exclusivity of French); *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 (commercial advertising aimed at children protected by “freedom of expression, but restrictive law reasonable limit under section 1).

¹⁴ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

¹⁵ *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 (restrictions on tobacco advertising not reasonable limit on freedom of expression).

¹⁶ *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438 (blanket prohibition of voting for inmates in federal prisons unconstitutional); *Sauvé v. Canada*, [2002] 3 S.C.R. 519 (prohibition of voting for inmates serving terms of two years or more also unconstitutional).

¹⁷ Framework for section 15 set out in *Law v. Canada*, [1999] 1 S.C.R. 497 (restrictions on Canada Pension Plan benefits for able-bodied surviving spouses under 45 not discriminatory).

¹⁸ *Re Remuneration of Provincial Court Judges of PEI*, [1997] 3 S.C.R. 3 (setting constitutional requirements for determining compensation of provincial court judges).

¹⁹ FL. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).

²⁰ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Criminal Code scheme governing abortion interferes with security of the person contrary to principles of fundamental justice).

²¹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (failure to prohibit job discrimination based on sexual orientation unconstitutional); *M. v. H.*, [1999] 2 S.C.R. 3 (failure to provide same-sex partner with spousal support available to common-law partner unconstitutional); *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (proposed same-sex marriage law consistent with Constitution; Court declined to answer whether common law definition of marriage inconsistent with Constitution, as found by lower courts).

²² Peter W. Hogg & Allison A. Bushell, “The Charter Dialogue Between Courts and Legislators (or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All),” *Osgoode Hall Law Journal*, Vol. 35, No. 1 (1997), pp. 75–124.

²³ *Dairy Workers (Maintenance of Operations Act)*, SS. 1983–84, c. D-1.1, ultimately upheld in *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

The courts are doing their job

A discussion with Patrick Monahan



Patrick Monahan, LLB (Osgoode), LLM (Harvard), has been a member of Osgoode Hall Law School's faculty since 1982 and Dean since July 2003. Between 1986 and 1990 he was senior policy adviser to the Attorney General and Premier of Ontario and played a key role in negotiating the 1987 Meech Lake Accord. Professor Monahan was also a driving force behind the Clarity Act that established the Quebec government's duties in any referendum on secession, and in 2004 argued before the Supreme Court on behalf of a group of senators who intervened in the groundbreaking *Chaoulli* case that has reframed provinces' health care responsibilities. He spoke with Toronto policy analyst and Inroads associate editor Finn Poschmann in the summer of 2005.

FINN POSCHMANN: A generation of Canadians has now grown up with a Charter of Rights and Freedoms grafted onto a postmodern Canadian constitution. And today we are amid a flurry of major cases in Canada and the United States that test the relationship among the courts, governments and society. It seems time for a retrospective look at Canada's experience with a written bill of rights, a Charter that

has elevated and solidified the role of the courts. Admittedly, it remains incomplete, as it must until the Province of Quebec agrees to sign. The Charter is also somewhat tentative, in fact an oddity among Western democracies, in having retained a notwithstanding clause (section 33) that permits governments to abrogate recognized Charter rights should they explicitly choose to do so.

PATRICK MONAHAN: I had an excellent view of the patriation process, working as I was as a Supreme Court law clerk at the time of the *Patriation Reference*.¹ In fact, I was clerking for the late Justice Brian Dickson, and his position was that an accommodation needed to be made. I was certainly sceptical about the Charter – sceptical about the implications of transferring power from the legislatures to the courts. Ultimately though it is a matter of accommodation and tradeoffs; the provinces were rightly jealous of their legal powers and hesitant about yielding more room to courts in shaping the law. Securing an agreement meant striking a balance that reflected those accommodations, and section 33 was part of that balance.

FINN POSCHMANN: The obvious question is: Did Canadians get what we expected? There was much public debate in the runup to April 1982 – the public and the premiers certainly had a set of expectations about the course we were setting on. Did they expect that course to lead, for instance, to events like provincial courts instructing legislatures on who would be permitted to marry?

PATRICK MONAHAN: While that particular question would not have occurred to anyone in 1982, if the issue is, Did legislators understand that this involved a major transfer of power to the courts?, I think the answer to that is yes.

FINN POSCHMANN: Let us try to look at that straightforward answer through a 1981 filter. As I mentioned, there was a huge amount of public debate on the specific content of the Charter. This included close argument over the grounds under which discrimination would be forbidden – the hot-button example of the day was whether

a private landlord could be required to rent premises to a homosexual couple even if he or she passionately disapproved. The answer given by provincial premiers was no, sexual orientation would not be listed among protected grounds, and in fact of course it was not. Yet Canadians learned very quickly, after April 1982, about the concept of like grounds, and discovered that the courts had a broad view of the degree to which the list of protected grounds could or should be given expansive reading. More expansive, at least, than most voters surely expected.

PATRICK MONAHAN: All the same, the premiers were concerned about these issues at the time, and the wording they agreed to was broadly written. That was not an accident, and of course the list of covered grounds in section 15 was intended to be read in a nonexhaustive fashion.

FINN POSCHMANN: But did Alberta Premier Peter Lougheed nonetheless expect the result?

PATRICK MONAHAN: Premier Lougheed was certainly aware of voters' sensibilities, and that is why he pursued the notwithstanding clause. That clause permits governments to override the fundamental rights discussed in Charter sections 2 and 7 through 15, provided they expressly do so in legislation, which in turn requires reenactment after a five-year sunset, if legislatures so wish. However, Lougheed may not have had a proper understanding of the political difficulty of using the section 33 override. What he and other premiers have since found is that the popular opposition to using the notwithstanding clause to abrogate Charter rights is in fact quite formidable.

Moreover, as you suggested, there were public debates on just these issues, and the bill ultimately reflected those and the various governments' efforts to accommodate the concerns that were raised. We need today to take seriously that we made those tradeoffs, with eyes wide open, in pursuit of a Charter that did the things we wanted it to do. Hence today we should not be surprised that laws are struck down from time to time; we created the Charter explicitly to empower individuals in exercising their basic rights and to give the courts the tools to ensure that Canadians could exercise those rights.

FINN POSCHMANN: True enough, and at the fall 1981 first ministers' conference Allan Blakeney said the notwithstanding clause

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would allow "Parliament and legislatures to override a court decision which might affect the basic social institutions of a province or region and this is fully consistent with the sort of argument we have put forward that we need to balance the protection of rights with the existence of our institutions which have served us so well for so many centuries." Blakeney's identification of the tradeoff is reasonable as far as it goes. He does not make clear, however, whether he expects societal gains from a constitutionally entrenched Charter. In your view, what

have been the gains? How are Canadians better off?

PATRICK MONAHAN: In the long haul, restraint of the executive is where the big gains have been found. An important example is restraint of police practices; without the Charter there would have been little leverage for Canadians seeking to ensure that police forces adhered to Western norms with respect to personal security, privacy or restrictions on search and seizure. Some of the earliest Charter cases were concerned with the manner in which evidence was secured, and Canadians today have a clearer view of their rights in matters such as search and seizure. We would not otherwise have had this clarity.

Another positive development is the discipline the Charter has placed on government decision-making. In other words, the peace, order and good governance directive is a shield for government choices that must be explicitly invoked – governments must explicitly justify restraints on Charter rights, and placing on government of the onus to do so is an important gain. That is what we saw with the *Chaoulli* decision,² which we should discuss.

FINN POSCHMANN: Before dealing with this recent decision, I would like to take you back to the reason I described Canada's constitutional arrangement as postmodern. The people who assembled the Charter in the early 1980s regarded many debates about the shape of society and proper modern law as settled. They perceived themselves as part of the triumphant progressive viewpoint; they felt that "we" knew better than the "they" of the past, and could right past wrongs through measures such as affirmative action. Hence Canada's Charter has



OTTAWA, APRIL 1982 “If the issue is, Did legislators understand that this involved a major transfer of power to the courts?, I think the answer to that is yes.” PHOTO: NATIONAL ARCHIVES OF CANADA

15(2), the section that permits discrimination on otherwise prohibited grounds if such discrimination is intended to achieve currently favoured goals – such as preferential hiring of people of race *x* or *y*. Now some of us may believe that stance unwise, even if it has broad approval, and certainly unwise to enshrine constitutionally, with the result that the stance becomes extraordinarily difficult to shift in law.

Contrast this experience with U.S. history, where such pivotal social questions remain open. The relevant example is *Bakke*, which placed limits on those who would pursue socially approved racial (reverse) discrimination, and subsequent debates over preferences in university admissions in California, Texas and elsewhere. Social pressure successfully reversed a trend toward bur-

geoning racial preferences and – this is the important thing – there was energetic public debate that resulted in political choices being made (in California for example) that were subsequently sustained by courts. The courts themselves were not agents of social change, in these cases, notwithstanding complaints from U.S. politicians about judicial activism. Coming back to Canada, our constitutional authors saw such core social questions as settled, and the Supreme Court has subsequently seen itself as an agent of change that would implement the progressive vision of the future set in train by the legal elite of the day.

PATRICK MONAHAN: Again, as time goes by, choices do have to be made. The Charter is malleable and you have to remember that it

was intentionally made so – and, accordingly, today we have more room for growth and room for changes to public understanding of things that are and are not in Charter.

Consider section 7's guarantee of life, liberty and security of the person. At the time [of the constitutional negotiations] it was not clear to everyone, including the Justice Minister of the day, what the section added to similar guarantees already contained in the Canadian Bill of Rights (the Diefenbaker Bill), guarantees which were largely limited to procedural rights. Yet by 1988 the Supreme Court had used section 7 to strike down section 251 of the Criminal Code, which had set limits and conditions on access to abortion. There you have an

Being active at the legal margin is exactly what the Supreme Court must do; courts act against arbitrary actions, in defence of minority rights, exactly because that is their job.

example of the courts giving life and current contextual meaning in a manner not contemplated at the time the Charter was framed.

FINN POSCHMANN: Indeed, the living tree imagery is ubiquitous. But why should the Supreme Court see vested in itself a role in actively nurturing that tree? Why should it be a gardener of social change? The living tree image, a constantly changing world framework, is an inherently progressive image, and there is no mistaking the Court's belief in progress. Decisions cite Peter Hogg on progressive interpretation of the Charter, and the Chief Justice has been heard to speak as if the only constraint on judicial

activism is not wanting to be too far ahead of the broad public in pursuing a progressive vision. Should not the Supreme Court, vital institution that it is, adopt a more sceptical view of progress, seeking instead to cement in place those rights that we collectively are quite certain to be enduring ones? It is, after all, an institution that derives its authority from custom and tradition, whose authority needs to be jealously guarded – for the Court to have the political capital in hand that permits it occasionally to render controversial decisions.

PATRICK MONAHAN: The courts are active at the legal margins, and so they should be in defence of minorities. That is what the Charter is about. Majoritarian or populist views are easily expressed through the political process and ultimately in legislatures. The problem is when those views, or their legal outcomes, begin to infringe on individual rights or what we suspect should legitimately be regarded as Charter rights. If we believe a given right properly belongs on that list, we must rely on the Court ultimately to place it there, exactly because a populist majority might not be so inclined. From the point of view of the popular majority, however, the Court's actions will be perceived as pushing social boundaries. Again, however, being active at the legal margin is exactly what the Supreme Court must do; courts act against arbitrary actions, in defence of minority rights, exactly because that is their job.

Let me point out, however, that even conservative political scientists like Ted Morton of Alberta use Charter arguments, quite inconsistently in my view. I think you cannot have it both ways – if you want to get your way in court based on Charter arguments, you must accept that the court, if



it agrees with you, will assert a position on the margins that is contrary to the one that legislatures, and by extension the population they represent, would otherwise adopt. Were things otherwise, you would not need to assert your case based on the Charter. Hence, in pursuit of Charter rights, we simply must accept, as I said before, that the Supreme Court will from time to time strike down things that elected legislatures have put forward.

FINN POSCHMANN: Yes, and sometimes the Court does wisely defer on important social questions. And the Supreme Court, on the surface anyway, sought to do so in the case of the recent same-sex marriage reference,

SAME-SEX MARRIAGE “The courts are active at the legal margins, and so they should be in defence of minorities. That is what the Charter is about. From the point of view of the popular majority, however, the Court’s actions will be perceived as pushing social boundaries.”

punting back to the federal Parliament the core question of whether legislation should define marriage as requiring representation from precisely two sexes between two partners. At the same time, lower courts had ruled on Charter grounds, and the Supreme Court so hinted, that the elected government had no such power. And, quoting progressive, “living tree” interpretations of the Charter, the

Prime Minister said it was his understanding that the courts would rule such legislation to be unconstitutional, and that he would not thereafter invoke the notwithstanding clause. Through this dance, the courts were able to establish new Charter ground without taking a stand or making a ruling, and the Prime Minister was able to claim that the courts effectively forced his hand. The result was another progressive outcome for which no one was required to accept political responsibility. Is this not an example of the Charter permitting elite political actors to effect a progressive social agenda without first achieving a political mandate for doing so?

PATRICK MONAHAN: Well, the train really left that station with *Halpern* in 2003, which was successful in establishing in Ontario that the province could not withhold marriage licences from couples solely because they were of the same sex.³ That case ultimately set the course for legal recognition of gay marriage, and if provinces or the federal government did not aggressively defend the rearguard case for the status quo at that time, then the result could hardly be surprising. The governments of the day argued as they saw fit, and no attorney general appealed *Halpern*. No room for surprise then in 2005 when things proceeded as they did; the Supreme Court had very little to do by the time the case arrived before it.

Laws that limit private insurance are intended to protect a public health system so that it can deliver needed health services. If it does not do so, the law has failed in its stated purpose, and that is inconsistent with the principles of fundamental justice.

FINN POSCHMANN: Hence in the case of the gay marriage reference, you see the Court reflecting an evolving understanding of key rights with respect to nondiscrimination. Now, in the *Chaoulli* case the Supreme Court told Quebec that it must deliver particular health services in a manner sufficiently timely to suit the Court's pleasure. Here the Court seems to have extended rights talk well into the policy arena. One might say substantive due process has been extended not merely to the writing of law, but to the policy outcome. You must be uncomfortable with that.

PATRICK MONAHAN: I was surprised by the result, delighted and surprised by it because I certainly did not expect it. I am pleased that it has reopened debate about governments' responsibilities to their citizens when they place restrictions on individuals' choices. That is the tradeoff or the onus the Charter places on governments. Provincial law has restricted access to private insurance, plainly a restraint on individuals' ordinary activities, and that restraint needs to be justified under the Charter.

Stanley Hartt and I laid out the section 7 arguments that underpinned the *Chaoulli* decision in a 2002 paper for the C.D. Howe Institute. In it we explained that when ill Canadians are prevented from using private insurance markets to arrange medically necessary services, at the same time as being denied timely access to public health services, there is a clear violation of section 7's guarantee of liberty and security of the person. Laws that limit private insurance are intended to protect a public health system so that it, in turn, can deliver needed health services. If it does not do so, if the public system fails to deliver the timely care needed to keep people alive and healthy, the law has failed in its stated purpose, and that is inconsistent with the principles of fundamental justice.

The best part of the *Chaoulli* result is that provinces cannot fail to respond. Either they find ways to provide appropriate health services, or they must permit individuals to find their own ways of doing so, but governments cannot have it both ways. Governments cannot prohibit one person from using his or her own resources to purchase necessary health services on the grounds that someone else cannot afford to do so, and then fail to provide the needed services to either. That

would be an ideological pursuit, serving to treat people as objects rather than as living humans.

FINN POSCHMANN: And yet it seems a worrisome excursion into policy, and potentially an open-ended one. We have seen this in the United States, where high courts have forced states – in a more or less logical extension of the egalitarian reasoning of *Brown v. Board of Education*⁴ – to equalize local school board spending. The result, years later, is courts’ continuing to closely inspect state and school board spending to ensure that they are spending enough and in a fashion that the courts deem necessary. Are we not facing the prospect of Canada’s Supreme Court inspecting provincial budgets and choosing among priorities, in pursuit of our own egalitarian health vision? Certainly I have heard your coauthor Hartt and others speak of *Chaoulli* as having established the framework for a “health care guarantee.”

PATRICK MONAHAN: The important thing is that there will be different responses among the provinces. The Court is not telling them what to do or forcing particular choices. *Chaoulli* is instead another example of requiring governments to explicitly jus-

tify restrictions on Charter freedoms. The response provinces choose is up to them – some provinces will opt to improve health services and offer a health care guarantee; others will allow or encourage private insurance markets, as some do already. From this perspective, the policy incursion is modest to the point of nonexistence. The Supreme Court in *Chaoulli* is simply clarifying a section 7 right in the context of provincial restrictions on health financing, with potential gains for Canadians’ freedom – and their health.

FINN POSCHMANN: Thank you for your thoughts. ■

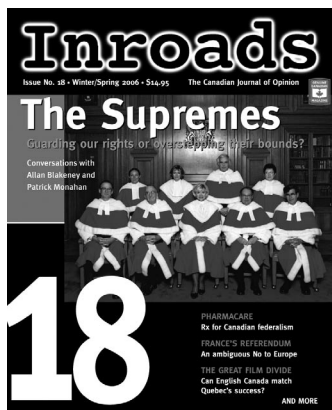
Notes

¹ *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 [“*Patriation Reference*”].

² *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.

³ *Halpern v. Canada (Attorney General)*, (2003) 65 O.R. (3rd) 161 (C.A.).

⁴ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), which invalidated the “separate but equal” defence for school segregation; the case was argued by Thurgood Marshall, who subsequently joined the Court as Justice.



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