

Courts and
the Making of
Public Policy

Are Courts Representative Bodies? A Canadian Perspective

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Policy Brief

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The Foundation for Law, Justice and Society

Courts and the Making of Public Policy

In the last fifty years, courts have emerged as key participants in the public policymaking process, exercising discretion to make decisions which have far-reaching consequences in terms of the distribution of benefits and burdens within society.

This programme provides a critical assessment of the role of courts in the public policymaking process, assessing their level of influence and scrutinizing the efficacy and legitimacy of their involvement.

The programme considers a range of issues within this context, including:

- the relationship between courts, legislatures, and executives
- how judicial policymaking fits within a democratic society
- what training and qualifications judges have for policy decisions
- how suitable the judicial forum is for handling policy choices.

Executive Summary

- The role assigned to the courts under constitutionally entrenched bills of rights like the *Canadian Charter of Rights and Freedoms* is essentially inconsistent with the notion of courts as representative bodies. It would be not only wrong for judges exercising the power of judicial review to claim legitimacy as representatives, but dangerous, as it distorts the nature of the judicial function.
- The legitimacy of judicial review rests on the perception that courts are not representative of anybody or anything other than the law. They act as independent and impartial arbiters who base their decisions on legal argument and reasoning rather than on political judgment.
- Judgments made by a court that reflect an appropriate diversity of legal traditions will be better not because they are representative but because they are based upon a wide range of thought and experience. A court will make better decisions if its membership reflects the gender, racial, cultural, and linguistic diversity of society. A diverse court will bring to bear a wide range of life experience that will assist and enrich collective decision-making.
- Judicial review in the name of protecting individual and minority rights vital to full participation in public discourse and the political process supports democratic values even though it permits the courts to override majoritarian decisions. If judges deceive themselves into thinking they are representative and fail consciously to relate the exercise of the power of judicial review to their non-representational role, they are likely to exceed acceptable limits of judicial authority.

Are Courts Representative Bodies? A Canadian Perspective

Introduction

In this policy brief, I offer the perspective of a Canadian judge with particular reference to judicial review under the *Canadian Charter of Rights and Freedoms, 1982*.¹

I will argue that the role assigned to the courts under constitutionally entrenched bills of rights like the *Charter* is essentially inconsistent with the notion of courts as representative bodies. I argue that it would be wrong for judges exercising the power of judicial review to claim legitimacy as representatives. In my view that claim is not only wrong, it is dangerous as it distorts the nature of the judicial function.

Judges are not appointed to represent any group or interest. They have no mandate and no capacity to reflect the popular views or opinions. They are appointed to interpret and apply the law. Judicial review of legislation against constitutionally mandated standards can only be defended for what it is: independent judges acting as impartial adjudicators applying legal method and argument. The notion of courts as representative bodies is dangerous as it suggests a capacity that judges lack. I fear that if judges deceive themselves into thinking they are representative and fail consciously to relate the exercise of the power of judicial review to their non-representational role, they are likely to exceed acceptable limits of judicial authority.

At the same time, I resist the argument that because judges are not representative, judicial review is illegitimate or anti-democratic. Indeed, I argue that the legitimacy of judicial review rests on the perception that courts are not representative of anybody or anything other than the law and act as independent and impartial arbiters who base their decisions on legal argument and reasoning rather than on political judgment.

The *Charter* and judicial review

Let me begin by offering a brief sketch of judicial review under the *Charter* to show my starting point. The *Charter* constitutionally protects an essentially

liberal catalogue of fundamental rights and freedoms and creates an awesome constitutional duty: judges are required to declare of no force or effect laws enacted by Parliament or a legislature that are inconsistent with those rights and freedoms.²

The courts — in particular, the Supreme Court of Canada — have fully accepted and embraced that mandate. The courts have generously interpreted the rights and freedoms protected by the *Charter* and have not hesitated to strike down and occasionally rewrite laws that infringe *Charter* guarantees. Courts now confront some of the most controversial issues in Canadian society and the Supreme Court's *Charter* decisions have had significant impact on public debate in Canada. The power of judicial review and the threat of declarations of constitutional invalidity shape decisions on many significant issues — freedom of expression, abortion, religion in the schools, assisted suicide and euthanasia, police investigative powers, the design of our public health care system, and national security in the age of international terrorism, to mention but a few.

The right to equality has been a particularly fruitful source of contentious *Charter* issues. Section 15, the *Charter's* equality rights guarantee, allows courts to review laws and ensure that they respect the fundamental right of human dignity and to be free from discrimination. Hospitals and other public institutions have been required to change their procedures to ensure the equality rights of disabled persons.³ Laws denying gays and lesbians benefits available to those in heterosexual spousal relationships have been found to deny the right to equal benefit of the law.⁴ The Supreme Court 'read-in' sexual orientation as ground of discrimination under Alberta's *Human Rights Code*,⁵ and same-sex couples have gained the right to marry through judicial decisions.⁶

Other minority rights have also been liberally interpreted. Provincial governments have been required to provide minority language schools,⁷ and Aboriginal rights, given specific constitutional protection in 1982, have also been generously construed.⁸

However, judicial review under the *Charter* has been tempered in relation to socio-economic rights. The Supreme Court has consistently accorded significant deference to legislative choices on economic issues. Canadian courts have been unsympathetic to those seeking to vindicate pure economic rights through the *Charter*.⁹ As Chief Justice Dickson stated, the right to liberty protected by section 7 'is not synonymous with unconstrained freedom' in the economic sphere and does not extend 'to an unconstrained right to transact business whenever one wishes.'¹⁰ In a similar vein, Dickson C.J.C. wrote that care must be taken when interpreting the *Charter* to avoid it becoming 'an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.'¹¹ The Supreme Court has staunchly upheld the notion 'that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee', and it has held as well that corporations cannot claim the protection of economic rights under section 7.¹²

The Supreme Court has also resisted the invitation to interpret the *Charter* as protecting a basic minimum level of social assistance and disappointed those who hoped to gain *Charter* protection for basic welfare rights.¹³ This cautious approach coincides with the Court's general reluctance to interpret *Charter* guarantees as including economic rights as well as the Court's tendency to defer to legislatures where complex economic and social policy choices are at issue. It reflects a judicial unwillingness to become embroiled in social welfare policy.¹⁴

'Judicial activism' and democracy

Judicial review under the *Charter* has been criticized as being inherently anti-democratic as it allows non-representative, unelected, and unaccountable judges to interfere with the will of Parliament and the provincial legislatures. Critics accuse the courts, especially the Supreme Court of Canada, of 'judicial

activism', a phrase that suggests the courts have exceeded acceptable limits of judicial authority and engaged in an undisciplined, unprincipled, and unwarranted assertion of judicial power that fails to respect the limits of judicial authority and usurps the role of the democratically elected legislatures. Critics argue that if our democratic tradition is to survive, the courts should adopt a much more restrained approach and essentially limit themselves to the literal interpretation and application of the *Charter* and laws as they are enacted by Parliament and the provincial legislatures.

It is interesting to note that the criticism of the Supreme Court has come from both ends of the political spectrum. The first wave of assault on judicial activism under the *Charter* came from the political left.¹⁵ These critics were fundamentally wary of what they saw as the constitutionalization of individualistic, liberal values. They distrusted the judiciary as an essentially conservative institution and feared that the *Charter* would do little more than allow those who already enjoyed wealth and power to attack legislation designed to improve the interests of the weak and vulnerable.

More recently, the focus of the criticism of judicial activism has come from the political right.¹⁶ The expansion of rights for those accused of crime and the generous interpretation accorded minority rights, especially rights based on sexual orientation or aboriginal background, have been attacked by these critics. They urge a programme of judicial restraint and long for the era of parliamentary supremacy, when the democratically elected legislatures could rule without interference from the courts. These critics suggest that *Charter* litigation is little more than a subterfuge that enables liberal academics and left-leaning special interest groups to implement views that would not otherwise attract majority support from the populace at large.

Although their politics differ, critics of judicial power on both the left and the right share some common concerns. They both seize upon the argument that in a democracy, important public issues, including the definition and scope of fundamental rights and freedoms, are only legitimate if made by elected officials who can claim representational authority. As courts are not representative, the power to overrule

legislative choices is illegitimate and contrary to basic democratic principles. Judges have too much discretion to read their own personal preferences into the vague words of the *Charter*, with the result that judicial review gives some groups too much power. The left is troubled by corporations and other advantaged interests using the *Charter* to strike down progressive laws curtailing their power and wealth, while the right is concerned about minorities and accused persons using the *Charter* to gain advantages not achieved through democratic politics.¹⁷

Judicial review and ‘courts as representative bodies’

Can judicial review be reconciled with the ideal of representative democracy, that is, a democracy in which the opinions of all citizens are heard, respected, and considered when important decisions of public policy are made? My answer is yes: judicial review is not only consistent with the ideals of representative democracy; judicial review can strengthen representative democracy.

However, a defence of judicial review based on the argument that courts should act as representative bodies is doomed to fail.

The view of courts as representative bodies seems to me to be inconsistent with our traditional notion of the role of the judge, the nature of adjudication, and accepted principles that emerge from the history and evolution of our Constitution. Our ideal of the judge is that of an independent, impartial actor who strives to decide disputes fairly and in accordance with the law. I cannot see the quality of representation as being consistent with that ideal. The idea of courts as representatives seems to me to be inconsistent with a basic tenet of the rule of law, namely that judges have a duty to decide cases impartially and strictly according to law. Representation implies a very different responsibility, namely to reflect views or opinions of particular interests that may be extraneous to the law.

The idea of courts as representative bodies is also inconsistent with the foundational principle of judicial independence. The central tenets of judicial independence are three-fold.¹⁸ First, judges

enjoy tenure of office and are removable only for a cause related to their capacity to perform the judicial function. Second, judges enjoy financial security so that they need not fear diminution in remuneration because of judgments that are unpopular or unfavourable to the government. Third, institutional independence in relation to court administration ensures control over lists and the assignment of judges to particular cases. These principles of judicial independence posit judges as impartial, independent actors, not beholden to any group or interest. Judges are accorded the status and protection necessary to enable them to stand above the political fray, immune to the pushes, pulls, and swings of popular opinion. As a leading study of judicial independence and accountability in Canada put it, judges necessarily occupy a ‘place apart’.¹⁹ Judicial independence, fundamental to our legal tradition, is difficult to reconcile with the notion that courts act as representative bodies.

The danger of courts as representative bodies

If judges are to exercise the power of judicial review responsibly, they must take account of both their strengths and their weaknesses as decision-makers in a constitutional democracy. Their strengths are the attributes of independence, impartiality, and, ideally, a profound knowledge and understanding of our legal and constitutional order. But those very strengths imply certain weaknesses when it comes to deciding issues of public importance. The attributes of independence, impartiality, and the capacity to decide cases on the basis of legal standards carry the obvious limitation that judges are relatively isolated and shielded from the constantly fluctuating landscape of politics and public opinion. Our constitutional order depends upon that isolation, and because they are isolated, judges have to be careful about how far they go when exercising the power of judicial review.

It seems to me that it would be quite wrong for judges to ignore the fact that when they decide *Charter* cases, they do not speak for the people but rather sit in judgment on laws that have been enacted by democratically elected legislators. Democratically elected legislators are more in touch with the will of the public. Judges are not, and they

should be mindful of their own lack of representative capacity and the inherent limits of adjudication.

Judges should be prepared to pay appropriate heed to the fact that when they wield the awesome power of judicial review, they are overruling choices made by those who have the mandate and the capacity to reflect the views of the majority.

I fear that the concept of courts as representative bodies could deceive judges into thinking they have capacities and responsibilities they do not possess and discourage a judicious sense of restraint and deference to legislative choices.

Judicial review to reinforce and enhance democracy

Not only is it wrong to attempt to justify judicial review or the exercise of judicial power on the pretense that courts have representational capacity, but in fact, the best defence of judicial review rests on the very opposite proposition. It is precisely because courts are isolated from the push and pull of politics and popular opinion that they have an important role to play in a constitutional democracy through the power of judicial review. It is to that argument that I will now turn.

There is more to our constitutional order and our democracy than majority rule. In 1998, the Supreme Court of Canada decided one of the most important cases in Canadian history: does Quebec have the right to secede from Canada unilaterally.²⁰ In answering this difficult and politically loaded question, the Court identified not one but 'four fundamental and organizing principles of the Constitution': federalism, constitutionalism and the rule of law, respect for minorities, and democracy. These four unwritten but implicit principles 'inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.' The unwritten principles represent the 'major elements of the architecture of the Constitution itself and are as such its lifeblood.' They 'infuse our Constitution and breathe life into it.'²¹

It is apparent that within this fundamental framework, the principle of democracy cannot be equated with simple rule by the majority. Federalism, constitutionalism and the rule of law,

and the protection of minorities all qualify the reach of majority rule, but at the same time, are entirely consistent with democracy. Federalism recognizes that there can be 'different and equally legitimate majorities in different provinces and territories and at the federal level'. Federalism offers a richer form of democracy by enabling citizens 'to participate concurrently in different collectivities and to pursue goals at both a federal and provincial level'.

Constitutionalism, the rule of law, and the protection of minorities are structural constitutional principles that underpin Canadian democracy. A properly functioning democracy 'requires a continuous process of discussion'²² and the opportunity for full participation by all. By limiting the power of the majority to curtail rights of individuals and minority groups to dignity and respect, judicial review aims to enhance the capacity of all to participate fully in Canadian society. By limiting majority rule in that manner, the Constitution and judicial review reinforce rather than weaken the democratic principle.

The constitutional vision reflected by the *Quebec Secession Reference* rests on the perception that the protection of fundamental rights and freedoms by an independent judiciary, independent of and isolated from the push and pull of politics and public opinion, is vital to protect and enhance the pre-conditions for democratic life.²³

Now of course democratically elected legislatures can ordinarily be counted on to respect the fundamental pre-conditions for democracy. That is the British parliamentary tradition. But unfortunately, history has shown that majorities of the day are often hostile to unpopular views and are prone to use, or abuse, their power to suppress opinions that threaten the status quo. As Dickson C.J.C. stated in an early foundational *Charter* case dealing with freedom of religion: 'What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "tyranny of the majority".'²⁴ Judicial protection of fundamental rights, from this perspective, enhances and protects democracy, even though it often means checking the power of majority rule.

The most obvious pre-condition to democracy is the right to vote, a right that, as the Supreme Court of Canada stated when striking down a law that curtailed the right of penitentiary inmates to vote, ‘underpins the legitimacy of Canadian democracy and Parliament’s claim to power’ and that should be robustly defended by the courts, ‘unaffected by the shifting winds of public opinion and electoral interests’, against legislative curtailment.²⁵ Beyond the right to vote, a healthy democracy can only exist within a legal and political framework that allows for free and open debate on public issues and protects the values of individual dignity, autonomy, and freedom of choice. Freedom of thought and religion and the rights to equality and the protection of life, liberty, and security of the person are the necessary conditions for democracy. As Chief Justice Dickson stated in defence of judicial review in an early *Charter* decision: ‘The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.’²⁶

The protection of the human dignity of minorities and other vulnerable members of Canadian society through judicial review is also consistent with accepted democratic principles.²⁷ Judicial enforcement of minority rights protects those whose voices are too few or too unpopular to be adequately heard in political debate. The Supreme Court’s focus on disadvantage and historic patterns of discrimination in its interpretation of the *Charter’s* equality guarantee²⁸ was explicitly based on the need to protect those vulnerable groups who lack an effective voice in majoritarian politics. When the Supreme Court held in a 1998 decision that the failure of Alberta’s human rights legislation to protect gays and lesbians from discrimination violated the guarantee of equality, it again based its decision on the basic democratic ideas that every citizen is entitled to the protection of the law and that the Constitution simply does not allow the majority to deny such protection to vulnerable minorities.²⁹ Judges do not act as ‘representatives’ of marginalized groups: the protection of minority rights rests on the capacity of courts to stand back from the political fray and insist that the majority respect the pre-conditions for democracy.

Judicial appointments

How does my argument that judges do not act as representatives fit with the often heard pleas for the need to better reflect diversity in making judicial appointments? I support the push for a more diverse judiciary. However, I resist the notion that any judge is appointed as a representative of a particular community or interest. I suggest that a more diverse court will be a better court because it will make better decisions and is more likely to enjoy public respect and confidence.

Constitutional and statutory provisions or conventions commonly require the appointment of judges possessed of special knowledge. In Canada, the Supreme Court Act³⁰ requires that three of the nine judges of the Supreme Court of Canada be from Quebec to ensure that our highest court has the capacity to determine issues of civil law. In the United Kingdom, convention requires that the Supreme Court include one judge from Scotland. Appointments to the International Court of Justice³¹ and the International Criminal Court³² must take into account the need for representation of ‘the principal legal systems of the world’. The rationale is the need to ensure merit. These requirements are designed to ensure the court has the required knowledge and expertise to decide all cases that come before it, whatever their provenance.

But a judge is a judge and, from whatever legal tradition, he or she is there to hear all cases that come before the court and to decide them not as a representative of any particular legal system but rather on the basis of the law or legal tradition that governs that case. Judgments made by a court that reflect an appropriate diversity of legal traditions will be better not because they are representative but because they are based upon a wide range of thought and experience.

The merit-based justification for taking diversity into account in judicial appointments holds even where we are not dealing with different legal cultures. A court, especially an apex court that sits en banc, will make better decisions if its

membership reflects the gender, racial, cultural, and linguistic diversity of society. A diverse court will bring to bear a wide range of life experience that will assist and enrich collective decision-making.³³ Senior judges recognize that diversity in the judiciary will enhance public confidence in the capacity of the courts to deliver fair and impartial justice³⁴ and 'rout from the law the clichéd stereotypes which have, for too long and too often, distorted judging.'³⁵

Finally, I suggest that if judicial appointments do not reflect the diversity of society, the claim that judicial appointments are made strictly on merit will simply ring hollow in the world of today. It will be very difficult to resist the public perception that a judiciary that is overwhelmingly white, male, and from the privileged social and economic class is the product of an 'old-boys-network' rather than merit. An all-white, all-male judiciary indicates that insufficient effort has been made in the appointments process to find the most qualified candidates from the starkly more diverse population of practising lawyers.

Conclusion

It is apparent that the challenging task of ensuring that *Charter* rights and freedoms are respected inevitably embroils the judiciary in difficult and contentious issues of public concern. Judicial review is bound to be controversial and contested. I argue that we can only defend judicial review for what it is: the scrutiny of legislation against constitutional standards by an independent judiciary on the basis of legal method and argument. I argue that judicial review in the name of protecting individual and minority rights vital to full participation in public discourse and the political process supports democratic values even though it permits the courts to override majoritarian decisions.

In my view, the notion of courts as representative bodies offers no hope as a justification for judicial review. Courts have no capacity to represent any group or interest and they should not purport to do so. I fear that for courts to purport to act as representative bodies would be to subvert the nature of the judicial function and entice judges into assuming powers they ought not to assume.

Notes

1. I draw freely on Sharpe, R. and K. Roach (2009) *The Charter of Rights and Freedoms* 4th edn. Toronto: Irwin Law, and thank my law clerk Alan Cliff for his assistance.
2. S. 52(1) of the *Constitution Act, 1982* provides: 'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.'
3. *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624.
4. *M v. H*, [1999] 2 S.C.R. 3.
5. *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
6. *Halpern v. Canada (A.G.)* [2003], 225 D.L.R. (4th) 529 (Ont. C.A.); *Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698.
7. *Mahé v. Alberta*, [1990] 1 S.C.R. 342.
8. See e.g. *R. v. Marshall*, [1999] 3 S.C.R. 456.
9. See, e.g. *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, at para. 46: 'The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*.'
10. *Edwards Books & Art Ltd. v. R.*, [1986] 2 S.C.R. 713, at 785–86.
11. *Ibid.*, at 779 (S.C.R.).
12. *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, at 1003.
13. *Gosselin v. Quebec (A.G.)*, [2002] 4 S.C.R. 238.
14. Compare, however, *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, striking down a Quebec law that prohibited private insurance for the cost of medical care, which was widely perceived to be a direct assault by the Court on Canada's universal public health care system, and the decision was attacked as an unwarranted judicial intrusion into a complex area of social policy.
15. See e.g. Mandell, M. (1994) *The Charter of Rights and the Legalization of Politics in Canada*, 2nd edn. Toronto: Thompson; Hutchinson, A. (1995) *Waiting for CORAF: A Critique of Law and Rights*. Toronto: University of Toronto Press.
16. Knopff, R. and F.L. Morton (1992) *Charter Politics*. Scarborough: Nelson Canada; Morton, F.L. and R. Knopff (2000) *The Charter Revolution and the Court Party*. Toronto: Broadview Press.
17. Roach, K. (2001) *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. Toronto: Irwin Law, c. 5.
18. See *Valente v. R.*, [1985] 2 S.C.R. 673; Friedland, Martin L. (1995) *A Place Apart: Judicial Independence and Accountability in Canada*. Ottawa: Canadian Judicial Council.
19. Friedland, *supra*.
20. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217.
21. *Ibid.*, at 240, 247, 248.
22. *Ibid.*, at 266, 255–56, 256.

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23. J.H. Ely is a strong proponent of this view in *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980). Patrick Monahan echoes this view, with his own refinements, in *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987). See also R. Penner (1996) 'The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom?', *Public Law*, Spring, 104.
 24. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 337.
 25. *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, at paras. 34 and 13.
 26. *R. v. Big M*, *supra*, at 346.
 27. *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
 28. *Law v. Canada*, [1999] 1 S.C.R. 497.
 29. *Vriend v. Alberta*, *supra*, at 566-67, per Iacobucci J.: 'judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*'.
 30. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 6.
 31. *Statute of the International Court of Justice*, Art. 9.
 32. *Rome Statute of the International Criminal Court*, s. 8(a)(i).
 33. *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 38.
 34. Lord Clarke M.R., 'Selecting Judges: Merit, Moral Courage, Judgment and Diversity' (2009) 5 HCQR 49; Baroness Hale, 'The Appointment and Removal of Judges: Independence and Diversity', International Association of Women Judges, 8th Biennial Conference, 3-7 May 2006, Sydney, Australia; Chief Justice McLachlin, 'Why We Need Women Judges', International Association of Women Judges, 8th Biennial Conference, 3-7 May 2006, Sydney, Australia.
 35. McLachlin, *supra*.



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