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Editorial Open Access

Neglected No More: Legislators, Administrators, and the Rise of the Canadian Courts

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"Our primary objection to the Charter Revolution is that it is deeply and fundamentally undemocratic. . . . The growth of courtroom rights talk undermines perhaps the fundamental prerequisite of decent liberal democratic politics: the willingness to engage those with whom one disagrees in the ongoing attempt to combine diverse interests into temporarily viable governing majorities" (Morton and Knopff, 2000, p. 149).

"The judiciary is entrusted with the duty of ensuring that legislatures do not infringe unjustifiably upon certain fundamental individual and collective interests in the name of the broader common good. . . . The courts are and will remain allies of Canadian democracy, strengthening any weaknesses of democracy by providing a voice and a remedy for those excluded from equal and effective democratic participation in our society" (Chief Justice Brian Dickson, 1988)[1].

These two quotations focus on the tension between those who favor relying on legislative bodies in making and carrying out governmental policies, and those who are wary of that reliance, and who argue that careful review by the courts is essential – to ensure that decisions made by legislators and administrators are reasonable and fair.

Although both quotations focus on the role of legislators, the issue inevitably extends to administrative officials, from senior executives to other lower-level officials, who have the power to provide or refuse job opportunities and benefits, and to the police and others who interact with the public and who hold the power to imprison or otherwise punish those they decide deserve such treatment. What role do the courts have in providing a "voice and a remedy" for those targeted by these officials for unfavorable treatment? In this essay, I explore elements of this issue in Canada, a nation that recently has given a wide-ranging influential role to the courts, and I focus in particular on the role of Brian Dickson, the first chief justice to lead the Supreme Court after the Charter went into force.

Until 1982 Canada had no constitutional Bill of Rights – that is, it had no statement of individual rights enshrined in its written constitution, and it had no judiciary that could declare legislative actions null and void, as violations of those constitutional rights. Canadians relied on their elected officials to protect their liberties; following the doctrine of legislative supremacy, the federal Parliament and provincial legislatures could, in most areas, overturn any court decision[2].

All that changed in 1982. With the creation of the Charter of Rights and Freedoms in April of that year, the Canadian constitution was embellished with an extensive list of individual rights and, adding a complexity not found in the American system, an array of "group rights" as well. The Supreme Court sitting in Ottawa now had the wide-ranging role that its American counterpart had successfully asserted in the first years of the 19th Century under Chief Justice John Marshall – the power to declare null and void any governmental action which the Court found to be inconsistent with the new Charter[3]. Within a few years, the Canadian court would exercise this power, and those who favored relying on legislative majorities would be unhappy. The first quotation above captures this unhappiness and some of the reasons why opponents of the Charter preferred a judiciary with weaker power.

There were many who had viewed legislative supremacy as a very mixed blessing. Included were those who fought for the rights of Aboriginal groups and the rights of women, and others who found laws passed in Ottawa, and in Manitoba and Alberta (and other provinces), at times oppressive or insensitive, and the actions of police officials and other public officials to be insensitive and at times abusive. To these individuals and organized clusters of Canadian citizens, a charter -- combined with judicial review on the American model – offered a way to remedy the weaknesses of legislative dominance[4]. A charter could be a route to making these disadvantaged Canadians full citizens – reducing their sense of alienation, protecting their members and their associations from disadvantages that majoritarian laws and administrative actions imposed, and perhaps providing them with resources needed to nurture their cultures. In 1980, the Liberal Party led by Prime Minister Pierre Trudeau completed a draft Charter and sought public comment. Women's groups and civil-liberties leaders criticized what they viewed as weaknesses in the draft, and they then fought successfully to strengthen individual and group protections. The 1982 Charter showed the impact of their efforts in a variety of areas[5].

Between 1984 (when the Supreme Court of Canada handed down

[1]*R. v. Holmes*, 1 SCR 914, at 931, 93

[2]An important exception was the allocation of powers between the central government and provincial legislatures. As to this limitation on legislative supremacy prior to the Charter, see Frank Iacobucci, "Judicial Review by the Supreme Court of Canada…," in David Beatty, ed., Human Rights and Judicial Review (Martinus Nijhoff, 1994).

[3]As legal scholar Radha Jhappan comments, the Charter "explicitly rejects the timeworn doctrine of legislative supremacy" and "manacles governments in a manner unprecedented in Canadian constitutional history". Jhappan, "Charter Politics and the Judiciary," in Michael Whittington and Glen Williams, eds., Canadian Politics in the 21st Century (Nelson, 2005), p. 261-262. See her essay (pp. 255-290) for a perceptive analysis of legal rights in Canada prior to 1982 and of the impact of Court decisions under the Charter.

[4]Which meant, as some observed, dominance by white male decision-makers.

[5]The 1980 draft was revised to strengthen the guarantee of gender equality (by adding section 28), to refer to the importance of preserving and enhancing the "multicultural heritage of Canada" (by adding section 27) and to restrict further the power of the government to imprison individuals and to use search and seizure powers (modifying sections 8 and 9). The campaign for the Charter is discussed in Peter Russell, Constitutional Odyssey, 2d ed. (Univ. of Toronto Press, 1993), and F. L. Morton and Rainer Knopff, The Charter Revolution and the Court Party (Broadview Press, 2000).

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its first "Charter case" decision) and 1990, the leader in shaping Court policy was its chief justice, Brian Dickson. Dickson, who retired in 1990, wrote many of the Supreme Court's most important opinions, which often framed the issues before the Court in large ways and rendered decisions with extensive sweep. Yet he was sensitive to the concerns raised by Morton and Knopff and by others, and he sought to direct attention to the nexus between judicial action favoring individual rights and the preservation of a vigorous democracy; his own position is in part captured in the second quotation at the top of this paper. On other occasions he deferred -or may have deferred - to legislatures as the institutions better able than the courts to determine national policy.

This paper first describes the traditional role of the Supreme Court of Canada and developments leading to approval of the Charter in 1982 and appointment of Brian Dickson as chief justice. I then discuss the strategies that Dickson and his colleagues used in eroding "legislative supremacy" and turning the Court into an active force in grappling with complex social issues. Next I turn to the criticisms of Morton and Knopff and others, who view the kind of judicial activism embraced by Dickson - and by the Court majority while he was chief justice (and beyond) -as undermining a once-vibrant Canadian democracy. More specifically, have Dickson's efforts, and the precedents his Court established, weakened Canadian democracy more than they have contributed to its vitality?

Legislative Supremacy and the Case of Stella Bliss

Canada inherited its governmental design from Great Britain, which has long lived under a system of parliamentary sovereignty. In Britain, no court decisions could block Parliament's power to set final policy in any area; freedom of speech and religion, the right to trial by jury, and other "individual rights" -- and limitations on those rights -- were decided finally at Westminster. Under the British North America Act of 1867, this system of parliamentary supremacy was conveyed to Canada, except for modifications needed to fit Canada's federal structure. That is, some powers were allotted only to legislative and administrative officials of the Canadian provinces (for example, education), others exclusively to the federal government (for example, banking), while still others were shared (as, criminal justice). The Canadian courts could and did at times declare a provincial or federal law unconstitutional – but only because the statute violated the division of responsibilities set forth in the BNA Act (later retitled the Constitution Act, 1867). Except for cases that raised federal "allocation of powers" questions, however, Canadian courts, like those in Britain, could be overruled by – and tended to defer to – the federal parliament and the legislatures of the ten provinces[6].

The problems generated by this tradition are nicely illustrated by the Supreme Court's handiwork in the case of Bliss v. the Attorney General of Canada (1979). In 1971, the federal parliament had approved the Unemployment Insurance Act, which authorized federal administrators to provide monetary benefits to women during the final months of pregnancy and during a period of weeks after childbirth. These "maternity benefits" were only available to women who had been employed for at least ten weeks just before leaving a job; pregnant women who had left a position with less than ten weeks of service were also barred from receiving the unemployment benefits available (without the ten-week constraint) to all men and to women who were not pregnant.

Stella Bliss took maternity leave but did not meet the ten-week standard; administrators therefore denied her application for benefits. In 1960, however, Parliament had enacted a Bill of Rights that declared "the right of the individual to equality before the law" and barred discrimination "by reason of race, national origin, colour, religion or sex"; Bliss applied to the courts to use this statute to overturn the denial of benefits[7]. In the lower court, Judge Collier agreed with her contention: "I am driven to the inescapable conclusion that the impugned section . . . authorizes discrimination by reason of sex, and as a consequence, abridges the right of equality" under the 1960 law[8]. After appeal, the case reached the Supreme Court of Canada.

Traditionally reluctant to declare a federal law invalid (and knowing that the Parliament could respond with a new statute overturning the Court's ruling, and perhaps thereby diminishing its prestige), the justices sought a way out of the dilemma framed by Judge Collier. But their reasoning managed to do exactly what they hoped to avoid – undermine the Court's reputation[9].

Writing for a unanimous bench, Justice Roland Ritchie argued that the sections of the 1971 insurance act challenged by Stella Bliss were part of "a legislative scheme enacted for valid federal objectives . . . from which men are excluded". Thus "any inequality between the sexes in this area," Ritchie wrote, "is not created by legislation but by nature". Having decided that the legislation provided distinct (and in this case lesser) benefits because women are different from men, he reached for a way to avoid Collier's conclusion – that this must be labeled as sex discrimination. A comment by one lower-court judge in Bliss offered intriguing reasoning, and Ritchie quoted it: If the act "treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are female".

"I am in accord" with this thinking, Ritchie concluded, and his analysis and conclusion, rejecting Stella Bliss's appeal for benefits, were endorsed by a unanimous Court[10].

But not by all observers. The Court's decision was pilloried in the press and at meetings of women's groups, and critics pointed to the very different position taken by American courts. Directly relevant was a 1971 case interpreting the U. S. Civil Rights Act of 1964: "The effect of the statute is not to be diluted because discrimination adversely

[6]In the past two decades, parliamentary supremacy in Britain has been constrained as a result of the influence of the European Court of Justice and other developments.

[7]The 1960 *Bill of Rights* was a simple statute that applied only to the federal government; it could be altered by Parliament at any time. The courts rarely considered its provisions as limitations upon later legislative acts. (See Peter W. Hogg, Constitutional Law of Canada [Carswell, 1999], ch. 32.)

Stella Bliss did not ask that she receive maternity benefits; rather, her argument was that, during a portion of the "maternity" period, she was "available for work but unable to find suitable employment". Thus, had she not been pregnant, she would have obtained the same benefits as those received by men in that situation. See Bliss v. AG Canada [1979] 1 SCR 183, at 189.

[8]Quoted in Bliss, 1979, at 190.

[9]The motives of the justices in the Bliss case are a matter of conjecture. More generally on the Court's concerns and behavior, see Christopher P. Manfredi, Judicial Power and the Charter (Oxford University Press, 2001), pp. 16-17, 108 ff., and Ian Bushnell, The Captive Court (McGill-Queens University Press, 1992), chapters 30-31 and passim. On the impact of the Court's decision in Bliss, see Manfredi, 2001, pp. 110 ff.

[10]Bliss, 1979, pp. 190-191.

affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex[11].

In response to the Court's action and subsequent criticism, the federal Parliament soon amended the insurance act and other laws, so that pregnant women would not be subjected to benefits discrimination in the future. In an important sense, one could argue, the changes made in Ottawa showed the dynamic of legislative supremacy at work: Parliament had responded by enacting new provisions to aid those whose rights previous legislatures and courts had failed adequately to protect.

The impact of Bliss carried further, for it stimulated action on the part of women's groups, aimed at obtaining a "bill of rights" imbedded in the written Constitution. And thus it became part of the vigorous debate that shaped the creation of the new and constitutionally entrenched Charter[12].

Trudeau, the 1982 Charter, and the New Chief Justice

In an important sense, the story of the Charter of Rights and Freedoms begins with the education of Pierre Elliott Trudeau. A francophone from Quebec, Trudeau obtained a law degree in his home province and then traveled to Harvard for graduate work in economics and political science. There he became closely familiar with the American Bill of Rights and the role of the United States Supreme Court in protecting freedom of speech and other rights. Returning to Canada, he gained prominence as a nationalist and an opponent of Quebec separatism. Beginning in 1968, Trudeau pressed for the creation of a strengthened bill of rights along the lines of the American model. One of the benefits of rights imbedded in the constitutional text, as Trudeau explained, is that the language and cultural heritage of French-speaking citizens would be better protected in the nine provinces in which they were a minority, and where their rights were at times disregarded. The long-term result might be a greater willingness of francophones in Quebec and elsewhere in Canada to abandon separatism and to thrive in a (truly) bi-cultural nation. The rights of Aboriginal groups and women and other Canadians who were sometimes badly treated by legislatures, by senior executives in carrying out provincial policies, and by other government officials would also be more fully protected[13].

Trudeau won his campaign: the British North American Act of 1867, previously a British statute, was "patriated" to Canada (and renamed the Constitution Act, 1867); and the 1982 Charter of Rights and Freedoms was added to the basic documents that the Supreme Court of Canada would now treat as the "law of the land". In the course of the debate and negotiations, however, Trudeau encountered resistance from those who in principle preferred to rely on legislators, who could weigh individual rights against other important policy goals -- and more specifically from officials of the ten provinces, whose political power might be constrained by a newly invigorated Court sitting in Ottawa. To mollify the opponents, Trudeau and his allies modified an early draft of the Charter, with the hope of reducing the potential power of the courts. These clauses now appear as Section 1 and Section 33 of the 1982 Charter.

In the 1980 draft, Section 1 provided that equality and other rights listed in later sections of the *Charter* would be "subject only to such reasonable limits as are generally acceptable in a free and democratic society *with a parliamentary system of government*"[14]. Critics suggested that the italicized phrase might lead courts to defer to whatever laws achieved legislative majorities, thus maintaining the tradition of judicial deference seen in Bliss. Under pressure from women's groups and others, Trudeau and his advisers then modified the draft, and Section 1 as it appears in the 1982 Charter reads:

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.

The "reasonable limits" clause offered the Court a rationale for finding laws and administrative actions to be constitutional even if the justices conclude that such actions violate freedom of religion or speech, or other provisions of the Charter. How Section 1 would limit the guaranteed rights would depend on the actions of the Canadian Supreme Court.

In the final negotiations in the fall of 1981, the provincial premiers extracted another change in the draft Charter, adding Section 33, which might have been used to restore legislative supremacy to its traditional, central place[15].

Section 33 reads:

… Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature . . . that the Act or a provision thereof shall operate *notwithstanding* a provision included in section 2 or sections 7 to 15 of this Charter (emphasis added).

Section 2 of the Charter provides for freedom of conscience, religion, opinion and the press, and freedom of assembly and association. Sections 7-15, inter alia, prohibit unreasonable search as well as arbitrary arrest and imprisonment, and provide for equal protection of the law. Under the Charter, the provinces and the federal government could use the "notwithstanding" clause to suspend any of these rights for up to five years. And the suspension could then be renewed indefinitely![16] However, after Québec, which had not approved the Charter, used S. 33 to suspend all federal laws, that provision fell into disrepute and has rarely been used since the 1980s[17].

When the Charter was approved in 1982, Bora Laskin was chief

[11]Sprogis v. United Airlines, 444 F.2d (Seventh Cir., 1971) at 1198. The U.S. Supreme Court let the decision stand.

[12]On the role of women's groups, see Morton and Knopff, 2000, pp. 25-26 and passim; on the change at the Court, see Bushnell, 1992, pp 441-42. See also Lorraine Eisenstat Weinrib, "The Activist Constitution" and other essays in Paul Howe and Peter H. Russell, eds., Judicial Power and Canadian Democracy (McGill-Queen's University Press, 2001).

[13]See Pierre Elliott Trudeau, Federalism and the French Canadians (Macmillan, 1968); Trudeau, Memoirs (McClelland and Stewart, 1993), Part Four; Stephen Clarkson and Christina McCall, Trudeau and Our Times, vol. I (McClelland and Stewart, 1990), Part II; Russell, Constitutional Odyssey, 1993, ch. 6-8.

[14]Quoted in Robert J. Sharpe, Katherine E. Swinton and Kent Roach, The Charter of Rights and Freedoms, 2d. ed (Irwin Law, 2002), p. 19; emphasis added.

[15]On the negotiations and Trudeau's unhappiness, see Clarkson and McCall, vol. 1, chapter 18 (esp. pp. 380-386).

[16]The U.S. has no counterpart to S.33. However, the "exceptions" clause of Article III of the U.S. Constitution does offer the possibility that Congress could bar judicial review of some categories of statutes ("… the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make". Art. III, sec.2). See Tribe, American Constitutional Law, 2000, v. 1, pp. 270-280, and especially the article by Gunther, cited on p. 274.

[17]For an interesting discussion of Section 33, see Janet L. Hiebert, "Compromise and the Notwithstanding Clause," in James B. Kelly and Christopher P. Manfredi, Contested Constitutionalism (UBC Press, 2009), 107-125.

justice, but he died in 1984, as the first cases under the Charter reached the Supreme Court. The Prime Minister then appointed Brian Dickson. Dickson had been a member of the Supreme Court since 1973, and during his nine years in office he had shown little visible concern for women's rights. He had been a member of the Court that unanimously endorsed the Ritchie opinion in the Bliss case; and he had taken positions in other cases that attracted unfavorable attention from those who sought greater sensitivity in the courts to the vulnerable position of women[18].

From Trudeau's perspective, Dickson did, however, have several evident strengths. He had demonstrated, while serving as a judge in Manitoba, an uncommon ability to sort out complex issues when the rights of distinctive cultural groups were involved[19]. On occasion, his own opinions showed strong support for the thrust of the 1960 Bill of Rights, in contrast with his silent deference to legislative supremacy in accepting the Court opinion in Bliss. For example, he had used the "equality" clause of that Act to challenge federal officials who discriminated against an Aboriginal woman. He had argued in favor of restricting the powers of local police, when they arrested individuals based on vague "vagrancy" statutes and when they entered private homes and arrested those engaged in consensual sexual behavior. The positions Dickson had taken on the Court suggested that he agreed with Trudeau's public position, expressed in his 1968 campaign and beyond, that "the state has no business in the bedrooms of the nation". And Dickson had shown a real interest in drawing upon experience in American and other courts[20].

The fact that the 1982 Charter was a part of the Constitution of Canada – not an ordinary statute like the 1960 Bill of Rights – appears to have had an immediate and significant impact on the justices of the Court, and that impact was perhaps greatest on Dickson, who assumed the leadership position at this critical moment. A few years later he commented:

My own view is that the Charter marks the opening of a dramatic and historic new chapter in Canada's constitutional and jurisprudential evolution; the development of a distinctly Canadian constitutional jurisprudence, basically British in orientation but drawing freeing upon the experience and teachings of other jurisdictions, including the United States[21].

Dickson Searches for Standards to Discipline Court Action

In the paragraphs below, I first discuss Dickson's strategy in developing standards that the Court could use in tackling cases under the Charter. Then I explore how Dickson and his colleagues employed these standards, in three areas in which the tension between Charter freedoms and the power of legislative and administrative bodies was palpable: protections in criminal proceedings; women's rights; and the ability of provincial and federal officials to control Aboriginal rights.

We begin with Hunter v. Southam (1984), Dickson's first opinion interpreting the Charter. "The task of expounding a constitution is crucially different," Dickson argued, "from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. . . ". Therefore a "broad, purposive analysis," interpreting specific provisions of a constitutional document "in the light of its larger objects," was essential. The Court would no longer ask, what goals did the legislature hope to achieve in enacting this statute? (a key question under the doctrine of legislative supremacy). Instead the judges would ask, Does this law or this administrative action conflict with the language and underlying purposes of the Charter? In embracing this wide-ranging and "purposive" approach to Charter cases, which drew on American constitutional experience, Dickson was able to win the endorsement of his colleagues in Hunter without dissent[22].

Police Actions, the Criminal Law and the Role of the Courts

The important role of Section 1 – and a distinctive difference between the Charter freedoms and the American Bill of Rights – was demonstrated in an early case in the field of criminal justice, The Queen v. Oakes. In 1985 the police in London, Ontario, stopped David Edwin Oakes, searched him, and discovered eight small vials of hashish oil. Oakes said that he had purchased the hashish for his own use (which was legal), but the police doubted his story and arrested him. The prosecutor then charged him with possession of narcotics for the purpose of trafficking – an offense that carried a maximum penalty of life in prison.

Applying the usual standard, "beyond a reasonable doubt," an Ontario court had found David Oakes guilty of unlawful possession of hashish. However, under Section 8 of the federal Narcotic Control Act, the court then used a lower standard of proof to find Oakes guilty of the more serious offence of possession "for the purpose of trafficking" in the drug[23]. Oakes challenged the conviction as a violation of the Charter, section 11(d): "Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law . . .". The police and prosecutors had no evidence that Oakes was planning to sell the drug. For a unanimous Court, Dickson agreed that the narcotics act "denied [Oakes'] right to be presumed innocent and

[18]See in particular his dissent in Pappajohn v. the Queen [1980], 2 SCR 120, 111 DLR 1, at 5. As Lynn Smith observed in 1992, ". . . if, ten years ago, one had been speculating about what individual members of the Supreme Court would do with respect to equality rights for women, one might not have predicted the creative role that Chief Justice Dickson came to play. . . . Some [of his earlier positions] were heralded, but others were denounced, by academics and women's rights advocates". She noted Bliss and Pappajohn on the negative side. (Lynn Smith, "The Equality Rights," in Roland Penner, ed., The Dickson Legacy [Legal Research Institute, University of Manitoba, 1992], p. 123).

[19]Notably in Hofer v. Hofer (1967), which involved a conflict of property and religion in a colony of Hutterites. See Robert J. Sharpe, "Brian Dickson: Portrait of a Judge," The Advocates' Society Journal, July 1998, pp. 3-38, at 14-15. For the information in this text paragraph, I draw particularly on Sharpe's essay.

[20]See Canard v. AG Canada (Manitoba, 1972), R. v. Heffer (Manitoba, 1969), and R. v. P. (Manitoba, 1968). These cases are discussed in Sharpe, pp. 16-20.

[21]Brian Dickson, "The Canadian Charter of Rights and Freedoms and its Interpretation by the Courts," address to the Princeton Alumni Association (Princeton, NJ, April 1985), p. 7. In that address, Dickson also argued that a "liberal and purposive interpretation" of rights and freedoms "is, of course, merely a reiteration of the basic principles of constitutional interpretation first enunciated by [US] Chief Justice Marshall in McCulloch v. Maryland [1819]" (p. 18).

On the attitudes and behavior of Supreme Court judges in the Charter era, see Manfredi, 2001, pp. 21 ff; Morton and Knopff, 2000, and the essays by Beverley McLachlin and Janet Hiebert in Howe and Russsell, 2001.

[22]Hunter v. Southam [1984], 2 SCR 145. Dickson noted that a "broad, purposive analysis" is "consistent with the classical principles of American constitutional construction".

[23]Once found guilty of possession, the accused was then given the burden of proving "on a balance of probabilities" that he or she was not in possession for the purpose of trafficking. R. v. Oakes [1986], 1 SCR 103, at 116.

subjected to the potential penalty of life imprisonment unless he can rebut the presumption"[24].

In American jurisprudence, the case would probably have ended there. But the government asserted that even if Section 8 of the Act violated Section 11(d) of the Charter, it should be upheld under Section 1 as a "reasonable limit" to Charter rights. Now Dickson and the Court were faced with the need to construct a set of conditions under which prosecutors and other administrative officials could override Charter rights. In consultation with his colleagues, he fashioned a systematic response. To justify that step, Dickson argued, the government must first show that the goal is of "sufficient importance to warrant overriding a constitutionally protected right or freedom" – that it relates to "concerns which are pressing and substantial". If that high standard is met, the government must then demonstrate that the means chosen are reasonable and justified, using a "proportionality test" with three components: (1) The measures adopted must be "rationally connected to the objective". ("They must not be arbitrary [or] unfair".) (2) The means chosen should "impair 'as little as possible' the right or freedom in question". (3) There must be "proportionality between the effects of the measures . . . and the objective which has been identified as of 'sufficient importance'. Dickson noted that the severity of the law's impact on individuals or groups would need special attention: "the more severe" the impact of the law, "the more important" must be the goal of the law that is to be upheld under Section 1[25].

Applying these tests to David Oakes' case, Dickson concluded that the goal of reducing drug trafficking was "substantial and pressing". Section 8 of the narcotics law, however, failed the "rational connection test"; it would, he argued, "be irrational" to infer that "a person had an intent to traffic" simply based on possession of "a very small quantity of narcotics". Thus Section 8 was unconstitutional, and Oakes could be found guilty only of possession[26]. Dickson's colleagues endorsed his approach to Section 1 and his findings unanimously.

Dickson's opinion was, in the view of legal scholar Peter Hogg, "brilliant". The "stringent requirements of justification imposed in that judgment," Hogg argued, have strengthened the Charter, and Oakes "remains the keystone of judicial review under the Charter"[27]. Others were more critical. Pierre Blache objected to the requirement under Oakes that the government proves the law under attack was not more severe than necessary to achieve the goal. This "least drastic means" test was almost impossible to meet, he argued, because there would always be some slightly less severe law or rule that might well achieve the same objective. More broadly, Blache noted the criticism leveled against the Oakes test by champions of the "majoritarian conception of democracy": the legislature has already "balanced the pros and cons of limiting a right" and its decision "deserves great respect" – not the heavy burden of proof required under Dickson's approach[28].

Despite the divided opinion among scholars and citizens, the Supreme Court was united on the best way to grapple with the crucial issue of Section 1.

In the sections that follow, we will see how Dickson and his colleagues then used a "broad, purposive analysis" (Dickson in Hunter v. Southam, 1984), combined with the approach set forth in Oakes, when considering the rights of women, Aboriginal rights, and other issues raised while Dickson was chief justice.

The Rights of Women: Legislative and Administrative Agencies vs. the Courts

During the 1980s, the Supreme Court examined the question of whether affirmative-action programs, including quotas, were legally binding. A key case was Action Travail des Femmes v. Canadian National Railway Co., which reached the Supreme Court in 1986. CN was a "Crown corporation"; that is, it was an administrative arm of the federal government[29]. Action Travail, a public interest group, alleged that the policies and behavior of Canadian National employees discouraged women from applying for jobs and blocked promotion of women at CN. A Human Rights tribunal agreed with the charges and noted that as of 1981 women constituted only 6.11 per cent of CN's total work force and, in the St. Lawrence region, only 0.7 per cent of the blue-collar labour force. The tribunal then issued an order which required CN officials to "hire at least one woman for every four non-traditional jobs filled in the future," until the goal of "having 13 per cent of non-traditional positions filled by women is achieved"[30]. CN objected to the proposed "mandatory quotas" as a remedy not permitted under the federal Human Rights Act, and the Court of Appeals agreed with the railroad. In the Supreme Court, however, the Chief Justice persuaded his colleagues to reject that position. For the Court, Dickson argued that the tribunal's quota system was consistent with the language and intent of the federal statute. Moreover, it was an essential strategy in order to "destroy discriminatory stereotyping and to create the required 'critical mass'" of women, so that the behavior of CN workers and senior officials might then become self-correcting. Dickson won unanimous approval for this position. Although this was a statutory rather than a Charter case, Dickson's argument in favor of affirmative-action remedies was a valuable building-block for Charter cases soon to be decided by the Court[31].

Now to the Morgentaler case, perhaps the most contentious litigation in the field of women's issues during Dickson's years on the Court. We begin in 1969, when the Canadian Parliament determined that an abortion would be legal in one circumstance: "when the continuation of the pregnancy of the woman would or would be likely to endanger her life or health" (Criminal Code of Canada, Section 251). That determination would not be made by the woman

[24]R. v. Oakes at 120, 134.

[25]R. v. Oakes, at 139-140.

[26]R. v. Oakes, at 142.

[27]See Peter W. Hogg, "Shaping Section 1 of the Charter," in DeLloyd J. Guth, ed., Brian Dickson at the Supreme Court of Canada, 1973-1990 (University of Manitoba, Faculty of Law, 1998), pp. 95, 103. See also Hogg's comments on the central role of the Oakes test in Canadian jurisprudence in his Constitutional Law of Canada (Carswell, 2008), pp. 728 ff. One element of the Oakes test was later modified; see Edwards Books (1986).

[28]See Pierre Blache, "The Criteria of Justification Under Oakes," in Roland Penner, ed., The Dickson Legacy University of Manitoba, Legal Research Institute, 1992), pp. 185-199, quotation at 189. Cf. Morton and Knopff, pp. 140 ff.

[29]CN was created in 1919 as a Crown corporation, and in 1995 it was privatized.

[30]Action des Femmes v. Canadian National Railway Co. [1987] 1 SCR 1114; the Tribunal's order is included at 1117-23.

[31]Action des Femmes at 51-52. Two years later, Dickson wrote the Court opinion in Brooks v. Canada Safeway Ltd. [1989] 1 SCR 1219, which examined a disability plan that excluded pregnant women in the later part of pregnancy. Dickson concluded that the plan violated the Charter, and Bliss was overruled. For discussion of these and other cases, and of the importance of Dickson's Action Travail opinion, see Lynn Smith, "The Equality Rights," in Penner, 1992, pp. 120-135.

and her physician, however; under Section 251, it would be made by a "therapeutic abortion committee", which would be "comprised of not less than three" doctors appointed by the hospital board where the abortion would take place. The doctor who would perform the abortion could not be one of the three.

Dr. Henry Morgentaler, a physician in Montreal, performed a number of abortions outside the guidelines, and in 1974 he was arrested and charged with violating the Criminal Code. The hurdles in the law were challenged by advocates for women's rights, who argued that the abortion law was unevenly applied by the hospital committees. Morgentaler was convicted and he appealed. At the Supreme Court, the conviction was upheld by unanimous vote. In his opinion for the Court, Chief Justice Bora Laskin refused to give weight to the argument that the abortion law was unevenly applied and therefore the results in any city or province were unpredictable. The courts should not supervise the "administrative efficiency of legislation," he concluded, and "any unevenness in the administration" of the abortion law was a matter to be reviewed by Parliament, not the courts. Legislative supremacy won the day, the 1969 Act was valid, and Dr. Morgentaler spent ten months in prison for violating the law[32].

After the Charter of Rights and Freedoms was enacted in 1982, Dr. Morgentaler again violated the requirements of Section 251. The government proceeded against him, and he responded that Section 251 should be declared null and void, because it conflicted with Section 7 of the Charter: "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" (emphasis added).

The case reached the Supreme Court in 1986, and the Court finally handed down its decision in January 1988. In urging that Section 251 be allowed to stand, counsel for the Crown had used the legislative-supremacy argument: "it is not the role of the judiciary . . . to evaluate the wisdom of legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments". Dickson, who wrote one of four opinions in the case, partially disagreed: "Canadian courts" would now be charged with ensuring that legislative and administrative actions of Canadian governments "conform to the democratic values expressed in the Canadian Charter of Rights and Freedoms"[33].

Examining the case, Dickson decided to focus only on the "procedural" issue: Do the provisions of Section 251 "meet the procedural standards of fundamental justice?" (p. 53) A crucial issue, in his view, was the importance of "security of the person" (Charter, Section 7), which must include not only "physical integrity" but also psychological aspects. The "case law" led him "to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of the security of the person" (56)[34].

Dickson then hammered away at the impact of Section 251 on women who were pregnant. First, "every pregnant woman is told by this section that she cannot" choose to have an abortion, even if that "might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations". Not only does "the removal of decision-making power threaten women in a physical sense; the indecision of not knowing whether an abortion will be granted inflicts emotional stress" (56-57).

Moreover, the system of review before a legal abortion could be obtained created "additional glaring breaches of security of the person". Hospitals were not required to establish "therapeutic abortion committees" and according to one study only 20 per cent of the hospitals in Canada had done so. Also, some of these committees "routinely refuse abortions to married women unless they are in physical danger" (67-69). Some hospitals that had functioning systems were compelled to turn away clients because of staff constraints and other demands. Because of these several hurdles, a woman typically had to contact at least three and at times as many as seven health professionals before an abortion could be obtained. In addition, because the law required that abortions be obtained at hospitals, the option of clinics (similar to those in the United States) was not available. These delays increased the risk of complications and death (57-59).

Dickson noted that the Crown had responded to these concerns about delay by arguing that these were only matters of "administrative inefficiency" and that they should not be of concern to the Court; "only evidence regarding the purpose of legislation is relevant". This Court will consider "both purpose and effect," Dickson commented, (58-60). However, the Crown also argued that delay was no real problem, since "women who face difficulties in obtaining abortions at home can simply travel elsewhere in Canada…" but Dickson pointed to the added "emotional and financial burden" encountered in such cases, and to evidence that even then women were likely to be turned away (75).

His conclusion was that the system created by Parliament "is manifestly unfair. It contains so many barriers to its own operation . . "that the choice of an abortion would often be unavailable or available only at great cost. Section 251 of the Criminal Code violated "principles of fundamental fairness" (78).

Could Section 251 be saved by Section 1 of the Charter? Dickson examined that possibility. Applying the Oakes test, he concluded that the goal of the legislation – to protect the interests both of pregnant women and of fetuses – was important. But the means chosen – the "procedures and administrative structures created by s. 251" – were often "arbitrary and unfair" (81,82).

In rejecting Section 251, Dickson was joined by Justice Lamer and (in a separate opinion) by Justices Beetz and Estey. Dickson's analysis did leave open the possibility that Parliament could "design an appropriate administrative and procedural structure" to achieve the goals he had acknowledged as important (77). Justice Bertha Wilson provided the fifth vote rejecting Section 251; she found any effort to compel a pregnant woman to meet externally imposed hurdles, in the early stages of pregnancy, a violation of the Charter (245-268). Until Parliament could design an administrative system that would meet the

[32]Morgentaler v. The Queen [1976], 1 SCR 616. There were actually two separate issues, with Laskin dissenting on one, while Dickson accepted the law and conviction of Morgentaler on both counts. See discussion in Sharpe and Roach, 2003, pp. 8-13.

[33]R. v. Morgentaler [1988] 1 SCR 30, at 45, 46. The views of the Crown above are quoted from Dickson's opinion. The opinion was written jointly by Dickson and Justice Lamer and delivered by Dickson.

[34]Dickson reviewed previous Canadian cases, with particular attention to the individual opinion by Justice Lamer in Mills v. The Queen [1986], 1 SCR 863. He also noted that the right to "security of the person" is more limited than the "right to privacy," a central element in the majority opinion in the major American "abortion case," Roe v. Wade, 410 US 113 (1973). "It is not necessary," Dickson wrote, "to determine whether the right extends further, to protect with interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice" (56).

concerns of Dickson and his colleagues, Canada would have no law restricting a woman's right to an abortion.

Advocates of women's rights were, by and large, pleased with Dickson's opinion and with the overall outcome. Those who would leave the choice on abortion to the woman and her doctor would have preferred wider Court support for Wilson's opinion. Yet the possibility, left open by Dickson and his colleagues, that legislators could design a constitutional law on abortion meant that the Supreme Court had, in a sense, dodged a bullet. Political pressure would be focused on Parliament, rather than on the Court, in solving a problem that has generated conflict through many decades in both Canada and the United States[35].

Administrative Control over Native Canadians: the Supreme Court Asserts a Role

In contrast to the American Bill of Rights, the Canadian Charter includes several provisions that are intended to safeguard the rights of groups of people. These include sections that protect the right of Canadian citizens to be educated in French or English and to use either of these languages in communicating with provincial and federal officials (Charter, Sections 16-21 and 23). Section 25 offers protection, though less directly stated, for the rights of Aboriginal peoples:

"25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada . . .".

In addition, Section 35 was added by amendment in 1982; it is not technically part of the Charter but is, together with the Charter, referred to as the "Constitution Act, 1982". Section 35 (1) states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".

Finally, Section 27 potentially provides an additional basis for protections for those groups identified in sections 16-25, as well as other distinct cultural groups:

"27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".

In the paragraphs below, I review Brian Dickson's contributions to the field of Aboriginal rights. The main focus here, as in previous sections, is on the tension between actions by the legislative branch and those implementing the laws, on the one hand, and decisions by the Supreme Court, on the other.

Because of Dickson's distinctive contributions to the legal rights of Native Canadians, his work in this field has been the subject of several essays[36]. In a systematic analysis discussing Dickson's work in many areas, Robert Sharpe singles out two of his opinions on aboriginal issues -- Guerin v. R. and R. v. Sparrow -- as "truly seminal"[37]. The Sparrow opinion is particularly notable in relation to the "legislative supremacy" issue; Sparrowhas been vigorously attacked by champions of legislative dominance, and it will be the focus of the discussion here.

In 1984, federal officials apprehended Ronald Edward Sparrow, a member of the Musqueam Indian Band, and charged him with fishing with a drift net longer than permitted under the Band's license, which had been issued according to the federal Fisheries Act of 1970. Found guilty, Sparrow appealed, arguing that he was exercising "an existing aboriginal right to fish" and that any net restriction was, therefore, invalid under Section 35(1) of the 1982 Constitution Act (p.1083).

In examining this case, the Supreme Court of Canada was required for the first time to explore the scope of Section 35. It would have to define "existing aboriginal and treaty rights". In addition, the Court would have to decide what criteria to use in balancing those rights against the power of federal and provincial governments to meet competing goals. It was widely acknowledged that some of these rights could be limited by the government – for example, to meet conservation goals essential to ensuring that treaty rights (as, to fishing) would be protected in the long run. However, Section 35 had been added to the 1982 Constitution outside the Charter, so it was not subject to the Charter's Section 1; therefore, the Court could not directly apply the Oakes test in deciding what government restrictions could be placed on these rights.

The Chief Justice had already written several important opinions concerned with native rights (as, Nowegijick, Guerin, and Simon), and he decided to tackle this one[38]. The opinion was drafted by Dickson and Justice La Forest and delivered by Dickson, who was in effect the main author[39]. The opinion gained the unanimous support of the Court and set the standard for future Court decision-making in this field.

The Crown had argued that "existing . . . rights" in this case meant simply the rights under the license provided to Sparrow's band. Sparrow had been fishing in the Fraser River, however, where 92 tribes had fishing rights, often with licenses that set different requirements on line length and other matters. To accept the Crown's argument, Dickson

[35]Two of the sharpest critics of the Supreme Court's "generous interpretation" of Charter rights seemed to be persuaded by Dickson's framing of the problem as simply procedural; see Morton and Knopff, 2000, p. 158: "The majority of Supreme Court justices struck down Canada's abortion law in Morgentaler not by explicitly siding with the pro-choice position but by emphasizing the procedural defects of the law".

One might equally well have noted that the "procedural" weaknesses in the statute -- as they were described by Dickson and his colleagues -- were so extensive that legislators, sharply divided as they were known to be, would have great difficulty agreeing on a statute that would limit the right of a woman to make her own decision (at least in the first 3-5months of pregnancy) and still meet Dickson's standards of "fundamental justice".

Peter Hogg was not persuaded by Dickson's focus on "procedural" weaknesses in the law. "Ignoring the warning signs posted by American jurisprudence," he argued, 'the Court has interpreted 'fundamental fairness' as a substantive concept, and used it to strike down . . . restrictions on abortion," as well as other laws (Hogg, 1999, p. 652).

In fact, the government did draft a bill that appeared to meet most of Dickson's concerns and then attempted to have it enacted. A coalition of pro-choice and anti-abortion advocates blocked passage, and the Criminal Code still has no provision against abortion. (In Canada, unlike the United States, a law criminalizing abortion can only be enacted by the federal government. I.e., under the 1867 Constitution, criminal law is one of the powers granted exclusively to the national government.)

[36]See M. B. Nepon, "The Dickson Court and Native Law," pp. 158-171, and J. Rod McLeod, "Commentary on Aboriginal Rights," pp. 172-174, both in Penner, 1992; also " Geoffrey S. Lester, "The Dickson Impact on Aboriginal Rights," in Guth, 1998, pp. 161-173.

[37]Robert J. Sharpe, "The Constitutional Legacy of Chief Justice Brian Dickson," Osgoode Hall Law Journal 38 (Spring 2000), p. 211. (Guerin v. R. [1984] 2 SCR 335; R. v. Sparrow [1990] 1 SCR 1075).

[38]In Canada, as in the United States, the chief justice (if a member of the majority) assigns opinions.

[39]See Sharpe and Roach, 2003, pp. 449-453.

and La Forest reasoned, would be to incorporate into the Constitution a "patchwork quilt" of administrative regulations. Instead they sought a broader framework, consistent with their view that "existing aboriginal rights" must be "interpreted flexibly so as to permit their evolution over time" (1093).

They then reviewed the evolution of Canada's relations with Aboriginal peoples, a history they found replete with neglect and deception (1102-08). They concluded that Section 35(1) "represents the culmination of a long and difficult struggle" and that it must be viewed in relation to its underlying purpose – "the affirmation of aboriginal rights". Thus a "generous, liberal interpretation" would be required (1105-06). Notably, they argued, Section 35(1) implies that there must be a "strong check on legislative power". Hence the government would "bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1)" (1110; emphasis added).

The analysis in Sparrow then proceeded in the systematic fashion we have seen in Dickson's Oakes opinion. In examining the validity of any federal or provincial legislation challenged under S. 35(1), the courts should first determine if the law or regulation interferes with an existing Aboriginal right. They are to view "rights" in this context according to the traditions of Aboriginal peoples. "Interference" is defined essentially as a governmental action that imposes "undue hardship" on an Aboriginal group (1111-12)[40].

If a court finds such interference with an Aboriginal right, it must examine whether that infringement of S. 35(1) is justified – for example, by the need for conservation. In view of the government's "special trust relationship" with Aboriginals, the Sparrow opinion argues, its officials would face a substantial hurdle in arguing for regulations that infringe. Methods aimed at conservation – for the long-term benefit of Aboriginal peoples and the larger society – would generally qualify; but benefits to "sport fishing and commercial fishing" would yield to the right of Aboriginal groups to fish (1113-16)[41]. Moreover, the court must ensure that there has been "as little infringement as possible" in order to achieve the government's goal, and they should probe whether the Aboriginal group affected "has been consulted" in developing the law or regulation. Endorsed by the entire Court, this checklist formed the Sparrow test, which would henceforth shape the Supreme Court's approach in weighing the power of Parliament and provincial lawmakers to legislate in areas affecting Aboriginal rights[42].

As noted earlier, Sparrow did not win approval from observers who preferred to rely on legislative power. Morton and Knopff were unhappy with the Court's interpretation of the term "existing treaty rights"; in their view, the "existing" right to fish in the Fraser was limited to the license provided under the Fisheries Act, and Dickson's effort to interpret Aboriginal rights in a "generous, liberal" way was anathema. Thus, to Morton and Knopff, Sparrow was an unjustifiable Supreme Court attempt to determine public policy, in defiance of legislative intent and likely to hinder the administrators who were required to carry out the law. This was particularly frustrating to these champions of legislative supremacy, because this and other judicial efforts have been successful in determining important public policies[43].

Brian Dickson's Judicial Strategy: does it undermine democracy?

For some scholars who place great value on the vigorous debate and necessary negotiation and compromise that are hallmarks of a liberal democratic system, Brian Dickson's strategies and success at the Supreme Court of Canada are difficult to embrace with enthusiasm. From the beginning of the Charter era, Dickson sought to go beyond the text of that document in search of its "underlying purposes" -- as he would interpret or find those purposes. His desire to give the 1982 Constitution "a generous, liberal interpretation" suggests a readiness to use his creative talents -- and his distinctive ability to fashion systematic doctrine – in order to enrich and broaden the spare words of that document. And when Dickson confronted Section 1, with its signal that courts might defer to legislatures in a range of circumstances, he devised the Oakes test, which encourages judges to subject every law and administrative action that (in their opinion) violates a Charter right to systematic and probing skepticism. As to Aboriginal rights, the Sparrow test sets an even higher standard for court approval of legislative policy and administrative implementation.

On the other hand, a strong case can be made for Dickson's position, as stated in the second headnote to this paper – that a healthy democratic society requires citizens who can develop and use their own judgments in grappling with complex policy issues. Moreover, if they are to be motivated to be active members of the polity, those citizens need to believe that they are "full citizens" – equal in worth to all others. Dickson developed these arguments in Oakes and other opinions. In Oakes, for example, he argued that the values "essential to a free and democratic society" include "respect for the inherent dignity of the human person, commitment to social justice and equality, [and] respect for cultural and group identity"[44]. These themes are central to his decisions in the cases discussed in this paper.

But possibly at times Dickson went too far, for example by endorsing detailed hiring goals in the Canadian Railway case, or by setting high hurdles to be faced by any new abortion law or implementation guidelines, as a result of the 1988 Morgentaler decision. Perhaps the values of a healthy democracy were better served by the dynamic seen in Bliss – when a Supreme Court decision helped to stimulate further thinking in Parliament, followed by a legislative remedy to undo the injustice generated by the 1971 law.

Those who view Dickson's leadership favorably argue in part that he was at times deferential to legislatures, even in Charter cases[45]. Dickson acknowledged legislative discretion, for example, in Edwards Books, when he upheld an Ontario statute under S.1. However, Dickson's painstaking analysis (of various ways that the Ontario law might have been better designed) suggests the mind of a creative legislator at work,

[40]Here the authors caution: "Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property…" (1112).

[41]Dickson and La Forest make the point sharply by illustration: "If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equaled the number required for food by the Indians, then all the fish available after conservation would go to the Indians…" (1116; emphasis added).

[42]Regarding the impact of Sparrow on later Court decisions involving Aboriginal rights, see Hogg, 2008, chapter 28. As to Edward Sparrow, the Court said it did not have enough information to determine whether the net-length limit in the Act met the standard of justification, and a new trial was ordered.

[43]Morton and Knopff, 2000, pp. 42-43, 108. For a critical assessment of Sparrow and subsequent Court dcisions affecting Aboriginal rights, see Kiera L. Ladner and Michael McCrossan, "The Road Not Taken," in Kelly and Manfredi, 2009, pp. 271 ff.

[44]R. v. Oakes, at 136.

[45]See for example Sharpe, 2000, pp. 217-219.

not the approach of a judge who is ready to defer to a conscientious effort by lawmakers.

Having lived under an American Supreme Court that in recent years has blocked Congressional action to ameliorate social ills -- for example, in declaring unconstitutional portions of recent federal gun-control laws and the federal "violence against women" act -- I am attracted to a judicial perspective that defers across a wide range of areas to the legislature and that, as a consequence, may give substantial discretion to federal and local administrative officials. And certainly many Americans, liberal as well as conservative, would find much value in the basic argument put forward by Morton and Knopff in the headnote (and in their book) -- that democracy is strengthened when divisive social issues are resolved through democratic debate and then action in a representative assembly. A recent article in the New York Times Magazine captures an important aspect of this argument, reflecting on the abortion debate in the United States[46].

There is, however, an important issue that the "defer to the legislature" school of thought tends to disregard, and which gives Brian Dickson's approach greater persuasive power. In Canada, as in the United States, the national and provincial/state legislatures are populated predominantly by white males, largely from a Christian heritage. The probabilities are high that a legislative body composed in this way will not always act in ways that are sensitive to the special problems that "vulnerable groups" face on the street, in schools, in their work lives, and in other situations. In Canada, as in the United States, administrative officials often include a wider range of backgrounds – more women, those from a variety of ethnic groups, many with more experience in varied cultures.

The Supreme Court of Canada, during Dickson's years, was also composed mainly of white males, Dickson among them. But Dickson had an uncommon capacity to understand the problems that face religious, ethnic and linguistic minorities, and women; and his sustained focus, in creating the Oakes and Sparrow tests, and in probing cases affecting members of vulnerable groups, was to use the Charter of Rights and Freedoms as shield and sword to protect their interests. Not only – or perhaps mainly – out of empathy for the difficulties they face and for their need for judicial protection, but also – and perhaps primarily – because the vitality of Canadian democracy will depend, in the long run, on whether these vulnerable individuals are treated as -- and feel themselves to be -- *equally valued* citizens of the larger community. When they are equally valued – a condition likely to be greatly aided by having substantial numbers in the federal and all ten provincial legislatures, and in the administrative arms of Canadian governments -- then it will be easier to agree with Morton and Knopff, and Dickson's brand of judicial activism may no longer be of crucial importance in maintaining a vibrant democracy.

This article draws on the author's presentations at the University of Edinburgh and at the University College of the Cariboo (BC), and portions, now updated, were included in Stephen Tierney, ed., Constitutionalism and Cultural Pluralism, UBC Press, 2007, pp. 164-181.

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[46]"By striking down so many laws", [the Supreme Court in Roe v. Wade] largely short-circuited a national debate about abortion. Popular opinion about abortion in the early 70's was becoming more and more liberal…. By cutting off that debate, the court in Roe had the effect of giving abortion rights advocates a false and complacent sense of victory; anti-abortion groups, by contrast, were energized…. While states had been liberalizing their abortion laws before 1973, they increasingly limited access to abortion after Roe…." (Jeffrey Rosen, "How to Reignite the Culture Wars," New York Times Magazine, Sept. 7, 2003, p. 49).