The Expanded Role of the Judiciary:
The Supreme Court and the Charter

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The introduction of the 

Charter of Rights and Freedoms

and the Constitution Act, 1982 marked a decisive moment for Canadian federalism. In particular, it greatly expanded the role of the judiciary and the Supreme Court of Canada. The Charter created a legal framework of rights which changed the role of the courts in the Canadian political landscape. As a result, governments have been dissuaded from policy measures which might invoke legal action as a potential Supreme Court ruling is considered stare decisis and could be potentially damaging to the confidence of the House of Commons and its popular support.

Expanding the role of the Supreme Court has raised the question: is it democratic for the Supreme Court to make decisions on behalf of parliament? Fears that the appointment of judges results in patronage and therefore ideologically driven decisions, are of little concern when the matter is closely inspected. Taking this into consideration, this paper argues that the Supreme Court is a valuable democratic tool in our federalist system, and that it is accountable and fair in practice regardless of its method of appointment. Having said this, there are methods which can improve upon the procurement of Judges which will be discussed later in this paper. In order to properly discuss the Supreme Court role in the Canadian federalist system, the measures of judicial independence for Supreme Court judges must be made clear, as must their general function within Canadian federalist structure post Charter. After which, this paper will show the positive role of the courts through case studies and how they affect our democratic institutions.

\footnote{A doctrine or policy of following principles laid down in previous judicial decisions, otherwise known as precedent.}
This will be followed by brief statistical analysis of the court’s rulings before and after 1982 as well as suggestions made to address some of the major concerns voiced in regards to role of the Supreme Court.

In Canada, the Supreme Court rules on issues of jurisdiction, constitutionality and rights based claims. The importance of the court playing a neutral role in a federalist system is that it helps avoid jurisdictional and ideological conflicts between politicians and parties. The significance of non-interference and impartiality from government are paramount to a functioning judicial system. If the executive could interfere, it would negate the purpose of the court in general. The methods of ensuring judicial independence are similar to those of bureaucratic accountability in Canada prior to new public management; if either the government or the court acts outside their sphere then both are accountable to constitutional and public ramifications.

The basics of non-interference and impartiality as laid out by Andrew Heard are as follows: For judges, security of tenure, financial security and the administrative independence of the courts are the defenses available against government interference. As well, there are “constitutional conventions” which also follow a tradition of non-interference. These measures help to ensure independence; security of tenure ensures that a government cannot threaten to remove a judge due to an unfavorable decision; financial security helps to ensure leaders of the day cannot manipulate a judge’s income as a reward or punishment and finally administrative independence distances court proceedings and dockets from political interference. On the other hand, the politicians have their own sets of rules and traditions which keep the judiciary at arm’s length.

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171 Heard, A. *Canadian Constitutional Conventions* (Toronto 1991), 118-120.
172 Ibid, 118.
length, they must maintain the confidence of the house as well as public favor, and are also
bound by *stare decisis*. Furthermore, parliamentary conventions of deference to the court and a
tradition of non-interference are also observed by those in office.

The relationship between judges and parliamentarians is in balance due to a situation
where acting out results in punishment and accountability is maintained by externalities. Both
parliamentarians and judges are under scrutiny; the courts are under the scrutiny of parliament
and parliament is under the scrutiny of the opposition and the people. As well, both face the
potential loss of employment. Politicians face re-election and judges face the tool of S.99(1)
which suggests judges may only hold office under ‘good behavior’. 173 Removal of a judge, by no
means a simple procedure, has never been invoked in Canada. The complexity of the process
deters politicians from manipulating security of tenure and involves first referring the judge to a
jury of peers known as the Judicial Council, a measure which ensures the government is not
playing a role in the decision, then, if misconduct is found, the Canadian Judicial Council makes
a recommendation of removal to the Justice Minister. The Justice Minister must then secure the
approval of both the house and senate before the action can be completed. 174 The process serves
as another measure of accountability; as the decision is made by all members of the house and
senate, it maintains security of tenure for judges, but not without limitations.

The Supreme Court’s role in Canada has been described as Meta political, in that it helps
manage the difficulties between people and politicians. However, the Supreme Court remains
accountable to parliament, and through them, the people. James Kelly and Michael Murphy
pointed out that “the Supreme Court's federalism jurisprudence supplements rather than subverts

the constitutional role of political actors.”\textsuperscript{175} It is the role of the politicians to create the framework of the constitution, thereby creating the rules of the Supreme Court which the court must adhere to, which therefore makes the courts answerable to parliament. This demonstrates the democratic connection; the people vote for politicians who appoint Supreme Court justices, who oversee the Constitution and Charter, which is legislated by parliament, who are in turn answerable to the electorate. No further democratic process is necessary; the people vote for parliamentarians and they make the system work. If judges were elected it would create a whole new systemic incentive for partisanship. Judges would be competing for their position not on merit, but popular issues and ideology, as the complexities of their position are not easily summed up by slogans. The result of this would be similar to the US system; there would be no uniformity of law state to state, and personal vendettas against groups could be carried out by partisan judges. At a Supreme Court level, elected judges could have the effect of constitutional deadlock, and a poorly selected judge could intentionally slow politicians of different stripes so as to appease their voting constituency. The judges would then be answerable to their voters and not the law or the constitution, as it is the public’s vote that won them their position.

There are some who argue that the expanded role of the Judiciary has led to judicial supremacy.\textsuperscript{176} They suggest that the choices of the court “are less a function of the Charters text then of the choices made by judges in the course of interpreting it.”\textsuperscript{177} The concern raised by Morton and others regards an increase in governments and the public seeking out the Supreme Court to settle disputes. Morton also feels that this increased usage has invaded the public policy

\textsuperscript{175} Murphy, J. B. \textit{Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political} (2005), 218.
\textsuperscript{176} F.L. Morton, r. K. \textit{The Charter Revolution and the Court Party}. (Peterborough 2000).
\textsuperscript{177} Elliot, R. \textit{The Charter Revolution and the Court Party: Sound Critical Analysis or Blinkered Political Polemic} (2001-2002).
arena and is therefore grounds for concern, if governments are utilizing the courts for decision making one not versed in the nature of their relationship would be right to fear the judiciary supplanting parliament, or operating to favor the provinces or federal government. It is important to note that while the courts interpret the Charter and precedent the parliamentarians still have the ability to enact law to more accurately instruct the judges. As will be discussed later in greater detail, the charter itself should be actively updated by parliament in order to maintain the balance of power and to properly instruct the judges so that precedent need not be made in absence of political guidance. Statistically speaking, the court’s decisions post 1982 have favored no particular branch of government over the other and as was discussed earlier the government has yet to remove a judge from office. Furthermore, the increased activity of the court can only be explained by an equal thirst of participants in the courtroom. This suggests that the presence of the court has not only increased citizen participation, as will be discussed in the case studies, but also both levels of government. This increased role of the courts is due to an increased need for clarification and a civil pursuit of the law by all parties involved and not by a pursuit to increase caseload of the court by the court itself.

The Supreme Court does not actively pursue cases; cases are brought before the court. As James Kelly argued, “the court must interpret the constitution in a manner respectful of the contributions of other political institutions.” This has included suspending decisions in the hopes of a legislative solution to an unconstitutional application. From 1982-2001, 9 cases were suspended in hopes of legislative remedy. If the court pursued cases, or sought to impose decisions outside of the Charter and constitution, this activity would more accurately describe the supremacy that Morton and Knopff refer to, as it would be a truly active judiciary. Instead, the
court has been respectful of the process of receiving cases, and adhered to the role given to them by parliament. If the court were to interject or subvert constitutional efforts of politicians, the court would be acting undemocratically, as it would upset the balance of accountability struck by the current arrangement. This is why “The Court explicitly encourages political actors to assume the lead in defining and implementing fundamental constitutional rights and freedoms”. In order for the courts to properly carry out their responsibilities, parliamentarians must participate in their guidance. Having adequately outlined how the Court operates in the Canadian federalist system, case studies will be used to highlight the way in which the court has positively affected our democracy and federalism.

The Charter and increased role of the judiciary marked a democratization of Canadian federalism in some ways. Before the Charter, the public did not have the same access to legal power to pursue rights based discourse. The strengthening of the Supreme Court offered an avenue in which “[groups] can now pursue their policy agendas to the courts.” This is not the only manner in which the Supreme Court has improved democracy. In the reference case *Figueroa v. Canada*, the Supreme Court “unanimously struck down the 50 candidate threshold for party registration under the *Canada Elections Act*.” This ruling is significant, as it found that the S.3 must extend to all, including those who do not align with a party which meets the required 50 seat threshold. The ruling seeks to improve access to office for smaller, sometimes localized interest groups, especially in a rural area, where electoral districts may cover large territories. Size, or a lack thereof, does not dictate the validity of their issues, or their need for

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178 Murphy, J. B. *Shaping the Constitutional Dialogue* (2005), 218.
representation. The court focused on “the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government.”¹⁸¹ By ruling in favor of Figueroa, the Supreme Court demonstrated its commitment to the constitution and the democratic process by removing barriers to entry in the political arena and ensuring that these rights are not arbitrary or partisan. If the government found this decision by the courts to be outside their purview or found that it was not in the public interest, they could have enacted legislation to correct it. The courts were only interpreting in the absence of political clarification which illuminates the position they have been given by parliament. There is also significance for judicial independence, the judges were free to strike down the law and received no ill will or interference from the government even though the Canada Elections Act was an act of parliament. Although this decision seeks to improve entry into the political arena, arguments have been made to the contrary.

Proponents of the 50 seat threshold argue that many fringe parties are not fit to govern due to their narrow scope of interest. The Court responded to this, stating that “The ability of a party to make a valuable contribution is not dependent upon its capacity to offer the electorate a genuine “government option””.¹⁸² The court therefore recognizes that politics are about contributions to the process, not just what the dominant political parties offer to be considered. This portrays the importance of a constitutional ‘umpire’ in the Canadian federalist system.¹⁸³ Having this ‘umpire’ aids the democratic process by giving the populace a pulpit to contest laws

¹⁸² Ibid.
¹⁸³ Heard, A. Canadian Constitutional Conventions (Toronto 1991), 121.
based on precedent and the Charter. This helps to keep politicians in check and helps to avoid legal oversights which are bound to happen in an ever-changing system.

In the reference case *Prov. Electoral boundaries (Sask.)*, the court examined the right to redraw electoral boundaries to reflect population disbursement more appropriately with regards to S.3.\(^\text{184}\) The court upheld the provinces actions on the grounds that the province did not impinge the public’s right to vote in redrawing electoral boundaries. This demonstrates the courts’ even handed approach to issues of the constitution. Finding that “The purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se* but the right to ‘effective representation’”.\(^\text{185}\) Because the court is bound to the constitution, and S.3 does not guarantee equality of voting power, the court upheld the right of democratically elected officials to draw boundaries where social/physical geography and population necessitate change. This is important because it distinguishes the limitations of S.3 of the Charter and ensured that the province was able to adapt to the changes it faced.

The Supreme Court is not affiliated with the provinces, and its members are chosen by Federal Cabinet. The court had no impetus to prefer the province in this decision. This reinforces their adherence to the ‘black letter law’ of the Charter. By abstaining from meddling where the constitution does not specify, the court acknowledges that it must defer to the legislatures in order to create such boundaries through constitutional amendment. It is important to note that the decision was not unanimous and concern was raised in regards to the redrawing of boundaries by Justices Lamer, C.J, L'Heureux-Dubé and Cory J.J, who felt that they should only be redrawn where they are “justified as contributing to the better government of the people as a whole, giving

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due weight to regional issues involving demographics and geography.”\textsuperscript{186} This shows a consideration for the right to vote and therefore a continuation of the commitment to the democratic process previously discussed in Figueroa \textit{v. Canada}. The concern of misuse leaves room for future decisions to rule against unfair or illogical gerrymandering. The ruling upholds the previous assumptions of fair judgement, and exemplifies how the interpretation of S.3 was not biased towards or against any particular area of government.

In \textit{Reference re Goods and Services tax}, the court ruled in favour of the federal government and its role to tax under S.91 (2). The ruling exemplifies the court’s understanding that the federal government has a constitutionally enshrined right to raise money “by any mode or system of taxation”\textsuperscript{187}, and does not require provincial consultation. In this case, a distinction was made between ‘black letter law’ and ‘legitimate expectations’. The court maintained that their job is not to be drawn into “a political controversy” or to “involve it in the legislative process”.\textsuperscript{188} The court added that the provinces had “a ‘legitimate expectation’ that no change would be made in the agreement without [provincial] consent”\textsuperscript{189}, but that ‘legitimate expectations’ are not legally binding, and the court ruled based on the confines of its jurisdiction in federalism. If the court had ruled in favour of the provinces it would have been acting outside the jurisdiction of the court, and against the division of powers set out in S.91 and S.92.

The judgments of the court are often decided based on the ‘pith and substance’ or the jurisdiction as \textit{intra vires or ultra vires}. Rulings, such as those on the Canadian Environmental

\begin{itemize}
  \item \textsuperscript{186} Ibid
  \item \textsuperscript{187} Canada, G. o. \textit{Justice Laws Website} (2013).
  \item \textsuperscript{188} Saywell, J. T. \textit{The Lawmakers: Judicial Power and the Shaping of Canadian Federalism} (Toronto 2004), 277.
  \item \textsuperscript{189} Ibid.
\end{itemize}
Protection act (1985), found the federal government’s right to criminal law allowed them to create laws which crossed into provincial jurisdiction. They could so, as long as it concurred with the constitutional right and in no way impeded the provinces right to “regulate and control the pollution of the environment either independently or to supplement Federal action.”\textsuperscript{190} The court was promoting shared governance, suggesting that both provinces and the federal government had roles to play in the environment, and that the two could function in their own spheres or seek to compliment on another provided they did not act \textit{ultra vires}.

The increased role of the judiciary in Canadian politics since 1982 has had the effect of evening the playing field in the federalist arena. Between 1949 and 1982, the division of power cases fell consistently in favour of the federal government. Major blows were also dealt to the provinces in regards to economic and energy policy cases.\textsuperscript{191} This centralization shaped the views of many political scientists, that the courts were bias in favour of the federal government, for the obvious reasons of appointment and control of funds. Kelly argued that “Under the division of powers, the court determined which level of government has jurisdiction in specific policy areas”.\textsuperscript{192} The effect of which, was to consistently rule in favour of the federal government. This is demonstrated by the statistical data, from 1949 to 1982 where “the Court invalidated 25 of 65 (38.5 percent) challenged provincial laws, but only 4 of 37 (10.8 percent) challenged federal laws”.\textsuperscript{193} The loss of a case for either a federal or provincial government was ‘zero sum’; it involved the loss of power from one level to the other. After 1982, a defeat for the provinces did not increase the powers of the federal government. The empowerment of the court has removed the ‘zero sum’

\textsuperscript{190} Saywell, J. T. \textit{The Lawmakers} (Toronto 2004), 286.
\textsuperscript{191} Kelly, J. B. \textit{Guarding the Constitution} (Montreal, Kingston 2002), 80-81.
\textsuperscript{192} Ibid, 83.
\textsuperscript{193} Smithey, S. I. \textit{The Effects of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada} (1996), 86.
aspect of federalism and given the courts the ability to “rule that neither level of government may act in a manner that denies protected rights and freedoms, or conversely, that all governments may act in a certain manner.”\textsuperscript{194} The result has been not greater centralization, but an evening out of court decisions.

During the first decade of the Charter, the rulings tilted slightly in favour of the provinces, as the court ruled in favour of the provincially challenged policy 72.3\% of the time and the federally challenged policy 62.5\% of the time.\textsuperscript{195} Kelly argues that the “The empirical evidence demonstrates that the Supreme Court has acted in a balanced manner as federal statutes have been found to violate the protected rights and freedoms in 47\% of cases”\textsuperscript{196}, and “Provincial statutes represent 50\% of constitutionally invalid statutes”.\textsuperscript{197} So, not only do the courts show evenhandedness in how often they side with either government, but also in how often the statutes are found constitutionally invalid.

The court’s even-handedness is statistically verified. Since 1982, the federal government has had a 67\% rate of upheld decisions while the province has 61\% of its cases upheld to date.\textsuperscript{198} Shannon Smithey suggests that “The Charter has transformed [the] system by entrenching the protection of a long list of rights and liberties, and by giving courts power to grant appropriate remedies to enforce constitutional guarantees.”\textsuperscript{199} Although the provinces have slightly less decisions in their favour, the small difference may be explained by the volume of cases and abilities

\textsuperscript{194} Kelly, J. B. Guarding the Constitution (Montreal, Kingston 2002), 83.
\textsuperscript{195} Smithey, S. I. The Effects of the Canadian (1996), 88.
\textsuperscript{196} Kelly, J. B. Guarding the Constitution (Montreal, Kingston 2002), 83.
\textsuperscript{197} Ibid.
\textsuperscript{198} Ibid.
\textsuperscript{199} Smithey, S. I. The Effects of the Canadian (1996), 84.
of the federal government. As it has substantially more experience than any one province it can more effectively deliver its case and consider rights implications before creating public policy. Statistic evidence of fairness does not suggest that improvements cannot be made.

Despite the benefits of the Charter and Supreme Court, there are inherent flaws in the system. Judges are chosen by cabinet, thus, justice selection is not as democratic as it could be. There is a simple solution to this; to make all of parliament vote on Supreme Court Justices in a manner similar to the procedure of the electing the speaker of the house.

Another problem that was not discussed in the research for this essay is the effect of an out of date Charter on Canadian federalism. If the Charter became outdated and unrepresentative of the people due to a lack of constitutional advocacy on behalf of parliament, the court would become the sole interpreter of the constitution and upset the balance struck. The absence of the legislature in the form of constitutional and rights advocacy would in effect make the entire process undemocratic. The vote of the people must be directly connected to constant revision of the Charter in order to maintain the democratic link between parliament and the Supreme Court. Without parliamentary guidance, the court would be forced to act unilaterally as the interpreter of the Charter, not as its guardian. The solution to this potential problem is to establish a long standing committee to review and offer amendments to the Charter in a systematic, so that the courts do not have to act unilaterally out of necessity due to the absence of constitutional direction.
To summarize, the courts democratic justification comes from a balance of accountability found in the relationship between the courts, parliament and the voting public. Each has the ability to hold the other accountable when any branch acts outside of their mandate. The measures of ‘good behavior’ for judges and *stare decisis* coupled with public scrutiny for politicians ensure that no party is in a position of privilege. This is a direct result of the introduction of the Charter in 1982 which has increased the role of the judiciary. The statistical data examined supports the court’s adherence to ‘black letter law’ and indicate an increase in access to the courts for both the governments and the populace. As a result of Supreme Court decisions the public now has increased access office, while increased activism of all parties has simultaneously decreased the elitist nature of politics. The court has proven to be a fair and even handed tool in the Canadian federation, as well as a benefit to democracy, the political process and federalism.
Bibliography


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