

“The Supreme Court of Canada in Changing Times”

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I Introduction

I have been asked to speak to you tonight about the Supreme Court of Canada in changing times. I would like to consider the role of the Supreme Court in shaping the law to meet the changing needs of Canadian society and to examine the charge of “judicial activism” that has been leveled at the Supreme Court, especially in relation to its decisions under the *Charter of Rights and Freedoms*.

The *Charter* not only constitutionally protects fundamental rights and freedoms - it also creates a constitutional duty on the courts to declare of no force or effect laws enacted by Parliament or a legislature that are inconsistent with those rights and freedoms. As a result, the *Charter* has greatly enhanced the power of the courts to influence and decide important and controversial issues of public policy. 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. Court decisions now confront some of the most controversial issues in Canadian society, and the Supreme Court’s *Charter* decisions have had significant impact on public life generally. Consequently, the power of judicial review and the threat of declarations of constitutional invalidity have shaped public debate on many significant

issues - abortion, religion in the schools, assisted suicide and euthanasia, police investigative powers, to mention but a few.

The right to equality has been a particularly fruitful source of contentious *Charter* issues. According to the Supreme Court, 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.¹ 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.² The Supreme Court "read-in" sexual orientation to Alberta's Human Rights Code ground of discrimination,³ and recently, the Court of Appeal for Ontario has ruled that same sex couples have the right to marry.⁴

Other minority rights have been also been liberally interpreted. Provincial governments have been required to provide minority language schools,⁵ and Aboriginal rights, also given constitutional protection in 1982, have also been generously interpreted.⁶

Most opinion polls show that Canadians, especially young Canadians and new Canadians, hold the *Charter* and the rights it protects in high regard. But at the same time, the generous judicial interpretation of the *Charter* has provoked a lively and on-going debate about the legitimacy of judicial review. Earlier this month, the Globe and

¹ *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624.

² *M v. H*, [1999] 2 S.C.R. 3.

³ *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

⁴ *Halpern v. Canada (A.G.)* (2003), 225 D.L.R.(4th) 529.

⁵ *Mahé v. Alberta*, [1990] 1 S.C.R. 342.

⁶ See e.g. *R. v. Marshall*, [1999] 3 S.C.R. 456.

Mail published a survey indicating that 71% of those surveyed agreed with the proposition “*that it should be up to Parliament and Provincial legislatures, not the courts, to make laws in Canada*”. The survey also suggested that 54% of respondents thought that “*judges in Canada have too much power*”. But the complexity of these issues, and the difficulty of interpreting public opinion surveys, is revealed by an answer to a third question. Although given much less prominence by the Globe story, the survey also revealed that despite their answers to the first two questions 77% of those surveyed agreed with the statement: “*courts are within their right to issue decisions that are based on constitutional grounds that become legally binding.*”⁷

II Charter Critics and “Judicial Activism”

Charter critics have accused the courts, especially the Supreme Court of Canada, of “judicial activism”, a phrase that suggests the courts have exceeded acceptable limits of judicial authority. The “judicial activism” critics view the Supreme Court’s approach to *Charter* interpretation as an undisciplined, unprincipled, and unwarranted assertion of judicial power. The charge of “judicial activism” alleges the courts have been too willing to “make law” under the *Charter*, usually by striking down the laws enacted by democratically elected legislators, and occasionally by re-writing the law to make it comply with the *Charter*. The critics of “judicial activism” contend that the courts have failed to respect the limits of judicial authority and usurped the role of the democratically elected legislatures. According to these critics, the fundamental rights and freedoms guaranteed by the *Charter* raise issues that involve matters of political choice. These political choices, *Charter* critics argue, are for the democratically elected governments to

⁷ Globe and Mail, August 11, 2003

make, and so only the Parliament of Canada and the provincial legislatures should have the final say in such matters. On this view, judicial review under the *Charter* is essentially undemocratic and courts, therefore, should limit themselves to the interpretation and application of the laws as they are enacted by Parliament.

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.⁸ 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.⁹ The Supreme Court's decision on abortion, the expansion of rights for those accused of crime, the generous interpretation accorded minority rights (especially rights for gays, lesbians, and aboriginals), have been attacked by these critics. They urge a program of judicial restraint and long for an 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 special interest groups to implement views that would not otherwise attract majority support from the populace at large. They argue that judicial review under

⁸ See e.g. M. Mandell, *The Charter of Rights and the Legalization of Politics in Canada*, 2d ed. (Toronto: Thompson, 1994); A. Hutchinson, *Waiting for CORAF, A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

⁹ R. Knopff & F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992); F.L. Morton & R. Knopff *The Charter Revolution and the Court Party* (Toronto: Boradview Press, 2000).

the *Charter* is inherently anti-democratic as it allows non-elected and unaccountable judges to interfere with the will of Parliament and the provincial legislatures.

Is there an answer to these attacks on the authority of the Supreme Court under the *Charter*? Did the *Charter of Rights and Freedoms* make a regrettable break with the past and has it given the Supreme Court too much power? Has the Supreme Court exceeded its judicial function and become a kind of all-powerful super-legislature?

It will not probably surprise you that as a judge, I disagree with the *Charter* critics and the cries of judicial activism. I suggest to you that the Supreme Court's work under the *Charter* is fully in keeping with the best aspects of our liberal democratic legal tradition, and that vigorous judicial enforcement of fundamental rights and freedoms strengthens rather than diminishes Canadian democracy.

III The Need for Judicial Interpretation

Let me begin with the familiar plea that the courts should just apply the law and leave it to Parliament or the legislatures to decide what our laws should say. In my opinion, this proposition fails to recognize that the regulation of human affairs by law is simply too complex to allow for a strict division of responsibility legislatures as “law-makers” and courts as “law-apppliers”. Even before the enactment of the *Charter*, a rigid dichotomy between judicial and legislative power simply was not a feature of our legal system.

The first point to remember when answering criticisms of judicial activism is that under our common law tradition, judges have always played an important role in shaping the law. Precedents, established by judicial decisions, created most of our laws relating to contracts, property, civil liability for personal wrongs, much of family law and

administrative law, and even important parts of our criminal law. The vast area of common law has constantly been shaped and moulded by the courts to suit the changing needs of society. While courts tend to leave complex changes to the common law with legislatures, the common law tradition nevertheless recognizes that courts may legitimately adapt and develop the common law to reflect changing social circumstances and evolving social needs.¹⁰

The second important point to remember in this discussion is that even when courts interpret and apply statutes enacted by Parliament, judges cannot avoid shaping the law to meet the needs of contemporary society. A court has to interpret the law before it knows whether or not to apply it. Statutes are not and cannot be written to decide specific cases and Parliament cannot possibly anticipate every possibility or eventuality. Human activity is so complex and varied that it is simply not possible to write the law in a way that automatically decides every case. Parliament does not have the capacity to constantly revisit and revise every one of its laws to meet changing social conditions. Statutes, therefore, merely set out the general rules and principles that apply, and leave specific cases for the courts to decide. Many statutes explicitly acknowledge the impossibility of precise definition of every eventuality by directing the judges to do decide cases on the basis of what is fair, equitable, reasonable, or to prevent results that are “unconscionable”. The words of these equitable provisions were deliberately chosen to so that judges are allowed to shape and adapt the law, and they show that one of the essential and unavoidable aspects of judging involves shaping the law to meet unforeseen problems and changing social needs.

¹⁰ *R. v. Salituro* (1991), 68 C.C.C. (3d) 289 (S.C.C.).

The third point to keep in mind when approaching the issue of judicial activism is that when we come to the constitution, a significant interpretive judicial role for the courts is almost inevitable. Constitutions are intended to be permanent and, as we know from bitter experience, constitutions cannot be easily amended. Given the need for permanency, constitutions are written in terms of general principles intended to cover a vast array of subjects. The constitution is written in the language of one era, but it must be interpreted and applied to meet the changing needs of every succeeding era. It does not and cannot provide immediately obvious answers to every issue that might arise.

Canadian courts were already charged with the responsibility of constitutional interpretation long before the *Charter of Rights*. Canada is a federal country with a constitution that divides legislative authority between the federal and provincial levels of government and it falls to the courts to resolve disputes about the limits of federal and provincial legislative power. This means that judicial review of legislation has always been a fact of Canadian legal and political life. In a case argued in the early years of Confederation, a great lawyer recognized that given the “magnitude of the subjects with which it purports to deal in a very few words”, the constitution has to be “interpreted in a large, liberal and comprehensive spirit.”¹¹ We could not have survived as a nation under the text of our original 1867 Constitution Act without a healthy dose of creative judicial interpretation. The drafters of the 1867 Constitution could not have anticipated the issues and problems of 2003, and yet a functioning constitution and country requires that the language of 1867 be interpreted in a manner that is appropriate to the needs of 2003. A constitution is meant to be a permanent, enduring statement of the fundamental values of

¹¹ From the argument of Edward Blake in *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at p. 50, adopted in *Edwards v. Attorney General of Canada*, [1930] A.C. 124 at 137.

the nation, but it will last only as long as it can be interpreted to meet contemporary needs.

The creative nature of constitutional interpretation was wonderfully captured in 1930, more than fifty years before the *Charter*, by a metaphor describing the constitution as a “living tree”. In the famous *Persons Case*, the courts had to decide whether the constitutional provision that provided for the appointment of “qualified persons” to the Senate allowed for the appointment of women as well as men.¹² The drafters of the 1867 Constitution certainly did not consider women to be “qualified persons” for appointment to the Senate as, at the time, women could not vote or hold public office. However, in one of its most celebrated constitutional decisions, the Judicial Committee of the Privy Council quite properly and quite legally described the exclusion of women from public office as a “relic of days more barbarous than ours”,¹³ and refused to allow the meaning of the constitution to remain frozen in time. In the *Persons Case*, the judges described the constitution as a “living tree capable of growth and expansion within its natural limits”,¹⁴ and perceived to be a document that is in “a continuous process of evolution”.¹⁵ The constitution, they ruled, should not be cut down by “a narrow and technical construction” but instead should be given a “large and liberal interpretation.”¹⁶ Recognizing that the role of women in the life of the nation had radically changed since 1867, the judges of 1930 interpreted the constitution in a manner that took into account that fundamental social change.

¹² *Edwards v. Attorney General of Canada*, supra, interpreting the *British North America Act, 1867*, s. 24

¹³ At p. 128.

¹⁴ At p. 136.

¹⁵ At p. 135.

¹⁶ At p. 136.

Charter rights and freedoms, like the qualifications for appointment to the senate, are defined in general and abstract language. The *Charter of Rights and Freedoms*, requires the courts to interpret broadly worded rights such as “freedom of expression”, “life, liberty and security of the person”, as well as equality “before and under the law” and “equal protection and equal benefit of the law”. Recognizing that these rights are value-laden and cannot be elaborated in a narrow legalistic manner, the Supreme Court of Canada has adopted and applied the “living tree” metaphor to *Charter* interpretation. The *Charter*, says the Court, must “be capable of growth and development over time to meet new social, political, and historical realities often unimagined by its framers.”¹⁷ *Charter* guarantees are interpreted with reference to “the character and the larger objects of the *Charter*... the historical origins” of the rights it protects and, where relevant, “to the meaning and purpose of ... other specific rights and freedoms”. The Supreme Court has insisted that the “interpretation should be... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection.”¹⁸

While the image of the constitution as a living tree leaves considerable scope for interpretation to meet the changing needs of society, it certainly does not mean that judges have the freedom to make the constitution say whatever they want. The “living tree” is capable of growth and expansion, but only “within its natural limits”. Those natural limits are to be found in Canada’s fundamental legal values and principles. Those legal values and principles lie at the heart of our legal culture and democratic tradition. They are found in the text of the constitution, in the statutes enacted by Parliament, in

¹⁷ *Hunter v. Southam*, [1984] 2 S.C.R. 145 at p. 155.

¹⁸ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344.

previously decided cases, in the writings of legal scholars, and in the internationally accepted legal norms of civilized society. The first and most obvious constraint on judicial interpretation is imposed by the text of the constitution itself. Although cast in terms of generalities rather than specifics, the very words of the constitution define the parameters of judicial interpretation. The second constraint of judicial interpretation relates to the interpretation process. Judicial interpretation is a rational, objective process. The judge is required to give a reasoned opinion and that reasoned opinion must be based on recognized principles, not upon the judge's personal views. Judicial interpretation must be rooted in and consonant with the basic principles and values of our legal system. They impose the "natural limits" on the growth of the living tree. The law cannot be sufficiently precise to yield immediate or obvious answers to every problem, but the judge must use the law as his or her guide to interpretation.

IV Is Judicial Review Anti-Democratic

Let me now turn to the charge that judicial review under the *Charter* is anti-democratic. My first and most obvious point in response to the charge of judicial anti-democracy is to look at the circumstances surrounding the *Charter's* creation. Politicians, not judges, enacted the *Charter*.¹⁹ Judges did not ask for the *Charter*. Indeed, it is probably safe to say that most judges were skeptical about the *Charter* when it was enacted. Even Brian Dickson, arguably the greatest judicial exponent of the *Charter*, once said that the judges of Canada "did not ask for the enactment of the

¹⁹ The Supreme Court referred to this point in one its most important early *Charter* decisions *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at p. 497.

Charter. It was thrust upon us.”²⁰ Judges played no role in the creation and enactment of the *Charter* in 1982.

At the time the *Charter* was enacted, it was evident to both politicians and the judiciary that the document was created in specific response to the Supreme Court’s decisions under the 1960 *Canadian Bill of Rights*. With one or two notable exceptions, the Supreme Court of Canada had been very cautious in its interpretation of the *Bill of Rights*. Particularly notorious was the 1979 *Bliss* decision in, holding that the refusal of unemployment insurance benefits to pregnant women did not amount to sex discrimination, even though the same benefits were available to other workers.²¹ *Bliss* was strongly criticized, and the entrenchment of the *Charter*, with its strongly worded equality rights clause and explicit supremacy and remedies clauses was a conscious and deliberate choice by Parliament to push the courts towards a more proactive, pro-rights approach. By enacting the *Charter*, with most of the same fundamental rights and freedoms found in the *Bill of Rights*, the elected representatives of the people were telling the courts: stop interpreting fundamental rights and freedoms like a contract or an ordinary statute.

Given the historical development of the *Charter*, it is evident that the Supreme Court’s generous and liberal interpretation of the document is not an unwarranted assertion of judicial power, but is rather a direct response to an invitation by political actors, and a fulfillment of the widely held and deeply felt expectations of the Canadian public. As Dickson said in a 1984 speech: “*Our nation accepted on April 17, 1982, the political proposition that there are some phases of life in Canada that should be beyond*

²⁰ “Remarks at the luncheon with the Judges of the British Columbia Court of Appeal”, 8 May 1986, quoted in Sharpe and Roach, *Brian Dickson: A Judge’s Journey* (Toronto: U. of T. Press, 2003).

²¹ *Bliss v. The Attorney General of Canada*, [1979] 1 S.C.R. 183.

the reach of any majority, save by constitutional amendment or by the exercise of the [notwithstanding clause].”²²

In addition to fulfilling the expectations of the Canadian public, the enactment of the *Charter* and its consequent authorization of judicial review, also fulfilled Canada’s international responsibilities. The A decision to adopt a constitutional *Charter of Rights* brought Canada into line with the international community. Virtually every nation that aspires to the principles of liberal democracy has a judicially enforced bill of rights. The prevalence of such human rights bills in other democratic countries indicate that at least by the standards of the international community, there is nothing anti-democratic about the *Charter*.

My second point in response to the cries of “anti-democratic” judicial review is to emphasize the idea that there is more to democracy than majority rule.²³ *Charter* critics who equate democracy with majority rule have an impoverished vision of democracy. Democracy cannot function in a vacuum. There are certain rules of the game and we need a referee to enforce the rules. Those rules are the pre-conditions for a healthy democracy. I suggest that judicial protection of fundamental rights and freedoms protects and enhances the pre-conditions for democratic life and that this makes judicial review the friend, not the enemy, of democracy.

The most obvious pre-condition to democracy is a legal and political framework that allows for free and open debate on public issues. A healthy democracy can only exist in a society where the values of individual dignity, autonomy, and freedom of choice are respected. Freedom of thought and religion and the rights to equality and the protection

²² Remarks at Dinner in Honour of Governor General Jeanne Sauvé, quoted in *Brian Dickson: A Judge’s Journey*, *supra*.

²³ See especially *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

of life, liberty, and security of the person, are the necessary conditions for democracy. As Chief Justice Dickson once said: “*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.*”²⁴ Unfortunately, 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. *Charter* protection of fundamental rights, therefore, enhances and protects democracy, even though it often means checking the power of majority rule.

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.²⁵ 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 guarantee²⁶ 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 idea 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. As Justice Iacobucci stated in the case of *Vriend*, “...judges are not acting undemocratically by intervening when

²⁴ *R. v. Big M Drug Mart Ltd.*, *supra* at p. 346.

²⁵ *Vriend v. Alberta*, *supra*.

²⁶ *Law v. Canada*, [1999] 1 S.C.R. 497.

there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the Charter.”²⁷

My third point in answer to the critics of judicial review is to suggest that they exaggerate the power of the courts. Unlike the image portrayed by the critics, the courts are reactive, not pro-active. Judges can only decide the cases that come before them, and when deciding those cases, must apply the law. Parliament can set its own agenda and, provided it stays within the limits of the constitution, it can decide social and economic issues whenever and however it wants.

Consider what the *Charter* does not protect. Despite their importance, rights of property, contract and social welfare rights are excluded because of the prevailing Canadian view that decisions on these issues lie outside the limits of the judicial function and within the domain of legislative choice. The Supreme Court has remained faithful to this constitutional vision and when interpreting the Charter, the court has remained conscientiously aware of the natural limits of judicial lawmaking.²⁸ The Court has refused to interpret the open-ended language of section 7 as including the right to property,²⁹ or as a tool to review laws regulating business and commerce.³⁰ By focusing the broadly worded rights of sections 7 and 15 on matters of essential human dignity and the protection of vulnerable groups, the Supreme Court has, contrary to the arguments of the critics, consciously and deliberately limited its capacity to decide important issues of public policy.

²⁷ *Vriend v. Alberta*, *supra* at pp. 566-67.

²⁸ *Gosselin v. Quebec (A.G.)*, [2002] SCC 84.

²⁹ *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927.

³⁰ *Edwards Books and Art Ltd. v. R.*, [1986] 2 S.C.R. 713.

My final point in response to the judicial activism critics is based on the limitations provided by the structural features of the *Charter* itself. The *Charter* contains several provisions that attempt to balance and reconcile judicial and legislative power. Perhaps the most important structural feature of the *Charter* is the s. 1 “reasonable limits” clause:

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.

This means quite simply that *Charter* rights are not absolute, and that Parliament can limit *Charter* rights, provided it has a good reason for doing so, and provided the law respects the principle of proportionality by limiting the *Charter* right as little as is reasonably possible. In practice, the courts have interpreted s.1 in a way that gives Parliament considerable latitude in creating its own laws. In most cases, the courts find that even though the law under *Charter* attack infringes a right or freedom, it should be upheld under s. 1. Furthermore, even in those cases where a law is struck down for having a disproportionate effect on a *Charter* right, it is almost always possible for Parliament to come back with another law that accomplishes the same objective, but that does so in a way that has less impact on the right or freedom at issue.

Although largely overlooked by *Charter* critics, the possibility for a legislative response to an adverse court decision has proved to be very important in practice. Court decisions striking down laws have, with striking regularity, been followed by legislative initiatives that replace the unconstitutional law with an improved law that respects the protected right or freedom. For example, a federal law imposing a total ban on all

tobacco advertising was struck down as infringing freedom of expression,³¹ but was quickly replaced with a law that banned only the more invidious forms of advertising. In a long list of cases, decisions invalidating police investigative procedures as unreasonable search and seizures have been followed by laws providing for prior judicial authorization to ensure that *Charter* rights are respected.

Constitutional scholars have described this process as a “dialogue” between the courts and the legislatures.³² They point out that the effect of the judicial decision is to provoke a “public debate in which *Charter* values play a more prominent role” than they would without the decision. It is left to the legislature “to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplish the social or economic objectives that the judicial decision has impeded.”³³ In this light, judicial decisions invalidating laws can be readily justified as being consistent with democracy. The effect of the decision is not to give the court final say. It is, rather, to require Parliament or the legislature to pay proper heed to the fundamental right or freedom at issue, while leaving ample room for the validation of democratic choice.

The second important structural feature that reconciles judicial power with legislative power is s. 33, or the *Charter*’s “notwithstanding clause”. This clause allows Parliament or a provincial legislature to declare that a law shall operate “notwithstanding a provision included in section 2 or sections 7 to 15” of the *Charter*. A law containing

³¹ *RJR McDonald v. Canada*, [1995] 3 S.C.R. 199.

³² P.W. Hogg & A.A. Bushell, “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75; Kent Roach, *The Supreme Court on Trial* (Toronto: Irwin Law, 2001). Dialogue is also discussed by Iacobucci J. in *Vriend v. Alberta*, *supra* at p. 565-66 and by Bastarache J. in *M v. H*, *supra* at p. 182.

³³ Hogg, and Bushnell, *supra*.

this simple declaration will be protected from judicial review and legally valid even though it violates a *Charter* guaranteed right or freedom. The notwithstanding clause applies to the fundamental freedoms (expression, religion, association, and assembly), the right to life liberty and security of the person, legal rights in the criminal process, and to the right to equality.³⁴ The reach of the legislative notwithstanding clause does not extend to democratic rights (the right to vote and the requirement of regular sessions of Parliament and the legislatures), mobility rights (the right of citizens to enter, leave, and move about the country), or language rights. A declaration can remain in effect for a maximum period of five years, which is roughly tied to the length of a Parliamentary term. As a result of the limited lifespan of the notwithstanding clause, the decision to renew an override will almost always come before a newly elected Parliament or legislature and in those circumstances, will need to be debated again by a group of newly elected legislators.

Here again, the Supreme Court of Canada has shown remarkable judicial restraint by refusing to interfere with an extreme and extraordinary use of the notwithstanding clause.³⁵ Shortly after the *Charter* was enacted, Quebec adopted a general notwithstanding clause that exempted every Quebec statute from the *Charter*, a decision taken in protest by the separatist Parti Québécois government, which had opposed the 1982 amendments to the constitution and the enactment of the *Charter*. The Quebec Court of Appeal held that such a sweeping and general declaration of override was

³⁴ Subject to s. 28 that states that, notwithstanding anything in the *Charter*, “the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Section 33 could not override this guarantee.

³⁵ *Ford v. Quebec*, [1988] 2 S.C.R. 712.

invalid,³⁶ but the Supreme Court of Canada disagreed and held that the courts could not second-guess even this highly unusual use of the notwithstanding clause. Public opinion, not the Supreme Court, controls the use of the notwithstanding clause.

Despite its infrequent use, the very existence of the notwithstanding clause is an important feature of our constitution. The notwithstanding clause recognizes that elected legislators have a constitutional role in defining an appropriate balance between the rights of the individuals and the interests of society at large. With the notwithstanding clause, the *Charter* creates a check on the power of both legislatures and the courts. On the one hand, the *Charter* significantly curtails legislative power by conferring a broad mandate upon the judiciary to protect fundamental rights and freedoms. On the other hand, the court's power is also restricted through the inclusion of the notwithstanding clause.

Taken as a whole, section 33 ensures that no one has the last word. Even if the notwithstanding clause is invoked to overcome judicial review, the five-year sun-set ensures that the issue will have to be revisited by a differently constituted Parliament or legislature after an election in which the people can hold accountable their democratically elected representatives. The net effect of the section is to achieve a subtle and effective check on both legislative and judicial power.

V. Conclusion

My conclusion is that judicial review to protect *Charter* rights is neither inconsistent with our legal and political traditions, nor is it anti-democratic. The *Charter* not only protects the values of individual dignity, autonomy, and respect that are essential for free and open democratic debate, but it also gives a voice to many in Canadian society

³⁶ *Alliance des professeurs de Montréal v. Quebec* (1985), 21 D.L.R. (4th) 354 (Que. C.A.).

who are effectively excluded from the political process. A true democracy is surely one in which the exercise of power by the many is conditional on respect for the rights of the few. Majorities often fail to respect individual dignity and conscience and are inclined to shut out annoying and unpopular views. Constitutionalizing rights empowers the courts to check these unworthy inclinations by requiring those who exercise power to justify their actions through evidence and reasoned argument when the bedrock values of our democratic tradition are impinged.

I would therefore suggest that the *Charter* has had a beneficial impact upon democratic life in Canada and that it reflects an appropriate balance between judicial and legislative power. Fundamental human rights are now properly at the forefront of public debate, and the claims of those often drowned out in the cut and thrust of day-to-day politics can no longer be ignored. Legislators cannot enact laws without consideration of their impact on fundamental democratic rights. But the courts also are prevented from having the final word in the creation and application of laws. The notwithstanding and reasonable limits clauses allow for a dialogue between courts and legislatures in which neither institution is supreme and in which each can play its proper role.