

SPECIAL SERIES ON THE FEDERAL DIMENSIONS OF REFORMING THE SUPREME COURT OF CANADA

The Jurisprudence of "Canada's Fundamental Values" and Appointment to the Supreme Court of Canada

F. C. DeCoste
Faculty of Law, University of Alberta

**Institute of Intergovernmental Relations
School of Policy Studies, Queen's University**

SC Working Paper 2010 - 02



Judged by the norms of liberal democratic governance, our system of appointing judges to the Supreme Court of Canada is a constitutional embarrassment. This much must, by now, be beyond dispute. Since the Court's founding in 1875, s. 101 of the *Constitution Act 1867* has been taken by successive federal executives to be a grant of unfettered -- which is to say, rule-less¹ and therefore largely lawless -- prime ministerial discretion. In consequence, both the process and the substance of appointment offend in disgracefully equal measure the principles of transparent and accountable government. That this sorry state of constitutional affairs has not in fact fatally compromised the legitimacy of the Court can only, I think, be attributed to the complicity of those who know or ought to know better -- the legal, academic, and press communities especially included -- in the maintenance of civic ignorance among Canadians. But further criticism in these regards is not my remit in this too brief working paper.² Instead I shall argue that the Court's post-*Charter* devotion to what it terms "Canada's fundamental values" violates a core constitutional principle of federalism. I shall then argue that this violation not only supports but demands remediation by way of a role for the provinces in the appointment process.

Since the inception of the *Canadian Charter of Rights and Freedoms* in 1982, ink has bled profusely and continuously about the tectonic jurisprudential and political shifts it has wrought. Early along at least, these concerns seemed themselves overwrought. The *Charter* after all was but a local iteration of a standard institutional feature of the limited and accountable government promised by liberal political philosophy and practice. As events would have it, however, the (many) celebrants of *Charter* change and the (far fewer) *Charter* naysayers were alike proven correct in their prognostications of seismic upheaval. What none of them could have foreseen was the curious judicial methodology by which an otherwise prosaic strategy of limited government was turned into instrument of an ever-expanding federal state.

The method is simply stated: with the *Charter* as its point of hermeneutic departure, the Supreme Court has over time come to view constitutionalism -- the constitution itself and the law as a whole -- as an expression and repository of what it never tires of styling as "Canada's fundamental values."³ Though this is not the place to provide a full decisional archaeology of this notion, some excavation of its logic and breadth is necessary to disclose its suppositions and consequences, both of which matter much to my argument concerning the process of appointment to the Court.

The logic begins with the Court's view of the historical and legal significance of the adoption of the *Charter*. It is the Court's view that, considered historically, the *Charter* signalled a "new social contract" in which "our constitutional design was refashioned" as

¹ The sole rules being ss. 5 and 6 of the *Supreme Court Act* [R.S.C. 1985, c. S-26], the first prescribing minimal qualifications and the second that at least three of the Court's nine justices must be appointed from Quebec. The convention with respect to the provincial place of origin of the remaining six justices constrains executive discretion in the same fashion as holes do cheese.

² For my take on the embarrassment and the complicity, see respectively: "Political Corruption, Judicial Selection and the Rule of Law" (2000) 38 *Alberta L. Rev.* 654 & "Howling at Harper" (2008) 58 *U.N.B. Law J.* 121

³ For a recent and rather dramatic proclamation, see *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 at para. 2.

"part of a redefinition of our democracy."⁴ With this constitutional revolution came a jurisprudential one: henceforth, the judicial branch was to serve as "interpreter," "arbiter" and "trustee" of the rights and freedoms enumerated in the *Charter*.⁵ This understanding of history compels a hermeneutical turn: if the judicial branch is the interpretive trustee and arbiter of the *Charter*, it falls to the courts and to the Supreme Court especially to articulate what Ronald Dworkin would describe as a pre-interpretive understanding of the *Charter* and of its place in our constitutional structure and affairs more generally.⁶ And it is here that the Court's tale of fundamental Canadian values really begins. For the Court's pre-interpretive position is that the *Charter* is itself an expression of values that somehow or another lay unwritten beneath it. It has put the matter variously and repetitively. There are "democratic values and principles under the Charter";⁷ "the values underlying the rights and freedoms guaranteed by the Canadian Charter form part --and sometimes even an integral part -- of the laws to which we are subject";⁸ "fundamental values [are] reflected in the Charter";⁹ "fundamental principles emanat[e] from the Charter";¹⁰ and so on and on.

This understanding raises two questions, the answers to which complete the Court's pre-interpretive staging of its narrative of fundamental values. If the *Charter* is indeed an expression of the values that lay beneath it then, one is led to ask, whence those values and whose values are they? So far as their origin is concerned, the Court has taken the view that *Charter* values are "an expression of our traditions, of our debt to them as well as of the evolving values of our society"¹¹ (or alternatively put, "a restatement of the fundamental values which guide and shape our democratic society").¹² Thus rendered, the values that underlay the *Charter* become social values, the people's values, *real* values. And so in the Court's view, they indeed are. Those values buried beneath the *Charter* are "the fundamental values and aspirations of Canadian society,"¹³ "the most fundamental values of our society,"¹⁴ "the values of contemporary Canadian society,"¹⁵ "the values of modern Canadian society,"¹⁶: they are, that is, "fundamental Canadian values," our "basic values."¹⁷

It is on this transmutation of judicial values into social values that the post-*Charter* Court grounds its constitutional permit to discover and to defend the values of Canada and Canadians. The Court has proven itself ready and eager to the task. Indeed, the breadth of values discovered and defended is breath-taking both in number and in reach.

⁴ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 134-135.

⁵ *Ibid.* at paras. 132 & 135.

⁶ Ronald Dworkin, *Law's Empire* (Harvard U.P., 1986) at 65-66.

⁷ *Vriend* supra note 4 at para. 142.

⁸ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 6 at para. 16.

⁹ *R.W.D.S.U., Local 558 v. Pepsi-Cola Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 at para. 65.

¹⁰ *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 174.

¹¹ *R. v. Advance Cutting and Coring Ltd.*, [2001] 3 S.C.R. 209 at para. 259.

¹² *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 92.

¹³ *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 735-736.

¹⁴ *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 624 at para. 28.

¹⁵ *R.W.D.S.U.* supra note 9 at para. 69.

¹⁶ *WIC Radio v. Simpson*, [2008] 2 S.C.R. 420 at paras. 79-80.

¹⁷ *R. v. Hape* supra note 10 at paras. 163 & 178

As regards the latter, the Court has declared the common law,¹⁸ governmental policy,¹⁹ the division of powers,²⁰ and indeed the law in its entirety,²¹ as each and all subordinate to Canada's fundamental values.

The list of values is no less ambitious. "[M]ulticulturalism [and] diversity,"²² "inclusiveness, equality, and citizen participation,"²³ "self-fulfillment, participation in social and political decision-making, and the communal exchange of ideas,"²⁴ and "environmental protection,"²⁵ are just some of the values that the Court has declared as fundamentally Canadian. But the high-water, at least so far, has surely been reached in the Court's decision in *Bruker*,²⁶ a non-*Charter* divorce case,²⁷ in which the Court announced a veritable cascade of fundamental values. Besides multiculturalism, there we find the Court declaring and defending the following as Canadian values: "to ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion";²⁸ our "evolutionary tolerance for diversity and pluralism";²⁹ "our approach to marriage and divorce and our commitment to eradicating gender discrimination";³⁰ "Canada's approach to religious freedom, to equality rights, to divorce and marriage generally";³¹ "our commitments to equality, religious freedom and autonomous choice in marriage and divorce";³² "the right of Canadians to decide for themselves whether their marriage has irretrievably broken down" and our "attempt to facilitate, rather than impede, their ability to continue their lives, including with new families";³³ our view that "marriage and divorce are available equally to men and women";³⁴ and "protecting equality rights [and] the dignity of Jewish women in their independent ability to divorce and remarry."³⁵ As

¹⁸ See e.g. *WIC Radio* supra note 16 & *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835.

¹⁹ *Health Services & Support-Facilities Subsection Bargaining Assn. v. B.C.*, [2007] 2 S.C.R. 391 at para. 26.

²⁰ *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at para. 23; *R. v. Advance Cutting* supra note 11 at para. 277. And this understanding, it is worth noting, arose despite the spirit of the non-extension of powers provision found in s. 31 of the *Charter*.

²¹ *Multani* supra note 8 at para. 16.

²² *Ibid.* at para. 79.

²³ *Sauve v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 41.

²⁴ *R.W.D.S.U.* supra note 9 at para. 32.

²⁵ *114957 Can. Ltee. v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para. 1

²⁶ *Supra* note 3.

²⁷ *Bruker* concerned the enforceability at law of a religious undertaking by a divorced Jewish man to grant his former wife a *Get*, a religious divorce under Judaic law. For commentary see my "Caesar's Faith: Limited Government and Freedom of Religion in *Bruker v. Marcovitz*" (2009), 32(1) *Dalhousie Law Journal* 153-76.

²⁸ *Supra* note 3 at para. 19.

²⁹ *Ibid.* at para. 1.

³⁰ *Ibid.* at para. 16.

³¹ *Ibid.* at para. 63.

³² *Ibid.* at para. 80.

³³ *Ibid.* at para. 82.

³⁴ *Ibid.*

³⁵ *Ibid.* at para. 92.

elsewhere, here too the Court may be fairly said to have simply discovered these values since, with one unhappy exception, it credentializes none of them.³⁶

The whole of this -- the pre-interpretative sensibility and its continuing execution in the discovery and defence of fundamental values through the case law -- has sedimented into the ruling orthodoxy of the Court. So much indeed is this the case that the Court's mark is in equal measure ideological uniformity and blindness (and this quite independently from whether the appointing executive is Liberal or Conservative). The blindness reveals itself most tellingly in the Court's failure to come to terms with the supposition on which its entire fundamental values enterprise is based. The supposition is that the state is properly seized of a *weltanschauung* -- the state's "fundamental values" -- to which the conduct and projects of its subjects are properly held to judicial account. Now, whilst this may be, and of course has been, true of certain kinds of states, it has never been true, nor can it ever be, of liberal states. This is so because, unlike a *Kulturstaat*, the liberal state is, by definition and aspiration both, a *limited* state. And states of that kind and character are not in the business of articulating and consolidating nationalist values independently from the security and liberty interests of their subjects or of forcefully declaring those values as the core morality of the communities they serve or of degrading citizenship into clientelism. Just the contrary: in liberal states, the law's purchase is the liberty of the law's subjects to choose their own values and morality, and with that, their own lives, beyond the touch and taint of law and politics. Which is merely again to say, liberal constitutionalism is about personal and social autonomy and never about state-sponsored authenticity.

But not only does the jurisprudence of fundamental values in this fashion constitute a deformation of liberal constitutionalism, in our constitutional context, the neo-constitutionalism of which it is comprised is as well a violation of a founding norm of federalism. Federalism, ours included, is about split sovereignty in service to limited and liberty-serving government. The protection of the individual from abusive state power is the *raison d'etre* of divided sovereignty; and federal regimes are everywhere proposed and structured so as to make the individual safe from over-reaching, liberty-constraining government, from the central authority in particular.

Now, it is always the case that federalism has built into it a centralizing impulse, especially so in the authority of federal courts to interpret constitutional provisions and their own authority. However, I want to suggest that the Supreme Court's jurisprudence of fundamental values far exceeds such normal frailties of federalism. In the final analysis, that jurisprudence consists of a judicially conjured and constitutionally enforced pan-Canadianism that so violates the practice of divided, limited and agonal authority, that it constitutes its subversion by judicial means. For judicially manufactured Canadian values make jest of the norm of provincial protection of the individual from the claims of

³⁶ The exception is "the dignity of Jewish women in their independent ability to divorce and remarry" which it finds on s. 21.1 of the *Divorce Act* and on the parliamentary addresses of two, now long departed Ministers of Justice, Doug Lewis and Kim Campbell: *ibid.* at paras. 7, 8, 81. But s. 21.1 has on its own terms nothing whatsoever to do with the matter before the Court in *Braker*.

the central government by redefining the individual root and limb as an expression of federally-sanctioned values.

The jurisprudence of fundamental values is then diseased in two respects: it violates the norms and institutional patterns and limitations of liberal constitutionalism, and it compromises a central constitutional norm of Canadian federalism. So established however is this jurisprudence, there exists in my view no reasonable expectation that the Supreme Court will on its own accord recover from its totalizing and centralizing mission. Remedy, if a remedy there is, can only begin with an understanding of the relationship between the maladies. Though the second anti-confederal disease is a consequence and symptom of the neo-constitutional disease -- which is to say, without the former there would be no constitutional opportunity for the latter to infect -- treatment must begin with the symptom. The rationale is simple enough: though we may dissent from the Court's illiberal constitutional conception of fundamental values, the anti-federalism result alone gives constitutional room and reason to manage constitutional recuperation. The reason is the defence of a core norm of Canadian federalism, and the room is the appointment of justices with suitable "constitutional convictions"³⁷ to the Court.

Now, if we wish to test the "jurisprudential integrity and commitment"³⁸ of proposed appointees along confederal lines, then it is both proper and necessary for the provinces to have a place of prominence in the appointment process. The reason here too is so simple: not only have both the federal executive and the Supreme Court, when left to their own devices, proven themselves unfaithful custodians of divided, liberty-serving federalism, even were that otherwise, the structure and norms of Confederation alone would command divided appointment authority.

Nor, considered in the abstract, need this recuperative mission be complicated. Setting in place provincial authority, along the lines of either Meech or Charlottetown, would require nothing more substantial than parliamentary amendment of the *Supreme Court Act*. When however the rubber of abstraction meets the coarse and degraded surface of the present circumstances of our Confederation, the matter becomes so much more murky. Indeed, since 1982, so drastically have we turned from the founding impulse of our Constitution, setting matters aright seems to me every bit a fool's errand.

³⁷ Ronald Dworkin, *Freedom's Law* (Harvard U.P., 1996) at 263.

³⁸ *Ibid.* at 331.