

The Supreme Court of Canada as a “National School Board”: The *Charter* and Educational Change

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Since the constitutional entrenchment of the Canadian *Charter of Rights and Freedoms* in 1982, the Supreme Court of Canada is hesitantly but perceptibly beginning to assume an expanded and more activist role in educational policy making. If the U. S. constitutional experience with regard to education has any implicit lessons for Canadians, it is that the imposition of “national” education standards and policy on local school systems may induce profound social and cultural changes at all levels of Canadian society. After surveying recent constitutional trends and developments in *Charter* jurisprudence and education, this paper examines the implications for Canadian schooling and education of an activist Supreme Court and discusses some of the advantages and disadvantages of national policy making and judicial intervention in the educational arena.

Depuis l'enchâssement dans la Constitution de la *Charte canadienne des droits et libertés* en 1982, la Cour Suprême commence tranquillement mais de façon toujours plus apparente à assumer un rôle plus actif dans l'adoption de politiques d'enseignement. Si les Canadiens peuvent tirer une leçon de l'expérience constitutionnelle des Etats-Unis en ce qui concerne l'éducation, c'est que l'imposition de normes “nationales” et de directives aux conseils scolaires locaux risque d'entraîner des changements sociaux et culturels majeurs à tous les niveaux de la société canadienne. Après avoir pris connaissance de l'orientation constitutionnelle actuelle et des développements en jurisprudence et en éducation se rattachant à la Charte, cet article examine les implications pour le système d'éducation canadien du rôle que la cour suprême commence à jouer et discute de certains avantages et désavantages de la détermination de politiques nationales et d'une intervention judiciaire dans le domaine de l'éducation.

“... the Bill of Rights ... cannot be relied upon to open a new chapter in judicial law-making. It will remain largely a hair-shirt for Parliament.”
Chief Justice Bora Laskin (1962, p. 527)

“The Court is now fully seized of its responsibility. It's an active Court.”
Chief Justice Bora Laskin (1984a, p. 10)

The adoption in April, 1982 of a new Canadian constitutional framework to protect citizens' rights marks an important turning point for the judicial branch in the Canadian polity (Constitution Act, 1982). Under the

new constitutional system, the Canadian Supreme Court not only can confront and challenge unconstitutional decisions of the legislature and government but also has the potential to articulate and help implement important national goals. When asked prior to the enactment of the Canadian *Charter of Rights and Freedoms* whether he thought a constitutionally entrenched bill of rights *would* change the role of the judiciary, the late Chief Justice Bora Laskin remarked: "The possibilities of a wider role are there, the question really is this: Is the Court willing to seize them?" (Laskin, 1984b, p. 3). Since the adoption of the Constitution Act, 1982, Laskin's question still remains highly pertinent for the analysis of Canadian politics and society. Thus, whether the court will take up this constitutional challenge, the manner in which it will define its new role, and how an activist court might affect the Canadian polity are all issues that have stimulated lively and contentious debate since the promulgation of the act.

The following discussion consists of two parts. The first reviews some of the intended and unintended consequences for the role and function of the Supreme Court of entrenching a charter of rights. It is suggested that, although the framers did not explicitly intend or anticipate the expansion of judicial power vis-à-vis the other branches of government, recent constitutional development reveals a hesitant yet perceptible trend toward more judicial "activism," less judicial "modesty," and hence an expanded role for the judiciary in the Canadian political process. The second part of the paper addresses the more specific question of how judicial activism may affect the future of Canada's educational process. At issue here, for example, are questions concerning the kind of educational developments and reforms that might be anticipated if the Supreme Court renders decisions or advances policies that set uniform *national* educational standards in areas traditionally subject to diverse provincial and local policies and practices, what such a *Charter*-based "national school board"¹ might entail for local school authorities and educators, and finally how "courts in the classroom" will affect the quality and effectiveness of Canadian education and schooling. The answers to these and other related questions are, of course, still unclear at this early stage in the evolution of the constitution. In discussing such complex and important issues, therefore, our goal is primarily to help stimulate further dialogue among educators and "*Charter*-watchers" by offering some modest predictions and prescriptions for future court-classroom relations as the *Charter* and Canadian education move towards the twenty-first century.

JUDICIAL ACTIVISM: THE PROMISE AND THE POTENTIAL

The political sponsors² of an entrenched charter of rights for Canada

contemplated a number of broad-ranging and long-term constitutional goals when they devised the so-called “people’s package” of 1981. These goals included the enhancement of national unity, protection of fundamental liberties and freedoms, and, of course, the establishment of an independent constitutional framework.³ Integral to this constitutional framework was the promise that a charter of rights would transfer to the courts, and to the Supreme Court of Canada in particular, the authority to protect civil liberties and freedoms – a situation which, the framers maintained, would enhance “people’s rights” and hence promote national cohesion (Chrétien, 1981; Trudeau, 1981). Since the promulgation of the Constitution Act, 1982, it has become increasingly evident that, while Canadian constitution makers embarked on the patriation process with rather clear and explicit goals in mind, they exhibited less clarity about how a constitutionally entrenched charter would actually achieve their political objectives. For example, like earlier constitutional architects in other environments, the Canadian constitution’s founding father, Pierre Elliot Trudeau, might be depicted as having pursued simultaneously two goals: his fundamental constitutional vision for the country⁴ and the more mundane, and sometimes even quite bizarre, practical political imperatives necessary to implement that vision.⁵ An illustration of this phenomenon can be seen in his last address to the House of Commons on 23 March 1981, in which he made reference to his general vision but also candidly expressed his uncertainty about what its implementation would entail for the country’s political future:

... we are merely setting the stage with a contest about the kind of Canada we will have in the future Will we be highly centralized? Will we be a loose confederation of shopping centres ... ? Will we be something in between? I don’t know. (1981, p. 8519)

It may be that this overriding concern with setting the stage prompted the *Charter’s* political sponsors to maintain that the purpose of an entrenched bill of rights was “to give the courts, in an open and direct manner, the authority they need to protect basic rights and freedoms if legislative and government restraint should fail” (*House of Commons Debates*, 1981, p. 13428), while neglecting to outline the obvious new judicial tasks which the exercise of such authority imposed. Leaving aside the controversial issue of s. 33, the *Charter’s non obstante or opting out* clause (the political motivation for which was probably more to ensure a provincial check on the *Charter’s* centralizing, i.e., federal, provisions than a “legislative brake” per se on the court’s authority),⁶ the framers devoted relatively little attention to the role and responsibilities of the court. Thus, while the framers surely anticipated that their constitution-making work would have far-reaching effects on the court system, they did little to spell

out explicitly the nature and implications of that effect. One member of parliament complained, for example:

There are some parts of the *Charter of Rights and Freedoms* I do not like. I do not like turning my life over to the courts and to interpretation by the courts. That is alien to our form of government and our social consciousness. That is something that is American. (*House of Commons Debates*, 1981, p. 13424)

Yet it probably would be incorrect to characterize this neglect or inattention as anomalous. The constitution makers took for granted, and had little reason to question, either the future viability of the well-ingrained tradition of parliamentary supremacy or the continuation of the Supreme Court's prior record of judicial self-restraint.⁷ Given these political and judicial traditions, it is not surprising that the framers rather easily sidestepped suggestions that judicial interpretations of the *Charter* might imply a fundamental shift of power from the legislative to the judicial branch of government. Moreover, when, prior to 1982, the framers did consider the possibility of an enhanced role for the court, this possibility was largely downplayed or dismissed as exceedingly remote and essentially antithetical to the Canadian legal and political culture. In other words, it might be argued that the framers merely expected and intended that the *Charter qua Charter* would protect fundamental rights and freedoms and thus foster national unity but did not fully understand or consider that judicial *interpretation* and *review* of the rights bill might necessarily impel an expanded and more activist role for the court. By basically sidestepping or overlooking the possible implications of establishing a constitutional footing for the court to exercise judicial review, Russell (1983) has suggested that the federal Liberals ignored the *Charter's* "strongest centripetal effect on the Canadian polity." He speculates in the same vein:

It is primarily through judicial decisions interpreting the *Charter* – applying its general terms to particular laws and government activities – that the *Charter* will come to play an important part in the on-going political life of Canada. ... Judicial decisions on the *Charter* will be unifying in that the very debates and controversies they produce will be national and on issues that transcend the regional cleavages. ... (p. 40)

The framers' ambivalence or neglect of such implications is rather predictable. Since the adoption of the Constitution Act, 1982, the Supreme Court of Canada possesses quite impressive responsibilities but lacks any clear guidelines or expectations about how such responsibilities should be fulfilled.

If, as the *Charter's* political sponsors maintained, patriation of the constitution does not imply an institutional realignment among the various branches of the parliamentary system, the rub then becomes how to have a judiciary which actively and effectively protects rights and guarantees national unity yet does not assume a completely new and ascendant political role.⁸ This predicament is not particularly unusual in the history of comparative judicial development, as the American case has clearly shown,⁹ but it does produce a certain ambiguity or creative tension about the court's potential impact within the Canadian political system. Thus, since the adoption of the *Charter*, the difficulty of untangling the closely related dimensions of *judicial independence*, *judicial supremacy*, *judicial review*, and *judicial activism* has become a major feature of Canadian constitutional analysis. It has been argued in comparative studies of judicial development that the evolution of a high court's role in a political system is influenced by the interaction of three major considerations: judicial independence, judicial review, and judicial sovereignty (supremacy). While the first of these considerations, the independence of the judiciary, is rather well rooted in the Canadian scene, the latter two dimensions might now be regarded as essentially in a state of flux (McCloskey, 1967).¹⁰ While a detailed discussion of these important and evolving dimensions is beyond the scope of this paper, it is useful to consider briefly the basis and potential of one of these concepts, namely, judicial activism.

The possibility of judicial activism is clearly rooted in s.52 – the constitutional supremacy clause – of the Constitution Act, 1982. Declaring that “the Constitution of Canada is the supreme law of the land,” this provision establishes a new and expanded doctrine of judicial review based on “inconsistency” or “repugnancy” and replaces the less potent doctrine of judicial review based on the principle of *ultra vires* (Grant, 1964; Hogg, 1982; Strayer, 1968). Whether the notion of supremacy will make inroads and eventually even supersede the principle of *ultra vires*, and in the process foster greater judicial activism, has been the subject of much speculation (Low, 1984; Morton, 1984). Despite considerable negative reaction concerning the court's ability to overcome its “judicial temerity,”¹¹ recent judicial statements and decisions offer increasing evidence that the Supreme Court intends, while taking an essentially gradual and evolving approach to constitutional interpretation, to adopt a more activist stance regarding judicial decision making. For example, less than one year after the *Charter's* adoption, Justice Brian Dickson of the Supreme Court of Canada expressly recognized that judicial deference to parliament had dictated the court's previously timid interpretation of the 1960 federal statutory rights bill (e.g., the court used the *Bill of Rights* to

impugn only one out of the approximately 30 federal acts challenged)¹² and admitted that: "A spirit of uneasiness, even of guilt, colours some of the cases under the *Bill of Rights*" (Dickson, 1983, p. 185). He hastened to add, however, that "the *Charter* has replaced parliamentary supremacy with constitutional supremacy" and that such "thinking and those misgivings are now behind us" (p. 184). Moreover, he signalled that the new constitutional basis for judicial review (s.52) also places the judicial branch in a more egalitarian and thus active position vis-à-vis "the executive and legislative powers."

The new Constitution makes it abundantly clear that Canadian courts must now deny effect to a federal or provincial statute that offends against the Rights and Freedoms guaranteed in the *Charter*. That responsibility and power now exists as an integral part of the process of Canadian government. (p. 185)

Thus, if judicial activism is understood as the court's inclination or propensity to intervene in the governing process – a trait which in comparative terms is commonly marked by decisions calling for "social engineering"¹³ and which may intrude on matters traditionally reserved for legislative or executive action – then clearly the potential for its exercise now exists in the Canadian context. For example, although Justice Dickson (1983, p. 6) argues for a cautious and incremental approach to "judicial law-making," he has recently indicated that the Supreme Court of Canada's law-making function has taken on an important new dimension since the enactment of the *Charter*. He thus offers this injunction: "The legislative process should not be idealized all out of proportion. It is certainly not the solution to every trouble of the law. On the contrary, judicial law-making may be a spur to a lazy or indifferent legislature. The judiciary and the legislature do not exist in splendid isolation from each other." While admittedly the notion of judicial activism is exceedingly slippery, it is just such slipperiness and ambiguity which create an opportunity for the interplay of various political forces and judicial interpretation.¹⁴

The Supreme Court of Canada and the Charter: Cases and Decisions

The absence of critical discussion about constitutional supremacy and its implications for a more activist high court are especially striking in the light of U. S. constitutional experience. It was exactly the notion of the court "as the ultimate and effective partisan of constitutional and individual rights" which Chief Justice John Marshall seized upon to defend the U. S. Supreme Court's assertion in the landmark case of *Marbury v. Madison* and which, moreover, has served as the focus for the

U. S. court's modern activist tendencies. While the Canadian framers may have largely downplayed or neglected the pivotal role of the judiciary in balancing out and adapting the new constitutional system to its broader environment, Canadian Supreme Court justices have been far more attuned to comparative constitutional history and to their own capacity as a political force. For example, in its first major consideration of the *Charter* in *The Law Society of Upper Canada v. Skapinker*, the court, in what promises to be a seminal contribution to Canadian constitutional development, explicitly drew attention to the significance of judicial review under the new system of constitutional government and felt no hesitation about citing the famous American precedent of *Marbury v. Madison* to support its contention. Thus, in the unanimous ruling written by Justice Willard Estey, the court went well beyond considering the substantive issues raised in the *Skapinker* case to indicate how it envisioned its new constitutional role and responsibilities, offering guidelines to its new approach to constitutional interpretation. Moreover, in a significant preface to his discussion of the court's new role, Justice Estey clearly distinguished the nature and force of the *Charter of Rights and Freedoms* from that of its "shabbily treated" (Freedman, 1984) predecessor, the *Bill of Rights*:

We are here engaged in a new task, the interpretation and application of the *Charter of Rights and Freedoms*. ... This is not a statute or even a statute of the extraordinary nature of the Canadian *Bill of Rights*. ... It is part of the Constitution of the nation adopted by the constitutional process. ... The *Charter* comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it is the supreme law of Canada. (*Law Society of Upper Canada v. Skapinker*, 1984, p. 9)

Having once established the constitutional nature of the *Charter*, the court also asserted that the new *Charter of Rights* would be accorded broad and generous judicial interpretation in order "to better serve" the Canadian community "it is designed to guide...for a long time." Anything less, the court cautioned, would "stunt the growth of the law and hence the community it serves." Finally, adopting judicial reasoning which should put to rest any doubts about whether or not the Canadian Supreme Court is embarking on a new and dynamic course of constitutional development, the court drew on U. S. precedent to outline its future approach to constitutional interpretation: "The courts in the United States have almost 200 years of experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States court" (p. 11).

In an unusual and revealing use of precedent the court cited the 1803 decision of *Marbury v. Madison* to authorize Canadian courts to review the constitutionality of legislation. On a double-edged note, the court also relied upon Marshall's 1819 decision in *McCulloch v. Maryland* to stress that both legislative and judicial power are limited under the constitution and the court must allow the legislative branch to exercise the discretion assigned to it (and vice versa). Perhaps even more telling of the Supreme Court's future direction within the Canadian polity, however, was the analogy made by the newly appointed Chief Justice Brian Dickson when he said that his *Charter* decisions "may resound like those of John Marshall" (1984, p. 23).

The unanimous ruling of the Supreme Court that the section of Act 101 limiting eligibility for English language schools to children whose parents received their primary education in Quebec was "incompatible" with the constitutional guarantees set out in s.23 of the *Charter* marked the second time the justices interpreted the *Charter* and the first time they invoked its guarantees to actually invalidate legislation. Various constitutional analysts have argued, quite correctly, that the outcome of the Act 101 case was predictable given the political history and federal objectives embodied in s.23 of the *Charter*. It would be a mistake, however, to allow debate over the substantive issue involved to obscure the importance of the court's willingness to become entangled in such a controversial and unmistakably political issue.¹⁵ Thus the court's decision in this highly politicized case is perhaps not as important as its exercise of judicial review, a striking expression of the court's emerging involvement in the formation of public policy. Such involvement usually has two outcomes: either the court upholds the constitutionality of the legislation and thus associates itself with the policies of the government or parliamentary majority, or it decides the legislation is unconstitutional and thereby subscribes to the status quo preceding the adoption of the legislation. Other types of policy involvement are, of course, open to the court. It may, for example, sidestep the issue of constitutionality without necessarily signalling agreement in either direction though this situation sometimes also signals that the justices regard certain legislative changes as basically acceptable. While the Supreme Court justices are certainly not unacquainted with such a policy-making function (Barry, 1982; Russell, 1982), the new constitutional basis for its review of legislation does suggest that a novel and expanded dimension of policy making is now at the court's disposal.

It is certainly not accidental that one of the first cases crystallizing court attitudes towards its own activism or passivity should also be associated with one of the most momentous issues in Canadian political life. One does not, however, have to reach an excessively cynical interpretation of

the coincidence between the court's self-definition and its consideration of such a salient issue in Canadian life; after all, the issue of language itself served as a catalyst for the patriation of the constitution after a long stalemate in Canadian history. Moreover, during the last decade, the question of language rights has been highly relevant for all Canadians, especially those residing in Quebec (Bilodeau, 1983).

The preceding overview of recent constitutional developments reveals that the Supreme Court justices are extremely aware that the court has important responsibilities for breaking new ground for the constitution and the *Charter* and that as an institution it must effectively tap and mobilize a public constituency which supports an enhanced role for the court.¹⁶ A perusal of the Supreme Court's first constitutional decisions suggests that the justices intend to tread carefully, if more actively, down the "un-Chartered" path ahead of them. While judicial reasoning in its early *Charter* judgements indicates that the court has established a hesitant yet definite trend towards more judicial activism, several caveats are certainly in order. First, only a brief time has elapsed since the Constitution Act, 1982 was passed and so there is still little evidence upon which to base any hard and fast generalizations. Second, and perhaps more importantly, it is essential to remember that the life of any one institution within a state or constitutional framework is like the life of an individual; it has its ups and downs, its periods of modesty and of self-assertion. As such, the role of judicial institutions in a dynamic and changing democracy is not stable or static. Rather, dimensions of judicial development such as the independence, the activism, and the supremacy of the judiciary are in a constant state of flux. Thus, if other political systems are any guide to the Canadian future, one can expect to see a perceptible ebb and flow in the court's legal and political role.

Cycles of more and less judicial involvement will, of course, depend on a host of factors both implicit in and external to the judicial process. The personal attitudes of the individual justices, for example, may have an important bearing on the scope and direction of the court's activism. Attitudes themselves are shaped by a number of factors including the justices' legal education, travel experience, reading habits, and available opportunity structure, as well as by direct or indirect impetus from political forces (e.g., the Trudeau-led Liberals) or judicial example (e.g., the civil-liberty concerns of Chief Justice Bora Laskin), and contribute to the judiciary's estimation of its own role and future in the constitutional process.¹⁷

External factors which may foster or impede judicial activism may include the policies and orientations of political parties, public opinion, and attitudes of affected groups and individuals. For example, the

emergence of minority ethnic groups as an important demand sector may serve as a major focus and catalyst of the court's future activism. It is not necessary to subscribe to an exaggerated Americanist perspective to be aware of the way in which new Canadians are beginning to use the judicial process to assert and protect their corporate and group interests. Whether one regards affirmative action or new styles of political protest as acceptable or not, such ethnic group behaviour is important to the Canadian political, cultural, social, and educational scene and is likely to become even more so in the decades ahead. Indeed, if in fact Canadian civil rights and liberties do receive more attention and protection within the Canadian community in general and the school community in particular, such a development may well be attributable to the emerging ethnic component in Canadian society (Cohen, 1986).

The fact that the first landmark cases regarding education in both the United States and Canada have related to the rights and demands of ethno-linguistic groups and have focussed and galvanized judicial activism is probably not accidental or lacking in significance.¹⁸ It may be too early to conclude that the judicial reasoning in *Skapinker* and the *Bill 101* decisions will prove to be the Canadian equivalent of *Marbury v. Madison* and *Brown v. Board of Education*. The justices' approach to both judgments, however, indicates a definite tendency to broader constitutional interpretation and judicial activism. What the court's changing judicial posture implies for the future of educational policy and practice is, of course, another important question.

Courts in the Classroom: Education and the Canadian Charter of Rights and Freedoms

Despite obvious differences between the U. S. and Canadian political systems and legal traditions, U. S. Supreme Court decisions affecting American educational policies and practices offer Canadian educators a unique opportunity to assess the potential impact of an activist national court on educational processes at the state and local levels. One recent assessment of the U. S. Supreme Court's impact on public education suggests, for example, that, because the field of education is so intricately related to other important walks of life, it often becomes the battleground for important debates on issues of social policy. "Schools," the study points out, "by the nature of the enterprise and the immediacy of the impact of educational policies on large numbers of persons of disparate backgrounds, have been the focus of a significant share of Supreme Court opinion on social policy issues" (Reutter, 1982, pp. 1-2). The interaction between schools and social policy making illustrated by the U. S. juridical

experience may have important comparative lessons for current Canadian constitutional development. Such lessons become particularly relevant in view of recent Ontario Court of Appeal and Supreme Court of Canada decisions that will have a direct bearing on the educational processes in public schools across the country.

As might be expected with any issue which simultaneously relates to a number of sensitive questions, the courts' recent intervention in minority language rights education has provoked considerable and in some cases extremely bitter debate. While recognizing, of course, that such controversy certainly touches upon issues beyond the domain of education, it is important to note how the language-of-education debate has crystallized opinions about the judiciary's involvement in the field of education. The Ontario Court of Appeal indicated in *Re Minority Language Education Rights* (1984, p. 100), for example, that, "although the judiciary is not the sole guardian of the constitutional rights of Canadians" and while "Parliament and the provincial legislatures are equally responsible," judicial intervention is, nevertheless, warranted in situations where local administrative discretion infringes upon certain constitutionally entrenched rights. The Court of Appeal accordingly ruled that local Ontario school boards "have too much discretion to provide French language education" and asserted that "any limitation placed on minority education rights cannot be left to the unfettered discretion of existing school boards no matter how well-meaning those boards might be" (p. 44).

Those objecting to any such judicial supervision or involvement in what they regard as an exclusive legislative domain reject out of hand any suggestion that the court act as a "national school board." For example, critics of the Supreme Court of Canada's recent invalidation of the education provisions of Act 101 have argued that the imposition of uniform national standards on provincial education practices threatens to turn each distinct cultural region of Canada into part of a "great levelled whole" (Johnson, 1984, p. 1). In another critique of the Act 101 decision which maintained that the court's "exclusive constitutional competence in the field of education is a very fragile one," the court was lambasted for "imposing on one province, namely Quebec, a framework of school rights which it takes strong exception to" (Le jugement final, 1984, p. 6, authors' translation). Perhaps the most fundamental attack on the national educational policy making of the Supreme Court of Canada in the Act 101 case came from Quebec Premier René Lévesque, whose immediate response to the ruling was: "If our forebearers had thought they might lose control over education, they would never have agreed to enter the federal system" (Lévesque lauds, 1984, p. 15).

Intrusion of the national judiciary into provincial education matters

may signal a new division of powers between the legislative and judicial branches and the provincial and federal levels of government. This is not to suggest, however, that the court will interpret the *Charter* as a green light for unmitigated judicial intervention in all spheres of the educational process. As noted, judicial activism and self-restraint are generally matters of degree and are subject to various external factors including shifting national conditions and public expectations. While mindful of this caveat, it is nonetheless quite evident from several recent indicators (e.g., statements by individual justices, lower court decisions, public opinion, and so on) and most notably the judicial reasoning in the Supreme Court's first *Charter* judgements that there has been a definite shift toward greater involvement in policy making or what in comparative constitutional terms might be referred to as a *tipping of the scales in the direction of activism*. This trend is apparent both in the court's overall pattern of activity and in the educational sector. The court's tilt toward judicial activism to secure individual rights in the education area, however, may encounter certain resistances or countervailing pressures. Evidence of barriers to judicial activism within the court itself are revealed, for example, in statements like: "Legislative action in the important and complex field of education is much to be preferred to judicial intervention" (*Re Minority Language Education Rights*, 1984, p. 100). Judicial trends in this area also suggest, however, that judicial restraint as a preferred course of action and judicial protection of constitutional rights may dictate two quite different results. Thus, a persistent theme present in many important U. S. Supreme Court decisions with a nationalizing effect on education, for example, is that the judicial branch should be wary of unnecessary involvement in the education process. In *Epperson v. Arkansas* (1968, p. 104) the court accordingly warned:

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. ... Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate constitutional values.

The U. S. Supreme Court (*Tinker v. Des Moines*, 1969, p. 49) has also recognized the importance of allowing state and local authorities to manage the public education system and has thus maintained that it "... has repeatedly emphasized the need for affirming the comprehensive authority of the State and school authorities, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."¹⁹ Despite such well-intentioned statements, however, observers

of the U. S. educational process have been quick to note that the U. S. courts are becoming more involved in matters related to education.

Recent constitutional developments in Canada suggest that similar judicial reasoning may be evolving in the Canadian setting. Thus, while initial judicial forays into public education have been tempered by a degree of caution and self-restraint, the Canadian judiciary has also clearly signalled that the *Charter's* emphasis on guaranteed rights provides "a yardstick of reconciliation between the individual and the community" (*Law Society of Upper Canada v. Skapinker*, 1984, p. 11) and has "changed the focus of constitutional law and the role of the courts" (*Re Minority Language Education Rights*, 1984, p. 19).

JUDICIAL DECISION MAKING AND EDUCATIONAL POLICY: CONFLICT AND CONTROVERSY

The first part of this paper documents the gradual movement of the Canadian Supreme Court into the arena of educational policy making in Canada. These initial indications by the judiciary that the constitutional protection of citizen's rights may involve the courts' undertaking a "supervisory function" in the area of education suggest the possibility of fundamental changes in the structure and organization of education across Canada. These changes are likely to be characterized by a variety of interrelated developments, including judicial decisions acting as nationalizing influences on Canadian educational policy and practice, legislative revision in compliance with the newly enacted constitutional provisions, and real limitations placed on traditional administrative discretion and initiatives of provincial and local school officials. In all probability such *Charter*-based changes will be mixed blessings, in some cases contributing to much needed educational reform, in others leading to bureaucratic sclerosis.

Judicial Decisions as "Nationalizing" Influences on Educational Policy

Traditionally, the provinces have jealously guarded their responsibility and have sought to protect their prerogatives in education. Despite this well-established tradition, however, the federal government has over the years defined for itself a major role in educational matters (Hargraves, 1981). The role is of sufficient magnitude to call attention to the sheer volume of federal funds flowing into educational programs (Hodgson, 1976), to the need for a federal office of education (Organization for Economic Cooperation and Development, 1976), and to the possibility of a national core curriculum (Manley-Casimir, 1980). These are only a few

of the factors in the debate surrounding the federal presence in education. The evidence, indeed, suggests that provincial autonomy in matters of education is becoming increasingly eroded by federal initiatives.

The extensive role of the federal government is one of the existing nationalizing influences in Canadian education, but there are also several others, including national organizations like the Canadian Education Association, the Canadian School Trustees Association, and the Canadian Teachers Federation. In addition, the provincial ministers of education, recognizing the need for a national consultative and coordinating mechanism, participate in and support the Council of Ministers of Education in Canada. Considered together, these organizations and agencies attest to the need for a national or federal perspective in educational matters. Add to these the existing federal role and the development of new policy initiatives affecting education (e.g., the proposed Multiculturalism Act), and we begin to appreciate the presence of various nationalizing influences on education in Canada.

The pressure building in Canada, however, to use constitutional arguments to secure educational change adds the significant element of judicial decisions to existing nationalizing influences. Indeed, the addition of the *Charter* introduces a dramatically new and novel instrument to the arena of educational policy making – one with no less than *constitutional* force. While this new tool was perhaps not intended to be as deliberately potent as a legislated federal commitment (e.g., to multiculturalism) in fostering developments in and through Canadian society, it may nevertheless affect the policy and practice of education throughout Canada. Judicial decisions regarding education-related matters will reach into every province and school district and may well contribute to a greater trend toward centralizing educational governance. The potential effects of the *Charter* as a nationalizing influence – that is, an influence finding its form and taking its shape through judicially imposed standards – are, therefore, extensive and far-reaching. Not only may such decisions introduce a federal or national perspective into arenas of educational policy and practice hitherto beyond federal reach, but they will do so by introducing quite new governing concepts and standards into educational policy. The Supreme Court will continue to grapple with *Charter*-related jurisprudence and doubtless will find occasion to apply new constitutional principles to educational questions. Clearly it is difficult to predict the exact nature or outcome of judicial decisions relating to future educational issues; it is, however, also clear that the court, while recognizing regional, provincial, or local variations in educational practice, will ask that essential constitutional requirements be observed.

One of the most obvious and difficult arenas of judicial decision making respecting education will be the interpretation and application of s.15 – the *Charter's* equality provisions – to the practice of education in Canada. Proclaimed in force on 17 April 1985, these guarantees affirm for Canadians the right to both *procedural* equality (“before and under the law”) and *substantive* equality (“the equal protection and equal benefit of the law”). Taken together with ss. 27 and 28 – the multiculturalism and gender equality provisions – these entrenched guarantees announce a distinctively new constitutional status for Canadians. Moreover, the equality provisions in s.15 (much broader in scope than their predecessor provisions in the Canadian *Bill of Rights* which were interpreted by the Supreme Court of Canada as guaranteeing *only* equality of process) create a veritable thicket of difficulties for judicial, legislative, and administrative interpretation and application in many areas of social policy but especially so in the field of education (Manley-Casimir & Sussel, in press). While it may appear that the politically sensitive Minority Language Educational Rights provisions (s.23) will most profoundly affect educational policy and practice in Canada, the potential effect of the equality clauses on educational policy making and practice should not be overlooked as a comparable if not even more potent tool for educational reform.²⁰ Indeed, Kurland (1964, p. 144), describing the impact of the equal-protection clause of the 14th Amendment on educational policy as manifested in the United States Supreme Court decision in *Brown v. Board of Education*, acknowledged the “emerging primacy of equality as a guide to constitutional decision” and noted that “the egalitarian revolution in judicial doctrine has made dominant the principles to be read into the equal protection clause.” More recently, Westin has noted that: “Fifty years ago equality was dismissed as a legal argument of the ‘last resort,’ one to be eschewed until all available ‘rights’ had been tried and rejected; today equality is becoming the argument of first choice...” (1982, p. 537).

So too in Canada the impact of constitutional entrenchment of the far-reaching equality rights may be to produce fundamental and far-reaching change in educational policy and practice, particularly as individual challenges to existing educational practice come before an increasingly activist judiciary at both the trial and appellate levels of the Canadian court system. Given the apparent predisposition of the Supreme Court of Canada to look to American constitutional jurisprudence for guidance in the resolution of Canadian constitutional questions, it is not unlikely that Canada may duplicate to some extent the U. S. experience with respect to constitutional interpretation and education. In adapting the American experience with education and constitutional law to the Canadian context, some of the most difficult and fundamental

issues on the Canadian Supreme Court's agenda will include: What do the phrases "equal before and under the law" and "equal benefit and protection of the law" mean when applied to educational practices? What standards will the court invoke? Will the remedy section (s.24(1)) be invoked to require provinces and school boards to implement court-fashioned policy? Add to these questions the linkages in the *Charter* between the affirmative-action (s.15(2)) and gender-equality provisions (s.28) and the interpretative force of the multiculturalism clause (s.27), and it is not difficult to envisage the extent and complexity of the judicial thicket the court faces.

Nor is it difficult to appreciate the potential impact of judicial decisions on educational policy. Just as the school desegregation decision of *Brown v. Board of Education* fundamentally revised the structure of public education in the U. S., judicial decisions of the Canadian Supreme Court may profoundly change or modify the various structures of public education across Canada when policy or practice fails to satisfy the constitutionally protected interests of individuals or groups. The overall effect of such decisions will certainly be to infuse a new judicially-based "nationalizing" influence into Canadian education (Jung & Kirp, 1984).

Legislative Rationalization and Administrative Compliance

The potential impact of the *Charter* is important both for the development of a new constitutionally derived educational jurisprudence and the decisive influence it is exerting on legislative change and administrative discretion. In the legislative arena, for example, the provincial legislatures and federal government have recently conducted across-the-board legislative reviews and revisions in an attempt to "*Charter*-proof" statutory enactments which in their pre-*Charter* form threatened to attract constitutional court challenges and judicial scrutiny. This process of legislative rationalization suggests two possible government reactions to the *Charter*: first, an automatic institutional response triggered by the Canadian political tradition of legislative supremacy; second, a more conscious strategy by legislative decision makers to pre-empt the constitutionally strengthened and more activist judiciary.²¹ Whatever the specific motivation may be, it appears that even at this early stage of *Charter* development the constitutional entrenchment of rights has both enhanced the institutional self-confidence of the judiciary and provoked new concerns and activity by the traditionally supreme legislative branch. These interrelated trends, judicial activism and legislative responsiveness, underlie suggestions that the *Charter* is a potential centralizing political instrument and, more to the point here, that it is well on its way to

becoming a vehicle of an increasingly centralized or national educational policy.

It might also be anticipated that the educational administrative sector will comply with new constitutional norms and principles. The Canadian tradition of administration evident in educational systems, as elsewhere, has required local and regional compliance with provincial departments and ministries of education. Partly as a function of the British imperial legacy concerning the role of a civil service and partly in recognition of the normative cultural character of education as a social enterprise, school administrators across Canada may accept *Charter*-derived judicial decisions and legislated change as the legitimate consequence of a new constitution initiated and implemented in accordance with a legitimate governmental process. In contrast to the U. S. experience, where administrative non-compliance with judicial decisions is well documented, it might be anticipated that Canadians will accord greater compliance and legitimacy to the new constitutional rules of the game, considerations which, in turn, would reinforce the nationalizing influence of the *Charter* (Manley-Casimir, 1982; Muir, 1967).

Judicial Limits on Administrative Discretion

Charter-based judicial decisions together with *Charter*-induced legislative and administrative compliance in the area of educational policy will place practical and cumbersome constraints on the traditional administrative discretion exercised by school administrators. As the courts embark on constitutional interpretation regarding the *Charter's* application to educational questions, they begin the thorny task of articulating, specifying, and elaborating what they perceive to be rationally acceptable standards. Throughout this process, school administrators at provincial, regional, and local levels of the educational enterprise will have to implement and be governed by such standards. The net effect of this ongoing process may well be to circumscribe and constrain administrative discretion. In British Columbia, s.98 of the *School Act Regulations* confers unrestricted discretionary power upon a school principal in matters of administering and supervising the school including: the placing and programing of pupils, the time-tabling of teachers, the program of teaching and learning activities conducted by the school, the maintenance of school records, and the general conduct of students both on school premises and during extra-curricular activities away from school premises but organized and sponsored by the school. Finally, the same section concludes by noting that the principal may, in his discretion, exercise paramount authority in matters concerning the discipline of pupils.

Any observer of the U. S. constitutional scene will immediately recognize how Supreme Court decisions in that country have severely constrained the discretionary powers of school principals in many of the above areas of Canadian administrative discretion. As one example, the U. S. Supreme Court in the case of *Tinker v. Des Moines Community School District* affirmed the constitutionally protected right of students to freedom of speech within the school provided that such exercise neither "materially disrupts or substantially interferes" with school activities. This decision placed real limits on the principal's discretion – in this instance overturning his decision prohibiting the wearing of black armbands by students to signify symbolically their opposition to the involvement of the U. S. in the Vietnam War.

Given the novel character of the *Charter*, it is possible that similar decisions might arise in Canada. For example, s.15(1) of the equality provisions prohibits discrimination on the basis *inter alia* of "mental or physical disability." Linked with the equal-benefit-of-the-law clause, it is possible to envisage a legal challenge to an educational practice of placing or programming of students at a principal's discretion where children with mental or physical disabilities are involved. If the court applied the equal-benefit-of-the-law clause to decide that the practice in question violates the constitutionally protected interests of children with disabilities, the discretion of school principals in the placing and programming of students could be severely circumscribed, and the teaching activities conducted by the school and other aspects of school maintenance and routine would likewise be restricted. Clearly, the imposition of judicial standards with constitutional force will alter the administration of schools and will increasingly cause administrators to acknowledge the constitutional interests of students, parents, and teachers.

While the expansion of the rights of such groups will likely be welcomed as a progressive and long-awaited development, there are certain risks in the institutionalization of the measures necessary to enforce these new constitutional principles. A recent American study (Comfort, 1982), for example, concluded that one of the most serious by-products of rights expansion in education concerns the sheer scope and complexity of administrative procedures involved in translating national education policy into local practice. In short, the study contended that the division of powers inherent in the American political system proved to be a hindrance to educational change, as such change pertains to the application and implementation of constitutional rights and principles. Developing the most desirable combination of constitutional protections and administrative practices will become, no doubt, one of the most important issues on the Canadian education agenda in the years and decades ahead.

JUDICIAL INTERVENTION IN EDUCATION: PLANNING AND PROBLEMS FOR POLICY MAKERS

Overall, the prognosis for *Charter*-based judicial decisions in the educational arena is unclear. Such decisions could effect needed educational reform, yet paradoxically they could also induce a degree of bureaucratization so constraining to administrative initiative as to create organizational stagnation and sclerosis. Either way, of course, judicial decisions and legislative reform derived from the *Charter* will serve educational change.

What general guidelines should policy makers keep in mind while adapting educational policy and practice to the new constitution? Certainly, the Supreme Court must clarify the nature of constitutionally protected interests in education; such fundamental decisions are necessary to introduce a degree of predictability and standardization to educational policy and practice. While judicial interpretation in the arena of educational policy making will inevitably lay the court open to the charge of acting as a "national school board," the judiciary does have a real opportunity to play a vital and significant role in promoting the idea that the constitutionally protected interests of Canadians in education must be recognized by school authorities not just rhetorically but practically. At the same time, courts will have to grapple with the fact that the school is a particular kind of social institution with a particular purpose, and as such the judiciary will have to search for that delicate balance between constitutional interests and the special nature of education. The Supreme Court indeed enters a thicket of difficult interpretations and decisions. While specific issues and potential questions are immediately unclear, education in Canada has undoubtedly entered a new and potentially very significant phase of development.

NOTES

¹ The characterization of the Supreme Court as a "national school board" is adapted from a similar usage by Corwin (1949) who used this term to describe the U. S. Supreme Court's decision in *McColum v. Board of Education*: "In my opinion the Court would act wisely to make it clear at the first opportunity that it does not aspire to become, as Justice Jackson put it, a super board of education for every school district in the nation."

² In this article, the terms *sponsors* and *framers* of the constitution are used synonymously although we are well aware of the rather different actors that came into play during the constitution-making process.

³ In a conceptual analysis of constitutional change, Schubert (1967, p. 18) suggests that: "Constitutions probably are best not conceptualized as frameworks for governmental systems or blueprints. They are more like dictionaries recording the standards of

political, as well as of linguistic, preference of the generation most recently buried – or, characteristically, of even earlier generations.” This observation is certainly relevant to the Canadian constitution-making process. For an interesting journalistic account of the historical “preferences” which shaped the constitution see, Sheppard and Valpy (1982). A more legalistic approach to these developments is taken in McWhinney (1982). See also Milne (1982).

- ⁴ As early as 1966, Trudeau (1968, p. 59), the one-time constitutional law professor and then Liberal Justice Minister, described a constitutionally-entrenched rights charter as “essentially ... testing – and hopefully establishing – the unity of Canada.” Over a decade later, in 1981, Prime Minister Trudeau again took up this theme when he emotionally implored the House: “Lest the forces of self interest tear us apart, we must now define the common thread that binds us together” (1981, p. 8519).
- ⁵ See Sheppard and Valpy (1982) for a lively overview of these imperatives. The bargaining process that developed around the question of native rights was characteristic of this phenomenon. See especially Asch (1984).
- ⁶ S. 33, commonly referred to as the *non obstante* or *override* clause, was finally included in the *Charter* as a result of a major federal concession to the provinces. The controversial provision is generally understood as a “subtle way of preserving the present balance among Canadian political institutions, that is, the traditional imbalance in favour of the provincial legislatures.” If used, however, s.33 would basically aid the interests of provincial governments (as was promised during the constitution-making process) rather than fundamentally ensure the integrity of legislative institutions *qua* institutions. For a discussion and analysis of s.33, see, for example, Hogg, (1982; 1984). For an interesting discussion of whether the override clause is actually “immune” from judicial review see Slatterley (1983).
- ⁷ For a critical analysis of the Supreme Court’s approach to decision making prior to the adoption of the *Charter*, see Weiler (1974). For an empirical analysis of the court’s record of self-restraint in the interpretation of the *Bill of Rights*, see Gibson (1967). For a more recent analysis which maintains that the court will continue to exhibit a posture of self-restraint during the *Charter* era, see Hovius and Martin (1983).
- ⁸ Strauber remarks, however, that it is impossible to divorce the *political* and *legal* components implicit in the protection of rights. Thus he suggests that:

... the practice of transforming political rights into legal ones is ... a matter of the use of language to link politics and law. The law is not self-executing and its function and meaning depend upon political claims which describe and justify its use. That, of course, means that legal rights are judge-made, and that they are part of the process of defending a political position. The idea of transformations brings to light the political side of legal claims by directing attention to the background arguments embedded in a legal text. ... In constitutional law this means that legal rights are formulated to sustain political rights as practices which the Court deems to be deserving of its protection. (1983, p. 94)

This analysis implies that an activist interpretation of the *Charter*, that is, the court’s creation of legal rights, will have important political consequences, including a greater policy-making role for the court.

- ⁹ There is, of course, a voluminous literature describing U. S. constitutional development and the role of the Supreme Court. For an interesting recent treatment of this question, especially as it relates to the court’s activism, see Agresto (1984).
- ¹⁰ A recent discussion of judicial independence in the light of Canada’s new constitutional arrangements is found in Russell (1984). The classic treatment of this question is Lederman (1956). For a practical illustration of how this issue has become more controversial in recent years, see Felsky (1984).

The interplay and relationship of judicial review with judicial supremacy are discussed in Smith (1983a). Critical reviews of Smith's approach, which themselves are interesting contributions to this debate, are Knopff (1983), Strayer (1983), and Smith (1983b).

- ¹¹ For an especially pessimistic account of this trait see Hovius and Martin (1983).
- ¹² *The Queen v. Drybones* (1970) where the court held that s. 94(b) of the Indian Act was inconsistent with the *Bill of Rights*. For an indepth analysis of this and other *Bill of Rights* decisions see Tarnopolsky (1975). The *Bill's* failure has been attributed to three main weaknesses: the vagueness of its language, its application only to federal and not to provincial matters, and the fact that it is only statutory and not a constitutional amendment. Chief Justice Laskin's assertion that "it simply cannot be that an unentrenched nonconstitutional enactment will be given force to limit parliamentary action" was acknowledged in the Supreme Court of Canada's first *Charter* judgement, *The Law Society of Upper Canada v. Skapinker* (1984). At the outset of the judgement, the court thus distinguished between the exercise of its "simple statutory interpretation" of the *Bill of Rights* and its "constitutional role" now implicit in the interpretation of the *Charter*. See Laskin (1959).
- ¹³ For an interesting discussion of these concepts as they relate to the activist Warren Court, see McCloskey (1967). This term is most often applied in the Canadian context to the civil liberty cases decided in the 1950s, and is usually identified with the approach taken by Chief Justice Rand.
- ¹⁴ As with most broadly descriptive terms, this concept involves some ambiguities; however, it is useful for identifying a general judicial approach or point of view. An interesting example of how this tendency can be operationalized to illustrate certain constitutional trends and developments is found in Schmidhauser (1984, pp. 6-7).
- ¹⁵ Only three months prior to the Supreme Court's ruling on this case, Chief Justice Brian Dickson remarked: "If you look at the judgements of 25 to 30 years ago and look at the judgements of the last three or four years, I think you will find, increasingly, a political component. Some of the matters ... are matters that might be decided by the political process. But they come to us as a justiciable issue, and that's entirely proper" (1984, pp. 6-7).
- ¹⁶ Moreover, the increasing amount of time, money, and attention now being expended on the judicial sector has, to a certain extent, enhanced the reputation of the judicial branch and lessened the institutional self-confidence of the legislatures even before the precise outcome of this resource expenditure is clear. In other words, power flows to institutions which are active, and that activity engenders power.
- ¹⁷ An interesting comparative analysis of how justices' social background characteristics influence their approach to judicial decision making is found in Shetreet (1980).
- ¹⁸ The American counterpart to the *Bill 101* decision is *Brown v. The Board of Education* (1954).
- ¹⁹ This analysis of American case law draws on that offered by Reutter (1982).
- ²⁰ Since the writing of this paper, the Supreme Court of Canada in *Winnipeg School Division, No. 1 v. Maud et al.* (unreported, Sept. 19, 1985) has opined that school teachers in Manitoba cannot be forced to retire because such a legislative provision violates the province's Human Rights Act. At issue was the Manitoba Public Schools Act (1980) which allowed school boards to determine compulsory retirement for teachers. The Manitoba case did not invoke the *Charter* as s.15 was not in force at the time the challenge was initiated. While the ruling does not deal with the substantive issue of mandatory retirement, it is nevertheless indicative of the reasoning the Supreme Court may take with regard to the *Charter's* guarantee of equality notwithstanding age. This decision will likely have an important bearing on the test case against mandatory retirement launched by the Ontario Confederation of University Faculty Associations which is based on the *Charter's* equality rights section.

- ²¹ For example, Canadian Supreme Court Chief Justice Brian Dickson (1985) asserted that, while it was still too early to assess the effect of the *Charter* on the legislative powers of parliament, the judiciary would not hesitate "to impose limits on governmental action where warranted by the *Charter*."

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Seit der verfassungsmäßigen Festsetzung der Kanadischen Verfassungsurkunde der Rechte und Freiheiten im Jahre 1982, fängt das Oberste Bundesgericht zögernd aber merklich an, eine erweiterte und aktivere Rolle in das politische Bildungsverfahren anzunehmen. Wenn

das amerikanische Verfassungserlebnis gegenüber Bildung überhaupt als einbegriffene Lehre für Kanadier dienen kann, dann warnt sie, daß das Aufdrängen "nationaler" Bildungsnormen und-politik auf Lokalschulgebiete tiefreichende gesellschaftliche und Kulturelle Änderungen in allen kanadischen Gesellschaftsebenen herbeiführen könnte. Nach eine Übersicht über jüngere Verfassungstendenzen und Entwicklungen in Verfassungsrecht und Bildung, werden die logischen Folgen eines aktiven Obersten Gerichts auf das kanadische Bildungswesen untersucht, und einige Vor- und Nachteile von dem nationalen politischen Verfahren und der Gerichtsintervention in das Bildungsgebiet werden besprochen.

En 1982 se fortalece la Constitución Canadiense de Derechos y Libertades. Después de este hecho, la Corte Suprema, aún indecisa, comenzó a asumir un papel extenso y más activo en la toma de decisiones de políticas educativas. La lección que deja a los Canadienses la experiencia constitucional educativa en los Estados Unidos, es, que la imposición de normas "nacionales" y políticas locales en el sistema escolar pueden llevar a profundos cambios sociales y culturales en todos los niveles de la sociedad. Después de examinar recientes corrientes constitucionales y procesos educativos y judiciales de la constitución, este trabajo explora las implicaciones educativas de una Corte Suprema activista, y, los pro y contras de las políticas nacionales y judiciales en el campo educativo.

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