

JUDGES, THE COURT PARTY AND THE *CHARTER* REVOLUTION

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This month Broadview Press publishes an important new book by Ted Morton and Rainer Knopff, both of the University of Calgary. Titled The Charter Revolution and the Court Party, it argues that the advent of the Canadian Charter of Rights and Freedoms has drastically increased the power of judges in Canadian society. In deciding to use their new powers in an activist way, judges have been urged on by what Morton and Knopff call “the Court Party,” a loose coalition of feminists, civil libertarians, government lawyers, Supreme Court clerks, law professors, and social activists, many funded principally by government. In the following excerpt from the book’s first chapter, Morton and Knopff argue that, on its own, the introduction of the Charter did not prompt the Charter revolution. Judges had to decide to take up their new powers, and the Court Party helped them make that decision.

MM. Ted Morton et Rainer Knopff, tous deux de l’Université de Calgary, ont publié ce mois-ci chez Broadview Press un important ouvrage, intitulé The Charter Revolution and the Court Party. Selon eux, la promulgation de la Charte canadienne des droits et libertés a radicalement élargi l’influence des juges sur l’évolution de la société canadienne. Dans l’utilisation « activiste » de leurs nouveaux pouvoirs, les juges ont été encouragés par ce que Knopff et Morton appellent « le parti de la Cour », formé de groupes divers, comme les groupes de femmes, les défenseurs des libertés civiles, les avocats du gouvernement, les greffiers de la Cour suprême, les professeurs de droit et les activistes sociaux, dont plusieurs bénéficient de subventions gouvernementales. Dans l’extrait reproduit ci-bas, Morton et Knopff font valoir que, en elle-même, l’enchâssement de la Charte n’a pas causé la révolution. Pour ce faire, il fallait que les juges décident d’utiliser leurs nouveaux pouvoirs, et « le parti de la Cour » les a aidé à prendre cette décision.

The *Charter* itself is not so much the cause of the revolution as the means through which it is carried out. The *Declaration of Independence* did not “cause” the American Revolution, nor the *Declaration of the Rights of Man* the French Revolution. A revolution cannot occur without leaders and the support of interested classes. Judges are professionally obliged to declare that the *Charter* “requires” their decisions, but this kind of formal legalism is hardly persuasive outside the courtroom. In fact, the *Charter* rarely required the full extent of legal transformation undertaken in its name. Something in addition to the document is at work.

Judges themselves are at work, of course. Precisely because their decisions are generally not required by the *Charter*, judges are more important to explaining the *Charter* revolution than is the document itself. In 1983 at the dawn of the *Charter* era, the late Eugene Forsey, the pre-eminent constitutional scholar of an earlier generation, predicted that

the *Charter* would be “a field-day for crackpots ... a headache for judges ... [and] a goldmine for lawyers.” Forsey was certainly right about crackpots and lawyers, but he was wrong about judges. Far from giving judges a headache, the *Charter* has given them a second opportunity — the *Bill of Rights* was the first — to succumb to the seduction of power. It is the different responses of two generations of judges — especially Supreme Court judges — to this seduction that explain the very different fates of the 1960 *Bill of Rights* and the 1982 *Charter of Rights and Freedoms*.

The seduction of power certainly gave a headache to an earlier, more self-disciplined generation of judges — a generation steeped in the doctrine of parliamentary supremacy. That generation, with only an occasional slip, resolutely resisted the temptation. The judges’ interpretation of the 1960 *Bill of Rights* deprived it — and thus the judges themselves — of any real influence on public policy.

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Court as “the quiet court in the unquiet country.” Similarly, in 1975, on the one hundredth anniversary of the Supreme Court of Canada, the historian Kenneth McNaught, wrote that “Our judges and lawyers, supported by the press and public opinion, reject any concept of the courts as a positive instrument in the political process.” Also in 1975, the late Chief Justice Bora Laskin, one of the more activist judges of his time, came to the same conclusion. “How foreign to our constitutional traditions, to our constitutional law, and to our concept of judicial review,” he wrote, “was any interference by a court with the substantive content of legislation.” A decade later, just as the Supreme Court was about to take an activist turn, Dalhousie law professor Wayne Mackay similarly observed that “the Canadian judiciary has historically been quite different from its counterpart in the United States [in that] Canada’s judges do not have an activist tradition.”

On this basis, J.R. Mallory confidently predicted that Canadian courts “will be fairly circumspect in using the *Charter* to nullify the acts of governments and legislatures.” Law professors Berend Hovius and Robert Martin also predicted that the *Charter* “would not transform the Canadian system of government.” They pointed out that “the approach of the court to the Canadian *Bill of Rights* was characterized by restraint, a restraint which was demanded by neither the status nor the wording of the *Bill*.” Believing that there was “nothing in the *Charter* which requires the abandoning of this tradition,” they predicted that Supreme Court, would “strive to ensure that the legislatures continue to bear the ultimate responsibility for determining social policy ...”

How wrong such predictions were! By 1982 a new generation of lawyers had entered the legal profession. While still a minority, they were strategically situated in the law schools, and, through their academic commentary, enjoyed a privileged position for influencing judges, especially appeal court judges. Having carefully observed the development of judicial power south of the border, they saw in the *Charter* an opportunity for empowering Canadian courts as an agency of political reform. After some initial hesitation by lower-court judges, the Supreme Court — led by recent Trudeau appointees — followed the commentators’ advice and seized the opportunity.

Judges often insist that their new activism is required by the *Charter* itself. In 1985, for example, Justice LeDain proclaimed that the *Charter’s* constitutional status — as compared to

the purely statutory *Bill of Rights* — made it “a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection.” In 1997, Chief Justice Lamer conceded that under the *Charter* “very fundamental issues of great importance to the kind of society we want are being made by unelected persons.” But, he asked, “that’s a command that came from where? It came from the elected [Parliament]. We’re heeding the command of the elected ... that’s their doing, that’s not ours.”

As a justification of judicial activism and innovation, this line of thought is persuasive only to an audience suffering from historical amnesia. There are numerous historical and contemporary examples of judicial self-restraint in the face of constitutionally entrenched rights. The Swedish constitution explicitly authorizes its Supreme Court to declare legislation invalid, but the Court has resolutely refused to do so. Even in the United States, the birthplace of judicial review, the Supreme Court declared only two federal laws invalid during its first 75 years. Indeed, under Chief Justice Rehnquist, the contemporary American Court initiated a new period of judicial self-restraint, just as the Canadian Court took off in the opposite direction. Clearly, the activist or restrained exercise of judicial review under an entrenched constitution is more an attribute of the judges than of the document being interpreted.

The reverse is also true: If constitutional documents do not inevitably generate activism, neither is activism precluded by the absence of such documents. For example, high courts in France, Israel and most recently Australia have engaged in considerable judicial activism in defense of rights without any explicit constitutional document. Closer to home, the Canadian Supreme Court was more activist in its defense of freedom of speech and religion during the 1950s, when we had no explicit rights-protecting document, than it was under the 1960 Diefenbaker *Bill of Rights*. In sum, an explicit bill of rights is neither a necessary nor a sufficient condition for judicial activism. Where they exist, moreover, constitutional documents are generally vague enough to allow both activist and restrained interpretations, and the *Charter* is no exception.

We do not mean to suggest that the absence or presence of constitutional documents makes no difference at all. As Samuel Bottomley has demonstrated, although innovative judges can be very creative even without a constitutional bill of rights, they remain somewhat more cautious than their activist counterparts under an entrenched

bill. Similarly, where a constitutional document exists, groups without an explicit foothold among its provisions may have less legal leverage. In Canada, for example, environmentalists and property rights enthusiasts do not have the kind of constitutional platform that, say, feminists or ethnic groups enjoy under the *Charter*. Gregory Hein's finding that feminists have indeed enjoyed more litigation success than have environmental groups in the post-*Charter* era thus comes as no surprise. Hein is quite right in attributing the feminist litigation advantage to "the benefits of fully entrenched constitutional guarantees." Giving innovative judges more confidence, explicit constitutional provisions do tend to extend the scope and range of their policy involvement. Still, as we have just noted, entrenched documents do not guarantee judicial activism. The *Charter* may enhance the policy involvement of activist judges, but it rarely requires their policy innovations. Judges drive the *Charter*, not vice-versa.

Judges do not drive the *Charter* alone, however. It would be as absurd to say that Canadian judges are alone responsible for the revolution as it is to say that the *Charter* is itself the sole cause. Left to its own devices, the judiciary is hardly inclined to be a hotbed of political ferment. Like the *Charter* itself, judges are as much a means as a cause of the rights revolution in Canada. While judges are in the vanguard of the revolution, they are being pushed as much as they lead. They are being pushed by what we call the "Court Party." The *Charter* revolution, in other words, is characterized by the rising prominence in Canadian public life of both a policymaking institution (the judiciary) and its partisans (the Court Party). As Mark Silverstein has noted "Political power [including judicial power] is inevitably a function of constituency."

Using a different label, Charles Epp comes to a similar conclusion. A rights instrument by itself, Epp argues, is not likely to have much practical effect. Rights become practically powerful only where there exists a "support structure for legal mobilization" with at least three components: rights-advocacy organizations, government or foundation funding of test cases, and the availability of sympathetic and competent lawyers. While Epp is more sanguine about the consequences than we are, we share his view that a rights-litigation infrastructure has been the necessary precondition of the surge in judicial power since the adoption of the *Charter*. Indeed, we argue that Epp has not gone far enough in identifying the actors

and institutions that have contributed to the growth of judicial power in Canada.

Alan Cairns has coined the term "*Charter* Canadians" to describe many of the groups that form part of the Court Party coalition. Some of these groups were active in shaping the *Charter's* content in 1980-81 and then contributing the support necessary for its adoption; others sprang up in response to the *Charter*. They all seek to constitutionalize policy preferences that could not easily be achieved through the legislative process.

The Canadian Civil Liberties Association (CCLA) is one of the key interest-group members of the Court Party. At the stage of *Charter*-drafting, CCLA representatives lobbied hard to change the wording of certain key passages in the legal rights sections of the *Charter*. They recommended that the right against "illegal" search and seizure be rewritten as the right against "unreasonable" search and seizure. They urged the government to broaden the right to counsel to include the "right to be informed" of this right. The government's original version of the *Charter* preserved the Canadian (and British) practice of allowing illegally obtained evidence to be used at trial. The CCLA wanted this rewritten to exclude such evidence. The CCLA joined feminists and other rights-advocacy groups in calling for the rewording of section 1 of the *Charter*, which permits "reasonable limits" on rights, so as to place a greater burden of proof on governments. When the Trudeau government unveiled amendments to the draft version of the *Charter* in January, 1981, Walter Tarnopolsky, the President of the CCLA, exulted: "It's incredible ... [I]t appears that they have given us just about exactly what we asked for." The CCLA has gone on to become one of the most frequent interveners in *Charter* cases before the Supreme Court of Canada.

The CCLA is not the most frequent intervener, however. It ranks second to The Women's Legal Education and Action Fund (LEAF). Like the CCLA, feminists heavily influenced the wording of key *Charter* sections. Representatives from the National Action Committee on the Status of Women (NAC) derided the original version of section one of the *Charter* as the "Mack truck clause," alleging that it created such a large loophole that any exception could be "driven through it." Like the CCLA, feminists successfully urged the rewording of their favourite *Charter* provision — section 15. Moreover, when the section 33 override clause was added to the *Charter*, feminists mounted a furious and successful campaign to

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Feminist groups then sought ways to take advantage of the Charter's broad wording. In 1984 the Canadian Advisory Council on the Status of Women published a study calling for the creation of a single, nationwide "legal action fund" to coordinate and pay for a policy of "systematic litigation" of strategic "test cases." The study reported that with the adoption of the Charter, "we find ourselves at the opportune moment to stress litigation as a vehicle for social change." A year later LEAF was launched, and it has gone on to become not only the most frequent but also the most successful non-government intervener in cases before the Supreme Court.

What is true of LEAF is true of a rapidly growing list of organizations with a similar political genesis: the Charter Committee on Poverty Issues, Equality for Gays and Lesbians Everywhere (EGALE), the Canadian Prisoners' Rights Network, Canadian Committee on Refugees, the Equality Rights Committee of the Canadian Ethnocultural Council, to name just some. These groups have been organized in response to the adoption of the Charter, and they all litigate or intervene in Charter cases, usually with the financial support of sympathetic public bureaucracies.

Such interest-group litigation differs from that of the individual litigant who employs constitutional arguments primarily as a means to protect his own liberty or other interests, and for whom the broader policy consequences of a judicial opinion are unimportant. For systematic litigation groups, the reverse is true: The primary focus of their interventions is to change the meaning of constitutional rules and the policy outcomes shaped by these rules. The actual dispute becomes just a vehicle for pursuing the policy objective. For example, one of LEAF's early Charter triumphs was *Andrews v Law Society of British Columbia*. Yet when LEAF intervened in this landmark section 15 case, it did not even take a position on the outcome of Andrews' dispute with the Law Society. Andrews, a male non-citizen, claimed that the law permitting only citizens to become lawyers in British Columbia was unconstitutionally discriminatory. LEAF cared not a whit about Andrews' fate. It was concerned only to ensure that the Supreme Court adopt a definition of equality rights and discrimination that would best support LEAF's own policy agenda in future litigation. It is systematic litigation groups that lie at the heart of the Court Party.

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In addition to litigating on behalf of their respective policy agendas, Court Party groups use the Charter in a variety of other ways. They employ the Charter and its judicial glosses as symbolic resources in the normal course of political lobbying. In an ongoing campaign of "influencing the influencers," they attempt to affect Charter interpretation through Charter scholarship, the politics of judicial appointment, and judicial education seminars after appointment. A well-organized group pursues the judicial protection and expansion of its Charter "turf" on all of these fronts simultaneously. This is the process aptly described by Alan Cairns as "Charter imperialism," whereby the Charter's "various clientele seek to extend its jurisdiction." What we call the Court Party is the agency of this "Charter imperialism."

Needless to say, the Court Party is not a party organized to compete for elected office, like the Liberals or the Reform Party. It is more a loose coalition of interests than a disciplined political machine. Indeed, Court Party interest groups are sometimes policy enemies rather than allies. Feminists and civil libertarians, for example, have found themselves on opposite sides of such issues as rape laws and censorship of pornography. Similarly, feminists and aboriginal groups have crossed swords on the question whether the Charter should apply to aboriginal forms of self-government.

The Court Party coalition is not so fragmented, however, that its coherence or identity exists mainly in the mind of the analyst; when galvanized into action, it can pull together as a self-conscious and highly effective political force. During the debates over the *Meech Lake Accord* (1987-90), for example, a variety of Charter groups formed the "Canadian Coalition on the Constitution" to oppose the accord. At the time, Deborah Coyne, chairperson of the Coalition, provided an apt (self) definition of what we are calling the Court Party. She went so far as to describe it as a new "power structure" in Canadian society.

The Charter's appeal to our non-territorial identities — shared characteristics such as gender, ethnicity and disability — is finding concrete expression in an emerging new power structure in society. ... This power structure involves new networks and coalitions among women, the disabled, aboriginal groups, social reform activists, church groups, environmentalists, ethnocultural organiza-

tions, just to name a few. All these new groups have mobilized a broad range of interests that draw their inspiration from the *Charter* and the Constitution

The efficacy of this “emerging power structure” cannot be doubted, for it achieved what was unimaginable only a decade earlier — the defeat of a constitutional amendment that enjoyed the support of all eleven first ministers and of the leaders of both opposition parties. While the coalition of *Charter* groups may initially have been an alliance of convenience and circumstance, it is now as entrenched in Canada’s (“small c”) constitution as the *Charter* is in the (“large C”) *Constitution*.

The involvement of *Charter* Canadians in the politics of formal constitutional amendment is paralleled by their enthusiastic participation in the less obvious but generally more significant process of informal constitutional amendment that goes on every day in the appeal courts of this country. While formal constitutional change is purposely made difficult to achieve and is thus rare, real change can and does occur in an incremental fashion through judicial interpretation. This is especially true for a new constitutional text like the *Charter*, where each judicial interpretation is analogous to a mini-amendment. The reasoning of judges adds new constitutional meaning that can expand or contract the “rights” — and thus the policy influence — of the groups involved. Since it is the courts that most directly influence the content and scope of “their” *Charter* provisions, the *Charter* groups have a vested interest in judicial power. As self-described “outsiders” who believe that the traditional institutions of parliamentary democracy and federalism have failed them, they look to the courts for more favourable policy outcomes. Certainly, these groups and their academic supporters have become the chief exponents of judicial power in Canada, though not at the cost of abandoning more traditional political strategies.

In sum, part of what unites the various elements of Coyne’s “new power structure” — and what leads us to call it the “Court Party” — is an interest in the judicialization of politics. Parties are partisan, and the Court Party is a partisan of the courts.

To speak of the partisans of the judiciary may seem a little strange at first, but only because we have become accustomed to thinking of the courts as non-political bodies. With respect to

other governmental institutions there is nothing at all remarkable in speaking of their partisans and of the resulting inter-institutional politics. The federal and provincial governments in Canada, for example, certainly have their respective partisans, and the politics of centralization versus provincial rights has been a perennial feature of Canadian public life. The same is true in other federal systems.

The executive and legislative branches of government also attract partisans in battles against each other. Violent rebellions broke out in 19th-century Canada over the question of whether to make the executive “responsible” to the legislature by requiring it to maintain the “confidence” of a majority of legislators. Today the tables have turned: Worrying about the overly disciplined parties and cabinet-dominated legislatures produced by “responsible government,” we now wonder whether it might be better to stop treating every major legislative vote as a test of “confidence.” Similarly, in the United States, while it was once common to celebrate or lament an “imperial presidency,” observers later became more likely to debate the merits of an imperial judiciary or an imperial Congress.

The different political institutions in any regime attract partisans because institutions are not neutral arenas in which substantive political battles are fought. Different institutions privilege different types of political resources, which are not equally distributed amongst social interests. Moving responsibility for a policy decision from legislatures to courts, for example, hurts interests with superior electoral clout but helps interests with better legal resources (e.g., sympathetic judges, skilled lawyers). Because institutions shape the political process in ways that enhance the prospects of certain outcomes and diminish the prospects of others, political partisans will thus gravitate to institutions that appear most open to their policy preferences or most closed to the preferences of their opponents. As Keith Archer et al. have written: “Far from being external to the substance of politics, institutions are often the very things at stake in political struggles; politics is as much about institutions as it is constrained and channeled by them.”

To repeat, the notion that institutions attract political partisans is commonplace with respect to all governmental institutions but the courts. The idea of a court party seems outlandish to the extent that courts are perceived as non-political institutions. But the courts have never, in

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In the decades preceding the Great Depression, business elites in both Canada and the United States successfully used litigation to slow the advent of the emergent welfare state. The proponents of *laissez-faire* economics turned to the courts to argue that many of the new regulatory and redistributive policies violated their freedom of contract or exceeded the legislative jurisdictions assigned by the federal division of powers. In short, business interests successfully defended their policy interests by cloaking them in legal garb. It turns out that the modern court parties in both Canada and the United States had earlier predecessors.

Sceptics on the Left were quick to dispatch the veil of legalism cast over public policy by the earlier court parties of the Right. The sceptics argued persuasively that it was not law but judicial sympathy with business interests that fuelled anti-welfare state judgments. In the United States, the leftist opponents of judicial power brought right-wing judicial activism to heel in the famous court-packing crises of 1937. President Roosevelt threatened to expand the size of the Supreme Court from nine to 15, and to fill the new vacancies with pro-New Deal judges. This threat was never carried out, partly because the Supreme Court quickly backed down. For the next decade and a half, the Supreme Court, gradually filled with handpicked Roosevelt confidants and New Deal loyalists, practiced the new-found virtue of judicial self-restraint. Abandoning a century's worth of constitutional law, the Roosevelt Court allowed Democratic presidents and congresses to build the American welfare state. In Canada, leftist criticism of judicial opposition to the welfare state contributed to the 1949 abolition of appeals to the British Judicial Committee of the Privy Council. Again, the result was greater judicial openness to the modern interventionist and regulatory state. Between 1950 and 1972, for example, the Supreme Court of Canada did not strike down a single federal law.

In time, however, those who criticized judicial power have become its partisans. By the 1980s, the US Democratic Party, which during its Roosevelt heyday had been vociferous in its criticism of judicial power, "became the advocate and champion of a liberal agenda institutionalized by the Warren Court," while Republicans, who had earlier sided with the courts, took over Roosevelt's "court curbing" agenda. According to

Silverstein, the weaker the Democrats became politically, the more they relied on the Supreme Court. "To an extraordinary degree," he writes, "the judiciary has [permitted] the New Progressives [within the Democratic Party] to substitute court victories for electoral failures." This analysis is echoed by Lowi and Ginsberg: "During the 1960s and 1970s, the power of the federal courts expanded in the same way that the power of the executive expanded during the 1930s — through links with constituencies, such as civil rights, consumer, environmental, and feminist groups, that staunchly defended the Supreme Court in its battle with Congress, the executive, or other interest groups."

This, in turn, is why Republican presidents nominated "conservative" judges such as William Rehnquist, Antonin Scalia, Robert Bork and Clarence Thomas for appointment to the Supreme Court in the 1980s, and why liberal Democrats fought so fiercely to defeat those nominations (successfully in the case of Bork).

Again, a similar pattern is evident in Canada. Here, too, the systematic defence of judicial power under the *Charter* now comes mainly from the Left — though, to be sure (and as one would expect), those of all political persuasions seek to harness judicial power to their purposes when the opportunity presents itself. And here, too, "court-curbing" tendencies are found most prominently on the Right. True, there are important critics of judicial power on the Left, but they have had little influence on recent partisan politics. Outside of Quebec, court-curbing tendencies are found chiefly in the Reform Party and among conservative provincial politicians, journalists and academics.

The current debate about judicial power, in short, is largely a reprise of the similar debate that occurred in the 1930s, with only the partisan positions reversed. We believe that the sceptics, both then and now, have a point. Indeed, scepticism of judicial power may be even more appropriate nowadays, when prominent contemporary legal theory, drawing inspiration from postmodernism, insists that the legal rationales of judges are little more than rationalizations of the power of particular interests. What interests and whose power are served by the newly reinvigorated judiciary? This should be the first question of analysis. If, to use our term, there was a "court party" backing the Depression-era assertion of judicial power, chances are that a court party also underlies the current outbreak of that power. n