DECISION-MAKING IN THE SUPREME COURT OF CANADA

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In a presentation such as this one, there are a number of subjects that could be covered. After some hesitation, I have concluded that the preferable approach is to speak to you about the changing role of our court, its decision-making process, and the impact of globalization on its work.

The Nature of Decision-Making: The Changing Role of the Court

The most glaring characteristic of society today, I believe, is the rapidity at which it is changing. Social cohesiveness, the role of governments, the expansion of regulation in all fields, and the creation of multiple boards have all led to a deep transformation of judicial review. The nature of judicial review, its application to discretionary and ministerial decisions, its scope and frequency, and its consideration of substantive content, are all relatively new developments. Public expectations with regard to judicial review have also changed. More and more, people turn to the courts to challenge governmental decisions rather than appear before legislative committees. The impact of judicial review on the credibility of governments can be enormous; the impact of judicial review on the freedom of government to act in an efficient way can also be enormous. In a number of cases, courts have severely criticized governments, affecting their credibility. Governments and legislators in general expect the courts to be accountable for their judicial decisions. In some cases, they have responded to unfavourable decisions by attacking the courts for what has come to be known as judicial activism.

In a society increasingly defined as espousing a culture of rights, constitutional law has obtained a new meaning. In the age of the *Charter*, constitutional review has become a constant reminder that the relationship between the courts and legislatures has changed a great deal.[1] There is now constitutional review of legislation and the exercise of executive powers. The fact that many rights are undefined, results in the necessity for the courts to exercise great discretion, which is sometimes seen as arbitrariness. It is largely because of this that the appointment process regarding judges of the Supreme Court of Canada has been questioned.

Why are things so different now? It is largely because everyone has an opinion

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act, 1982* (U.K.), 1982 c.11 [*Charter*].

concerning fundamental rights, even though they may have no legal training. What brings justice into disrepute? What is an unreasonable delay? What is an unreasonable search? Is a fetus a person? Is a homosexual partner a spouse? Everyone has an opinion concerning these questions and the reasonableness of the court's decision.

Public scrutiny of decisions reported and commented on by the press creates a new challenge for the courts in preserving the dignity and respect that their role requires. Criticism of judicial decisions is often based on a bad understanding of the law or inadequate reporting. Judicial review is not the same as an appeal; parole is not awarded by judges. These distinctions are not always understood by the general public. Sometimes, criticism is simply based on a misunderstanding of the facts: two examples come to mind – *Liberty Net* and *Pushpanathan*.[2] Criticism and editorial comment are very often personal, even in the case of appeal courts. Often, criticism is just an attack on outcomes disguised as an attack on judicial activism. For instance, consider *Thompson Newspapers* and the publication of polls during an election.[3]

Is there judicial accountability? Yes, and it takes the form of reasons for judgments and demonstrating that the protection against arbitrariness is in the process of decision-making and the reality of judicial precedent. Still, it is clear that courts are called to define the moral and ethical standards of society. No one expects that this can be done without beliefs, experience, ideals, and values coming into play. There is no truth that is absolute, no one correct decision. Chief Justice Barak of Israel says that hard cases can be defined according to the fact that they allow for many correct decisions. This would be the case, where many values and principles confront each other; this was so in *Sharpe* concerning child pornography and free speech.[4] It is also the case in many decisions where section 1 of the *Charter* is applied.[5] This section basically says that fundamental rights can only be interfered with if a justification can be made that is acceptable in a free and democratic society. The question then is the following: what are the applicable critical norms? Governments must justify and not just explain restrictions on rights. Real support for an interference with rights can be political, economic, social, and scientific. Of course, restrictions very often have to do with beliefs and desires; they are, in fact value judgments. This is why the exercise is so hard. In *Thompson Newspapers*, the government said it wanted to give voters a rest period before the vote because this was good for democracy.[6] How could the government justify that decision? What

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2 *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 [*Liberty Net*] (The Court defined the powers of the Federal Court; it did not grant an injunction or interfere with the freedom of expression of Liberty Net); *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 1222 [*Pushpanathan*] (The Court ordered a hearing; it did not grant asylum to the appellant).

3 *Thomson Newspapers Co v. Canada*, [1998] 1 S.C.R. 877 [*Thompson Newspapers*].

4 *R. v. Sharpe*, [2001] 1 S.C.R. 45 [*Sharpe*].

5 *Supra* note 1.

6 *Supra* note 3.

did it have to prove? What was the court to do? I think the answer lies in the application of standards and values that have more importance than the will of Parliament; that are logically superior because they are part of the underpinnings of a modern, free and democratic society.

Some value judgments cannot be justified by proof: why polygamy is proscribed (morality); why marketing boards are required (economic policy); why social benefits are not evenly offered to all types of claimants (social priorities). Some justifications must only be plausible and consistent with democratic principles. The court requires a rational basis for choices that will withstand the scrutiny of normative analysis. Deference exists, but it is circumscribed; factors include the vulnerability of those affected, a group's subjective apprehension of harm, the inability to measure harm scientifically, and the efficaciousness of a remedy.

Given this role, do courts create law? If so, how come? Well, the answer is yes, and they always have. The common law was created by judges and developed by judges. Their power is tempered by the rule of precedent. A recent example can be found in the case of *Bazley v. Curry* concerning the sexual exploitation of a child by the employee of a charitable foundation.[7] Was there vicarious liability if the foundation had been reasonable in hiring and supervising the defendant? Yes, on both counts, because the old test where the court would ask whether the employee exercised his function in such a way as to attract liability was too vague and had to reformulate. Judicial policy required a new test: who was responsible for creating the additional risk to the children? This is what is relevant, even if the act was voluntary and outside the mandate of the employee.

Nevertheless, interpretation is very important and very often misunderstood. There is truly no plain meaning rule. There is always a contextual meaning, a purposeful meaning. The text to be interpreted comes first but in its statutory context. Then the social context must be considered; in essence, the court determines the mischief to be addressed. The historical context is also important. There are rules of interpretation, classes of documents (constitutional, statutory, regulatory and private). Let me give an example taken from the case of *Chartier v. Chartier*.[8] In that case, the court had to decide the meaning of the words "*in loco parentis*" (in the place of a parent). Would these Latin words be given a 19th century definition or that corresponding to modern society? *Stare decisis* exists but it must often be relaxed at the level of the Supreme Court. It can give way if there is a serious reason to avoid it, for instance when there is a fundamental change in societal values (freedom of religion in *Big M Drug Mart*), a change in political values (legal capacity of women in *Salituro*), and the need to clarify the law (corroboration in *Vetrovec*).[9] It may also be necessary to avoid a precedent in order to improve the application of the law. This was the case in *British Columbia (Public Service*

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[7] *Bazley v. Curry*, [1999] 2 S.C.R. 534.

[8] *Chartier v. Chartier*, [1999] 1 S.C.R. 242.

[9] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Vetrovec*, [1982] 1 S.C.R. 811.

Employee Relations Commission) v. BCGSEU where the court considered discriminatory aptitude tests applied to firefighters.[10] It asked whether an employer's duty to accommodate applied to indirect discrimination as well as to direct discrimination and decided that the historical distinction should not be retained.

What has happened over these last few years? There has been a shift away from formalism and procedural governance of actions. This is exemplified in *Khan*, a case dealing with the hearsay rule.[11] It is also apparent in the area of judicial review where the court has abandoned the use of tests based on the expressions of error in jurisdiction and error on the face of the record. The same holds true with regard to the discrepancy that used to exist with regard to damages in contract and tort law (*BG Checo International*), in tort and fiduciary duty (*Norberg*), and in contract and fiduciary duty (*Hodgkinson*).[12]

The Effect of Globalization on Decision-Making

Where are we going? There are very hard questions that the courts will face very soon: equality rights, Aboriginal rights, Internet crime, cloning, and new sources of law. Globalization means that international law and foreign judgments have become a new source of law. We are therefore confronted with questions concerning the universality of human rights. Are the human rights developed and defined in the West truly universal? If so, do they have the same scope everywhere? Are principles of a modern democracy the same here and in other democracies? And has the role of the courts in answering these questions weakened the confidence of the public in the electoral process and taken its toll on the legitimacy of communitarian ideologies? I say this because it is obvious that the centrality of human rights has accentuated the importance of private interests and given rise to numerous claims against governments. Each society will define in a different way the common good and morality. For example, our fundamental values are not identical to those of Americans. Individual rights are at the centre of their political philosophy while we balance individual and collective rights. Do cultures interfere with the universal character of rights? In Canada we say "yes" and work with freedom of interpretation, allowing each country a "margin of appreciation", as Europeans call it. Courts are independent but not free to impose ideology on their own. Control over ideology in Canada is largely dependent on what we have called contextual analysis.

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[10] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

[11] *R. v. Khan*, [1990] 2 S.C.R. 531.

[12] *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

The Process of Decision-Making

How do we decide cases? And what cases do we decide? First, we select most cases. Our Court receives around 650 applications for leave every year. We give leave in about 85 cases. Another 15 appeals are granted as of right. The criterion for giving leave is national interest. The factors considered are the need for uniformity in the application of the law throughout the various provinces and territories, the public importance of the issue raised, the need to develop the law, the need to clarify the law, and the need to reform a particularly unjust result. Out of approximately 100 decisions a year, 30% will be criminal, 10% *Charter*-related, 5% constitutional other than *Charter*, 10% commercial, 10% civil, and 5% family.[13] The distribution between provinces is relatively stable. Ontario, Québec, and British Columbia, as well as the Federal Court, account for the great majority of cases heard. With regard to process, a panel of three judges review the applications for leave. If the panel's decision is unanimous, it will be final unless a judge who is not on the panel asks that the decision be reviewed by the whole court. This may happen in about 5% of the cases. If the decision is not unanimous, it will be reviewed by the whole court. This would be the case for approximately 20% of the cases.

Judges prepare individually for hearings and do not discuss the cases before they are heard. Immediately after the hearing, the Court holds a conference during which each judge will express his opinion, a vote will be taken, and the presiding judge, usually the Chief Justice (the full Court hears most cases under the present administration), will designate a judge to prepare reasons for the majority. Judges in the minority will decide between themselves who will prepare their reasons. Usually, a case will be heard approximately six months after leave has been given. Reasons will be circulated about three months after the hearing. All judges will send comments and suggestions to the authors of the various drafts and those drafts will be amended time and time again simply because it is very difficult to accommodate eight people (who may not always agree on the changes to be made). Final reasons will be published usually within three months after preparation of the final draft.

With regard to hearings, I am often asked why the Court asks so many questions and does not let counsel proceed with their arguments as they wish. Basically, it is because the judges know the case, have read the material, and want the short time allowed for argument to be concentrated on the issues that really preoccupy them. I am also often asked about the effectiveness of the oral argument. It is certainly not very often that a judge who has read all the material and come to a preliminary conclusion will change his or her mind. There are however cases where we come to the hearing without having formed a preliminary conclusion. In those cases, oral argument is very important. It is also particularly important in areas of the law that the Court is not very familiar with – admiralty and Internet crime, for instance. Although in many cases oral argument will not have a true impact on the outcome, it will often have an impact on the reasoning adopted by the Court in its decision and that can be very important to the parties.

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[13] The remaining 30% is for all other matters and varies from year to year.

I am also regularly asked whether judges lobby each other in order to achieve majorities; the answer to that is no. Judges will ask for explanations and they will want to make sure that their position is well understood by others, but I do not understand them as wanting to "win". They just want their own reasoning to be correct and clearly understood. I am also asked whether there are ideological camps within the court. I would say no. There are of course judges who approach issues from a different perspective because of their own experience and philosophies; this gives the appearance of uniform approaches to certain issues especially in criminal law where it is often tempting to say one judge is pro-defendants and the other pro-Crown. But this is a simplification that should be avoided. Commentators have often tried to define some judges as liberal or conservative particularly with regard to social issues, minority rights, and Aboriginal rights. But here too this is a simplification that makes no sense. Every case is dealt with on its facts.

This is also why I think it is very inappropriate to review decisions of our Court on the basis of statistics – the number of times the government has won or lost, the number of times the defendant has been acquitted, the number of times a court has been overturned. All of these statistics are meaningless.

I hope this overview has been of interest to you and helped you appreciate the work of our court.

Thank you.