THE ROLE OF THE COURT IN THE POST-CHARTER ERA: POLICY-MAKER OR ADJUDICATOR?

The Honourable Beverley M. McLachlin*

I. Introduction

Historically, the courts have played a modest if essential role in our society. Their function has been to resolve disputes. The nature of those disputes was in part private - quarrels between individuals which the courts were called upon to settle. Such of it as was public was largely limited to criminal law and certain fundamental constitutional questions. Most people passed their lives untouched by the law.

All that is changing of late. More and more, the headlines of our newspapers are concerned with judicial decisions. More and more, courts are being called upon to decide questions of central importance to great numbers of individuals in our society; questions which go far beyond the traditional areas of legal scrutiny into the uncharted waters of central social issues.

I propose to examine this change: its dimensions; its causes; most importantly, its impact, not only on the judiciary but on relationships between the judiciary and other branches of government. It will be my thesis that the developments of the past decade presage a new era when the traditional allocation of powers between the judiciary and other branches of government will be fundamentally altered. Only if we work cooperatively and responsibly toward developing new relationships between the different branches of our government will our governmental institutions be able to meet the complex challenges which lie ahead.

II. The Traditional Relationship

As any first year political science student will tell you, Canadian government, like most other governments in the western world, possesses three branches. The first is the legislative branch. It consists of Parliament and the ten provincial legislatures. These branches, at least in theory, make our laws. The second is the executive branch, which functions to implement and enforce the laws adopted by the legislative branches. The third branch of government, the judiciary, until recently lagged far behind the legislative and executive branches in importance.

For centuries, the courts could scarcely lay honest claim to constituting a distinct branch of government. One need only recall the methods of the Star Cham-

---

*Justice of the Supreme Court of Canada. Text of the Viscount Bennett Memorial Lecture, delivered at the Faculty of Law, University of New Brunswick, 26 October 1989.

ber of Elizabethan times to be reminded of the servile connection between the courts and the executive-legislative function that reposed in the King. Gradually, over the centuries, the idea of the courts as independent adjudicators, beholden to no power, whether executive or legislative, gained credence.

The battle for judicial independence was not easily won. In the days of James I that great judge, Sir Edward Coke, asserted the independence of judges. The King summoned all the Judges before him and told them that he proposed to take such cases as he pleased away from the judges and try them himself. He was supported by Archbishop Bancroft, who asserted that according to the scriptures, the ultimate power to try cases rested with the Sovereign. But the Chief Justice took issue. The King had no such power, he affirmed; all cases must be tried in a Court of Justice. The exchange between the King and Chief Justice is recorded:

> King James (Whom, you will obseve, was no mean cross-examiner) demanded: I always thought and I have often heard the boast that your English law is founded upon reason. If that be so, why have not I and others reason as well as you the Judges?
>
> The Chief Justice (who was, it seems, a rather adept chap himself) responded smoothly, but firmly): True it is, please your Majesty, that God has endowed your Majesty with excellent science as well as great gifts of nature; but your Majesty will allow me to say so, with all reverence, that you are not learned in the laws of this your realm of England. . . which is an art which requires long study and experience before that a man can attain to the cognizance of it. The law is the golden me-wand and measure to try the cases of your Majesty's subjects, and it is by that law that your Majesty is protected in safety and peace.
>
> King James replied, reportedly in anger: Then I am to be under the law - which it is treason to affirm.
>
> The Chief Justice did not hesitate in his response: Thus wrote Bracton, "The King is under no man, but under God and the law."

Here we have the issue revealed in its true dimensions. It was not at base a dispute about which individuals were fit to sit as judges; it concerned rather the fundamental proposition that all state institutions - even the King - are subject to the rule of law.

An interesting sidelight is that in typical English fashion, the dispute was not resolved by high statements of principle, but practical realities. James is said, notwithstanding the enjoinder of his Chief Justice, to have tried his hand at judging. He became so perplexed after hearing both sides, that he abandoned the attempt. "I could get on very well hearing one side only, but when both sides have been heard upon my word I know not which is right," the Sovereign is said to have observed in despair.

Thereafter, the business of judging was confined exclusively to the Courts. But further battle ensued over whether judges could be called upon by other

branches of government to answer for their decisions. Thus in *Knowles' Trial*, when Holt, the Lord Chief Justice, was called before a committee of the House of Lords to explain why he had quashed an indictment for murder he stated:

> The judgment is questionable in a proper method, but I am not to be questioned for my judgement.[1]

In the same spirit his fellow judge, Justice Eyres, affirmed that his judgment spoke for itself and could not be questioned:

> I humbly beg pardon if I say I ought not by the law to be called to account for the reasons of my opinion. If we err, the judgment may be rectified by writ of error, but the law acquits us.[2]

Before the full House of Lords, Holt and Eyres remained steadfast in their refusal to give reasons for their judgment, and at the end of the day their view of judicial independence prevailed.

Such issues still rear their heads from time to time; witness the recent decision of the Supreme Court of Canada that a royal commission, an emanation of the executive branch of government, could not compel judges of the Nova Scotia Court of Appeal to answer for their decision in the Marshall case.[3]

Nevertheless, by the mid-Nineteenth Century, when the governmental architecture of Canada was conceived, the principle of an independent judiciary, answerable to neither the legislative nor the executive branches of government, was well-established. The *British North America Act, 1867*, building on these traditions, made provision for the establishment of a federally-appointed judiciary charged with not only the traditional judicial tasks of presiding over criminal cases and disputes between citizens, but with a third task arising out of the new country's federal nature - adjudication on the constitutional division of powers between the federal and provincial legislatures. That the execution of these functions was until 1949 subject to final appeal to the Judicial Committee of the Privy Council in London, did not detract from the independent role accorded the judiciary under the *B.N.A. Act*.

For almost a century and a quarter, the relationship between the courts and the other branches of government remained essentially static, fixed by the framework of the *B.N.A. Act*. The respective roles of the legislative, executive and judicial branches of government were well-defined and unquestioned. The legislatures, federal and provincial, made the law. The executive implemented and enforced the law. To the courts fell the task of interpreting the law which others made and enforced.

---

[1] *Knowles Trial* (1692), 12 How. St. Tr. 1167 at 1181.

[2] *Ibid.* at 1181-1182.

[3] *MacKeigan v. Hickman* [1989] 2 S.C.R. 796.

This interpretation of the law possessed three main facets. The first was the interpretation and application of the common law inherited from England and the *Quebec Civil Code*. The courts' function as interpreters of the common law was not without its creative aspect. By the application of the doctrine of precedent - the application of established common law principles to new situations - the courts played a modest role in the making of the law that belied the theoretical division of powers between the legislature and the judiciary. From time to time, under the guise of extending existing rules, the courts created new systems of rights and obligations. One such creative leap occurred with *Donoghue v. Stevenson*[4], which introduced the revolutionary idea that each person owed a duty of care not to injure his neighbour with the foreseeable consequences of his or her negligent acts. Another such leap occurred in 1967 with the case of *Hedley Byrne v. Heller*[5] which extended the duty of care to negligent statements. The most recent extension of the concept of negligence came with the case of *Anns v. Merton London Borough Council*[6] in which the courts ventured to call to account the legislative and executive branches of government for failure to properly carry out tasks which they had undertaken in the exercise of their law-making and law-implementing role.

While these landmark cases originated in England, each of them was swiftly adopted by Canadian courts and applied in the Canadian context. In recent years, Canadian courts have been notably active in developing the law through existing common law and equitable principles. Canadian courts have shown themselves particularly sensitive to the plight of the little person, in face of the greater power of the large corporation or the uncaring entrepreneur. The doctrine of constructive trust was developed to confer property interests on persons who had earned them.[7] Unconscionable contracts were set aside, notwithstanding the absence of fraud.[8] Fiduciary obligations were found and enforced, even in situations of commercial contract.[9] In short, Canadian courts in recent decades have assumed a relatively activist approach to the common law, not only applying established

---

[4][1932] A.C. 562 (H.L.).

[5][1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

[6][1978] A.C. 728, [1977] 2 W.L.R. 1024, [1977] 2 All E.R. 492 (H.L.).

[7]Originally applied in the area of family law, the Supreme Court decisions of *Rathwell v. Rathwell* (1978), [1978] 2 S.C.R. 436 and *Pettkus v. Becker* (1980), [1980] 2 S.C.R. 834 are usually cited as introducing the American style remedial constructive trust to Canada.

[8]See for example *Bomek v. Bomek* (1983), [1983] 3 W.W.R. 634 in which the Manitoba Court of Appeal applied Lord Denning's judgment in *Lloyds Bank v. Bundy* (1974), [1974] 3 All E.R. 757 and set aside a real property mortgage on the grounds of unconscionability.

[9]The most recent benchmark being the decision in *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), SCC Judgment August 11, 1989 affirming *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1988), 44 D.L.R. (4th) 592 (Ont. C.A.). See also *Standard Investments v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 in which the Ontario Court of Appeal held that the customer's disclosure of confidential information and reliance gave rise to a fiduciary duty being owed by the Bank. The cases *Bedard v. James* (1986), 32 B.L.R. 188 (Ontario District Court) and *Canadian Aero Services Ltd. v. O'Malley* (1974), [1974] S.C.R. 592 demonstrate the court's imposition of a fiduciary duty on the senior corporate personnel.

principles, but extending them where justice and fairness seemed to so require. Nevertheless, prior to the advent of the *Charter*, few would have suggested that the courts were significantly impinging on the legislative function reserved by the constitution for Parliament and the provincial legislatures. While the courts might from time to time extend the law, it was always open to the legislators to override or alter judicial advances. Ultimate legislative power rested with the legislative branch.

The second function which Canadian courts assumed under the *B.N.A. Act, 1867* was the interpretation of statutes. Parliament and the legislatures passed the laws; and the courts interpreted them. The cardinal rule in this domain was deference to the legislature; the guiding principle the intent of the legislators, actual or presumed.

The third function which the courts assumed under the *B.N.A. Act* was construction of the constitution - for the most part a special and exalted form of statutory interpretation. The issue here was the division of powers, the task the scrutiny of legislative provisions to determine whether they were within the power of Parliament or the legislature which had passed them. Until 1949, it was the Judicial Committee of the Privy Council rather than Canadian courts which had the final say on these vital questions.

In addition to pronouncing on the division of powers, there were certain unwritten constitutional conventions which could be ruled upon by the courts. In a particularly significant decision of this type, The Patriation Reference,[10] the Court ruled on the "conventional" requirements for constitutional amendment, thus helping to set the stage for the repatriation of the Canadian Constitution the following year. Another example of an unwritten constitutional convention of quite a different sort is the independence of the judiciary.[11]

The role of Canadian courts in our country's first century may be summarized as follows: our courts, like their predecessors in England, were essentially independent - a third and autonomous branch of government. This independence ensured that Canada was a country governed by the rule of law. By that I mean that all governmental institutions, whether legislative, executive or the judiciary itself, were required to act in conformity with the law.

Having said that, the limited power of our courts prior to enactment of the *Charter* must be acknowledged. They could introduce changes in the common law, but only at the pleasure of the legislatures, which retained the right to annul judicial doctrine. They could interpret statutes, but only with a view to extending the intention of the legislators. And they could rule on the respective legislative spheres of the federal or the provincial power, a procedural function only indirectly related to the content of the law. Subject to constitutional convention and

---

[10] *Re Resolution to Amend the Constitution* (1981), [1981] 1 S.C.R. 735.

[11] *Supra*, note 3.

constraints imposed by the division of powers, Parliament and the legislatures remained dominant, the courts functioning as independent but essentially complementary bodies.

III. Factors Changing The Role of The Courts

In recent times, a number of developments have occurred which threaten to alter the time-honoured relationship between the courts and other governmental institutions. The most significant is the *Charter of Rights and Freedoms*, which we adopted in 1982. Prior to the *Charter*, Parliament and the Legislatures were subject to constraint in that they could exercise their powers only within the sphere of activity allotted to them respectively by the *British North American Act, 1867*. The *Charter*, however, added a new, overriding limit on the power of the legislatures. Henceforward, not only must laws be within the subject matter allotted to the legislature in question; they would be required to conform with the fundamental precepts established by the *Charter*. To the courts' role as arbiters of the division of powers between the federal and provincial governments would be added the new task of determining whether the laws passed by these bodies violated the rights and freedoms granted by the *Charter*.

Nor was this expanded role of the courts confined to passing on the validity of laws. The *Charter* extends to all government action. Thus the mandate of the courts was expanded beyond passing on laws to determining the validity of government acts. Police conduct, for example, is now subject to *Charter* constraints. Even decisions of cabinet are not immune from judicial scrutiny, as the *Operation Dismantle*[12] case illustrates. While the precise definition of "government action" remains to be worked out,[13] there can be no doubt even at this early stage of *Charter* interpretation that not only the governments but many of the agencies to which they delegate the handling of public business now find their conduct subject to *Charter* scrutiny.[14]

If government had always been subject to the rule of law, it was rendered, with the passage of the *Charter of Rights and Freedoms*, subject to an express law of greatly expanded magnitude. Adoption of the *Charter* moved Canada away from the British model of unwritten constitutional conventions, toward the American model of a written declaration of rights and freedoms to which all branches of government were subject. I use the word "toward" advisedly. The *Charter* contains certain concessions to parliamentary sovereignty not found in the American constitution. The first is the override provision of s. 33 of the *Charter*, which

---

[12][1985] 1 S.C.R. 441.

[13]See *Re Blainey v. Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), leave to appeal to the Supreme Court of Canada dismissed, reported at (1986), 58 O.R. (2d) 274 and *R.W.D.S.U. v. Dolphin Delivery Ltd.* (1986), [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75, 33 D.L.R. (4th) 174 for an analysis of the scope of the *Charter*.

[14]For example in *Connell v. University of British Columbia* (1988), [1988] B.C.J. No. 13 (C.A.) although there was insufficient government control of hiring to make this aspect of university administration subject to *Charter* scrutiny, the provincial human rights code gave rise to the same result.

permits Parliament or the legislatures to maintain laws which violate many (but not all) of the rights and freedoms enumerated by the *Charter* for a period of five years.[15] It is by virtue of s. 33 that the Quebec legislature has passed a sign law which violates the freedom of expression guaranteed by the *Charter*. In its only use by another province, Saskatchewan has employed s. 33 to override the possibility that the *Charter* gave employees a protected right to strike.[16] The second concession to parliamentary sovereignty is found in s. 1 of the *Charter*, which provides that a law or government act which violates the guarantees of the *Charter* may nevertheless be valid if it is "demonstrably justified in a free and democratic society." Thus the *Charter* recognizes that situations may arise where government action which violates some right or freedom may be justified.

While the *Charter of Rights and Freedoms* is undoubtedly the single most important factor in the changing relationship of the courts to other branches of Canadian government, there is another, less obvious development which merits mention in that context. That is what I perceive to be the increasing tendency to transmute political and social questions to legal questions, thus placing the task of their resolution on the shoulders of the courts. This tendency is doubtless related in part to adoption of the *Charter*, for the *Charter* brings entire areas which were previously immune from legal scrutiny or subject only to limited legal scrutiny, into the legal arena - democratic rights, civil liberties and equality rights, to mention only a few. But quite apart from the *Charter*, one detects an increasing tendency to look to the courts for answers to the difficult questions of our day. Bio-medical issues like sterilization[17] and abortion; [18] environmental issues like the recent Baie Comeau P.C.B. dispute; [19] native rights problems[20] - on these issues and others like them, people are increasingly turning to the courts for answers.

These developments prove that De Tocqueville's observation with respect to our neighbours to the south is becoming increasingly applicable to Canada. The French nobleman wrote two centuries ago:

---

[15]Section 33 of the *Charter* provides that: (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*. Thus sections 3-5 (democratic rights), section 6 (mobility rights), sections 16 to 23 (language rights) and section 28 (sexual equality rights) may not be overridden.

[16]*Saskatchewan Government Employees' Union Dispute Settlement Act* 1984-85-86 S.S. c.111, s.9(1).

[17]See *E. (Mrs.) v. Eve* (1986), [1986] 2 S.C.R. 388, [1986] S.C.J. No. 60 and *Re K.; K. v. Public Trustee* (1985), [1985] 3 W.W.R. 204 (B.S.S.C.).

[18] *Morgentaler v. R.* (1988), [1988] 1 S.C.R. 30 and the *Daigle v. Tremblay* (1989) (reasons pending S.C.C.).

[19] On this same subject see also *Re Attorney-General for Ontario and City of Mississauga* (1980), 33 O.R. (2d) 395.

[20] Such as the scope of aboriginal fishing rights as are presently before the Court in *Sparrow v. R.* See also *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1980), [1980] F.C. 518.

> Scarcely any political question arises in the United States that is not resolved, sooner or later, into a juridical question.

The same, one ventures, may soon be said of this country.

What we have then, as a result of the *Charter* and the increasing tendency to refer difficult social and political questions to the court, is an enlarged role for the judicial arm of government. The pre-*Charter* view of our courts as independent but inherently limited in scope and function, must give way to a new view of the courts as the ultimate arbiters of our society, in the sense that whatever the legislative and executive branches of government propose may ultimately be required to pass judicial scrutiny, subject to the right to override the courts granted by s. 33 of the *Charter*.

IV. The New Functions of the Court

I have suggested, in my comments thus far, that the traditional relationship between the judiciary and other branches of government has shifted as a consequence of the *Charter* and the increasing tendency to refer difficult issues to the courts. Against this background, it is not amiss to examine the areas in which increased reliance on the judiciary may have its greatest impact.

Three come to mind. The first is the responsibility of the court with respect to the framework of our government. The second relates to the responsibility of the Court for the relationship between individuals and the state - the question of civil liberties. The third concerns a different aspect of the relationship between the citizen and the state - the affirmative obligations of government toward the individuals who people the state. I turn first to the court's role in monitoring the framework of government.

I have already alluded to the judiciary's historic role in monitoring the division of powers between the federal and provincial governments. That task continues; while division of powers cases are not the steady diet of Supreme Court Justices, each year gives rise to important questions as to where the boundary should be drawn between provincial and federal powers.

But the *Charter* has placed on courts an additional new responsibility with respect to the framework of our government. The *Charter* guarantees to each citizen certain democratic rights, including the right to vote. The right to vote has been interpreted by the courts as comprising the right to reasonable equality of voting power, with the result that electoral ridings which grossly violate this ideal, it being conceded that perfect equality cannot be realistically attained in the Canadian geographical context, have been struck down.[21]

Never have the courts been forced so close to the essential core of the political institutions of this country as they have been by the voting guarantees of the

---

[21] *Dixon v. A.G. for British Columbia* (1989), 35 B.C.L.R. (2d) 273 (S.C.).

Charter. Here is a function which the courts are compelled to assume, but which strikes at the core of the electoral process. The dilemma of the courts is clear. On the one hand, they must pronounce on the particular statute in question: does it or does it not violate the guarantees of the *Charter*? On the other, there can be no doubt that within the proper constitutional limits, it is for the legislature or Parliament, as the case may be, to draw specific electoral boundaries. To complicate matters, striking down the existing law may leave no electoral boundaries in place, giving rise to a constitutional dilemma of crisis proportions should the current government fall. The duty of the courts with respect to voting rights raises in stark relief the conflict between the legislative function, which the courts must not usurp, and their obligation under the *Charter* to adjudicate on guaranteed rights.

The same conflict occurs with respect to the courts' second main responsibility under our revised constitution - the responsibility to adjudicate on the relationship between the individual and the state. The *Charter* guarantees to each resident of Canada certain fundamental rights which the state must not infringe - for example, the right to liberty, the right to freedom of expression, the right to a fair trial, the right against self-incrimination, the right against unreasonable search and seizure. These are the "must-nots" of the *Charter*. Essentially, they guarantee a core of civil liberties into which the state must not venture, or may venture only on special conditions. They are the bulwark of the individual against abuse of state power and they make the courts the guardians of individual liberties. As the American founding father, Madison, explained in the debate on the first of the ten amendments:

> If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of these rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or the Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Yet the courts' duty to uphold individual rights and liberties may conflict with their duty to uphold the proper framework of government - a framework where courts decide legal questions and legislatures legislate. As Archibald Cox points out, judicial review of statutes and conduct affecting individual liberty "calls upon the Court to go over the very social, political and economic questions committed to the. . . legislatures, yet it can scarcely do so without usurping in some degree the legislative function of weighing and balancing competing interests." [22]

Section 1 of the Canadian *Charter* expressly requires the Court to weigh and balance the policy interests for and against a government action or law, once an infringement has been found. Thus in Canada, there is no avoiding the dilemma of judicial policy-making. At the same time, it appears clear that the Supreme Court is determined not to venture too far into the uncharted waters of judicial

---

[22] A. Cox, "The Role of the Supreme Court in American Society" (1967) 50 Marquette Law Review 575 at 582.

legislation or to pronounce more broadly than necessary on social and economic issues. This is apparent in *R. v. Edwards Books Ltd.*[23] where the Court emphasized the need for deference to the legislating body in applying section 1 of the *Charter*. The courts should not set aside a legislative scheme which infringes individual rights merely because they can think of a better solution less calculated to infringe rights. Rather, so long as the legislative scheme pursues a pressing and substantial objective and the means employed are proportional to the objective, it should be allowed to stand even though it may infringe individual liberties by more than a minimal amount.[24]

The third area in which the courts are increasingly being asked to adjudicate concerns, not protection of the individual against a potentially hostile government, but the affirmative actions of the government toward its citizens. The difference, as Archibald Cox has noted, is between warding off legislative attacks upon civil liberties and securing civil rights.[25]

Some provisions of the *Charter*, are worded in terms of protection from the invasive powers of the state. The right to be free from unreasonable search and seizure, self-incrimination and being tried twice for the same offence are such rights. But other rights are framed more in terms of what the state is obliged to provide than what it is forbidden to take away. The democratic right to vote is such a right, as are the guarantees of minority language education found in s. 23 of the *Charter*. Similarly, the equality provisions of s. 15 of the *Charter* can be read as conferring not only a right not to be discriminated against by the state, but to be given equal rights and privileges. Note the affirmative language employed in Section 15(1):

> 15(1) Every individual is **equal** before and under the law and **has the right to the equal protection and equal benefit of the law without discrimination** and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (emphasis added)

Section 15(2) expressly endorses affirmative action programs by the state.

> 15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is too early to predict how the courts will interpret the equality provisions of the *Charter*. But legal scholars have outlined the possibilities - possibilities which include a much expanded view of the state's obligation to citizens. In this regard it

---

[23][1986] 2 S.C.R. 713.

[24] See *A.G. Quebec v. Irwin Toy Limited* [1989] 1 S.C.R. 927, *Slaight Communications Incorporated v. Davidson* [1989] 1 S.C.R. 1038, and *United States v. Cotroni* [1989] S.J. No. 56.

[25]Cox, *supra*, note 18 at 584.

has been suggested that while s. 15 will not be interpreted as requiring a general redistribution of wealth, it may require that resources of society be re-directed in ways which will bring about greater equality of opportunity by minimizing the disparity in the skills and earning potential of people. De-institutionalization of the disabled, desegregation of educational facilities, attacks on exclusionary zoning and increasingly stringent accessibility requirements for all public and private buildings rank among the changes that could find support in the *Charter*'s equality rights provisions.[26]

It remains to be seen how far Canadian courts will proceed down the path of enforcing affirmative rights. But if the United States affords an example, the trend will be difficult to resist. An example may be found in the equality provisions of the Fourteenth Amendment as applied to provision of school facilities. Abstractly, a state could avoid discrimination on grounds of race by granting no one the protection of its laws. But in practice, this proved impossible. The Supreme Court ruled that the granting of certain privileges to one class of citizens imported an obligation to confer them on all citizens. Thus in the United States, following the landmark case of *Brown v. Board of Education*[27] the courts adopted the approach of extending public school privileges to all students, rather than restricting the privileges white students enjoyed, which might, in its ultimate extreme, have led to the closure of all public schools.

In essence, when a court is confronted with a discriminatory law, it has two options. It can strike the law out entirely, thereby negating the positive benefits it confers on many members of society. Or it can hold that the benefits conferred on some by the law should be extended to others. In either case, it can be argued that the intent of the legislator is violated. Where the law is struck out altogether, the intention to benefit some citizens is frustrated. Where the law is extended, the scope of the legislation is extended beyond what the legislators may have intended. The choice is difficult. If a law is discriminatory or fails to assure guaranteed rights, should the entire law be struck out, leaving it to the legislature to replace it as it sees fit? Or should the court substitute its own version of a proper law, laying itself open to the charge of judicial legislation?

It remains to be seen how Canadian courts will resolve such issues.[28] While considerable restraint may be expected, the fact remains that our society accepts without question - perhaps more so than the United States where less govern-

---

[26]See A.F. Bayefsky and M. Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985), in particular the sections on the physically and mentally disabled.

[27](1954), 347 U.S. 483.

[28]However in *Re Blainey v. Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), leave to appeal to the Supreme Court of Canada dismissed, reported at (1986), 58 O.R. (2d) 274 the Court struck down the provision of the *Ontario Human Rights Code*, (1981), c.53, s.19(2) that excluded sex discrimination in sports from the general provisions barring discrimination on the basis of sex. Similarly in *Connell v. University of British Columbia* (1988), [1988] B.C.J. No. 13 (C.A.) the Court struck down the provision of the provincial human rights code that facilitated mandatory retirement. This latter case is presently on Appeal before the Supreme Court of Canada.

ment is still to some extent equated with good government - that the state has affirmative obligations to its citizens. It would be surprising if this attitude were not reflected in the judgments of our courts.

Another area where the affirmative duty of the state to protect its members has been recently raised, concerns the debate about foetal rights which has occupied the Supreme Court of Canada not infrequently over past years. Cases like *Morgentaler*,[29] *Borowski*,[30] and *Daigle* [31] can be seen as disputes between individuals. But the issue they raise is more fundamental. Does the unborn foetus have a right to life - a right which should be protected through the courts? Here again, the drama has already been partially played south of the border. In *Roe v. Wade*,[32] the Supreme Court asserted that States had the right to protect foetal rights after the first three months of pregnancy - the trimester rule. *Webster*,[33] which was decided by the U.S. Supreme Court this July, raised the question of the duty of the state toward the citizen in a different guise. The issue there was whether the state could prohibit the use of state funds and facilities for abortions other than those performed to save the mother's life, and whether it could impose testing for viability after 20 weeks gestational age. The case thus posed a conflict between two affirmative state obligations - the assumed state obligation to protect the unborn and the assumed state obligation to provide funds for medical care. The Supreme Court answered both questions posed in the affirmative. Rehnquist C.J., writing for the Court, rejected the idea of a constitutionally guaranteed affirmative right to government aid, even where such aid may be necessary to secure life, liberty or property interests of which the government may not deprive the individual."[34] At the same time, writing for the majority on the fetal testing provisions, he affirmed an expanded, but not unlimited, government power to regulate abortion.[35]

The issue of sterilization of the mentally defective raises another example of a call on the state to protect individuals. In the case of Eve[36] which not long ago

---

[29]*Morgentaler v. R.* [1988] 1 S.C.R. 30.

[30]*Borowski v. A.G. Canada* [1989] 1 S.C.R. 342.

[31]*Daigle v. Tremblay* [1989] Q.J. No. 1, reversed by the Supreme Court of Canada August 8, 1989.

[32]*Roe v. Wade* (1973), 410 U.S. 113.

[33]*Webster (A.G. Missouri) v. Reproductive Health Services* (1989), 49 C.C.H. S.Ct. Bull. B4589 (U.S. S.C.).

[34]*Ibid.* at B4604.

[35]*Ibid.* at B4617-4618, per Rehnquist C.J.: "There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of such cases as *Colautti v. Franklin*, ... But the goal of constitutional adjudication is surely not to remove inexorably "politically divisive issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. We think we have done that today." Justice Scalia, while concurring in the result, disclaimed the Courts right to meddle in what he regarded as a purely political question. Justice Blackmun dissented for the opposite reason.

[36]*Supra*, note 16.

came before the Supreme Court, the question was whether a young woman, mentally defective, should be sterilized. She was sub-intelligent, and unable to care for any offspring she might produce. Her widowed mother who was approaching sixty feared that she would have to assume the responsibility for the child should Eve become pregnant, and wanted her sterilized. An application for an authorization to sterilize her was refused by the court of first instance but allowed by the Prince Edward Island Court of Appeal. The Official Trustee, Eve's Guardian *ad litem*, appealed. The Supreme Court forbade the sterilization, stating the Court's *Parens patriae* jurisdiction could only be exercised for the benefit of the person in need of protection and not for the benefit of others. The Court decided that sterilization should never be authorized for non-therapeutic purposes under the *Parens patriae* jurisdiction.

Other courts have reached different conclusions on this issue. Shortly before Eve the Court of Appeal of British Columbia had ruled in favour of the sterilization of such a person,[37] although the Supreme Court in Eve distinguished the earlier case as involving a therapeutic procedure. Since the Supreme Court's decision in Eve was released the House of Lords in England considered this question and, rejecting the restrictions set out in Eve, allowed a sterilization on the basis that it was in the handicapped individual's best interest.[38]

Similar issues arise with respect to the provision of medical services to children contrary to the wishes of their parents. We are all familiar with applications to the court to obtain orders for blood transfusions for children,[39] or to provide a brain shunt for a child who will die without it.[40] These cases pose in stark relief the conflict between the right of parents to do what they think is best for their child, against the perceived duty of the court to protect the life of the child.

The legal peg upon which many of these new appeals to the court for protection of life are hung, is the ancient concept of *Parens patriae* - the idea that the state, through the instrumentality of the court, acts as parent or protector of the person who cannot protect himself. The doctrine originated in feudal times and was originally concerned primarily with care and conservation of the estate of an incompetent person. *Parens patriae* responsibility was transferred from the feudal lords, to the royal household during the reign of Edward I and in the 1540's was shifted from the royal household to the Court of Wards and Liveries. In the 17th Century it was transferred to the Court of Chancery, lost its connection with property, and became purely protective in nature. The doctrine of *Parens patriae* presents an interesting example of how an old concept can be used to support the modern conception of the obligations of the state to its members.

---

[37] *Supra*, note 16.

[38] In *Re B (A Minor)* (1987), [1987] H.L.J. No. 21.

[39] *Re Children's Aid Society of Metropolitan Toronto and F* (1988), 66 O.R. (2d) 528 (Prov. Ct. Fam. Div.).

[40] *Re Superintendent of Family & Child Service and Dawson* (1983), 145 D.L.R. (3d) 610 (B.C.S.C.).

The emphasis on the obligation of the state to its citizens has pervaded even the common law of tort and contract. In addition to the common law's expansion of the tort law duty of care, and the development of such innovations as unconscionability and fundamental breach in contract law, the legislatures have intervened extensively to protect the populace from harm and help them recover from mishaps. In tort law, for example, the statutory onus shift[41] helps pedestrians injured as a result of a motor vehicle accident obtain a judgment against a negligent motorist, while mandatory insurance requirements ensure that they will get paid if they win in court. Health insurance, unemployment insurance and other such components of our social safety net spread risks, while legislative restrictions on dangerous activities such as driving, flying or shooting are enacted to minimize exposure to risk. Contract, business, and property law has also been revolutionized by the legislature. Consumer protection and sale of goods statutes add mandatory protective terms and warranties to commercial transactions while business corporations acts impose minimum standards of conduct on those establishing or operating a business. The relations between landlord and tenant are now largely set out in statute form, and land titles registries have ousted the possibility of obtaining title by adverse possession.

V. Problems Posed by the New Role of the Judiciary

In this segment of my lecture I propose to examine some of the problems which are posed by the new responsibilities of the judiciary which I have outlined - responsibilities with respect to the framework of government, the rights of individuals to be free from state interference, and the affirmative obligations of the state toward its citizens. Developments in these three areas, as well as in certain areas of the common law, involve a realignment of the traditional relationships between the judiciary and other branches of government. We must ask ourselves anew: what are the respective roles of the legislatures, the executive and the judiciary? How should these institutions respond in the face of the realignments of traditional power patterns between them?

Two fundamental questions must be considered by all those concerned with these matters. The first concerns how far the courts can and should go in enunciating and enforcing new rights. In other words, how far and in what circumstances should the courts intrude into the spheres traditionally reserved to the legislative and executive branches? The other question concerns the response of the legislative and executive branches to the new alignment of powers. How should they conduct themselves so as to avoid the necessity for over-inclusive judicial review? When a law that it has passed is ruled invalid, how should a legislative body respond? When new state obligations are imposed, what are the implications for the executive, charged with enforcement of the law?

I turn first to the question of how far the courts should venture into territory traditionally reserved to the legislative and executive branches of government. For the most part, the courts have little control over the scope of their mandate.

---

[41] For example see *Highway Traffic Act*, R.S.O. 1980, c.198, s.167.

The legislatures, through the enactment of laws, constitutional and otherwise, and the litigants, through the bringing of suits, essentially determine what questions the courts must answer. Within these constraints, however, courts may choose between broad and narrow interpretations of legislation and precedents. But even here the role of the courts is limited. For example, while considerable scope for choice was present immediately after the coming into force of the *Charter*, judicial precedent since then has fixed the parameters of most of the rights and freedoms, leaving limited room for policy decisions about whether the court should or should not venture on particular questions.[42]

Within these limits, there exist good reasons why courts cannot avoid a certain degree of judicial activism. The first is that if the courts fail to act, the citizens of our society will find their rights curtailed. The courts are the ultimate guardians of the rights of society, in our system of government. Legislatures may pass laws upholding these rights; boards and human rights councils may act to enforce them. But when conflicts arise, it is to the courts that the citizen must turn. If the courts decline to act, the law becomes an empty symbol, full of sound and fury but signifying nothing. One need only look to the elaborate guarantees of rights found in the constitutions of many non-democratic countries. The paper reads magnificently. But the reality is otherwise. The difference lies in a single factor - the absence of an independent judiciary which is prepared to uphold the citizen's rights. Only thus can we be assured of the rule of law and spared the rule of tyranny.[43]

Another reason why the courts cannot decline to act is related to the first; it is their function in curbing the wrongful exercise of power. If the courts do not uphold the peoples' rights, the state may unduly impinge upon them. If the courts do not confine Parliament and the legislatures to their respective constitutional spheres, the equilibrium between the national and more local exercise of power will be disturbed. If the courts do not respond to abuses of executive power by the state and its agencies, the rights of individuals will suffer. As Lord Denning has stated:

> In all societies there is a hierarchy of power. At the top there may sometimes be a king or a dictator, at other times a president or a prime minister, or yet again a totalitarian party. Below the top there are hundreds of subordinates who wield power of one kind or another. Throughout history you will find instances of power being misused or abused. On occasion the abuse is so great that the only remedy is by rebellion. - as of the Barons in 1215 or Parliament in 1642. Yet such a remedy is much to be deplored. The rebels are judges in their own cause. In modern times as often as not they are terrorists - seeking to change the Con-

---

[42]For example *Reference re Section 94(2) of the British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486 decided that fundamental justice was to be given a substantive, not merely procedural meaning and that laws whose substantive content violated the *Charter* should be struck down.

[43]It is interesting to note that an important aspect of the current reforms in the Soviet Union is the effort to reinstate an independent legal system in place of administrative or bureaucratic fiat, i.e. the rule of law instead of the rule of power.

> stitution by violence. The only admissible remedy for any abuse of power - in a civilized society - is by recourse to law.
>
> In order to ensure this recourse, it is important that the law itself should provide adequate and efficient remedies for the abuse or misuse of power from whatever quarter it may come. No matter who it is - who is guilty of the abuse or misuse. Be it government, national or local. Be it trade unions. Be it the press. Be it management. Be it labour. Whoever it be, no matter how powerful, the law should provide a remedy for the abuse or misuse of power, else the oppressed will get to the point when they will stand it no longer. They will find their own remedy. There will be anarchy.[44]

The third reason why courts may be forced to act in a more interventionist way I have already touched on. It is the failure from time to time of other branches of government to respond to the need for legislation in certain difficult areas. The quantity of legislation passed by Parliament and our legislatures on the surface may appear staggering. But on difficult social and political issues, the legislative response may be delayed, or the legislation may be so drafted as to place upon the judiciary the responsibility for resolution of problems too thorny for the legislators to tackle. The same phenomenon has been remarked in the United States, where the system of checks and balances between the executive and legislative branches and the disparity of views on certain issues may lead to legislative deadlock. The result, scholars postulate, is that the judiciary responds to fill the vacuum - "the safety valve theory of judicial review."[45] The mechanism, I suspect, is less one of deliberate decision on the part of courts to move into the vacant terrain, as of response to increasing demands for judicial action in the face of a clear need and no other apparent solution but judicial action.

Our courts, while responding to pressures such as these, nevertheless are concerned not to trench too much on the legislative role. Judges, by training and temperament, are most comfortable with the traditional judicial role of applying established precedents and the laws made by others to familiar situations. Moreover, judges are acutely aware of the dangers and difficulties inherent in the new role that, whether they like it or not, is being thrust upon them.

The first problem is that of defining the appropriate judicial response. Section 52 of the *Charter*, for example, renders invalid all laws inconsistent with the precepts it lays down. The problem is that frequently the legislative provision impugned is a small portion of a larger law. To remove that provision may be to distort a carefully crafted legislative scheme and impose a result which the legislators would not have contemplated. Removal of an offending exception to a right granted, for example, may broaden the impact of legislation. This is what happened in the United States when the court ruled that blacks could not be ex-

---

[44] Lord Denning, "Misuse of Power" (1981), 55 Australian Law Journal 720 at 720.

[45] C.R. Ducat, *Modes of Constitutional Interpretation* (St. Paul, Minn: West Publishing, 1978) at 278.

cluded from educational benefits or that every citizen had equal rights to vote. In Canada, courts have struck out exceptions to rights guaranteed by Human Rights Codes, thereby extending the right to be free of discrimination on the basis of age beyond the limit of 65 that was established by the legislature,[46] and extending the ban against sex discrimination by the removal of an exception for sports activities.[47] In other contexts, however, the removal of a provision on constitutional grounds may have much broader consequences, such as the creation of a new offence.[48] Canadian courts confront problems such as these every day since the advent of the *Charter*. The dilemma is obvious. To fail to act is to fail to uphold a right granted by the constitution; to act may be to impose a result at variance with the legislative scheme in question.

These problems, of a technical legal nature, stand apart from the inherent difficulties involved in defining the ambit of the rights and freedoms guaranteed by the *Charter*, or formulating the correct response to difficult social and moral issues like abortion and the sterilization of mentally deficient persons. The answers to such questions often involve the resolution of competing convictions and may have wide implications. Judges, unlike legislators, have no forum for open debate equivalent to the House of Commons or the Legislative Chamber. The views aired before the Courts are limited to those of the litigants, the judicial perspective limited to what the parties say and the instincts and background which the judge brings to the case. Compromises available to legislators may not be open to courts, which are confined to all or nothing, valid or invalid, rulings. Moreover, the doctrine of *stare decisis* reduces the ability of courts to alter or adjust solutions which prove inadequate or erroneous. The highest courts in Britain, Australia, the United States and Canada now assert the power to reverse earlier decisions which prove inappropriate,[49] as witness the recent reversal by the Supreme Court of Canada in the pregnancy cases.[50] One is led to query, neverthe-

---

[46] As was decided in a number of British Columbia decisions including that in *Connell v. University of British Columbia* (1988), [1988] B.C.J. No. 13 (C.A.) which is presently under appeal at the Supreme Court of Canada.

[47] In *Re Blainey v. Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), leave to appeal to the Supreme Court of Canada dismissed, reported at (1986), 58 O.R. (2d) 274 the Court struck down the provision of the *Ontario Human Rights Code*, (1981), c.53, s.19(2) that excluded sex discrimination in sports.

[48] Although this question would not appear to have been addressed in a Canadian decision, the courts in the U.S. have ruled that an unconstitutional section of a statute could not be struck out if it would result in the judicial creation of a crime without legislative sanction and therefore that the violative provision in its entirety must be struck down. *Tatro v. Mississippi* (1979), 372 So.2d 283 (Miss. Supreme Court). In addition the U.S. Supreme Court has ruled the retroactive application of a common law rule to be violative of the Due Process Clause of the Fifth Amendment *Marks v. U.S.* (1977), 430 U.S. 188 thus suggesting that Canadian courts would consider the creation of a new criminal offence in this manner to constitute a violation of the principles of fundamental justice. See also "Note: The effect of an Unconstitutional Exception Clause Upon the Remainder of a Statute" (1942), 55 Harvard Law Review 1030 at 1031 which notes that "The Courts have usually refused to extend the scope of a criminal statute by this procedure - since to do so would create new crimes." (footnotes deleted).

[49] See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 183-185.

[50] See *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 which took a different view of sexual discrimination than had been taken in *Bliss v.*

less, whether the judicial forum is the best one for resolving the difficult social and political issues of our time?

Yet another dysfunctional aspect of excessive reliance on judicial review is the inherent conservatism of the judicial process. The process at best is slow, piecemeal, and frequently deals with only a small part of a larger, more complex problem.[51] It has been pointed out that "insofar as chronic reliance is placed upon the courts for the rectification of social ills, institutions of popular control atrophy and fall prey to those forces with ever-narrower designs on the uses of power."[52] Finally, it has been said that "judicial pronouncements convey the illusion that the problem has been taken care of, when, in fact, nothing may really have been done at all, because the Court's judgment has been quietly disregarded."[53]

This raises one of the most problematic aspects of too great a reliance on the courts in remedying social ills. A judiciary charged with a more active role must also confront the problem of enforcement. The judiciary has no independent means by which to enforce its edicts. What happens if the legislative and executive branches fail to act to further or uphold the rights and obligations enunciated by a court? One view is that the courts should decline to act unless it is clear their edicts will be enforced. Justice Frankfurter of the United States Supreme Court recognized this in a comment from the bench in *Brown v. Board of Education.* Said he:

> Nothing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks.[54]

In the end, as we all know, the Court did declare segregation to be wrong. And, predictably, disillusionment followed when the inevitable evasions occurred and segregation continued. Some judges responded by giving detailed, literal orders, virtually taking over the administration of schools or dictating the development of desegregated housing. The image of a judge making day to day operational decisions in the running of a school - down to what kind of tennis balls to order in one case - is hardly one most Canadian judges would embrace.[55] And the verdict on the results of judicial administration, is, to put it at its highest, mixed. Not only do practical problems arise out of the courts inability to adminis-

---

Canada, [1979] 1 S.C.R. 183.

[51] *Supra*, note 45.

[52] *Ibid.* at 278.

[53] *Ibid.* at 278.

[54] *Supra*, note 27.

[55] There being a long tradition in the Anglo-Canadian law of the Courts refusing to make an order or enforce a contract "the execution whereof would require continued superintendence by the court" as was noted in I.C.F. Spry, *The Principles of Equitable Remedies: Injunctions, Specific Performance and Equitable Damages* (London: Sweet & Maxwell, 1981) at 95.

ter that which it has prescribed,[56] and constitutional, separation of powers, problems are posed by judicial interference with state appropriation of funds.[57] For example, the landmark mental health care decision in *Wyatt v. Stickney*[58] led to a quadrupling of Alabama's spending on mental institutions in the year following the decision.[59] Also at risk is the impartiality and neutrality of the judiciary. Judicial management almost inevitably leads to conflict with the bureaucracy, whose decisions have been overruled by the Court, thus placing judges in an adversarial relationship with one of the parties before the court.[60] And ultimately, after all the problems, all the delays, and all the evasions, the court's pronouncement in *Brown v. Board of Education* in the end won the day and more and more legislators and administrators accepted the need to bring their institutions into conformity with the precepts laid down by the Court.

This is not to criticize the activist stance adopted by American courts in enforcing racial equality. They had little choice, given the uncooperative stances taken by many law-making and administrative institutions charged with enforcing the newly declared rights, an attitude which may be contrasted with that historically found in Canada, where by tradition, decrees tend to be obeyed. The alternative of allowing court edicts to be ignored and circumvented would not only have denigrated citizens' rights, it would have made a mockery of justice and undermined the foundation of law and order upon which democracy ultimately rests.

We face similar questions in Canada under the *Charter*. While thus far, the courts have not been required to make mandatory orders against other government bodies, the problem is a live one. The *Charter*'s guarantee of democratic rights - the right to vote in particular - illustrates some of the problems which may arise in enforcing judicial pronouncements on rights and suggests an alternative - cooperation between the judicial and legislative branches. As a trial judge in British Columbia, I presided over a trial in which the electoral districting of the province was challenged: *Dixon v. A.G. for British Columbia*.[61] The plaintiff's case was predicated on the assertion that the existing electoral districts resulted in

---

[56]These being concerns that have traditionally led Canadian judges to avoid involvement in such questions. See M. Valpy, "New Jersey's Folly Can Teach Us a Lesson" (*The Globe and Mail*, Monday September 25, 1989, at A8) for a discussion of the damage caused by judicial interference with residential zoning in New Jersey.

[57]As was noted in *Webster*, supra, the courts are generally reticent to interfere with allocative decision of the state. Many decisions have held that where the legislature fails to make an appropriation, a court is powerless to remedy any resulting inequities. See *Myers v. English* (1858), 9 Cal. 341 and "California Constitutional Law Doctrine of Separation of Powers" (1982), 9 Pepperdine Law Review 715.

[58](1971), 325 F. Supp. 781 (M.D. Ala.).

[59]See D.L. Horowitz, "Decreeing Organizational Change: Judicial Supervision of Public Institutions" (1983), [1983] Duke Law Journal 1265 at 1267.

[60]*Ibid.* at 1303, this change also suggest that judicial decisions must be evaluated for "effectiveness" as well as "rightness."

[61](1989), 35 B.C.L.R. (2d) 273 (S.C.).

great disparities of voting power, a vote in certain rural ridings being worth almost forty times a vote in larger urban ridings. I concluded that the right to vote guaranteed by the *Charter* comprehended, if not exact voter parity, relative equality of voting power having due regard for the difficulties of representation in remote and sparsely populated areas. Applying s. 52 of the *Charter*, the electoral law, I concluded, was void. But the consequences of striking out the statute and leaving the province without any electoral machinery in place in the event an election were required to be called was, I felt, unacceptable. So I adopted the approach of the Supreme Court on the Manitoba statutory reference[62] and said that the statute, although unconstitutional, would stay in effect for a specified period of time during which the legislature could move to replace it with an electoral law that met the requirements of the *Charter*. It was not for me, I felt, to dictate to the legislature what sort of law they should enact; that was the responsibility of the elected representatives. But, again following a time-honoured judicial tradition, I offered advice on what limits on the principle of one person, one vote, might be acceptable.

I decided to defer the really difficult question. What would happen if the government, which had an obvious interest in maintaining the electoral boundaries as they were, ignored the judgment and did nothing during the time allotted by the court for reform? Could the court issue a mandatory injunction to the legislature to pass the required law? Could the Court substitute a law of its own devising, openly entering into the legislative arena? I did not resolve these questions in my judgment. Instead, I followed the approach which Chief Justice Nemetz had adopted in an earlier case. In that electoral case, the Chief Justice had written:

> If any law is inconsistent with the provisions of the *Charter*, it is the court's duty, to the extent of such inconsistency, to declare it to be of no force or effect (s.52(1)).
>
> Before the *Charter*, the courts could and did declare legislation invalid on the division of powers grounds. When they did so, we know of no recent occasion when the legislative branch of government did not faithfully attempt to correct the impugned legislation. Likewise, when this Court declares a statute or portion thereof to be "of no force or effect" where it is inconsistent with the *Charter*, it is for the Legislature to decide what remedial steps should be take in view of that declaration. Section 24(1) of the *Charter* empowers the courts to grant citizens remedies where their guaranteed rights are infringed or denied. . . . It would be anomalous, indeed, if such powers were reserved only for cases where limitations are expressly enacted and not for cases where an unconstitutional limitation results because of an omission in a statute.[63]

---

[62] *Order: Manitoba Language Rights*, [1985] 2 S.C.R. 347.

[63] *Hoogbruin v. A.G.B.C.* (1986), 70 B.C.L.R. 1, [1986] 2 W.W.R. 700, 24 D.L.R. (4th) 718 (C.A.). at 722-723.

Chief Justice Nemetz proved right. The Court's call to the government to correct the defective legislation was heeded in Dixon, the case with which I was concerned. The government moved to introduce legislation in conformity with the *Charter* and the legislation was promptly passed. The case illustrates how the court and the legislature, each acting within the bounds of its proper constitutional responsibilities and each accepting its different constitutional responsibility, can efficaciously resolve a difficult issue. This is to be contrasted with the confrontational relationship between the courts and other branches of government which has from time to time arisen in the United States, and which has forced the courts to assume functions more properly discharged by the legislature and executive. It is too soon to postulate that Canadian legislatures as a matter of constitutional convention will always respond to judicial decisions striking down legislation by moving promptly to correct the deficiency. But the record to date augurs well.

VI. Conclusion: Toward A New Relationship

I return to the questions I posed earlier. What must the courts do to meet the new challenges before them? What must the legislatures do? My observations suggest the following answers. First, legislators and courts alike must recognize that it is the function of the courts to pronounce on legal issues, not to resolve the major social questions of our time. The nature of our constitution in the post-*Charter* era means that judges will increasingly be called upon to determine legal questions with broad implications for our social and political system. But judicial review can never be a satisfactory substitute for proper legislative action. As one legal scholar has put it, "The Court's decree is a promise only; delivery on that promise has to be rested [sic] by popular political participation."[64]

Our legislative bodies should avoid, wherever possible, the temptation to refrain from tackling difficult issues in the hope the courts will resolve them. Similarly, they should avoid the easy solution of casting difficult problems in vague language, thereby shifting to the courts the responsibility of defining the content of the legislation. Finally, they should move promptly to faithfully correct legislation which the court has impugned. Just as the courts must accept the responsibility which the constitution has placed upon them, so too must our legislators accept their obligations.

The *Charter* and the increasing tendency to bring problems to the courts have altered the traditional balances between the legislative branch of government, the executive branch of government and the courts. We are, all of us, feeling our tentative way to a new alignment. My belief is that we can succeed through an acceptance of our mutual but quite different responsibilities and cooperation. There is nothing new in this. As Justice Jackson of the United States Supreme Court wrote in 1952:

---

[64] *Supra*, note 45, at 284.

While the Constitution diffuses power the better to preserve liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but independence, autonomy but reciprocity.[65]

[65] *Youngstown Sheet & Tube Co. v. Sawyer* (1952), 343 U.S. 579 at 635 quoted in C.R. Ducat, *Modes of Constitutional Interpretation* (St. Paul, Minn: West Publishing, 1978) at 683.