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Book Review: Courting the Right - Review of: The Charter Revolution and the Court Party, by Ted Morton and Rainer Knopff

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Book Review

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COURTING THE RIGHT

Review of: The Charter Revolution & The Court Party

BY TED MORTON AND RAINER KNOPFF
(Peterborough, Ont.: Broadview Press, 2000)[1] 227 pages.

I. INTRODUCTION

The Charter Revolution presents an updated synthesis of the argument that Ted Morton and Rainer Knopff advanced throughout the 1990s,[2] namely that the rise of judicial power in public policymaking following the enactment of the *Canadian Charter of Rights and Freedoms*[3] has put too much power in the hands of interest groups, especially those on the left, and thereby threatens the democratic fabric of Canada. These interest groups (gay and lesbian rights organizations, feminist groups, poverty activists and civil libertarians, among others) use *Charter* litigation to further their policy agendas, and because of this, are said to constitute the "Court Party." This "Party," according to Morton and Knopff, has succeeded in advancing its policy agenda, because several key actors in the judicial process sympathize with its goals and support its efforts. These actors include most notably, the law clerks of the Supreme Court of Canada, federal bureaucrats in charge of funding activist litigation, and law professors. Together, this alleged cabal has hijacked the Supreme Court and transformed it into a venue for advancing unpopular left causes to the exclusion of public participation and public scrutiny.[4]

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[1] [hereinafter *The Charter Revolution*].

[2] Among their previous publications on this theme, see F.L. Morton & R. Knopff, "Does the Charter Hinder Canadians from Becoming a Sovereign People?" in F. Fletcher, ed., *Ideas into Action: Essays in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999); F.L. Morton & R. Knopff, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992) [hereinafter *Charter Politics*]; F.L. Morton & R. Knopff, "Canada's Court Party" in A. Peacock, ed., *Rethinking the Constitution* (Toronto: Oxford University Press, 1996).

[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[4] This characterization of Morton and Knopff's thesis is borrowed from P. Jackson, "Supreme Court's Been Hijacked: Interest Groups and Slick Lawyers Sway the Cause of Justice" *Calgary Sun* (4 May 2000) 15.

As this brief description suggests, *The Charter Revolution* is part partisan screed, part scholarly research on interest group pluralism and part meditation on the relationship between the political and judicial branches of government in a liberal democracy. These ingredients could add up to a recipe for provocative and original scholarship. The authors do indeed present a highly readable and sincerely argued analysis. However, as I discuss below, the partisan screed surfaces time and time again to undermine the authors' timely and challenging account of judicial policy making under the *Charter*. Following the organization of the book, I consider the main thrust of the authors' argument relating to the Court Party, the "jurocracy," the state connection and the legal intelligentsia. I conclude by examining the position of this book in the literature on judicial power under the *Charter* in Canada.

II. THE COURT PARTY

In *The Charter Revolution*, Morton and Knopff take aim at a loose but coherent coalition of interest groups which they characterize as the "Court Party"—comprised of groups that "seek to constitutionalize policy preferences that could not easily be achieved through the legislative process."[5] Prominent members of the Court Party are said to include the Canadian Civil Liberties Association (CCLA), the Women's Legal Education and Action Fund (LEAF), the Charter Committee on Poverty Issues, Coalition of Provincial Organizations of the Handicapped (COPOH), and Equality for Gays and Lesbians Everywhere (EGALE), among others.[6] Rather than employ constitutional arguments as a means of protecting their own "liberty," these groups explicitly use litigation as a vehicle for policy change. In this sense, Morton and Knopff argue that the Supreme Court should be seen as a distinct venue for political contest in which, as they put it, legislation may be amended by appellate judicial interpretation of the *Charter*. Moreover, just as legislators have partisan political parties which vie for control over the policy agenda, so courts have spawned a broadly analogous type of partisan party which seeks control over *Charter* decisionmaking.

Morton and Knopff acknowledge that the membership of the Court Party will not always line up on the same side of *Charter* issues. Libertarian civil rights groups and egalitarian feminist groups, they note, typically oppose one another as intervenors in cases relating to obscenity

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[5] *The Charter Revolution*, *supra* note 1 at 25.

[6] *Ibid.*

and freedom of speech even though they may share the larger project of furthering policy change through *Charter* litigation.[7] They also recognize that not every *Charter* claim renders the litigant a member of the Court Party. Criminal defendants, for example, routinely raise *Charter* arguments, which sometimes may result in policy change, but their objective typically is narrow and related to avoiding a criminal conviction. Further, they acknowledge that the Court Party is not the preserve of one ideological persuasion, noting the earlier "court parties of the right" which successfully resisted welfare state policies in the U.S. and Canada in the early decades of the twentieth century.[8] Curiously, however, the authors omit any significant reference to corporate sponsored litigation in the post-*Charter* era, which similarly seeks to further policy change through the courts. This is an especially striking omission as the corporate community, at first glance, appears to be the most powerful special interest in Canada, and certainly one which has enjoyed marked success under the *Charter*.[9] Morton and Knopff explain this omission on the following grounds:

> Similarly, corporate litigants cannot be counted as part of today's Court Party. As Hein's review of Supreme Court and Federal Court cases shows, although corporations and Court Party interests generated roughly the same number of legal challenges to cabinet decisions and public policies between 1988 and 1998—about 100 cases each—there are many more corporations than Court Party associations. Hein finds that one in eight interest groups launched court cases, while only one in 399 corporations did so, showing that corporations have a much lower propensity to litigate than do Court Party interests. In addition, most corporate litigation is directed at other corporations with whom they are competing. When they do challenge government statutes, it is in a defensive, reactive mode. *To date, there appear to be no corporate examples of the kind of sustained, systematic Charter litigation undertaken by Court Party interests*.[10]

The line that the authors attempt to draw between self-interested corporations defending themselves on the one hand, and opportunistic Court Party interests launching litigation proactively on the other hand, is not compelling. Some of the earliest *Charter* cases featured corporations successfully removing statutory barriers to conducting business,[11] and successfully resisting regulatory enforcement by the

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[7] *Ibid.* at 72-74.

[8] *Ibid.* at 30.

[9] For analyses of corporate *Charter* litigation, see, for example, A. Petter, "The Politics of the Charter" (1986) 8 Supreme Court L.R. 473 at 490-93; and C. Tollefson, "Corporate Constitutional Rights and the Supreme Court of Canada" (1993) 19 Queen's L.J. 309.

[10] *The Charter Revolution*, *supra* note 1 at 85 [emphasis added].

[11] See, for example, *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 (striking down the *Lord's Day Act* prohibition on Sunday shopping).

state.[12] In these early cases, a central issue before the Court was whether corporations could or should benefit from the protections set out under the *Charter*. This in and of itself constituted an important policy agenda which corporate *Charter* litigation proactively sought to advance. More recent cases have seen corporations successfully strike down restrictions on the freedom to advertise.[13] Can such litigation be characterized as "defensive"? Further, interest groups such as the National Citizens Coalition (NCC) (funded by, among others, some of Canada's largest insurance companies) have launched litigation expressly intended to turn the courts into a venue for the pursuit of the neo-liberal political agenda.

The most well-known case involving the NCC was *Lavigne* v. *Ontario Public Service Employees Union*.[14] This litigation involved a college teacher challenging certain expenditures by the union to which he belonged. The teacher's litigation was financed by the NCC. Hundreds of thousands of dollars was spent litigating whether the union had the right to spend approximately two dollars of the teacher's salary on political causes. This was not a defensive piece of litigation and there was no issue of liberty for the plaintiff Lavigne, or for the NCC; rather, both shared a desire to prevent trade unions from spending dues on political activities. Morton and Knopff mention *Lavigne* (and the NCC's financing of the case) only in passing as part of an analysis of the influence of the Canadian Civil Liberties Association, which had intervened in the case.[15]

Most recently, the NCC (currently headed by former Reform party MP Stephen Harper) has challenged the *Canadian Elections Act* because it limits to $150,000 the amount an interest group can spend on an election campaign, which the NCC claims is an unconstitutional infringement of the right to freedom of expression.[16]

If there is a Court Party, groups like the NCC constitute its influential right flank. Excluding such groups from their analysis suggests that the authors are not so much concerned with *special* interests as they are with *specific* interests. The authors seem most offended by what they characterize as the elitist, equality-seeking, social engineering

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[12] *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 (striking down a search and seizure provision of a statute regulating competition).

[13] *RJR-MacDonald* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199 (striking down a prohibition on advertising tobacco products).

[14] *Lavigne* v. *OPSEU*, [1991] 2 S.C.R. 211.

[15] *The Charter Revolution*, *supra* note 1 at 73-74.

[16] See M. Campbell, "Court Challenge Launched Over Election Spending Limits" *The Globe and Mail* (8 June 2000) A4.

philosophy of a handful of gay and lesbian advocacy groups, feminist groups, and an ill-defined clatch of other groups representing the vulnerable classified under the alternating rubrics of "postmodernism" or "postmaterialism." Why should the involvement of these groups in *Charter* litigation pose any more of a threat to democracy than the involvement of corporate groups, or of large corporations themselves, in *Charter* litigation to pursue neoliberal policy agendas?

A less unbalanced analysis might indeed conclude that the opposite position is more tenable. Much of the litigation mounted by the gay and lesbian and feminist groups has merely accelerated legislative change removing openly discriminatory barriers. *M.* v. *H.*[17] is a good example of this phenomenon. While this Supreme Court decision led to an omnibus bill changing over sixty statutes in Ontario to recognize same sex partners on an equal footing to common law heterosexual spouses,[18] it is likely that these legislative changes were on the horizon in any event. British Columbia and Quebec had already developed versions of the same legislation, and several municipalities in Ontario, including Toronto, were moving in this direction. Indeed, Ralph Klein, the Conservative Premier of Alberta, decided not to invoke the notwithstanding clause following the Supreme Court's decision in *Vriend* v. *Alberta*,[19] and added, "it's morally wrong to discriminate on the basis of sexual orientation."[20] Irrespective of how genuine this sentiment might have been, or whether Mike Harris shared it, this view certainly is consistent with the view of the majority of Canadians, who appear to have not only approved of the decision in *Vriend* by a significant majority, but also approve of the protection of civil rights of gays and lesbians more generally.[21] By contrast, entrenching a constitutional right to advertise and a constitutional right for special interests to contribute unlimited amounts to political parties, are policy changes unlikely ever to have emerged on any legislative agenda in Canada.

The idea of a Court Party (or, perhaps more accurately, court parties) in Canada is intriguing, especially when such a party organizes around policy agendas that are indeed legislatively unpopular. The

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[17] [1999] 2 S.C.R. 3 [hereinafter *M.* v. *H.*].

[18] *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, S.O. 1999, c. 6.

[19] [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

[20] Public statement to the media reproduced in J. Fletcher & P. Howe, "Public Opinion and the Courts" *Choices* 6:38 (May 2000).

[21] *Ibid.* at 38-42. See also K. Makin, "Top Court Inspires Highest Confidence" *The Globe and Mail* (31 May 2000) A7.

authors' critique of the self-serving "knowledge class" that occupies the leadership of many interest groups active in *Charter* litigation is often effective. Overall, however, the analysis of the Court Party in *The Charter Revolution* is a partial and partisan account of how *Charter* litigation is politics by other means.

III. THE JUROCRACY

The jurocracy is not precisely defined in the book but includes the law clerks of the Supreme Court of Canada, administrative tribunal members (especially in the human rights field), government legal departments, the Law Commission of Canada, judicial institutes, and education centres. For the most part, the links drawn between these organizations and Court Party interest groups are well documented. The one exception is the authors' attempt to show a link between the Court Party and the law clerks.

Three law clerks are assigned to each Justice of the Supreme Court. These clerks are for the most part recent law graduates drawn from Canadian law schools. In an impressionistic account of the clerks' role in the Court published several years ago, I attempted to link the role of clerks in the Supreme Court with the emergence of that institution as a de facto policymaking body in the wake of the *Charter*.[22] In that article, I concluded that clerks have a significant role in the *form* of Supreme Court judgments but very little influence over the *substance* of those decisions. While Morton and Knopff rely to some extent on this article, they reach the far more dramatic conclusion that, "[i]n sum, the influence of the clerks has been an important factor in the Court Party's success before the Supreme Court."[23] The only real basis for this claim is that a feminist litigator once claimed to have inside knowledge of the Court's decisionmaking (which the authors surmise must have come from a clerk) and a reference to an "anonymous" source who claimed that a clerk wrote the *Oakes* decision, which established the test to guide judicial discretion under section 1 of the *Charter*.[24] It is not clear what point is served by these anecdotal assertions. With respect to *Oakes*, for example, there is no suggestion that the clerk rather than the chief justice decided the case, nor that the chief justice was unduly or

22 L. Sossin, "The Sounds of Silence: Law Clerks, Policy-Making and the Supreme Court of Canada" (1996) 30 U.B.C. L. Rev. 279.

23 *The Charter Revolution*, *supra* note 1 at 113.

24 See, for example, *ibid.* at 111.

improperly influenced by his law clerk. As I noted in my article, the fact that clerks help draft judgments should be no more shocking than the fact that speech writers draft addresses given by the Prime Minister. The authors' conclusion that the clerks are "an important factor" in the Court Party's success is overstated and unsupported.

IV. THE STATE CONNECTION

In this chapter, Morton and Knopff support their thesis that the *Charter* is both an effect and a cause of interest group formation. The authors show how the groups which benefitted from nurturing by the state in the 1960s and 1970s (for example, multicultural groups, feminist groups, and human rights organizations) tended to line up in favour of the *Charter* from its inception, and subsequently have used the *Charter* to shape public policy. Not all state connections to *Charter* litigation have been indirect. The authors take special aim at the federal Court Challenges Program, under which the government provides direct funding for interest groups to challenge government action under the *Charter*. While initially established to fund minority language-rights litigation in the wake of the first Parti Québecois victory in Quebec, after 1985, the mandate of the Court Challenges Program was expanded to encompass section 15 equality challenges under the *Charter*. This fund was terminated in 1992 by the Conservatives and reinstated in 1995 by the Liberals. It has provided crucial support for EGALE, COPOH, and LEAF, among others. As Morton and Knopff rightly assert, such groups could not function without the support of government granting agencies like the Court Challenges Program. Much litigation against the government is, it turns out, government sponsored in one way or another.

The involvement of government funding in interest group litigation, however, casts doubt on the authors' overall thesis. If the Court Party is indeed propped up through government funding, surely this reflects a determination by governments that it is in the public interest to have interest groups representing vulnerable groups which otherwise would have no voice in *Charter* litigation. Indeed, the Liberal Party was elected in 1993 having made a campaign promise to reinstate the Court Challenges Program. Rather than the Court Party reflecting a threat to democracy in Canada, the vitality of these advocacy groups would seem to vindicate the effectiveness of democratic politics in shaping and informing *Charter* litigation.

V. THE LEGAL INTELLIGENTSIA

One of the least scrutinized sectors which influence *Charter* politics in Canada is law schools. Law schools, and more specifically, law professors, play an important role in shaping legal thought, developing critiques of existing doctrines and thereby having an effect on the direction jurisprudence takes. Morton and Knopff argue that law schools provide three "tangible and crucial" modes of support for the Court Party: administrative support, rights experts, and advocacy scholarship.[25]

Morton and Knopff contend that legal scholarship (mostly law professors publishing articles in law reviews) provides the intellectual foundation of the Court Party. The authors cite the battered wife syndrome, for example, as a legal development which migrated from law reviews to judgments of the Supreme Court of Canada. The authors claim that feminists, gay and lesbian advocates, and others explicitly sought to influence the influencers, and that they succeeded because "[t]he legal commentators are all singing from the same hymn-book."[26]

Here again, the authors undermine a valuable insight by exaggerating its significance for partisan effect. A number of important studies have been conducted on the incidence of judicial citation of academic sources in Canada.[27] Virtually none are cited by Morton and Knopff. What these studies reveal is that very few pieces of what the authors would describe as "advocacy scholarship" are ever cited by the Supreme Court. The books most frequently cited by the Court are doctrinal analyses of "Constitutional Law" or the "Construction of Statutes".[28] The most frequently cited articles do not come from the Canadian Journal of Women and the Law or the Windsor Yearbook of Access to Justice, as one might think having read Morton and Knopff's analysis, but rather from the Criminal Law Quarterly, Canadian Bar Review, Canadian Tax Journal, and Canadian Business Law Journal.[29] Finally, while the quantity of academic citation in the Supreme Court

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[25] *The Charter Revolution*, *supra* note 1 at 143.

[26] *Ibid.* at 147.

[27] See, for example, P. McCormick, "Do Judges Read Books Too? Academic Citations by the Lamer Court, 1991-96" (1998) 9 Supreme Court L.R. 2d Series 463; G. Bale, "W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada" (1994) 19 Queen's L.J. 36; and V. Black & N. Richter, "Did She Mention My Name? Citation of Academic Authority by the Supreme Court of Canada 1985-1990" (1993) 16 Dal. L.J. 377.

[28] McCormick, *ibid.* at 490.

[29] *Ibid.* at 487.

has increased since the advent of the *Charter*, this is not a *Charter* specific trend. Indeed, academic citation is more common in private law cases in the Supreme Court than in *Charter* cases.[30] By focusing so narrowly on academic scholarship in support of what they have defined as the Court Party, Morton and Knopff miss the larger and more interesting question of how the Court uses legal scholarship in its decisionmaking, when and why it resorts to doctrinal texts, social science literature or advocacy scholarship. Focusing on advocacy scholarship alone seems odd. Even in landmark Court Party cases, advocacy scholarship tends to represent a minor, if not negligible, portion of the academic material relied on by the Supreme Court.[31]

The authors claim that law professors also influence the Court Party in more subtle ways. They contend that the rise of postmodernism in legal education provides intellectual fodder for Court Party advocacy groups. They observe:

> Postmodernism rejects the possibility of scientific or objective knowledge, claiming that all knowledge is self-interested and reflects (and supports) unequal power relationships based on class, gender, race, and so forth. It portrays the political, legal, and cultural traditions of western civilization as the corrupt legacies of "dead, white, heterosexual, male" privilege. For example, deductive logic and concepts of evidence are often dismissed as phallocentric modes of reasoning. Postmodernism provides the intellectual grounding for many of the new postmaterialist social movements: feminism, multiculturalism, gay and lesbian rights, and the more radical forms of environmentalism.[32]

While Morton and Knopff are right that postmodernism has enjoyed some popularity in some law schools in Canada, this is a body of social and legal theory that emphasizes the conservatism of the justice system and its inherently oppressive tendencies. Postmodernists (to the extent these scholars can be said to speak with one voice) typically reject public interest litigation as a means to achieve a better world; while they often believe that laws and government action are unjust, they also believe that courts are unjust. It is, rather, old-fashioned civil rights liberalism that provides the ideological and intellectual grist for the *Charter* mill. Indeed, most public interest *Charter* litigation is modelled on American civil rights litigation of the 1950s, the most famous example of which was *Brown* v. *Board of Education*[33] (which had, of course, influenced Canada

[30] *Ibid.* at 478.

[31] In *M.* v. *H., supra* note 17 for example, thirty authors were cited, of which no more than two or three could be characterized as "advocacy" related.

[32] *The Charter Revolution*, *supra* note 1 at 131.

[33] 347 U.S. 483 (1954).

to adopt the *Canadian Bill of Rights*[34] in 1960, and subsequently to entrench the *Charter* in the constitution, in the first place).

VI. CONCLUSION: IDEOLOGY VS. SCHOLARSHIP IN THE STRUGGLE TO DECODE THE *CHARTER*

The strongest critiques of the *Charter* and the rise of judicial power in its wake have come from the right and left of the ideological spectrum. Indeed, *The Charter Revolution* bears a striking resemblance to the left critique of the legalization of politics by Michael Mandel in *The Charter of Rights and the Legalization of Politics in Canada*.[35] Both books contend that parliamentary politics is not perfect but is a preferable venue for political debate in a democracy than is the courtroom. While Morton and Knopff lament that the courtroom has become the captive of left-wing interest groups, Mandel laments that the courtroom has become the captive of right-wing, corporate power. While critics on the right such as Morton and Knopff see the *Charter* as a tool of social activism, critics on the left see the *Charter* as limiting the ability of the state to regulate the market and as a bulwark designed to thwart social and political activism.[36]

While the Right and the Left both believe that the *Charter* has fundamentally undermined Canadian democracy, it is the mushier middle which contends that the *Charter* has in fact enhanced Canadian democracy. Peter Hogg and Allison Bushell popularized the thesis of a healthy dialogue between the judiciary and the legislature,[37] which became the accepted wisdom of the Supreme Court in a matter of months following its publication in this journal.[38] Predictably, Morton and Knopff claim that this so-called dialogue is in fact a monologue, with judges doing the talking and legislators powerless to do anything other than listen (though they concede that the "notwithstanding clause"

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[34] S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

[35] M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thomson Educational, 1994).

[36] See, for just a sampling of this literature, M. Mandel, *ibid.*; A.C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); and J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

[37] P. Hogg & A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75; see also P. Hogg & A.Thornton, "The Charter Dialogue Between Courts and Legislatures" (1999) 20 Pol'y Options 19.

[38] *Vriend*, *supra* note 19.

prevents outcomes from being forced on governments in most *Charter* litigation). Morton and Knopff's more modest claim that *Charter* litigation limits and influences the options open to government in social policy settings is sound. The true nature of the judicial-legislative conversation, and its impact on Canada's democratic institutions, depends on the eye of the beholder (or ear of the listener, in this case).

Irrespective of how one characterizes the place of judges in the conversation about public policy in this country, it is clear that Canadians need to better understand how legal institutions work, who makes decisions and on what basis those decisions are made. Like their earlier study, *Charter Politics*,[39] this book does an excellent job of bringing the world of judicial politics alive. Morton and Knopff vividly illustrate the ways in which the justices of the Supreme Court have animated the *Charter* through judicial interpretation, often in ways not entirely consistent with the intention of the drafters. For this reason alone, it makes a worthy addition to any reading list of introductory courses on the Canadian legal and constitutional systems. However, the authors' conclusion that the justices of the Supreme Court have become the captives of advocacy groups, whether through a network of law clerks and law professors or otherwise, is simply not persuasive. The Court Party, if it includes groups which seek to use the courtroom to further a policy agenda, constitutes a big tent indeed, with gay and lesbian activists alongside tobacco executives, and LEAF shoulder to shoulder with the NCC. Far from threatening democracy, the authors' own analysis suggests that the rise of interest groups in *Charter* litigation appears to be a direct and intended result of policy initiatives emanating both from the executive and legislative branches. That the authors' conclusions do not reflect this fact seems to flow from their clear dislike for many of the interest groups which they say constitute the Court Party. While this dislike may make for impassioned prose, it often distracts the authors from their task of investigating the influence of interests groups in the courts under the *Charter*, and ultimately detracts from what might have been a much more compelling piece of scholarship.

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[39] *Supra* note 2.