Ideology and Judging in the Supreme Court of Canada

Robert Martin
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Abstract
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Keywords
Canada. Supreme Court--Officials and employees--History; Judges; Canada

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I. INTRODUCTION

The state has been a central concern of Marxist analysis. It has been assumed that the state acts, in some way or other, as one means whereby the dominant class in a given society maintains its dominance. Considerable effort has been devoted to explicating more precisely the concrete ways in which different states at different periods have done so. An exceedingly broad range of hypotheses has been advanced.

The earliest was that of Engels. His approach was adapted and made blunter by Lenin who saw the state as nothing more than a weapon wielded by a dominant class. Lenin may have been right about Tsarist Russia in 1916, but his view can have little application in the advanced capitalist societies of the late 20th century. This seems to have become generally recognised and, as a result, theoreticians have tried either to supplement Lenin's formulation or to add a degree of subtlety to it. I will summarize my understanding of the various qualifications and disclaimers.

First, the state enjoys what has come to be called "relative autonomy." This means that the state does not invariably, or necessarily ever, respond to direct commands from the dominant class, but that it operates very much according to its own agenda. Second, the state may have priorities and interests which do not at any given moment correspond exactly to those of the dominant class. This will be particularly the case when the dominant class is riven by confusion or factionalism. Third, the state does more than simply physically coerce its subjects. More important for the purposes of this essay, it also plays a role in maintaining the primacy (or hegemony) of a particular ideology, an ideology which tends to be congruent with the interests of the dominant class.

Thus, the contemporary view of the state is that while its actions do support the dominance of a particular class, this must be

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2 Among such writers, one would want to especially note Antonio Gramsci, Ralph Miliband, Nicos Poulantzas, and E.P. Thompson.
seen as the expression of a tendency which is felt in the aggregate and over time. It is, therefore, conceivable that particular actions of the state may appear to contradict the immediate, ostensible interests of the dominant class. The purpose of this essay is to advance some hypotheses about the way the Supreme Court of Canada operates as a state institution. The analysis is based on the period since 1949.

The essay originates from the feeling of bewilderment which grew in me over years of reading Supreme Court of Canada decisions. The decisions made no sense. I kept puzzling over the question of what the judges were doing or, more precisely, what they thought they were doing. At its most basic, the essay is an attempt to explain to myself the mysterious behaviour of Supreme Court judges.

My first hypothesis is that the judges are members of the dominant class in Canada. A few were born into that class; the majority achieved membership in it. As Roy Romanow, former Attorney-General of Saskatchewan, put it, "judges are inevitably drawn from the most privileged ranks of our society." Implicit in my hypothesis is the assumption that there are classes in Canada and that there is a dominant class. I will assume that, contrary to the common myth of "classlessness," the existence of classes in Canada has been empirically established at least since John Porter published *The Vertical Mosaic.* Others, such as Wallace Clement, have simply confirmed Porter’s observations.

Porter, interestingly, argued that the judges were members of what he called the "political elite". As T.H. Marshall noted, this did "raise(s) problems of analysis" for, "the power of a judge is quite different in kind from the power of a minister or a president." If

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3 "The Canadian Charter of Rights and Freedoms" (Address to the Canadian Bar Association Annual Meeting, 1986) [unpublished].


judges are members of the dominant class, how do they play their class role within the state apparatus?

My second hypothesis is that the judges of the Supreme Court of Canada contribute to the dominance of their class primarily on the ideological plane. I do not believe that it is necessary or profitable here to rehearse the now considerable literature on the ideological functions of law. My own views can be found in two articles. The reader's attention is also directed to Alan Hunt's "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law," which provides a lucid summary of the most significant writing.

For present purposes, ideology can be viewed as a collection of beliefs, ideas, and values. These beliefs did not, however, arise randomly or fortuitously. They are intimately connected with a particular set of social and economic relations. The nature of the connection is that the ideology tends to conduce towards the maintenance of those social and economic relations. Ideology does this by presenting the relations as both just and inevitable.

The legal system is not the only source of ideology in a given society, nor is it necessarily the most important. But the legal system does operate at the level of ideology by acting to confer legitimacy on existing social and economic relations. It should be added that the legal system has more than ideological functions. The law also has substantive content and this content likewise conduces towards maintaining the primacy of a particular class. To be more concrete, the judges act to uphold the notion which is essential to the ideological functions of the Canadian legal system — equality before the law. This notion posits that all citizens are equally subject to the law, that each citizen is, in the eyes of the law, the equal of all others.

The ideological postulate of equality before the law is made manifest in the courtroom through judicial neutrality. The judge is indifferent as between plaintiff and defendant, appellant and

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8 (1985) 19 Law & Soc'y Rev. 11.
respondent. The judge is merely there to apply the law. And, indeed, the law itself is defined as neutral, as giving preference to neither side; nor, more important, as favouring any broader social interest or class. It should be obvious that the law is not, in an objective social sense, neutral, but I am dealing here purely at the level of ideology. Maintaining the appearance of neutrality is, indeed, the prime ideological function of the legal system. For, as E.P. Thompson put it, "if the law is evidently partial and unjust, it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony."

The judges of the Supreme Court of Canada play out their ideological roles in the courtroom by giving judgments which are couched in purely legal terms and which, therefore, give the appearance of social and political neutrality. Outside the courtroom the judges strive to reinforce the notion of judicial neutrality.

The state maintains its legitimacy, in part then, through the notion that the law is neutral. There may be a system of class domination in civil society, indeed that class domination is objectively manifested in the substantive content of the law, but the legal system must reveal itself, and be perceived, as neutral. The legal system cannot discharge its other class responsibilities unless it maintains the appearance of its own neutrality.

It is not necessary that the judges fully grasp their own role in the state system. The judges do, in fact, as I will suggest below, have ideological preconceptions about their own ideological functions. Put another way, the judges are not acting dishonestly in maintaining the notion of neutrality. They are both the subjects and the objects of the dominant ideology and are as much affected by it as ordinary citizens. It is, therefore, wrong to imagine that the judges of the Supreme Court of Canada are appointed on the basis of their willingness to give effect to the day to day requirements of the dominant class. The role they play is far more subtle and, therefore, more successful.

Equally, it would be a serious distortion to see the judges as little more than puppets. While it is true that political patronage has generally been central in making judicial appointments since well

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before Confederation, direct patronage has not been a factor in Supreme Court of Canada appointments in recent years. D.D. Abbott in 1954 appears to have been the last patronage appointment. Abbott went straight from the federal cabinet to the court. Still, one must not go too far in the other direction and imagine that the political inclinations of prospective appointees are irrelevant. Joe Clark, during his short-lived tenure as Prime Minister in 1979, made only one appointment to the Supreme Court of Canada — Julien Chouinard. Clark had attempted, without success, to get Chouinard into his cabinet. Chouinard was also known publicly as someone inclined towards the political right. At a more general level, the obvious similarity between the views of Bora Laskin and Pierre Trudeau about the Canadian constitution must have been a factor in Laskin's appointment as Chief Justice in 1973.\footnote{On this general question, see Canadian Bar Association, Committee on the Appointment of Judges in Canada (Ottawa, 1985) esp. at 57; James G. Snell & Frederick Vaughan, The Supreme Court of Canada: History of the Institution (Toronto: University of Toronto Press, 1985) at 199-200, 235; Martin "An Open Legal System" (1985) 23 U.W.O.L. Rev. 169 at 183-86.} Still, it should be evident from the confusing multiplicity of both majority and dissenting opinions produced by the Court that the judges enjoy considerable individual autonomy in carrying out their roles.

This essay has two parts. It begins with an analysis of precisely who, in social terms, the judges have been. None of them descended, gowned in ermine and scarlet, from heaven. Each was the product of a specific process of socialisation. This was a process which saw the judges ideologically incorporated within the dominant class. It also equipped the judges with the peculiar ideological preconceptions of Canadian lawyers.

The next part looks directly at ideology. We start with writing by, and about, the judges. To be more precise, I look at statements by judges, whether in the form of published speeches or in books or articles, where the judges discuss their views on Canadian society and the issues which move it. Then we look at material, in both popular and professional publications, which is devoted to the same general subject. The striking thing is how little of such material there is. Possible explanations for this will be
examined. Finally, we turn to reported judgments of the Supreme Court of Canada with a view, once again, to discovering what these reveal about the ideology of judging. This raises some difficult methodological questions which stem largely from the ideological notion of judicial neutrality itself. The methodological problems will be discussed more fully below. I conclude with some observations about the Canadian Charter of Rights and Freedoms.

A word of warning. My research has unearthed few surprises. This should not be surprising. The Canadian judiciary has been an exceedingly homogenous group. That is, the judges have been mostly middle-aged to elderly, white, males who were successful lawyer-politicians. And it should, I hope, astound no one to discover that their views on social issues have been pretty well the views that anyone with knowledge of Canadian society would expect such a group to hold.

II. THE JUDGES

My hypothesis that the judges are members of the dominant class must, at bottom, remain a hypothesis. I cannot prove empirically that they belong to that class. This is in large measure a function of the concept "class" itself. Class is not, as E.P. Thompson has made clear, a thing; it is a process, an experience. What I can demonstrate is that the judges have been through the dominant class's process of education and political and professional socialisation.

The first thing to not about the 30 people who have sat on the Court since 1949 is that 28 of them have been men. And even with the first woman to become a member of the Court, the homogeneity that is the overriding characteristic of this group asserts itself. Bertha Wilson, prior to her appointment to the Ontario court

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11 Most of the material which follows is drawn from standard reference sources. Where other sources have been used, this is indicated.

of Appeal in 1975, was a partner, albeit the first female partner, in the prestigious Toronto firm of Osler, Hoskin and Harcourt.

Only four of the judges went to private schools. It was in their higher education that the judges received their most intensive class socialisation. Four were Rhodes Scholars. Two more went to Oxford without Rhodes Scholarships. Curiously, none of the judges attended Cambridge. Five attended Harvard Law School. Only one, Locke, received no institutional legal education at all.

Eleven of the judges played an active part in politics. The activity ranged from being a federal minister (Abbott), through being an advisor to the Prime Minister of Canada (Beetz and La Forest), to holding office as a provincial Attorney-General (J.W. Estey and Rand), to be elected to a provincial legislature, or being a defeated candidate, and finally to merely being publicly identified with a party. It is noteworthy that no one who had been identified with the C.C.F. or the N.D.P. has been appointed to the Supreme Court of Canada. Indeed, when Hall was a Conservative candidate in the 1948 Saskatchewan election, he suggested that T.C. Douglas was a "National Socialist."\(^{13}\)

What is striking is the number of judges who were, at one time or another in their careers, involved in teaching law. Sixteen of the judges taught, although only eight were full-time teachers. Bora Laskin is undoubtedly the best known in this group, but several deans of university law schools are also included. Pratte, Beetz, Le Dain, and La Forest were deans before being appointed to the Court; Rand became a dean after his retirement; and Fauteux was a dean while still sitting on the Court.

Nine of the judges served in the military. In most cases, this was real military service. Three of the judges (Cartwright, Locke, and Nolan) were awarded the Military Cross, while Dickson was seriously wounded in action.

Only one judge managed to become a professional athlete. Sopinka played with the Toronto Argonauts and the Montreal Allouettes. About a third of the judges could be described as coming from haute-bourgeois backgrounds. A handful (Laskin and

Wilson, at least) rose from humble circumstances. The rest appear to have had comfortable, if less than grand, petit-bourgeois origins. But nearly all had noteworthy careers in academe, politics, or with prestigious law firms. The exceptions are Judson, Kellock, and Kerwin, who, so far as I can discern, had unmemorable careers prior to their translations to Ottawa. Most of the judges joined the Rideau Club on coming to Ottawa, although this has not been so true in recent years.

Two exceptions might be taken to the notion that the judges have been socialized into the dominant class. Both are based in an approach which defines membership in that class solely in economic terms. First, it could be said that, because of conventions which require judges, on appointment, to divest themselves of direct corporate investments, the judges do not partake in the ownership of the means of production and do not, therefore, belong to the dominant class. While owners of the means of production are clearly charter members of the dominant class, they are definitely not the only persons who undergo the processes that form the class. Second, it might be argued that wealthy lawyers in private practice make incomparably more than Supreme Court of Canada judges and this disqualifies judges from membership in the dominant class. This argument must be rejected on the methodological ground already noted and, to some extent, on empirical grounds. Many of the judges were once wealthy lawyers in private practice. They are paid $151,700.00 per year (The Chief Justice gets $163,800.00). This is not a bad salary, particularly when one remembers that it is guaranteed until age 75, that the pension is excellent, and the working conditions and perks are good.\textsuperscript{14} And, to repeat, it is a distortion of the reality of class to seek to establish economic criteria as the only indicia of class membership.

I will end this section by returning to the point about the homogeneity which the group exhibits. Two women, one Jew. All white. All, except for Laskin, either French or from one of the tribes of the British Isles. Even if one is not comfortable with class

\textsuperscript{14} See Judges Act, R.S.C. 1970, c. J-1, as am. S.C. 1987, c. 47, s. 1. These salaries are effective 1 April 1988.
analysis, this is not a group of people which is socially, culturally, or ethnically representative of Canadians.

III. IDEOLOGY

A. Writing and Public Statements By and About Judges

1. By Judges

Here one encounters tremendous variations both in quality and in volume. Four judges wrote a great deal. All were, for periods of their lives, legal academics. Laskin produced vastly more than any other judge, with Le Dain, Pigeon, and La Forest coming far behind.

The bulk of this writing by Supreme Court of Canada judges consists of exposition and analysis of technical legal issues. While it confines itself to doctrinal questions and is positivistic in approach and pedestrian in style, the same could be said for most Canadian legal writing. One can infer certain things from such writing. Its authors tend to accept the existing legal and social arrangements and to be disinclined towards critical reflection about the law or legal institutions. One could also make this observation about Canadian legal writing generally, and while it may tell us that the judges are in the mainstream of the Canadian legal culture, it does not assist us greatly in penetrating their particular social thinking. The rest of the writing by the judges could charitably be consigned to the genre of the after-dinner speech.

There is little writing in which the judges provide insights into their social thinking. Where such insights are to be found, they contain about what one would expect. Rinfret observed in 1956\textsuperscript{15} that religions are just different ways to "worship ... the same Supreme Being". Dickson in 1967\textsuperscript{16}, Cartwright in 1968\textsuperscript{17} Hall in

\textsuperscript{15} "Reminiscences from the Supreme Court of Canada" (1956) 3 McGill L.J. 1 at 4.


\textsuperscript{17} "An Address to Convocation" (1968) 2 Law Soc'y Gaz. 2.
1975,18 and Laskin in 1977,19 all came out against disrespect for the law. Rand spoke in 195420 about the methods Canada used to ensure "loyalty" and to keep vital secrets from disloyal people. He did this in an address titled "Man's Right to Knowledge and Its Free Use." Discussing the Civil Code of Quebec in 1952,21 Fauteux said that amongst its "'cardinal principles' were untrammeled freedom of dominion over the things one owns." At a grander level, Beetz opined in 197222 that "justice consists in giving everyone his due," while a year earlier Hall23 observed that "the courts and the legislature are pursuing the same ultimate goal — the common good of the people". De Grandpre24 attacked state-controlled legal aid schemes because they undermined the autonomy of the legal profession. If the legal profession gave up its autonomy, he believed, the public would lose confidence in the administration of justice. Rather more vigorous views were expressed by J.W. Estey and Chouinard. In 1940, as Attorney-General of Saskatchewan, Estey delivered a spirited attack on socialism.25 In 1950, he stressed the role of the Church in preserving the Charter of the United Nations.26 Chouinard, the senior advisor to Robert Bourassa during October 1970, and the first Progressive Conservative appointee since the Diefenbaker era, ran as a strong "law and order" candidate in

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19 "Public Perceptions of the Supreme Court of Canada" (Canadian Press Annual Dinner, Toronto, 20 April 1977).


22 "Reflections in Continuity and Change in Law Reform" (1972) 22 U.T.L.J. 129 at 140.

23 "Law Reform and the Judiciary's Role" (1972) 10 Osgoode Hall L.J. 399 at 406.


25 Regina Leader-Post (7 March 1941).

the federal election of 1968. He denounced the National Parole Board for leniency and claimed that the law was "soft" on criminals.\textsuperscript{27}

Heterodox public statements have been rare. In the 1967\textsuperscript{28}, speech referred to, Dickson said that the then fashionable challenge to authority was "not necessarily to be deplored." And he admonished the profession "to ensure that their concepts and practices and conduct stand the test of critical and continued scrutiny." On a less grand plan, W.Z. Estey\textsuperscript{29}, noted in 1981 that appeals were costly and that they could be a "weapon of tyranny in the hands of the economically stronger litigant." In the 1950's, Pigeon,\textsuperscript{30} long before he became a judge, called for the reform of labour laws and spoke in favour of the right to strike. Hall and Lamer have been the two most unusual members of the court. Hall was the Chair of the Royal Commission on Health Services which, in 1964, recommended the creation of a national system of health care. Indeed, his recommendations went beyond what was politically feasible at the time. And, although he was still a member of the Court, he publicly campaigned in favour of his Report when it ran into political difficulties.\textsuperscript{31} In 1968, the Ontario Committee on the Aims and Objectives for Education, of which he was Co-Chair, made its report.\textsuperscript{32} The Report was a blueprint for a root and branch re-ordering of education in Ontario. In 1971 Hall made a public speech in which he argued that a decent standard of living should be a legal right. He further suggested that Canada's freedoms were

\begin{flushleft}
\textsuperscript{27} Richard Cleroux, "Quiet Conservative, Chouinard, Joins Supreme Court Today" \textit{The Globe and Mail} (5 October 1979) at 10.

\textsuperscript{28} \textit{Supra}, note 16.

\textsuperscript{29} "Who Needs Courts?" (1981) 1 Windsor Y.B. Access Just. 263 at 278.

\textsuperscript{30} \textit{The Globe and Mail} (9 May 1957).

\textsuperscript{31} "Our Gentle Judge in the Supreme Court is a Man Who Cares" \textit{Toronto Star} (1 July 1972); Gruending, \textit{supra}, note 13 at 97.

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of little value to people without jobs. Lamer is rather less remarkable. Still, he was Chair of the Law Reform Commission of Canada between 1975 and 1978, a period when the Commission was being aggressively "liberal." In 1976 he spoke of the need to protect "the little guy."

To the extent that they have addressed the question, the judges have denied that their perspectives on social issues affect the way they discharge their judicial duties. Laskin was most vehement in this respect. In 1978 he took issue with widespread public criticism of the court's decisions in the CIGOL and Central Canada Potash cases. The view had been expressed in many quarters that these decisions demonstrated a centralist bias in the Supreme Court of Canada. He described this view as "reckless in its implication that we have considerable freedom to give voice to our personal predilections, and thus to political preferences." He denounced the suggestion that the judges might represent certain social interests "I know of no better way to subvert our judicial system."

In 1982, Laskin carried this point a step further and seemed to demand that Canadian judges behave as if they had no opinions at all on social issues. As a result of critical comments he had made about the Government of Canada's proposals for the "patriation" of the Canadian constitution, Mr. Justice Thomas Berger of the British Columbia Supreme Court was investigated by the Canadian Judicial Council. The Council decided that Berger's behaviour was

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33 Supra, note 31.

34 Montreal Gazette (29 March 1980). See also, Monopoli, "Lamer Brings Reform-Minded Record to Supreme Court" Financial Post (26 April 1980) 3.


38 "Judicial Integrity and the Supreme Court of Canada" (1978) 12 Law Soc'y Gaz. 116 at 121.
"indiscreet", but not so heinous as to support a recommendation that he be removed from office. This does not seem to have satisfied Laskin. In September of 1982 he made a public speech in which he said, "a judge who feels so strongly on political issues that he must speak out is best advised to resign from the bench." Three months later Berger decided to resign. In his letter of resignation Berger made reference to Laskin’s public criticism of him.

An obituary written after Laskin’s death made the point that Laskin took the stand he did because of his belief that "public respect for the law required great public confidence in the impartiality of the judiciary." Interestingly enough, Hall, by then retired, contacted Berger during the period he was under investigation and offered to make a public statement on his behalf.

The issue arose again in 1986. Dickson delivered a speech at the University of British Columbia on the theme, "The Importance of Universities". He made some unremarkable observations about universities and then went on to criticise both the Government of Canada and provincial governments for failing to fund universities adequately. He observed: "Please do not choke off the funding of universities" and "education is too important to be left to ministers of finance." The Globe and Mail was not amused. An editorial suggested that by letting the world know they had opinions on "political" matters, the judges might undermine the perception that they were impartial. The editorial seemed to regard


42 Gruending, supra, note 13 at 180.

43 Brian Dickson, C.J.C., "Congregation Address Delivered by the Right Honourable Brian Dickson at the University of British Columbia, 30 May 1986" (Convocation, University of British Columbia, 30 May 1986) [unpublished].
Laskin's earlier expression of his personal opinion about public utterances by judges as a formal canon of judicial behaviour.\textsuperscript{44}

Even as apparently consistent a judge as Martland stated in an interview given after his retirement that he had never consciously developed a judicial philosophy. He did, however, accept that such a philosophy was bound to develop implicitly and that it would be affected by the individual judge's background.\textsuperscript{45}

Sopinka expressed the traditional view on his appointment in 1988: "I don't think I'll decide cases on the basis of my own personal predilections -- at least that's what I'll strive to do."\textsuperscript{46}

Wilson has conceded, in a departure from the established tradition, that there may be factors other than the law which enter into judicial decision-making. She wrote:

All judges would like to think that their decisions, as well as constituting a proper application of legal principles, reflect current notions of what is right and fair. The difficulty, however, is to determine what current notions of justice and fairness are.\textsuperscript{47}

She did not admit, of course, that the judge's personal opinions or values might enter into a decision and refers instead to "current notions." This is itself an ideological formulation since it denies "current notions" any social context.

As a corollary to the notion that their values and attitudes do not directly obtrude into their judging, the judges appear to believe their role in the creation of law is limited. They reluctantly admit that they do change the law, but argue that they do so only on the margin and in an incremental fashion. "The law must be certain", said Hall.\textsuperscript{48} Pigeon believed that courts do not make

\textsuperscript{44} "A Judge Speaks Out" \textit{The Globe and Mail} (3 June 1986) 6.

\textsuperscript{45} Monopoli, "View from Inside the Supreme Court of Canada" \textit{Financial Post} (27 March 1982) 17.

\textsuperscript{46} Schmitz, "Prime Minister Appoints Lawyer to S.C.C." \textit{The Lawyers Weekly} (3 June 1988).


\textsuperscript{48} Supra, note 23 at 406.
policy;\textsuperscript{49} Dickson argued "judges do make law, but ... their law-making power is a limited one.\textsuperscript{50}

2. Writing about Judges

Professional and academic writing about the Supreme Court of Canada tends, like the writing of the judges themselves, to be devoted to doctrinal questions. The most critical writing has been directed at those decisions in which the court favoured police powers at the expense of the rights of citizens. But little attempt has been made to analyze the work of the Court in terms of the class background and class orientation of its members. The norm seems to be simply to rehearse the doctrinal criticism that a given decision is "wrong" (or "right").

A recent monograph by James G. Snell & Frederick Vaughan, \textit{The Supreme Court of Canada: History of the Institution},\textsuperscript{51} is very much in this disappointing tradition. The book is long on information and short on analysis. The authors have a penchant for making valid observations like "Wilson had an incisive legal mind"\textsuperscript{52} or "a basic deep-seated judicial conservatism remains."\textsuperscript{53} An interesting exception is a 1951 piece by John Willis in which he suggested that the result reached in one case owed more to the judges' attachment to the maintenance of a capitalist economy than to legal doctrine.\textsuperscript{54}

Such journalistic writing as exists about the judges of the Supreme Court of Canada offers little assistance. This is, in part, because reporters, who are properly cynical and disrespectful towards politicians and athletes, turn to jelly in the presence of judges. It is

\textsuperscript{49} Monopoli, "View from the Supreme Court" \textit{Financial Post} (22 March 1980) 25.


\textsuperscript{51} \textit{Supra}, note 10.

\textsuperscript{52} \textit{Ibid.} at 236.

\textsuperscript{53} \textit{Ibid.} at 241.

\textsuperscript{54} "Case Comment" (1951) 29 Can. Bar Rev. 296.
equally so because judges, on those few occasions when they have consented to talk to reporters, have not been forthcoming. Canadian judges refuse, in particular, to talk to journalists about judgments, dismissing questions with the grand observation that "the judgment speaks for itself." Journalists seem appropriately reluctant to rejoin that if a judgment really did speak for itself, there would be no need to raise questions about it.

As a result, the popular writing is very superficial. It usually amounts to dividing judges into "liberals" and "conservatives" or "activists" and "non-activists," with the odd bit of lawyer gossip thrown in for background. A recent biography of Hall described him as "an unrepentant liberal on a generally conservative court". Barbara Amiel provided the readers of Maclean's with profound insights into the inner workings of the Court, such as revealing that Laskin, Spence, and Dickson tended to be activists. Or another writer could make the meaningless statement that Dickson was "a key swing vote." A Globe and Mail editorial commenting on Dickson's appointment as Chief Justice remarked that he was "less inclined than [Laskin] to strike down bad laws." In 1986, a well-informed observer was able to opine in a similar vein that the Court was splitting into "progressive" and "conservative" wings. Most recently, press reports on the appointment of L'Heureux-Dube described her as "aggressive."

55 Gruending, supra, note 13 at 131.
58 "Judge Dickson's Day" Globe and Mail (20 April 1984) 3.
59 Calami, "The 'Dickson' Court's First Year" Ottawa Citizen (4 August 1986).
60 "Top Court Not First Challenge" The London Free Press (5 May 1987).
3. Some Observations

Three conclusions suggest themselves in this section. First, to state the obvious, the judges have beliefs, ideas and values. Second, it is not easy to discern precisely what those are. Third, the judges do not believe that their ideas determine or influence the way they deal with cases. They prefer to believe that the results in particular cases are determined by the application of legal principles.

Now to anyone with the slightest acquaintance with psychology, or epistemology, or sociology, or history, this is hard to accept. But it is made easier if one realises that the premises outlined above are an accurate description of the dominant Canadian ideology about judging. The judges, in my opinion, are not lying. They really believe the ideology about themselves.

There is an interesting parallel with journalists. The essence of the dominant ideology amongst journalists is the notion of objectivity. Journalists believe passionately that they can be, and are in fact, objective when covering stories. Judges can, like Thomas Berger, be sanctioned for threatening the notion of neutrality by revealing that they have ideas. Journalists, likewise, can be punished for undermining the perception of their own objectivity when they take public positions on matters of political controversy.61

Let me offer two illustrations of the judges' commitment to the judicial ideology. In 1981, Dickson addressed a meeting of the Manitoba Bar Association. The title of his address was "The Judiciary: Law Interpreters or Law-Makers." In attempting to define the limits of judicial law-making he quoted from one of his own judgments:

The duty of the court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decisions and established concepts. I do not for a moment doubt the power of the court to act creatively—it has done so on countless occasions; but manifestly one must ask—what are the limits of the judicial function.62

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62 Supra, note 49 at 1.
Fine. What does all this mean concretely? The case in question was *Harrison v. Carswell*. It involved a determination of the ambit of the authority of the proprietor of a shopping-mall over persons — in this case, striking workers — using the mall. The Supreme Court was being asked to rule that, consistent with the approach adopted in the U.S., while a shopping-mall was, as a matter of strict form, private property, it could be regarded, for certain purposes, as public space. To rule in this manner, the Court would have had to engage in some law-making. But Dickson, who is, and we have it on the authority of Barbara Amiel, an activist, refused to do so. Why?

Well, the shopping-mall in question was located in Winnipeg. And, prior to his initial appointment to the bench in Manitoba, Brian Dickson had practised law in Winnipeg. He made his reputation in the corporate and commercial area and had often acted as lawyer for real estate developers. Now, I do not wish for an instant to suggest that Dickson was directly influenced in his decision in *Harrison*. But is it not conceivable that his years of representing real estate developers might have, implicitly but implacably, predisposed Dickson to view the facts in *Harrison* in a certain light? One might, similarly, question whether Laskin’s extensive experience in the labour relations field before becoming a judge did not predispose him towards his dissenting conclusions in *Harrison*.

I am sure that Dickson (and most Canadian judges) would regard the suggestion I have just made as outrageous (if not contemptuous). But it strikes me that to anyone who was not a Canadian lawyer my analysis would appear trite and obvious.

The traditional view has been expressed by Wilson. Her explanation of the case is that,

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64 *Supra*, note 55.

65 In one of their few attempts at analysis, Snell and Vaughan observe that Cartwright’s experience as a defence counsel and Fauteux’s experience as a prosecutor may have affected the way in which each approached criminal cases. *Supra*, note 10 at 208.
these two sets of reasons ... demonstrate how very eminent judges can hold differing views on the proper scope of judicial law-making power. Which one the judge prefers will probably depend on the view he or she takes of the doctrine of precedent.66

The case is, as a result, stripped of all social content.

The second illustration has to do with L'Heureux-Dube, the Court's junior judge. When her appointment was announced, L'Heureux-Dube said to a reporter, "I can tell you I'm for justice. Whether it be left, right, or centre, that all that counts." Here, of course, she has distilled the essence of the ideological role of the law, and of judges, in Canada. There may be politics, and politics may respond to social divisions, but the law and "justice" are apart from, and above, anything so sordid. The law, again, is neutral. Dickson realised how clearly L'Heureux-Dube had understood her job on the court. At her swearing in he observed, "In my opinion this is a worthy statement of the ultimate, perhaps the only, role for the Supreme Court of Canada."67

Supreme Court of Canada judges live in a highly ideological world. They believe things about themselves and their work which are intellectually doubtful and which ordinary mortals would regard as astounding. Nonetheless, these are things which the judges actually and honestly believe. As Mr. Justice Robins of the Supreme Court of Ontario recently put it, "A judge must rise above his own prejudice, his own preoccupations, and his own predilections."68

It might be argued that, since this belief on the part of the judges is so clearly implausible, one should devise means of discerning what they actually do think about the way they make decisions. Some work has been done in this direction in the United States and the U.K. But there are serious problems with it. First, I believe the U.S. work is methodologically suspect and, as a result, yields insights which should have been self-evident. To take but one

66 Supra, note 46 at 233.
67 Supra, note 59.
example, it leads to such revealing conclusions as "liberal" judges are more lenient in sentencing criminals than "conservative" judges.\(^6\) Second, the work that has been done in the U.K.\(^7\) is concerned primarily with judicial administration rather than with the intellectual processes that lead judges to particular results. Finally, I have little doubt that Canadian judges would simply refuse to take part in any such study.\(^7\)

It is in the context of this ideological perception about judging that Laskin's vehement reaction to Mr. Justice Berger's statements about the 1981 package of constitutional reforms becomes more intelligible. To repeat, Berger's sin was to reveal that judges actually did have opinions. Given the prevailing ideology about judicial neutrality, this was a profound subversive act on Berger's part. And as the chief guardian of the Canadian judiciary, Laskin took appropriate action.

B. Judgments

I will begin this part by outlining the methodological difficulties that were encountered.

The basic difficulty is one alluded to in the preceding section. If there is one consistent thread in the judges' perception of their own social predilections it is that these in no way affect the way they approach actual cases. Let me put it another way. To the extent that the notions of Supreme Court of Canada judges about law and, more precisely, about judging can be discovered, these notions can be summarised as unvarnished, classical positivism. The judges appear to believe that all they do is apply the relevant law to the facts and, thereby, reach a result. The idea that each judge might through education, a professional career, political activity — through a lifelong process of socialisation — have acquired attitudes,


\(^7\) See Alan Paterson, The Law Lords (London: MacMillan, 1982).

\(^7\) In fact, when one of my students requested permission in 1984 to interview judges of a superior court, the request was denied.
perceptions, priorities, prejudices and that these might profoundly shape that individual's behaviour, and especially his judging, is not only rejected, but is regarded as subversive.\textsuperscript{72}

This is the methodological problem. Since, in writing their judgments, the judges do not state the social objectives which they are seeking to further, and indeed expressly deny the existence of any such objectives, what useful and scientifically valid information can be extracted from their judgments? Let me offer two illustrations of the problem. First, the Supreme Court of Canada has rendered two decisions — \textit{R. v. Morgentaler}\textsuperscript{73} and \textit{Minister of Justice v. Borowski}\textsuperscript{74} which concerned abortion. I assume, because I cannot imagine otherwise, that the judges who took part in hearing these appeals had personal beliefs about the desirability or otherwise of abortion. Yet in neither of these decisions do the judges express opinions about abortion itself.

For our second illustration we must cross the Atlantic. Lord Denning's judgments have been regarded as fine legal literature. In none of them does he make express statements that could lead one to conclude he was a racist. Yet, certain passages apparently in the first printing of his book \textit{What Nest in the Law?} suggested to some that he was.\textsuperscript{75} We may not like the obfuscating style in which judgments are written, but it works.

One could rely heavily on inference. But, in so doing, one would merely be reading one's own beliefs back into the judgments. For example, it could be said, as many have, that Rand was a champion of democratic rights. From a different perspective, however, one could read the decision in \textit{Winner v. S.M.T. (Eastern) Ltd.}\textsuperscript{76} and say equally well that he was simply a strong supporter of

\textsuperscript{72} I am not, here, simply trying to repeat the insights of realist jurisprudence. The realists demonstrated the serious failings of positivist jurisprudence, but they neglected to explore the social significance of their own insights.

\textsuperscript{73} [1976] 1 S.C.R. 616.

\textsuperscript{74} [1981] 2 S.C.R. 575.

\textsuperscript{75} See Gibb, "Denning Jury Reforms Anger Black Lawyers" \textit{The Times} (22 May 1982).

\textsuperscript{76} [1951] S.C.R. 887.
a "free market" economy. One might also look at the series of civil liberties cases from Quebec in the 1950s\textsuperscript{77} and conclude that Rand was merely expressing hostility towards Quebecois nationalism.

One could read the judgment in \textit{Switzman v. Elbling and A.G. Quebec}\textsuperscript{78} and say that Taschereau was anti-Communist, but this is an observation which, I am confident, could be made about every one of the judges.

One might begin with the presumption that the Supreme Court of Canada would exhibit an anti-working class bias. Such a bias could be inferred from a handful of cases.\textsuperscript{79} But again one would have to rely far too heavily on inference. More important, the number of cases involving working class litigants which actually gets to the Supreme Court is so small as to render any conclusions open to doubt.

The journalistic dichotomies between "liberals" and "conservatives" or "activists" and "non-activists" are revealed, on closer inspection of the cases, to be unhelpful. Ritchie is generally regarded as "conservative." Yet when it comes to questions involving Aboriginal peoples, as in \textit{R. v. Drybones},\textsuperscript{80} \textit{Athabasca Tribal Council v. Amoco Canada},\textsuperscript{81} and \textit{Four B Manufacturing Ltd v. United Central Garment Workers},\textsuperscript{82} he has been positively "liberal." Similarly, Laskin, the darling of proponents of "activism," was anything but activist in \textit{Reference re Anti-Inflation Act},\textsuperscript{83} Seneca


\textsuperscript{78} Supra, note 76.


\textsuperscript{81} [1981] 1 S.C.R. 699.

\textsuperscript{82} [1980] 1 S.C.R. 1031.

Conversely, one can point to few judgments which are more "activist" in their implications than the dissenting views of Martland and Ritchie in the *Patriation Reference*. Conversely, one can point to few judgments which are more "activist" in their implications than the dissenting views of Martland and Ritchie in the *Patriation Reference*.88 I am not criticising particular judges for being "conservative" (or "liberal") or "activist" (or "non-activist"). I am saying that these adjectives are of no analytical value and dangerously misleading.89

My point is that the usual methods of categorising judgments tell us little, if anything, about the way judges think. Still, absent express statements from the judges themselves, inference becomes the researcher’s only tool. In my considered opinion, there are two kinds of cases from which one can make legitimate inferences about the social thought of Supreme Court of Canada judges. These are, first, cases that raise questions about the place of women in Canadian society, and, secondly, cases where the Court has had to make a choice between the rights of individuals and the powers of the police. These cases suggest two conclusions. First, and more important for this essay, judges, however much they may deny it, do have opinions on social issues and these opinions are a factor in the way they decide cases. Secondly, the opinions of the judges tend to favour the maintenance of existing social relationships and practices.

Finally, I think that the style in which Supreme Court of Canada judgments are written is relevant. While an analysis of this phenomenon will not shed any new light on the thought of the judges, it will buttress some of my other assertions.

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87 *Supra*, note 74.
1. Women

The judges have not, as some might have expected, manifested an expressly sexist bias. The approach has been both more subtle and more consistent with the traditions of the Supreme Court. Where women have made claims that they have been the objects of discrimination on the basis of gender, the judges have simply denied the existence of such discrimination.\(^\text{90}\)

It should not be necessary here to engage in a detailed discussion of the cases. They are, with good reason, notorious. I will simply point out how the cases support my assertion. The cases are *A.G. Canada v. Lavell*,\(^\text{91}\) *Murdoch v. Murdoch*,\(^\text{92}\) *Bliss v, A.G. of Canada*,\(^\text{93}\) and *Leatherdale v. Leatherdale*.\(^\text{94}\)

*Lavell*, to the extent that it is relevant, involved a claim by an Indian woman that the former section 12(1)(b) of the *Indian Act*\(^\text{95}\) denied her equality before the law on the basis of sex, contrary to the *Canadian Bill of Rights*. Counsel for Lavell obviously hoped to build on the Court’s decision in *Drybones*. Just as the Court had in that case set itself against discrimination on the basis of race, so in this case, it was hoped, it would strike down discrimination on the basis of gender. Ritchie finessed this argument. He denied that any discrimination had occurred:

> The fundamental distinction between the present case and that of *Drybones*, however, appears to me to be that the impugned section in the latter case could not be enforced without denying equality of treatment in the administration and

\(^\text{90}\) This section is inspired by McDonald, "The Supreme Court of Canada and the Equality Guarantee in the Charter" (1984) 2 Socialist Stud. 45.


enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment flows as a necessary result of the application of s. 12(1)(b) of the Indian Act.

In favour of the decision in *Murdoch* it can be said that it galvanised the women’s movement in Canada. Once again, the judges did not manifest an express bias against women. But the judgments of the majority do demonstrate a complete inability to grasp the nature and meaning, or even the existence, of women’s claims to equality of treatment. The judges seemed to believe that it was the duty of a wife to contribute her labour to the enhancement of her husband’s property. They seemed, further, unable to grasp that a wife might have a legitimate claim against that property. The majority appeared to view the forced subservience of women as arising, not from the operation of legal and social mechanisms, but from the laws of nature.96

*Bliss* is breathtaking. Section 46 of the Unemployment Insurance Act97 clearly discriminated between men and women. Again, the majority avoided confronting this unpleasant reality by conceptualizing the discrimination out of existence. Unemployed pregnant women were to be treated in the same way as unemployed pregnant men and Parliament could hardly be blamed if it happened that all the people who went out and got themselves pregnant were women. The judgment stated, "Any inequality between the sexes in this area is not created by legislation but by nature."98

*Murdoch* led to the legislation governing the distribution of family assets being changed. But *Leatherdale* demonstrated how difficult it can be to move determined judges. Once again, the judges would not recognise the work of the wife in the home as commensurate with the work of the husband outside the home. Once again, the majority did not manifest an expressly sexist bias,

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96 One must, to be fair, refer here to *Petkus v. Becker*, [1980] 2 S.C.R. 834, where a majority was willing to find a constructive trust in favour of a common law wife. It turned out, however, that Ms. Becker enjoyed none of the benefits of this decision. Her award was eaten up by lawyers and, in frustration, she committed suicide.


98 *Bliss*, supra, note 93 at 190.
but merely adopted an interpretation of the law which reinforced
the subordinate position of women.

2. The Police

It is here that the judges have come closest to making
express statements of social belief. The trend of the Court, at least
between 1949 and the advent of the Charter had been to offer
support to the police, at almost any cost. The judges promoted the
expansion of police powers at the expense of individual rights and
freedoms in their interpretation both of statutes and common law
principles.99

In case after case, the Court altered the common law,
promulgated new doctrine, or misread statutes — all in order to
accede to the ostensible needs of the police. Rothman v. R.100 is a
striking illustration. Lamer, in allowing the admission into evidence
of information obtained through a police trick, came very close to
saying that the police should not be required to obey the law "in
dealing with shrewd and often sophisticated criminals". He did go
so far as to hold that the police should not be "hampered in their
work". In R. v. Biron101 the Court radically expanded the scope of
the police power to arrest without a warrant. The Court amended
the words "finds committing" in section 450(1)(b) of the Criminal
Code102 to read "apparently finds committing." In the process the
judges also disregarded several hundred years of development in the
common law. Eccles v. Bourque103 and R. v. Stenning104 both dealt

99 This section draws heavily on Solomon, "Drug Enforcement Powers and the Canadian
Charter of Rights and Freedom" (1983) 21 U.W.O.L. Rev. 219, as well as conversations with
its author.

100 (1981), 121 D.L.R. (3d) 578.


103 (1975), 50 D.L.R. (3d) 753.

with police entry without a search warrant onto private premises. In *Eccles* the Court held that the police could forcibly enter a dwelling-place without a warrant to search for a wanted person. In *Stenning* the judges decided that the standard by which to assess police behaviour was reasonableness, not the strict terms of the law. When it comes to the requirements of police work, a Canadian's home is no longer his or her castle and the legality principle can be safely jettisoned.

Citizens in a democratic state should be free to move about in public without police harassment. *Chromiak v. R.*[^105] and *Moore v. R.*[^106] raise serious questions about whether this right still exists in Canada. *Chromiak* blurred the distinction between being free and being under arrest. The judges said that a person could be free, but nonetheless subject to the authority and control of the police; not under arrest, but denied the rights of an arrested person.[^107] In *Moore*, the assumed common law right to remain silent in the face of the police was swept aside to maintain their authority.

The existing powers which permit the police to legally wiretap private conversations are, in my view, unacceptably broad for a democratic society. In *R. v. Commisso*[^108] the Supreme Court of Canada interpreted these powers so as to broaden them further.

I have only briefly surveyed some of the more egregious decisions. It is not necessary to duplicate Tarnopolsky's meticulous dissection of how judges rendered the procedural guarantees in the *Canadian Bill of Rights* meaningless.[^109] Grant's comment on the


[^107]: In fairness again it must be recorded that the court rejected this approach in *Therens*, [1985] 1 S.C.R. 613.


[^109]: See *The Canadian Bill of Rights*, 2d ed. (Toronto, 1975) esp. at c. VII.
Supreme Court’s decision in *Hogan v. R.*\(^{110}\) is, however, worth repeating, "a totalitarian state could ask for little better."\(^{111}\)

What this section has attempted to demonstrate is that, contrary to what they appear to believe about themselves, the judges do have social beliefs and those beliefs do have an influence on the way they decide cases.\(^{112}\)

3. The Style of Judgment Writing

Karl Llewellyn suggested there were two styles to be discerned in the fashioning of appellate opinions—the Grand Style and the Formal Style.\(^{113}\) A judgment written in the Grand Style concerns itself with the broad sweep of legal principles and social policies. The Formal Style is analytical, leading the reader through a logical parsing of the minutiae of legal doctrine. With the exception of passages in some of Rand’s judgments, and taking into account a less strict attachment to it on the part of the francophone judges, formalism has reigned in the Supreme Court of Canada. The importance of the judges' preference for the Formal Style lies, for present purposes, in the way the style reinforces ideological conceptions about the judicial role. As a literary form, the Formal Style proclaims the truth of the positivist view of judging. Judging really is nothing more nor less than a matter of sifting through the appropriate legal rules until the correct results reveals itself. A judge employing the Formal Style is better able to keep hidden from the reader, and from himself, the true nature of what he is doing.\(^{114}\) As Marc Gold put it, "formalism is a rhetorical style that obscures


\(^{112}\) Although this methodology has been much criticized, Peck sought to make a similar point, see "The Supreme Court of Canada, 1958-1966: A Search for Policy Through Scalogram Analysis" (1967) 45 Can. Bar Rev. 666.


\(^{114}\) See, for example, Stark, "Why Lawyers Can't Write" (1984) 97 Harv. L. Rev. 1389.
the true basis of a court's decision while enabling the court to appear as if it were acting impartially.\textsuperscript{115}

The Formal Style has been the style of opinion-writing in the Supreme Court of Canada.\textsuperscript{116} This is, surely, not fortuitous. The determinedly obfuscating way Supreme Court judgments are written is consonant with the ideological imperatives which inform the court's work. The Formal Style gives the appearance of confirming judicial neutrality.

The Formal Style is fitting for a judiciary which agrees with the dominant ideology.\textsuperscript{117} Formalism is a comfortable style for judges who are satisfied with existing social relations.

4. The \textit{Charter}

It is beyond argument that there has been a substantial formal change in the judicial function since the adoption of the \textit{Charter}. We have moved from a political system based on parliamentary supremacy to one based on constitutional supremacy.\textsuperscript{118} Practically speaking, this means that the grounds upon which judges may review both legislative and executive acts has been broadened. The judges have become, as Dickson put it in one case, the "guardians of the constitution."\textsuperscript{119}

But has the social role of the judges been changed? More precisely, has there been a change in the ideological responsibilities


\textsuperscript{116} On the origins of formalism in the Canadian legal system, see the magisterial article, Blaine Baker, "The Reconstitution of Upper Canadian Legal Through in the Late-Victorian Empire" (1985) 3 Law & Hist. Rev. 219.


\textsuperscript{118} The textual basis for this change is s. 52 of the \textit{Constitution Act}, 1982. See the interesting analysis in Del Buono, "The Implications of the Supreme Court's Purpose Interpretation of the \textit{Charter}" (1986) 48 C.R. (3d) 121.

\textsuperscript{119} \textit{Hunter v. Southam Inc.}, [1984] 2 S.C.R. 144 at 169.
of the judges or in the ideology with which they surround these responsibilities? The answer is a resounding no.

The clear objective tendency of Charter cases has been in favour of the dominant class. The major beneficiaries of Charter litigation have been corporations. Corporations have been granted the standing to bring Charter actions before the courts. Their claims to the rights set out in the Charter have been upheld. The result has been that the judges have enabled corporations to use the Charter to successfully challenge various forms of state regulation.120

And while the courts have been willing to permit corporations to enjoy the rights set out in the Charter, it has been held that those same rights do not apply as against corporations, that they impose no restrictions on the freedom of action of corporations. Thus, corporations get all the benefits, but none of the burdens, of the Charter.121

It is consistent with this tendency that trade unions have been major losers in Charter litigation. The "freedom of association" in section 2(d) of the Charter has been interpreted by the Supreme Court to be simply that: a freedom to associate, but no more. Workers may form trade unions and belong to them. But trade unions have no constitutional rights to bargain collectively or to strike.122

The truly amazing thing is the judges continue to act as if nothing had happened. Although they openly accept that they are now playing an expanded and explicit role in formulating social policy,123 their commitment to the notion of judicial neutrality remains unchanged. They are simply, as McIntyre put it, "neutral


The only thing that has changed, albeit slightly, is the way in which they now express that commitment.

Just as previously the judges had portrayed themselves as the passive means through which the law expressed itself, they now claim they are simply implementing the dictates of the Constitution. To the outside observer the judges have used the Charter to justify the almost whimsical imposition of their own values and priorities on Canadian society. But the judges themselves blithely deny it.

The decisions in Reference re Section 94(2) of the [B.C.] Motor Vehicle Act, especially that of Lamer, illustrate the current approach. The section created an absolute liability offence of driving while prohibited or while one's licence was suspended. An individual could be convicted even though he or she had not been aware of the prohibition or suspension. The minimum punishment for this offence was seven days imprisonment. The question before the Supreme Court was whether this provision violated the guarantee of "life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice" in section 7 of the Charter.

The judges struck the B.C. law down. In so doing they clearly gave themselves the authority to invalidate laws that conflicted with their notions of right and wrong, but denied that this was what they were doing. Lamer gave it all away in the first sentence of his judgment: "A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice...." What exactly are the "principles of fundamental justice?" Lamer was not sure. But that really did not matter, for, "the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public

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124 Supra, note 119 at 600.


126 Ibid. at 541.
policy but in the inherent domain of the judiciary as guardian of the justice system.\textsuperscript{127}

Was not Lamer merely substituting his own personal social preferences for those of the B.C. legislature? Of course not. "Content of legislation has always been considered in constitutional adjudication".\textsuperscript{128} But that did not mean the courts could resolve issues of public policy. "In neither case, be it before or after the Charter, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments".\textsuperscript{129}

A further illustration can be found in \textit{R. v. Oakes}.\textsuperscript{130} In this case the court formulated the approach to be taken in applying section 1 of the \textit{Charter}. Before looking at what the court did, it must be understood that determination of whether a limit on a guaranteed right is "justified in a free and democratic society" is inherently and inescapably political. But the approach set out by Dickson substantially obscures this. By couching a social value judgment in obfuscating language, Dickson made it appear that the judges, once again, were merely carrying out a technical function.

Dickson stated that a court must first look to the objective sought to be achieved through the limit on a \textit{Charter} right. Is it "of sufficient importance to warrant overriding a constitutionally protected right or freedom"? How does a court decide that an objective is "sufficiently important"? The objective must "relate to concerns which are pressing and substantial in a free and democratic society". Which concerns are "pressing and substantial"? We are not told.

If the objective passes muster, then the court looks to the means adopted to achieve the objective. The court must decide whether the means are "proportionate" to the objective. The words used by Dickson lend an air of scientific detachment to the

\textsuperscript{127} Ibid. at 550.

\textsuperscript{128} Ibid. at 544.

\textsuperscript{129} Ibid.

\textsuperscript{130} [1986] 1 S.C.R. 103.
exercise.\textsuperscript{131} The approach set out has come to be called the "Oakes test" by lawyers and judges, the word test confirming its success as ideology.

Wilson has decided to take a different approach. She no longer claims to be merely the conduit through which the Constitution expresses itself. She has expressly stated the social objectives which direct her decisions and then proceeded to give effect to them.

Wilson's approach is a profound departure from the received ideology of judging in Canada. It is set out in her decision in\textit{ Morgentaler v. R.}\textsuperscript{132} This was the case in which the Supreme Court of Canada assessed the constitutionality of the abortion provisions in the \textit{Criminal Code}. As they had done in earlier cases,\textsuperscript{133} the judges, other than Wilson, denied they were passing judgment on abortion. As McIntyre put it,

\begin{quote}
The task of the court in this case is not to solve, nor seek to solve what might be called the abortion issue, but simply to measure the content of section 251 against the \textit{Charter}.\textsuperscript{134}
\end{quote}

Again, the judges are performing a purely technical, neutral function.

But not Wilson. She claimed to find in the \textit{Charter} both a philosophy and a programme for the ordering of society. The \textit{Charter} defined the proper relationship between the state and the individual and in so doing "erect(ed) around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass".\textsuperscript{135} She is thus able to discern that the \textit{Charter} guarantees "the right to make fundamental personal

\begin{footnotes}
\item[131] \textit{Ibid.} at 138-140.
\item[133] \textit{Supra}, notes 73, 74.
\item[134] \textit{Supra}, note 131 at 465.
\item[135] \textit{Ibid.} at 485.
\end{footnotes}
decisions without interference from the state\textsuperscript{136} even though there is no reference whatsoever to this principle in the text of the \textit{Charter}. From this point Wilson need take only a short step in order to recognise a general right to privacy, to a constitutionally-based guarantee of individual autonomy. The point is not whether Wilson is "right" or "wrong". It is that she has eschewed the principle of judicial neutrality. She has openly declared her allegiance to a libertarian social philosophy and, more important, to implementing that philosophy in her judging.

Not only does the ideology continue to baffle the judges; it seems to retain its hold on the minds of many academic commentators. Although it is by no means unique, a recent article by F.L. Morton, "The Political Impact of the \textit{Canadian Charter of Rights and Freedoms}\textsuperscript{137} is a good example. Morton applauds the energetic approach the Supreme Court has taken to \textit{Charter} cases:

> The impact of the \textit{Charter} on judicial behaviour has been dramatic. Both in their words and in their deeds, Canadian judges have begun to carve out a bold new constitutional jurisprudence.\textsuperscript{138}

He notes the impressive success rate achieved by litigants who rely on the \textit{Charter}, especially in the Supreme Court. He reviews some of the major decisions, but nowhere seeks to analyze the social, which is to say, class, interests involved in them. More important, there is no discussion of the judges themselves, no attempt to suggest why they decided cases in the ways they did. Morton concludes his essay by arguing that in Canada we now have "constitutional supremacy", not "judicial supremacy." The implication is that we continue to have socially neutral judges who are doing nothing more than attempting to ensure that the \textit{Constitution} is obeyed.

From the 1880s until 1937 the Supreme Court of the U.S. was in the vanguard of reaction. The judges claimed to be upholding the Constitution; in fact they were striking down laws

\textsuperscript{136} \textit{Ibid.} at 486.


\textsuperscript{138} \textit{Ibid.} at 34.
which made even minimal concessions to working class political demands.\textsuperscript{139} There are hints in some of the cases that our courts may be entering a similar phase. The ideology about judging seriously inhibits our ability to perceive this.

IV. CONCLUSION

The law is, amongst other things, a major element in the development and maintenance of ideology.\textsuperscript{140} The central ideological precept of the Canadian legal system is the notion of equality. All citizens are formal equals in the eyes of the law. The administration of justice must, as a necessary corollary to this precept, be perceived as neutral. The judge must be seen as dispassionately applying the law, and nothing but the law. Were judges to be seen to be enforcing their own ideas or beliefs — their own social priorities — the ideology would be revealed as ... ideology. The peculiar ideological conditions which exist in Canada, then, dictate the approach taken by the judges of the Supreme Court of Canada. Of course the judges do have positions on social issues, but the ideology of the legal system demands that they strive to behave as if they did not.

The judges belong to a social class — the dominant class in Canadian society. They contribute to the dominance of that class by behaving on the bench as if they were socially neutral. They thus play their peculiar class role by acting so as to deny the very existence of class.
