Judicial Process in the Supreme Court of Canada: The Patriation Reference and Its Implications for the Charter of Rights

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Debates about the proper role of judges in Canada have taken on a new, exciting dimension because of the 1982 amendments to the Canadian Constitution. The "quasi-entrenchment" of certain rights in the Constitution will cast Canadian courts in a new and unfamiliar role. While the mere mention of the role of courts arouses legal academics, it has traditionally sent practitioners scurrying for cover. This should no longer be true, as judicial strategies will be as important as the words of the Canadian Charter of Rights itself.

The fate of the Charter of Rights rests squarely with the judges who will be called upon to interpret it. Judicial attitudes and methodologies are crucial to the effective implementation of any bill of rights. There has been much discussion about the exact wording of the Charter of Rights and the strengths and weaknesses of its legislative drafting but the document itself is only a beginning. Canada’s judiciary and in particular, the Supreme Court of Canada will either breathe life into the Charter of Rights, or reduce it to a hollow promise of things that might have been.

I. THE TRADITIONAL ROLE OF COURTS IN CANADA

It is timely to reconsider the role of judges in Canada. This paper focuses upon the Supreme Court of Canada, and assesses its past and present performance in order to make predictions about its future role as interpreter of the Charter of Rights. The focus is justified by the importance of the Supreme Court as Canada’s final appellate court. There is no intent to diminish the im-

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1 This term is used because the override provision in section 33 of the Canadian Charter of Rights and Freedoms Part I (ss. 1-34) of the Constitution Act, 1982, Sched. B of the Canada Act 1982, c. 11 (U.K.), [hereinafter referred to as the Charter] makes the entrenchment of rights conditional. Courts and legislatures are invited to jointly give shape to the Charter. Whether this is a futile attempt to “have your cake and eat it too” remains to be seen.

Portance of the front line trial judges and the provincial courts of appeal. Many cases never go beyond trial, if indeed they get to court at all. Litigants often cannot afford to pursue their case on appeal. Furthermore, trial courts are not always as mindful of the judicial hierarchy as is commonly believed. Lower courts demonstrated their ability to sabotage a Supreme Court strategy in the American struggle to desegregate schools. But lower courts and their significance for the Charter of Rights is a topic for another day.

Focus upon the Canadian Supreme Court is also timely in another respect. The patriation of the Canadian Constitution has been described as the removal of the last vestiges of British colonialism. Canada removed her badge of judicial colonialism much earlier than her legislative one. When appeals to the Judicial Committee of the Privy Council were abolished in 1949 a flurry of scholarly writing speculated about the reaction of the Supreme Court to its new found freedom and independence. A similar interest in the Supreme Court of Canada will undoubtedly be rekindled by placing the Charter of Rights in the Court’s lap. Interest in the Court coincides with assertions of Canadian independence.

The abolition of Privy Council appeals in 1949 was not free from controversy. Indeed, there was a concerted effort in the House of Commons to legislate stare decisis, so as to bind the Canadian Supreme Court by past decisions of the Privy Council and future decisions of the Court itself. Most Members of Parliament spoke in favour of stare decisis and abandoned their position only on assurances that the Court would continue in its old ways. A concern was expressed that the Court free of prior decisions, might lose its neutrality and become too intimately involved in the political process. Similar concerns undoubtedly will resurface in the inevitable debate about how the Court should proceed in interpreting the Charter of Rights.

There was a provision in the original Supreme Court Act that was intended to abolish appeals to the Privy Council. In view of this fact the Parliamentary furor over abolition of Privy Council appeals is even more surprising. There are some important differences between the Supreme Court’s escape from the Privy Council and its present qualified escape from Canadian

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4 MacGuigan, Precedent and Policy In the Supreme Court (1967), 45 Can. B. Rev. 627, is an example of the outpouring which demonstrates that the interest continued for some years after 1949.
6 This effort was approved by the Canadian Bar Association but opposed by the Canadian Association of Law Teachers. Laskin, English Law In Canadian Courts Since The Abolition of Privy Council Appeals (1967), 29 Current Legal Problems 1 (reprinted in monogram form in 1976).
7 MacGuigan in his account of the debates indicated that only the Cooperative Commonwealth Federation Party (C.C.F.) spoke against stare decisis, supra note 4, at 633.
8 Id., at 634-38.
9 1875, S.C., c. 11. The historical setting is discussed in Underhill, The Supreme Court Act and the Appeal to The Privy Council 1875-1876 (1938), Can. Hist. Rev. 245.
The Patriation Reference

legislatures. Nonetheless, it is important to understand the colonial roots of the Supreme Court, as well as the Canadian nation that it serves.

The Supreme Court, and courts generally, have had a low profile in Canadian public life. Canada’s constitutional tradition is significantly different from that of the United States of America. An important part of this difference is the acceptance in Canada of the supremacy of parliament. Legislators have been viewed as the protectors of rights in Canada and judicial review of their decisions has been narrowly restricted. Generally, courts have been considered an inappropriate forum for the resolution of issues of broad public policy. One notable exception to this approach is the reference mechanism, which has involved the Court in important public issues including, whether the federal government could unilaterally patriate the Canadian Constitution.

In Canada as in most federal states the Supreme Court is the final arbiter of the Constitution. There was no celebrated case such as Marbury v. Madison to establish this fundamental point. Indeed, this passing comment of Kerwin C.J. in B.C. Power Corp. v. B.C. Electric Co. is most frequently cited as authority for the courts’ role as the arbiters:

It is conceded by counsel for the Attorney General of British Columbia that the Courts have the jurisdiction to determine the constitutional validity of each of the three statutes under attack in the present proceedings . . . . In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.

The Supreme Court has had the final word in legal disputes only since abolition of Privy Council appeals in 1949. However, there is no entrenchment of the Supreme Court in the Canadian Constitution even with its 1982 amendments. The Court was established by a regular federal statute in 1875 and subject to conventions to the contrary, this statute could be repealed by a simple majority vote in Parliament. This is a telling reminder of the principle of

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11 Perhaps such issues required “polycentric” decision making as discussed by Professor Fuller in Collective Bargaining and the Arbitrator, [1963] Wisc. L. Rev. 3.
12 The Reference is a rather unique Canadian mechanism whereby provincial governments may send “matters” to the provincial courts of appeal and the federal government may send “matters” to the Supreme Court of Canada. The relevant legislation mandates the courts to decide the referred matters. Supreme Court Act, R.S.C. 1970, c.S-19, s. 55. There are equivalent provincial statutory provisions.
14 5 U.S. 137 (1803).
17 Supra note 9.
18 Bills were introduced in the House of Commons in 1879 and 1880 to abolish the Supreme Court as an unnecessary expense but the debate floundered on matters of procedure. McRuer, The Supreme Court as a National Institution (1980), 1 Sup. Ct. L. Rev. 467, at 469.
parliamentary supremacy. American-style separation of powers is not a part of Canadian constitutionalism.

II. THE SUPREME COURT’S RECORD ON BASIC RIGHTS ISSUES

Having set the institutional context, I shall take a brief backwards glance at how the Supreme Court of Canada has approached and decided issues of fundamental rights. The principle of parliamentary supremacy, in its broadest interpretation suggests that basic rights and freedoms exist only at the sufferance of legislators. This might be true if legislatures spoke in clear and precise terms and courts mechanically applied the clear rules, but such a view misconceives both the legislative and judicial processes:

[The kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules changes as the rules are applied.]

Canadian courts have used the important power of interpretation to strictly construe statutes that infringe fundamental rights. This can lead to only a very limited form of activism because basic rights are defined in very traditional property terms. Another limit upon the common law protection of rights is the principle of statutory over-ride. A legislature bent upon removing basic rights can reverse the common law by clear statutory language. Of course, the same limit applies to judicial interpretation of the Charter of Rights by virtue of the section 33 non obstante clause.

The Supreme Court of Canada’s interpretation of the distribution of powers stated in the Constitution Act, 1867 has played an important role in the Court’s protection of basic rights. This is only an indirect protection of rights, and applies only to provincial violations of rights. Nonetheless, the division of powers strategy was used during the 1950s by Mr. Justice Rand and others to protect Jehovah’s Witnesses against the repression by Quebec Premier Maurice Duplessis.

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19 Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1974) at 3-4. Professor Levi suggests that the distinction between British and American judges has been overstated.


21 Part I of Constitution Act, 1982, Sched. B of Canada Act 1982, c. 11, s. 33 (U.K.). This constitutional override must be re-enacted every five years and is intended to be used only on a statute by statute basis. Former Justice Minister, Jean Chrétien, publicly stated that using s. 33 would be political suicide, and concluded that its impact in practical terms will be small (Dalhousie University Law Hour, Halifax, November, 1982). The present author disagrees with that view. In reference to a particular case, such as overriding prisoners’ rights, the use of s. 33 may be quite popular politically.

22 1867, 30 & 31 Vict., c. 3 (U.K.) particularly sections 91 and 92. The name of this and other constitutional statutes was changed as part of the patriation exercise.

23 The preamble to the Constitution Act, 1867 gives residual power to the federal government and the idea that there is an “Implied Bill of Rights” beyond the reach of any government has never been accepted by a court majority. Abbott J.’s obiter dictum in Switzman v. Elbling, [1957] S.C.R. 285, at 328 is the only clear acceptance of an “Implied Bill of Rights”. He repeated his view in Oil, Chemical and Atomic Workers v. Imperial Oil, [1963] S.C.R. 584, at 600.

In a seminal study Professor Gibson examined the leading cases involving rights issues in the 1950s and discovered that 94% of them were decided in favour of fundamental freedoms. With the death of Premier Duplessis and the retirement of Mr. Justice Rand, the bloom of judicial activism withered. Two recent Supreme Court decisions legitimate invasions of basic rights even at the provincial level. This retreat from the activism of the 1950s was ironically accompanied by the passing in 1960 of the Canadian Bill of Rights [hereinafter the Bill of Rights].

Canadian judicial treatment of the Bill of Rights causes even the most ardent supporter of court activism to pause. The dismal record of the Supreme Court of Canada with regard to the Bill of Rights has been well chronicled. Why the Court so restricted the impact of the Bill of Rights is an intriguing question. In part the Bill’s failure rests with the language of the document itself; however, the caution with which the judges approached it poses a more permanent problem. Professor Russell has commented that:

Our judges have been at their best in the field of civil liberties when, instead of being asked to theorise about such abstractions as equality before the law or due process of law, they have been called upon to identify the rights implicit in the working of our basic institutions of government. . . .

The above comment is disturbing because judges on the Supreme Court and elsewhere will face a Charter of Rights full of abstractions. Courts will be concerned with democratic rights that are not subject to the override provision of the Charter, and section 26 permits judges to discover rights not enumerated in the Charter of Rights. Nonetheless, the past record of the Supreme Court offers little hope for the progressive development of such broad concepts as “freedom of conscience”.

Chief Justice Laskin has a more positive view of the Court’s role. While still a law professor, he wrote:

The time has surely come in the history of our constitutional law to recognize the conscious role that courts and judges have played in shaping federal and provincial power and thereby controlling governmental policies. A sign of such recognition resides in understanding how precedent and legal logic and advenlence to extrinsic materials have been used as formal tools in the tasks of interpretation. Yet it is the use made of such tools and not the mere fact of their availability that is determinative. A discriminating or undiscriminating use of precedent, the depth or shallowness of legal argument, the relevance or reliability of extrinsic evidence are the reflections of the mind that is working on the problems of the constitution. We may as well deny the existence of the court as to deny that judicial decisions are the

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28 This is quite apart from the concern expressed by Professor Dworkin in Taking Rights Seriously (London: Duckworth Ltd., 1977), that activism can be for good or bad and its true test lies in the results.
products of social and economic and political considerations for which the words of the British North America Act are merely the vehicles of communication. The constitution is as open as the minds of those called upon to interpret it; it is as closed as their minds are closed.31

Chief Justice Laskin may have been premature in expecting a recognition of the importance of the Court's role in 1955. However, after the Court entered its second century in 1975 and received control of its own agenda,32 his expectations are more realistic. The expanded role that the Court will be asked to play in relation to the Charter of Rights make the Chief Justice's final comments timely. Before speculating about the future of the Court, the Constitutional Amendment References 1981 [hereinafter the Patriation Reference]33 will be examined as a case study in judicial process.

III. THE PATRIATION REFERENCE: A STUDY IN JUDICIAL PROCESS

A. The Supreme Court in the Limelight

Unlike its American counterpart, the Canadian Supreme Court has been a relatively obscure institution dwelling somewhere in the mists of Ottawa's bureaucracy. Recently the Canadian media have discovered the Court, but they still do not appear to understand it. The recent referral of controversial political issues to the Court such as the federal proposal to reform or abolish the Canadian Senate34 and Québec's language bill limiting the use of languages other than French,35 has helped to raise its profile.

For many years Canadians viewed the Supreme Court through a British filter and comparisons to the House of Lords were commonplace. An American filter has now supplanted the British one and this has produced an even greater distortion of reality.36 There has been little scholarly analysis of the Supreme Court as a unique Canadian institution. This is hardly surprising considering Russell's conclusion that the public impact of the Court during its first century was minimal.37

The role of the Court in the patriation process is a clear indication that things have changed. Its deliberations in the Patriation Reference38 put the

32 Prior to 1975 a large number of cases came to the Supreme Court of Canada as of right, based upon such criteria as the amount of money in dispute. Since 1975 most cases are heard only with leave of the Court. Dissents on issues of law in criminal cases are one exception. The effect of this change was to make the Court a public law court resolving issues of broad Canadian import.
33 Supra note 13.
36 Supra note 30, at 576.
37 Id.
38 Supra note 13. There is a certain irony in the fact that this Reference began in the provincial courts of appeal of Manitoba, Québec and Newfoundland and was only appealed to the Supreme Court of Canada. In A.G. Ontario v. A.G. Canada (1912), 3 D.L.R. 509 (P.C.), the provinces argued that the Reference device would politicize the Court. They lost. Seventy years later these provinces plunged the Court into its biggest political controversy to date.
Supreme Court squarely in the public eye. On September 28, 1981 the Court delivered judgment in the most highly publicized, and arguably most important, case of its existence. For the first time in Canadian history, the rendering of judgment was televised.

This case was heard as a single appeal in May 1981. It consolidated appeals from decisions on References to the Courts of Appeal in Manitoba, Newfoundland and Québec. The complexity of the decision was due in part to the fusion of three sets of questions referred to the respective Courts of Appeal, but in essence all the References raised the same issues.

At the heart of the Patriation Reference was the law and convention dichotomy. All nine of the Supreme Court Justices accepted this to varying degrees. Mr. Justices Martland and Ritchie came closest to rejecting a demarcation of law and convention in their dissenting reasons. This article will suggest that the dichotomy is coloured by the "lego-centrism" of the profession that decides such matters.

The References consolidated in the Patriation Reference were initiated by the opposition of eight provinces to a proposed resolution laid before the House of Commons on October 6, 1980. The resolution contained an Address to be presented to Her Majesty The Queen requesting that a measure to patriate the British North America Act (with a consequent change of name to the Constitution Act), to provide an amending formula, and to provide a Charter of Rights and Freedoms be laid before the Parliament of the United Kingdom.

Provincial opposition to the proposed federal resolution was cast in terms of three questions which were referred to three provincial Courts of Appeal. The thrust of these questions was:

1. Would the enactment of the federal package in the proposed resolution affect federal-provincial relations?
2. Is there a convention that a resolution that would result in an alteration of federal-provincial relations, requires agreement of the provinces?
3. Is the agreement of the provinces constitutionally required for amendments affecting federal-provincial relations?

Manitoba's Court of Appeal was the first to respond. On February 3, 1981, it held by a three to two decision that the federal government did not need provincial consent to proceed. Four of the five Justices, including Chief Justice Freedman, also held that there was no convention of provincial consent. Hall J.A. was of the opinion that the question about the convention was non-justiciable.

The Newfoundland Court of Appeal, composed of three judges, held in a

40 Manitoba, Alberta, British Columbia, Prince Edward Island, Newfoundland and Québec originally opposed the resolution and they were later joined by Nova Scotia and Saskatchewan, leaving only Ontario and New Brunswick to support the federal stance.
41 This federal resolution was embodied in the Canada Act 1982, c. 11 (U.K.).
42 Supra note 39.
unanimous judgment delivered on March 31, 1981 that provincial rights would be affected by the proposed enactment, that a convention of provincial consent exists and that such consent for the proposed resolution would be constitutionally required.43

Finally, the Québec Court of Appeal (responding to differently worded questions) held in a four to one decision that the federal government could proceed unilaterally with its patriation proposals.44 In reaching this conclusion, the Court denied the existence of a convention of provincial consent.

The proposed resolution was put before the Supreme Court of Canada in May, 1981. The most notable departure from the arguments in the courts below was the position put forward by Professor Lysyk for the Province of Saskatchewan. He abandoned the principle of unanimity and argued that the relevant convention required substantial, rather than unanimous provincial consent. After several days of highly publicized hearings, the Court reserved judgment.

In September, the Court delivered its judgment consisting of four opinions — two majorities and two dissents. Describing these judgments is complicated by the fact that their individual authors are not identified.45

A Group of Seven judges subscribed to a judgment which bears the distinctive style and flare of Chief Justice Laskin. In this part all but two of the Supreme Court justices held that it was legal for the federal government to proceed with its proposed resolution without the consent of the provinces.

The dissenters, Martland and Ritchie J.J., held that it would be illegal for the federal government to proceed without provincial consent. This judgment, which has the precise and logical flow of Mr. Justice Martland’s writing, focused upon the questions referred to the Québec Court of Appeal. The focus was not on whether there were legal impediments to the federal government’s proposed course of action but rather whether there was any authority for it at all.

One of the most puzzling judgments is that of the Group of Six. This judgment, which reflects the style and structure as well as the constitutional expertise of Mr. Justice Beetz, attracted a strange alliance of judges. Mr. Justice Dickson and the three Québec judges joined forces with Mr. Justices Martland and Ritchie to hold that the consent of the provinces was constitutionally required in the conventional sense. It agreed with the Group of Seven that there was no legal sanction for a breach of convention; nonetheless, it did not shrink from declaring that a convention of substantial provincial consent existed which would be breached by the proposed course of action. Hence, the provinces could claim a partial victory because the federal plan, for all its legality, was constitutionally immoral.46

43 Id. A fourth question concerning Newfoundland’s Terms of Union is not relevant.
44 Id.
45 This was a practice followed by the Supreme Court of Canada in two earlier decisions of national dimensions. Re Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54 and Blaikie v. A-G Québec (1980), 30 N.R. 225. However, both of those cases were unanimous decisions of the Court.
In a spirit of slightly irritated dissent a Group of Three, composed of Laskin, Estey and McIntyre, parted company with their six brethren on the convention issue. It held in a judgment which once again has the ring of Chief Justice Laskin, that there is no convention of provincial consent. On this point the group agreed with the conclusions of Chief Justice Freedman of the Manitoba Court of Appeal. It also agreed with the Group of Six both on the nature of conventions and on their lack of legal impact. However, the Group of Three held that the question on the convention of provincial consent was non-justiciable. The dissenters addressed this issue with reservation, in response to the lengthy reasons of the majority Group of Six.

B. Laws and Conventions in Courts

Before examining the legal process implications of the Patriation Reference for the judicial process, it is useful to analyse the substance of the decision. Apart from the fact that process cannot be discussed in a vacuum, the Court's views on convention provide insights into its view of the judicial role. Upon what sources may a court draw to legitimate its decisions? This is an issue of broad significance but it also has particular relevance to the judicial determination of rights.

Will Canadian courts define the abstract concepts stated in the Charter of Rights in light of the traditions and conventions of Canadian society? This issue has not been resolved in the United States despite almost two centuries of experience with a bill of rights.47 Section 1 of the Charter of Rights, subjecting the guaranteed rights and freedoms to such limits as are reasonable in a free and democratic society, invites courts to examine the traditions and conventions of Canadians to assist them in deciding what limits are reasonable.48 The Supreme Court's view of convention is, therefore, a matter of practical importance.

Drawing a line between law and convention is more defensible from a perspective of traditional constitutional law than from a broader jurisprudential one. Yet, to come to grips with what the Supreme Court of Canada had to say about law and convention, we must look at the distinctions in a broader context. Its substantive comments on this subject can be analysed in terms of three models: the primacy of law model, the primacy of convention model, and the parity of law and convention model. Dicey was one of the early champions of the primacy of law model. He asserted that law and convention could be clearly distinguished because the former is enforceable in the courts, while the latter is not.49 In somewhat less extreme form the Dicey view has been adopted by more recent constitutional scholars.50

The primacy of convention model runs counter to constitutional orthodoxy. To some extent this model involves a rejection of constitutionalism.

48 This approach could have a chilling impact on the effect of the Charter of Rights as Canadians have been described as deferential to authority. Friedenberg, Deference to Authority (White Plains, New York: M.E. Sharpe Inc., 1980).
49 Supra note 46.
A.M. Honoré has effectively described the primacy of convention in the wake of a revolution:

Should one not therefore go on to ask whether some principle of law independent of any particular system authorizes a judge, simply by virtue of his office, and irrespective of the source of his jurisdiction, to recognize the revolutionary regime? Of course this notion of an inter-systematic or supra-systematic law sounds rather startling. It amounts to a resuscitation of ‘natural law’ or some such dinosaur, and rubs against nearly two centuries of positivism, and (what is more important) constitutionalism, which is part of the political ideology of which positivism is the legal reflection . . . .

This way of looking at the matter would involve the abandonment of that deification of the territorial state which is another of the complex strands that go to make up the ideological background of legal positivism. And if it is possible to jettison the exclusive status of the territorial state as a source of law, why is it not also possible to abandon constitutionalism in its exclusive guise, which holds that nothing can count as law unless constituted in accordance with predetermined and systematized criteria?51

Jennings has asserted that law outside the context of conventions is often unintelligible.52 The Constitution Act, 1867 provides a good example of this. According to the letter of the law, the Governor General of Canada rules in a discretionary fashion in the name of the Queen. Only when the law is put in its conventional context does it become clear that it is really an elected Cabinet which acts in the name of the Governor General. Professor Lederman goes one step further and argues that law derives its validity from convention. “Constitutional law arises out of our whole history and tradition as a people, and one must constantly relate these rules and principles of law and government to the organic ongoing life of our national community, from which they derive their validity.”53 On this view constitutional law draws its life from the conventions of the society and to that extent the latter are primary.

The parity of law and convention model, as the label suggests, is a halfway house between the two extremes. Jennings seems to espouse it in The Law of the Constitution.54 In his view, as has been indicated, law and convention are equal partners in constitutional practice.55

The Group of Seven rejected the idea that conventions could crystallize into law. Its members conceded that conventions could be adopted by statute, but denied that the court could fashion a kind of constitutional common law that could transform them into law. In reaching this conclusion they rejected the views of Lederman56 and Jennings.57 Not surprisingly therefore, it took a

54 Supra note 52.
55 Id. at 130-31.
57 Supra note 52, at 126.
different view of the cases upon which these two scholars relied. The adoption of the following quotation leaves no doubt that the primacy of law model was preferred.

The validity of conventions cannot be the subject of proceedings in a court of law. Reparation for a breach of such rules will not be effected by any legal sanction. There are no cases which contradict these propositions. In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises. (emphasis added)

Dissenting reasons of Martland and Ritchie J.J. throw no light upon the nature of conventions. Their views on conventions must be determined from the reasons of the Group of Six of which they were also members.

Without abandoning the primacy of law model, the Group of Six placed conventions closer to law in the legal hierarchy: “The main purpose of constitutional conventions is to ensure that the legal framework of the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period.” The Group of Six adopted the opinion of Chief Justice Freedman of the Manitoba Court of Appeal who had also placed convention higher than custom but lower than law. As members of the Group of Seven, Mr. Justice Dickson and the three Québec judges adopted the primacy of law model. Here, as in the Group of Seven judgment the argument that conventions can crystallize into law is rejected. There is also implicit disagreement with Jennings’ view that courts do not directly enforce either conventions or law.

In spite of its lip-service to legal primacy, the reasons given by the Group of Six exemplify on the whole the thinking of the parity of law and convention model; Canada’s Constitution is declared to be composed of two parts, constitutional law and constitutional convention. It is even conceded that some conventions are more important than laws. Indeed, the Group of Six concluded that action in breach of the convention requiring substantial provincial consent would be unconstitutional. The concurrence of Mr. Justice Dickson and the three Québec justices is difficult to reconcile with their participation in the Group of Seven discussion of “mere” conventions.

There is no doubt that the Group of Three adopted the primacy of law model. It cited and accepted the views of Professor Dicey. Like the majority

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59 Supra note 13, at 33.
60 Munro, Laws and Conventions Distinguished (1975), 91 Law Q. Rev. 218, at 228.
61 Supra note 13, at 192.
63 Supra note 52, at 130-31.
64 Supra note 13, at 195.
65 Id. at 195.
66 The existence of the convention was established on the basis of the criteria enumerated by Jennings, supra note 52, at 134-36; supra note 13, at 197-220.
67 Supra note 13, at 263-65.
Group of Six, the three dissenters accepted the definition of conventions given by Chief Justice Freedman in the Manitoba Court of Appeal. However, they expressed some concern about the application of conventions:

In a federal state where the essential feature of the Constitution must be the distribution of powers between the two levels of government, each supreme in its own legislative sphere, constitutionality and legality must be synonymous, and conventional rules will be accorded less significance than they may have in a unitary state such as the United Kingdom.

Regarding the nature of such a convention, the Group of Three asserted that substantial provincial consent was too vague and ill-defined to be workable; neither its observance nor its breach could be clearly identified. Constitutional scholar Geoffrey Marshall suggested, in a letter to The Times, that this kind of reasoning confused the existence of a convention with its application. This confusion may stem from the acceptance by the Group of Three of the primacy of law model.

The Supreme Court spoke with discordant voices about the legal significance of conventions. Six judges were willing to accord some conventions judicial weight. The way in which they did this reveals more about judicial creativity than the potential use of conventions in determining basic rights. It is time to focus on the judicial process.

C. The Process of Decision-Making

In the Patriation Reference all of the Justices of the Supreme Court of Canada implicitly reaffirmed the supremacy of Parliament. This reaffirmation is ironical, in so far as the Charter of Rights imposes some limits on this supremacy. The Group of Seven asserted that the federal Parliament could legally amend the Constitution Act, 1867 by joint resolution. In its view, there was nothing in the Canadian Constitution to prohibit it. Mr. Justices Martland and Ritchie were less deferential to Parliament, yet even they did not question its supremacy within the limits of the Constitution. They focused not on whether there was a constitutional prohibition but on whether there was express constitutional authority for the proposed federal action.

It is ironic that Justices Martland and Ritchie should be less deferential to the powers of Parliament than their brethren. More than any other judges of the present Supreme Court, they have advocated a restrained judicial role and deference to the will of the elected representatives of the people. Are the tell-tale signs of the result-oriented judicial process beginning to emerge?

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68 Supra note 39, at 13-14 (Man. C.A.).
69 Supra note 13, at 262.
71 Supra note 13, at 110.
Debates about the proper role of courts in the Canadian political sphere are not new. A classic example of this debate appeared in an earlier case which also involved a conflict of fundamental values — *Harrison v. Carswell.*

In this case the conflict was between private property rights and free speech rights to picket. Mr. Justice Dickson speaking for a majority of six, which included Justices Martland and Ritchie, made the following statement:

The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this Court under the Canadian Constitution. 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 decision 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? There are many varied answers to this question. Holmes, J. said in *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205, at 221: "I recognize without hesitation that judges do and must legislate, but they can do it only interstitially; they are confined from molar to molecular actions". Cardozo, *the Nature of the Judicial Process* (1921) p. 141, recognized that the freedom of the judge is not absolute in this expression of his view:

This judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.

Notwithstanding this statement, Justices Dickson, Martland and Ritchie were all members of the Group of Six which held that there was a convention of substantial provincial consent which rendered the proposed amendment package unconstitutional in the conventional sense. This is one of the most creative majority judgments ever delivered by the Supreme Court of Canada. The Group of Six strayed a long way from the "consecrated principles" and "established concepts" of constitutional litigation, in answering the convention question in terms of substantial provincial consent, instead of the unanimous provincial consent for which seven of the eight opposing provinces contended.

On the other hand, Chief Justice Laskin, who was a member of the dissenting Group of Three, expressed an expansive view of the judicial role in his dissenting judgment in *Harrison v. Carswell:*

This Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decisions . . .

It seems to me that the present case involves a search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation.

The above statement might be regarded by many as illustrative of the creative and even activist role espoused by the Chief Justice. Although this assessment has some validity with respect to cases concerning fundamental rights and criminal law, it is not directly applicable to constitutional matters.

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74 Id. at 529-30.
75 Id. at 534-37.
76 *R. v. Forsythe* (1980), 32 N.R. 520 (S.C.C.) demonstrates that even in this field there are limits to judicial creativity.
A close reading of Chief Justice Laskin's numerous constitutional decisions and his landmark text, *Canadian Constitutional Law*, reveal a more traditional judicial approach to constitutional disputes. Laskin the legal scholar predominates over Laskin the social engineer. It is Laskin, the constitutional scholar, whose views permeate the judgments of the Group of Seven and the Group of Three.

The intent of the foregoing is neither to belittle judges for inconsistency nor to suggest that they are hypocritical, but rather to demonstrate that abstract views about the proper judicial role and preordained legal principles will not necessarily stand in the way of reaching a "desirable" result. I do not accept Professor Wechsler's argument that there are neutral principles that transcend any immediate result. At the very least, judges are selecting the principles they consider most desirable, and their desirability is often related to the particular case result:

When they decide what is a "desirable" result judges must of course operate within the limits of the law and judicial conventions. They must also take account of social and political values. Failing to take account of these realities in reaching a constitutional decision is as great a sin as giving them too much weight. The real reasons for coming to a particular judicial decision are often hidden beneath a legal umbrella. This lack of candour is unfortunate. In a different context Honoré offered some useful advice that should be heeded by judges and legal commentators:

> What is needed, I believe, is to open the windows and let in the air, to appreciate that the phenomena are more complex and varied than they seem, and to state frankly what political values are being commended by the supporters of different types of theory. In this field neutrality is neither possible nor desirable, and the most misleading theory is that which claims to be neutral between different political values.

Those who insist upon legal purity and complete consistency in the judgments of the Supreme Court of Canada are unaware of the nature of the judicial decision-making process. Reasons are circulated among the judges of the Court before they are made final, and a judge who wishes to attract a majority of the Court to his or her conclusion may have to modify some of his language. As Mr. Justice Frankfurter of the United States Supreme Court commented, a judge never writes with greater freedom than when he writes in dissent.

The judgment of the Group of Six was undoubtedly the result of judicial compromise. Although many will be offended by this view of judicial decision-making, it is realistic. Moreover, a country that celebrates the constitutional accord as epitomizing the national spirit of compromise, should not expect her judges to shun it. If law is regarded as a means and not an end, compromise should be less alarming.

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79 Supra note 51, at 278.
D. Judicial Process Models

The judicial process implicit in the four judgments can be analyzed with the aid of two models. The essence of the "result-oriented model" is that the desired result conditions the legal reasoning rather than the reverse. In this model a judge begins with a social result considered desirable, and works backwards from it to fashion justifying legal reasons. A privative clause designed to prevent judicial review of a decision is a good example. A judge construing a privative clause might construe it narrowly because he or she believes that people should not be denied access to the courts. Although the reasons are cast in legal terms, the heart of the decision is its result orientation; the result is dictated by social considerations — the access of citizens to the courts.

A second model is the "legal reasoning model". There are two variants to this model. One favours inductive reasoning. Judges begin with the facts: by selecting appropriate legal principles and applying them to the facts, they reach the correct legal result. This is the branch of the model that has traditionally been associated with the common law.

An alternative form of the legal reasoning model is deductive in nature. According to this branch, a judge begins with legal imperatives that predetermine the results of most, if not all, fact situations. His task is to determine whether the facts of the case come under the provisions of the law. Facts will be relevant only if they help him to determine whether the case is or is not covered by the law. The judge seeks results, but the results are seen as the upholding of the law. What counts is not the social result, but the legal result. For example, if a judge accepts as a matter of legal doctrine that no privative clause, however worded, could exclude court review for jurisdictional error, then he or she has a legal result-orientation. This judge will fashion the reasons and select the facts so as to give effect to this legal doctrine limiting the force of privative clauses.

A clear line cannot always be drawn between the deductive branch of the legal reasoning model, characterized by a legal result-orientation, and the result-oriented model, which focuses on social results. Nonetheless, the two models are theoretically different. For the purposes of understanding the judicial process there is a relevant distinction similar to the separation of social policies and legal principles enunciated by Dworkin.81

In the result-oriented model the law is viewed as a means to achieve a particular social end. In the example of the privative clause, the law is to be construed so as to give the citizen maximum access to the courts of the land. On the other hand, the proponents of the legal reasoning model consider the law an end rather than a means. In administrative law, privative clauses must be construed so as to permit review for jurisdictional error, but the same clause can be construed as barring judicial review for non-jurisdictional error.82 Hence, the court can label the error in the original decision as jurisdictional or

non-jurisdictional depending upon whether it desires to review. Maintaining the legal purity of judicial review doctrine is the relevant end. This is a matter of legal principle rather than social policy.

Although they are mutually exclusive in logic, one reason why the legal reasoning model and the result-orientation model are often combined in practice is that judges can have more than one result in mind. They may desire maximum access to the courts but also desire to achieve it within traditional judicial review doctrine, thus maintaining legal purity. For example, they may have to label jurisdictional an error that would otherwise be non-jurisdictional to allow judicial review. Even in such apparent combinations, however, one model is likely to predominate. Only on the surface have judges maintained the purity of the legal doctrine by the change of labels discussed above. In reality, the law has been manipulated to achieve a particular social result.

E. Applying the Process Models

Without knowledge of the views and record of its author, it is difficult to determine whether an anonymous judgment is determined by a result-orientation. *Prima facie*, a concurring judge agrees not only with the decision but also with the reasons given. In reality, however, a judge will write his own reasons, concurring in the result, only if he seriously disagrees with those offered by another judge reaching the same decision.

In the judgment given by the Group of Seven there is no immediately apparent result-orientation. Indeed the form and logic of the reasons appear to fit the legal reasoning model. There is an express disavowal of any comment on the contents of the amendment package.83 If the Group of Seven judgment had a particular aim it was to fashion a legal solution devoid of political and social biases. This group stated explicitly that: "... the legal arguments pro and con do not engage the contents of the package, and it is impossible to qualify the issue of legality by considerations of fairness or equity or political acceptability or even judicial desirability."84

The Group of Seven assumed that there was a theoretical, socially neutral legal position to be fashioned in accordance with orthodox constitutional principles. But even those who proceed from established legal principles have to make choices. And it is on the choice that the result depends. For example, the Group of Seven chose to ask whether there were any express prohibitions against the federal government proceeding by resolution.85 Had it asked whether there was express legal authority to so proceed, the logical legal result might have been different. The style and form of the Group of Seven reasons are inductive, but there is also a trace of the deductive type of legal reasoning. In effect, the reasons affirm a legal view of federalism in which the powers of the federal government are superior to those of the provinces. It should be remembered, however, that even within the legal reasoning model conclusions may not be mandated by logic, but may have to be chosen from logical alternatives. There is frequently more than one correct solution to a legal problem.

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83 *Supra* note 13, at 56-57.
84 *Id.* at 38.
85 *Id.* at 34, 57.
It would be unrealistic to suppose that the Group of Seven ignored the social impact of its decision. Some judges undoubtedly viewed declaring the proposed federal action legal, as a step towards desirable political change. However, the law was not manipulated to that end. Indeed, Mr. Justice Dickson and the three Québec Justices also concurred in the Group of Six judgment, which had a very different political impact. It might have been expected that the judgment of the Group of Seven, if written by Chief Justice Laskin, would betray a social result-orientation. But none is apparent. If the Chief Justice has a federalist view of the Constitution, it is based upon a particular reading of the Constitution Act, 1867. Of course, he brings his own perspective to his reading of constitutional cases. This would include the fact that he is from Ontario — a province that has a vested interest in promoting a federalist view of Canada. Nonetheless, the judgment espouses a position that can be defended in traditional legal terms and, on its face, it does not fit the result-oriented model of judicial decision-making.

On the legality issue, the dissenting judgment of the Group of Two fits the result-oriented model. Mr. Justice Martland, the likely author of these reasons, and Mr. Justice Ritchie, concurred in an uncharacteristically creative statement of Canadian federalism. They answered the Québec formulation of the referred question, seeking direct authority for the proposed resolution:

At the outset, we would point out that we are not concerned with the matter of legality or illegality in the sense of determining whether or not the passage of the resolution under consideration involves a breach of the law. The issue is as to the existence of a power to do that which is proposed to be done.

This is an unusual position for two judges who throughout their careers have been very deferential to the will of Parliament. One may also wonder what they were concerned with if not with issues of legality. They appeared to adopt the philosophy of Lord Denning that "[l]egal theory must give way to practical politics," leaving little doubt about their distaste for the proposed federal action.

This is an attempt by the Federal Parliament to accomplish indirectly that which it is legally precluded from doing directly by perverting the recognized resolution method of obtaining constitutional amendments by the Imperial Parliament for an improper purpose.

It should be emphasized that their distaste was for a particular view of Canadian federalism, not for federal government in general nor for a particular Liberal regime. Indeed, they felt that the Court should exercise its inherent power to preserve federalism in the Constitution. They had a clear result in mind — the preservation of their view of federalism in the constitutional structure of Canada. This may be a perfectly sensible and desirable way to solve a constitutional problem. Result-orientation is not in itself a bad thing. It does not, however, promote consistency.

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86 Lyon, Constitutional Theory and the Martland-Ritchie Dissent (1981), 7 Queens L.J. 135, praises this dissent for emphasizing the substance of the resolution rather than its form.
87 Supra note 13, at 110.
89 Supra note 13, at 142.
Upon what basis did the Group of Two arrive at its conclusion about the nature of Canadian federalism? Justices Martland and Ritchie would likely reply that their view of federalism is a legal one, based upon a proper reading of the Constitution Act. If such a view emerges from the Constitution Act, 1867, it is only by implication. Furthermore, this implication appears only when the legal Constitution is placed in its political context. The compact theory of Confederation soundly rejected by the majority Group of Seven, would support the view of federalism of the Group of Two. The compact theory, however, if it has any credence at all, is a political construct and not a legal one.

The reasons of the Group of Two are stated in legal terms with an emphasis on statutory analysis and judicial precedent. But the use of the style of the legal reasoning model is only a facade. In support of the sovereignty of the provinces within their own spheres the dissentors quote a speech of Mr. Louis St. Laurent, then President of the Canadian Bar Association. This is hardly as solid a primary source of law as both Justices Martland and Ritchie usually demand from counsel who appear before them. Although both Justices would likely see themselves as followers of the legal reasoning model, they have on previous occasions demonstrated a result-orientation.

Demonstrating a degree of political realism, the group held that it is the federal joint resolution that amends the Constitution Act, 1867 in substantive terms and that the United Kingdom approval is essentially pro forma. This analysis of the realities of the amendment process is supported by Professor Scott, but comments from London during the controversy surrounding the Patriation Reference cast some doubt on the theory of automatic British approval. The Group of Two resorted to an argument in terrorem, reasoning that the effect of the federal argument would be that provinces exist only at the sufferance of the federal Parliament. This provides further evidence of a result-orientation.

The second set of majority reasons, subscribed to by the Group of Six, most clearly fits the result-orientation model. These reasons were a compromise apparently intended to force the federal and provincial governments

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90 Id. at 52.
91 Id. at 130-31.
92 In Gay Alliance Toward Equality v. Vancouver Sun (1979), 27 N.R. 117 (S.C.C.) Martland J., with Ritchie J. concurring, relied heavily on the American Bill of Rights to deny human rights protections to gay people. This is remarkable because both judges have in the past consistently rejected arguments based upon the American Bill of Rights. One example is R. v. Miller and Cockriell (1976), 70 D.L.R. (3d) 324 (S.C.C.).
93 Justices Martland and Ritchie have not always shown this preference for substance over form. This is illustrated by Walter v. A.G. Alberta, [1969] S.C.R. 383 in which the focus was the property overtones of the statute rather than the substantive intention to limit the holdings of the Hutterites in Alberta.
95 Supra note 13, at 136.
96 The Group of Six provides the best example of the statesmanship described by Professor Russell, “The Supreme Court Decision: Bold Statescraft Based on Questionable Jurisprudence,” in Russell et al., The Court and the Constitution (Kingston: Inst. of Intergov’t Rel’s, 1982) at 1.
back to the bargaining table.\(^{96}\) The composition of the Group of Six is interesting. Justices Martland and Ritchie who dissented on the issue of legality, are consistent in their espousal of a philosophy of political realism. Dickson, Beetz, Chouinard and Lamer J.J., who as members of the Group of Seven had adopted the legal reasoning model, were less consistent.

Manipulation of the law to achieve a specific end is blatant in the reasons of the Group of Six. It held that a convention existed after clarifying the necessary provincial consent as a substantial measure of provincial consent rather than unanimity.\(^{97}\) This change was necessary because not all Canadian political actors felt obliged to follow the unanimity rule. The group hastened to point out that quantification of substantial consent was a political matter. It was sufficient to decide that the federal government and two provinces did not "pass muster".\(^{98}\)

The selection of relevant amendments provides more evidence of result-orientation. Of the twenty-two amendments to the Constitution Act, 1867 the Group of Six selected only five which directly affected the federal-provincial balance of power.\(^{99}\) The importance of this selection is underscored by the fact that the Québec and Manitoba Courts of Appeal\(^{100}\) made a different selection and held that there was no convention.

Finally the classification of the issues suggests a desire to resolve the political deadlock. The Group of Six could have avoided the conventions issue entirely by classifying it as non-justiciable. Instead, it held that the proposed resolution was "unconstitutional" in the sense that it would be in breach of convention. That such a conclusion would have a decisive impact in both the Canadian and United Kingdom political arenas is not likely to have escaped the politically astute Group of Six.

The dissent of Chief Justice Laskin and Justices Estey and McIntyre abandoned the guise of legal purity adopted by them as members of the Group of Seven. They do not, however, entirely abandon the legal reasoning model. These dissenting reasons provide an example of the deductive branch of the legal reasoning model.\(^{101}\) Any pretense of inductive legal reasoning disappeared when the Group of Three proceeded to examine the convention issue, which in its view of the law was non-justiciable. On the inductive model non-justiciable questions would not be answered. The reasons given are in response to the reasons of the Group of Six and of the Group of Two.

From the perspective of the Group of Three the desired result is the preservation of Canadian federalism. It held that this federalism is not an ideal form but rather one which accords a fair measure of federal paramountcy. It

\(^{96}\) Supra note 13, at 188.

\(^{97}\) Id. at 216.

\(^{98}\) Id. at 203. The Group of Six, after listing the twenty-two amendments since Confederation, concluded that only five were relevant as affecting federal-provincial relations in the sense of changing provincial legislative powers. These amendments were the 1930 natural resources agreements with the western provinces, the 1931 Statute of Westminster, the 1940 unemployment insurance amendment, the 1951 old age pensions amendment and the second old age pensions amendment in 1964.

\(^{100}\) Supra note 39.

\(^{101}\) These reasons reflect the distinctive judicial style of the Chief Justice.
did not require a convention of provincial consent, either substantial or unanimous. Indeed, this group held that recognizing such a convention would result in an unwarranted surrender of federal sovereignty.\(^{102}\) This directly conflicts with the position of the Group of Two which held that the convention of provincial consent recognizes the supremacy of the provinces within their own spheres.

The reasoning of the Group of Three represents a view of federalism that includes a strong federal government. Such a view is based on a traditional legal reading of the *Constitution Act, 1867*.\(^{103}\) Why this view of federalism is characterized as a legal construct and not a political one as ascribed to the Group of Two is difficult to explain. An examination of the *Constitution Act, 1867* and the constitutional precedents establishes a degree of federal paramountcy.\(^{104}\) In legal terms, the federal government was attempting to do no more than send a resolution to the Queen requesting amendment. The actual change would have been made by the Parliament of the United Kingdom. Whether this analysis is a legal fiction or not, it is the standard legal position. Thus, by holding that the federal government can act unimpeded by a convention of provincial consent, the Group of Three espoused a particular legal view of Canadian federalism. Whether such a view accords with political reality is another matter.

Of course, the members of the Group of Three would also have political views about the federal balance in Canada. These were not, however, the operative factors in their judgment. Perhaps the judges have disguised their result-orientation cleverly. Certainly the judgment of this group fits the deductive branch of the legal reasoning model better than the inductive branch. In its selection of relevant amendments, this group demonstrates the fashioning of reasons to suit a particular legal conclusion.

Like the Group of Six, the three dissenters carefully chose their amendment precedents. They introduced a unique criterion, namely, the degree of provincial opposition to a proposed amendment.\(^{105}\) Their particular selection revealed no convention of unanimous provincial consent. Changing the convention question to a substantial measure of provincial consent would have been, in their view, a judicial invention of an amending formula for the *Constitution Act, 1867* and, in fact, social engineering beyond the proper limits of the judicial role.\(^{106}\)

**F. Implications of the Patriation Reference for Future Decisions**

In many respects the *Patriation Reference* was an atypical case. It was a Reference on the most controversial political issue in recent history, and in

\(^{102}\) *Supra* note 13, at 280-82.

\(^{103}\) Allegations of bias in favour of the federal government have been rejected by Hogg, *Is the Supreme Court of Canada Biased in Constitutional Cases* (1979), 57 Can. B. Rev. 721. Interestingly, an earlier study done by the Québec government also reached the conclusion that there was no federal government bias. L’Ecuyer, cited by Hogg, at 722 n. 6.

\(^{104}\) Examples are the federal declaratory power and the residual federal authority. The judicially created doctrine of concurrency also emphasizes federal paramountcy.

\(^{105}\) *Supra* note 13, at 273.

\(^{106}\) *Id.* at 280-82.
The Patriation Reference dealing with it the Supreme Court was subjected to unparalleled public scrutiny. Nonetheless, it does offer insights into how the Court may deal with the Charter of Rights. Certainly the American experience with a bill of rights suggests that decisions about fundamental freedoms are rife with political controversy. Furthermore, there were no clear precedents upon which the Patriation Reference could be decided and it thus tested the creativity of the Court. These are exactly the kinds of challenges that the Charter of Rights will pose, particularly in the early days of its interpretation.

The Patriation Reference reveals that there is a high degree of result-orientation in the Supreme Court's judicial process. If we accept that there really are no neutral principles, legal or otherwise, then at least three of the four judgments have a policy orientation. Unlike its American counterpart, which is candid about its declarations of policy, the Canadian Supreme Court still expresses itself in the form of the legal reasoning model. Drawing upon the shared standards of Canadian society, the Court appears to apply legal principles to a particular fact situation.

Whether this shift to a policy-oriented decision is good or bad is a matter of perspective. Indeed some suggest that to contrast legal reasoning with the making of policy is a false dichotomy. Professor Fuller has described the classic judicial role as "a collaborative articulation of shared purposes." Whether such articulation is a matter of legal reasoning or policy-making would be difficult to decide. It is important to note that the purposes or policies are to be shared and thus should be societal rather than personal.

Result-orientation can be a dangerous judicial model, if a judge decides subjectively which results are desirable. That the judicial process is, to some extent, subjective could not be seriously denied, but it does not follow that it is exclusively so.

Perhaps the fundamental question can be said to be whether judicial decision-making is purely subjective and possibly, therefore, emotional, or whether it can be said to be objective and rational. It is my contention that it is in large part rational, even if somewhat defectively so. It is objective in that, to the extent that there is social consensus on a particular matter, it will enunciate that consensus. It is rational in that the judge has the duty of integrating his decision with the rest of the law, and also in that the judge must attempt rationally to justify even his value judgments.

The flood of scholarly books and articles suggests a continued scrutiny. In addition to a special issue of the Alta. L. Rev. and several isolated articles there have also been several books. McWhinney, Canada and the Constitution 1979-1982 (Toronto: Univ. of Tor. Press, 1982) and Russell, supra note 96, are but two examples. Two of the articles have been written by leading Canadian constitutional scholars: Lederman, The Supreme Court of Canada and Basic Constitutional Amendment — An Assessment of Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3) (1982), 27 McGill L.J. 527 and Hogg, Comment on Reference Re Amendment of the Constitution of Canada (1981) (1982), 60 Can. B. Rev. 307.

The most obvious example of this is the on-going controversy that surrounds school desegregation.

Supra note 3, at 471. Professor Weiler has criticized this adjudicative model for producing "arid legalism" on the Canadian scene.

Fuller, Human Purpose and Natural Law (1958), 3 Natural L.F. 68, at 73.

Supra note 4, at 665.
To put this in the context of the *Patriation Reference*, the members of the Group of Six may or may not have been expressing their own views when they wrote that unilateral patriation was unconstitutional in the conventional sense. They were, however, articulating a view broadly held throughout the country. To have ignored such opinions and taken a more legalistic view might have produced a worse solution. Professor Lyon expressed this in a different context:

>[M]y purpose has been to try to persuade lawyers in general and legal scholars in particular of the urgent need for some new theoretical framework which will revitalize the connection between "the law" and its ethical basis, and ensure a continuing contact between the two. I proceed from a conviction that the notion of law as a prevailing force, separate and apart from justice, tends to be destructive of human values. Whether the framework I suggest can effectively overcome this defect I do not know, but I think those who reject the theoretical basis of the *status quo* ought to propose an alternative. I think the exploration of a policy-science model with its essential contextual approach is a step in the right direction. If I succeed in sowing doubts in the minds of some true believers I will be satisfied.¹¹²

Not everyone agrees that judges should be recognized as political actors and openly adopt a policy-making approach. Dworkin argues that people have moral rights against the state and not just political ones.¹¹³ On this analysis, a more principled decision-making taking account of moral claims would be the only way a court could claim legitimate authority. However, considering that the rights embedded in the *Charter of Rights* were established and modified by a process of political lobbying, it is difficult to assert that these are moral rights.

The Court's result-orientation should not be particularly surprising or alarming. Being human, Judges are not inclined to follow any one model. This has been substantiated even with respect to the traditionalist House of Lords.¹¹⁴ Courts have always been engaged in more policy-making than lawyers care to admit. Much of it is done behind a smoke-screen of precedent and logic. Competing values should be openly recognized so we can be clear whose values they are. Are they the values of the judges, of a particular social class or of society at large? These issues will be critical to the interpretation of the *Charter of Rights* and should be openly addressed by the Supreme Court of Canada.

IV. THE RELEVANCE OF THE AMERICAN EXPERIENCE

The idea of a result-oriented or policy-making judiciary is alarming to many Canadians. It conjures up images of the politicized United States Supreme Court.¹¹⁵ Although Canadians do not want mechanical


¹¹³ *Supra* note 28, at 131-49.


¹¹⁵ This was described in exaggerated fashion in Woodword and Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979).
jurisprudence, they are unlikely to embrace political jurisprudence as described by Professor Martin Shapiro:

The core of political jurisprudence is a vision of courts as political agencies and judges as political actors. . . . In short, the attempt is to intellectually integrate the judicial system into the matrix of government and politics in which it actually operates and to examine courts and judges as participants in the political process rather than presenting law, with a capital L, as an independent area of substantive knowledge. Quite fundamentally political jurisprudence subordinates the study of law, in the sense of a concrete and independent system of prescriptive statements, to the study of men, in this instance those men who fulfill their political functions by the creation, application and interpretation of law.¹¹⁶

American courts do not in fact act as mere power brokers. Indeed, they have developed a wealth of judicial methodologies and strategies that should interest Canadian judges and legal scholars. The record of the Canadian Supreme Court on the Bill of Rights underscores the need for fresh and innovative techniques, especially since interpreting an entrenched bill of rights is a unique task. A general division of judges into those dedicated to legal principles and those concerned with results is insufficient.

One school of American interpretation can be labelled "textual": the judge fixes on the exact words of the Constitution itself. Mr. Justice Black eloquently articulated the rationale for this strategy:

Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind which brings new political administrations into temporary power. Rather, our constitution was fashioned to perpetuate liberty and justice by marking clear, explicit, and lasting constitutional boundaries for trials. One need look no further than the language of that sacred document itself to be assured that defendants charged with crime are to be accorded due process of law — that is, they are to be tried as the Constitution and the laws passed pursuant to it prescribe and not under arbitrary procedures that a particular majority of sitting judges may see fit to label as "fair" and "decent." I wholly, completely, and permanently reject the so-called "activist" philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean in the interest of "fairness and decency" as they see it.¹¹⁷

This statement expresses a kind of Constitution worship that fortunately has yet to infect Canada. On the surface, this approach would promote judicial restraint and deference to the intent of the legislators as expressed in the Constitution. At first blush, it would be attractive to Canadian judges because British style judicial restraint has been the norm in Canada, with the possible exception of the 1950s. It would allow them to restrict themselves to the literal statutory analysis that frequently characterizes decisions on the distribution of powers under the Constitution Act, 1867.

As indicated earlier, however, interpretation is not a neutral process. It can result in an activist and creative interpretation of the Constitution, and the record of Mr. Justice Black bears witness to that fact. This is especially true

¹¹⁶ Shapiro, Political Jurisprudence (1963-64), 52 Kentucky L.J. 294, at 297.
¹¹⁷ Turner v. United States 396 U.S. 398, at 426 (1970), (per Black J. dissenting). This same approach was also demonstrated by Black J.'s dissenting opinion in Griswold v. Connecticut 381 U.S. 479 (1965).
when the words of the constitutional text are broad and abstract in nature. Of course, broad words can be interpreted narrowly, as the Canadian Supreme Court demonstrated in its *Bill of Rights* decisions. In Canada, a strict textual approach may well be used to limit the words of the *Charter of Rights* rather than expand them.

Interest balancing is one of the most common methods of resolving bill of rights issues. It has become so prevalent in the United States that Professor Wechsler\(^\text{118}\) and others have called for a retreat from the overt balancing of values and for a return to principles. This judicial balancing of interests would not be new to Canadian judges but doing it openly would be an innovation. Even when there is an obvious conflict of values, the Canadian Supreme Court, and judges generally, still tend to couch their decisions in logic and precedent.

There are significant problems inherent in interest balancing: whose interests are in fact being balanced?; are the interests of a particular social group more frequently sacrificed than those of other groups?; what kind of judges are best suited to this kind of decision-making? These difficult questions may become more relevant to Canada because section 1 of the *Charter of Rights* appears to invite some degree of interest balancing:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Whether the Canadian Supreme Court will directly balance the value of limiting freedoms in the name of the collective good against the independent value of individual freedom is not a real issue. They will have to do so. A harder question is whether they will do it openly or hide behind a subterfuge of precedent. Which competing value will prevail — the state’s or the individual’s? This is where the Canadian judicial tradition will probably tip the scales in favour of the state.

A final judicial strategy has been labelled the “preferred freedoms” approach.\(^\text{119}\) To a court this is an invitation to activism. It involves important judicial choices which may be out of step with the general view. *Brown v. Board of Education of Topeka*\(^\text{120}\) is an example of such a choice. On this model there is a presumption against invading preferred freedoms, and any statute which should do so would be strictly construed. Such a statute would not be saved by the fact that, on balance, it is a reasonable restriction on the right in issue. This approach is clearly not deferential to legislators.

Mr. Justice Douglas, of the Supreme Court of the United States, is an exponent of preferred freedoms. His majority judgment in *Griswold v. Connecticut*\(^\text{121}\) is an example. He held that certain rights were so basic that ancillary rights were included as part of the penumbra of the specific amendments. Us-

\(^{118}\) *Supra* note 78, at 19.


\(^{120}\) 347 U.S. 483 (1954).

\(^{121}\) *Supra* note 47, at 480-86.
ing this analysis Mr. Justice Douglas held that there was a constitutional right to privacy.

In Canada, the *non obstante* clause in the *Charter of Rights* prevents the courts from having the final word as to which freedoms are preferred. Nonetheless, there are aspects of the two-tier preferred-freedoms approach that are relevant to the *Charter of Rights*. There are different categories of rights enumerated in the Charter. Some are in a special class in that they are not subject to the section 33 override clause.\textsuperscript{122} The rights in section 2 of the Charter are labelled "Fundamental Freedoms". Is this a legislative designation of a preferred category? It will be interesting to see if different standards of review are applied to different categories of rights.

The entrenchment of rights in the Constitution should have important practical effects upon how a court operates. It will require an expanded concept of judicial notice and an increase in the use of extrinsic evidence.\textsuperscript{123} Another lesson from the American experience is that the Supreme Court must be flexible and willing to depart from precedent as social conditions change.\textsuperscript{124} In order to decide whether there has been discrimination under section 15(1) of the Charter or whether an affirmative action programme pursuant to section 15(2) is warranted, a court will need social, political and economic facts, necessitating an expanded use of the brief *amicus curiae* and possibly a movement towards a Brandeis-style brief. This development might import a kind of judicial lobbying which has been rare in Canada.\textsuperscript{125} Lawyers will also need to change some courtroom habits, but such matters go beyond the scope of this study.

V. THE SUPREME COURT OF CANADA: A CALL FOR CREATIVITY

The fate of the *Charter of Rights* ultimately rests with the Supreme Court of Canada. At most the experiences of other legal systems can offer guidance. Professor Mark MacGuigan described the abolition of appeals to the Privy Council as a muted call for gradualism and not a mandate for creativity.\textsuperscript{126} Our Supreme Court may consider that an entrenched *Charter of Rights* with a legislative override provision sounds the same note of caution.

\textsuperscript{122}Democratic Rights in ss. 3-5, Mobility Rights in s. 6 and Language Rights in ss. 16-23 of the *Charter of Rights*.
\textsuperscript{123}There has already been some extension of these concepts in Canada in recent constitutional cases. *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 and *Patriation Reference*, supra note 13.
\textsuperscript{125}*Weiler*, supra note 3, at 448 suggests that the Brandeis Brief was an early form of lobbying. There has been unofficial lobbying in Canada as gay rights groups paraded outside the Supreme Court during hearings in *Gay Alliance v. Vancouver Sun* (1979), 27 N.R. 117 (S.C.C.).
\textsuperscript{126}*Supra* note 4, at 638.
It is most unlikely that the Court will disregard its past judicial habits. At least in its early days the narrow interpretation of the Bill of Rights is likely to haunt the Charter. Canada's Supreme Court has not been noted for its creative advances in the law. Professor Read, former Dean of Dalhousie Law School, painted a bleak picture:

... a perusal of Canadian law reports not only verifies an absence of creative approach, but conveys the impression that most of the opinions reported there are those of English judges applying English law in Canada, rather than those of Canadian judges developing Canadian law to meet Canadian needs with guidance of English precedent.

Chief Justice Laskin is much more optimistic about the creative potential of the Court. When still a law professor in 1951, he made a plea for a new departure by the Supreme Court:

What is required is the same free range in inquiry which animated the Court in the early days of its existence especially in constitutional cases where it took its inspiration from Canadian sources. Empiricism not dogmatism, imagination rather than literalness, are the qualities through which the judges can give their Court the stamp of personality.

In December, 1973, the Prime Minister broke with tradition and appointed Laskin as Chief Justice of Canada, by passing the senior judge of the Court, Mr. Justice Martland. Justices Laskin and Martland have responded very differently to the Canadian Bill of Rights. The day after his retirement from the Supreme Court in February 1982, Mr. Justice Martland candidly admitted that he was opposed to the Charter of Rights. He also disapproved of the activist judicial role implicit in an entrenched bill of rights. Chief Justice Laskin, on the other hand, has given every indication that he is anxious to meet the challenge of the Charter.

Nonetheless it would be naive to be too optimistic about recent changes of personnel on the Court. In spite of the retirement of Justices Pigeon and Martland and the imminent retirement of Mr. Justice Ritchie, the character of the Court will not necessarily change. Their replacements are likely to come

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127 Cook v. The Queen, an unreported decision of March 16, 1983 (N.S.C.A.) suggests that the Bill of Rights is of little assistance in cases concerning the Charter of Rights (per Hart J.A.), at 26. However, many other courts have relied heavily on the Bill of Rights cases as has the Nova Scotia Court of Appeal itself in an earlier case concerning detention and the Charter: R. v. Currie, an unreported decision of February 1983 (N.S.C.A.). One case relying heavily on previous Canadian authority is R. v. McIntyre, an unreported decision of May 14, 1982 (Alta. Q.B.). There are other cases taking a more adventurous approach: R. v. Oakes, an unreported decision of February 2, 1983 (Ont. C.A.).


129 Supra note 6, at 18.

130 Laskin, The Supreme Court of Canada: A Final Court of and for Canadians (1951), 29 Can. B. Rev. 1038, at 1076.


132 Supra note 72.

133 MacKay v. The Queen, [1980] 2 S.C.R. 370 is one example of Laskin C.J.'s attempts to give life to the Bill of Rights.
from the same background and social class. These factors may be more important than judicial personality. Even Chief Justice Laskin has recognized that there are institutional restrictions on the individuality of the judge. Canadians should not too quickly adopt the cult of judicial personality.

The Charter itself is a classic Canadian compromise which gives rights with one hand and takes them away with the other. In the context of Canadian constitutional development, it is highly probable that Canadian judges will give a broad meaning to section 1 of the Charter and discover that there are many "reasonable limits" on rights, which can be demonstrably justified in a society as free and democratic as Canada. However, such conclusions are likely to find favour with the great majority of Canadian citizens. Judges will not be the inhibitors of the public will but rather its interpreters.

If the Supreme Court is to accord any significance to the Charter of Rights it must be innovative and creative. However, we should not expect an overnight revolution. Drastic change is neither desirable nor mandated by the quasi-entrenchment of rights in the Charter of Rights. Courts, as part of Canada's institutional structure, will not fashion a revolution where none was intended. Nonetheless, the performance of the Supreme Court in the Patriation Reference reveals some signs of creativity. An increasing number of Supreme Court judges appear to recognize that law is a means rather than an end. They also demonstrate a more flexible and responsive judicial process which, if followed, will assist the Court in meeting the new challenges of the Charter of Rights.


\[136\] The non obstante clause in s. 33 of the Charter of Rights introduces a perverse kind of double jeopardy for the protection of rights in Canada. If the courts give a broad interpretation to certain sections of the Charter then the legislators may override that decision. This means that unpopular groups such as gays or prison inmates may receive little real protections from an intolerant society.