

The Chrétien legacy: Courting democracy?

THE CHARTER AND PUBLIC POLICY

There can be no doubt that Jean Chrétien left his mark on Canadian law and society to an extent that few others have or could rival. If Trudeau was the constitutional prophet, Chrétien was, first as justice minister and then as prime minister, his leading disciple. For good and bad, the fates of Canada's *Charter of Rights and Freedoms* and the Shawinigan lawyer go hand in hand.

While Chrétien's influence is immense and unarguable, the more contested question is whether that legacy has advanced or retarded Canadian democracy. In "courting democracy" by putting the Supreme Court of Canada at the heart of Canadian politics, has Canada become a more or less democratic country? Has the switch from politicians to judges as the ultimate arbiters of much public policy been a boon or a bust?

Between 1980 and 1982, it was Chrétien who brokered the deal that made the Charter possible, with its characteristic mix of a balancing s. 1 and an overriding s. 33. Whether the resulting decisions have been substantively good or bad is the stuff of ideological parlour games—*Hunter* and *RJR-Macdonald* on corporate rights, the *Alberta Trilogy* on (lack of) union rights, *Dolphin Delivery* on private rights, *Andrews* on equality, and the list goes on.

CHARTER ACTIVISM AND A RIGHTS CULTURE

The cumulative force of the court's jurisprudence is significant and compelling. Yet, it is the shift in the balance of constitutional power between courts and legislatures over the last 20 years that is more telling. For all the hype and ballyhoo, Canadian democracy is in trouble. Chrétien leaves the country in worse democratic health than he found it. Notwithstanding increases in many economic and social indicators, Canadians are less involved in governing themselves.

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one of the best societies to live, there is a serious erosion of basic democratic precepts. The twin foundations of democracy—popular participation and political accountability—are going the way of the polar ice-caps. There seems to be an implicit Faustian bargain between elite and rank and file that the price of socio-economic advancement (which is still questionable when looked at in other than mean or median terms) is at the cost of democratic involvement. And the Charter is part of that setup.

While there has never been a golden age for Canadian democracy, what now passes for "democracy" is an elite and stilted conversation between the judicial and executive branches of government over what is best for the country. In this exchange, the voices of ordinary Canadians play no real or substantive role. Whatever ideological course is to be followed, the democratic choice should not be only between rule by a judicial elite or a governmental elite, but by a political process that is more responsive to broader democratic concerns.

JUDICIAL ELITES AND DEMOCRACY

Of course, a robust judiciary has a defi-

nite role in a vital democracy, but it should be limited and partial. Being neither elected by nor representative of Canadians, judges can hardly claim to have much democratic legitimacy. Their contributions must be restricted to the discrete resolution of disputes: extensive policy making seems outside their democratic ambit. On the other hand, while the executive can lay claim to greater democratic legitimacy, its actual exercise of power offends its democratic pedigree. Too often, political leaders dance to their own tune and interests. Increased "rule by Cabinet" is hardly better than extended "rule by the Supreme Court."

The fact that public opinion polls show almost overwhelming support (between 80 and 90 percent) for the Supreme Court is less an accolade for judges and more a slap in the face for politicians, particularly those leaders, like Chrétien, who preside in and over cabinet. Judges can only ever do a second-best job at making up the democratic deficit in the present performance of Canadian politics; they are neither positioned nor skilled at such a task.

Moreover, the debate over whether courts can or should invade the political domain misses the whole point. It is now surely accepted that courts cannot exercise their powers and responsibilities without reference to contested values and principles of governance. The real and neglected issue is not the politicization of the judiciary, but the democratic failure of the executive and legislative in fulfilling their constitutional responsibilities and mandate. This is the true and ironic measure of the populist Chrétien's legacy.

REDRAWING THE LINE BETWEEN LAW AND SOCIETY

If governments and legislatures were constituted properly and doing what they were supposed to be doing, the question of what judges do would be less pressing and more incidental. If there is

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cerned by the degree to which the CRTC had displaced the government as the chief policy maker in broadcasting. They wanted to see greater transparency and accountability and indeed checks and balances in the system including the appointment of a media monitor who would report annually to Parliament on the health of the *Broadcasting Act*. In addition, they called for the creation of a single communications act and indeed a single department (merging Industry and Heritage) because in an age of media convergence, telecommunications and broadcasting could no longer be seen as separate universes.

The report also had a great deal to say about cross-media and foreign ownership. Under the Chrétien government, conglomerates have gained strangleholds in several Canadian media markets. In the Vancouver/Victoria market, for instance, CanWest Global owns all three major newspapers and the two most-watched TV stations. In Montreal, Quebecor owns *Le Journal de Montreal*, cable giant Videotron, the largest TV


franchise, TVA, as well as a bevy of magazines. Laws strictly limiting cross-media ownership have been introduced in France and in the UK. Even in the United States, the Senate recently passed for only the second time in history a resolution of “disapproval” to overturn the Federal Communications Commission’s decision to increase the reach of media companies from 35 to 45 percent of TV viewers. Yet the Chrétien government has failed to address the issue at all. Given that the right of citizens to have access to a diversity of viewpoints is the basic linchpin of a healthy and educated democracy and society, the silence is haunting.

The Lincoln report recommended that there be a moratorium on the granting of any new licences involving cross-media ownership until the government formulates a clear policy. MPs also drew a line in the sand on foreign ownership. The argument was that Canada had enough talent, imagination, and capital to be able to harness its own cultural industries without needing to sell the farm

to foreign interests. Moreover, current provisions allow foreign companies to invest relatively heavily in Canadian enterprises if they wish, but they have invested relatively little so far.

A VAGUE RESPONSE

The Chrétien government’s response to the Lincoln report is filled with vague promises to do better on some issues and abject silence on others. Indeed the response is to some degree a symbol of the attitudes that seemed to prevail during Mr. Chrétien’s tenure as prime minister. Key decisions are avoided, entrenched bureaucratic and corporate interests prevail, small steps are preferable to bold moves, and the government compliments itself on doing such a good job.

Jean Chrétien, adept politician and political battler, seemed to take little interest in Canadian broadcast policy. From his vantage point, there were few political fires that had to be put out. The irony is that he may have missed the larger fires that were blazing all around him. 

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a crisis in Canadian democracy, it is to be found in the fact that politicians and legislators are simply not “democrats” in the full sense of the term. “Democracy” is used more as a rhetorical cloak for elitist practice than a measure and guide for popular politics. After all, a drop in turnout in federal elections from 76 percent in 1979 to 61 percent in 2000 is hardly reassuring.

There are no easy solutions to the present undemocratic trends. But improvement will not come from increased interventions by judges in the micromanagement of governmental policies. Chrétien midwived and parented a constitutional change with limited democratic value. Indeed, judicial prominence is a short-term crutch that actually harms a limping polity in the medium and long term. The replacement of one elite rule (executive) by another (judicial) can be

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considered positive only under the most warped sense of democracy.

POWER TO THE PEOPLE

So, if we want to reign in the judges, we need to ensure that politicians and rep-

resentatives are living up to their constitutional and democratic responsibilities. At present, they are palpably not. But simply construing the democratic challenge as being one about whether the judges stay out of or stray onto the political terrain is to misrepresent the problem and, therefore, to hamper any genuine solutions. The Charter is here to stay, but the elitist mentality that en-crusts it need not be.

Whatever else it means, democracy demands more power to the people and less to the elites. Aristocratic rule is no less palatable because judges and political leaders are the new dukes and barons. And, it is certainly no more acceptable when such elites wrap themselves in the trappings of democracy. Chrétien’s Charter has turned out to be more about elite power than about genuine democracy. 