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CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

SPECIAL DOUBLE ISSUE ON THE SUPREME COURT'S 1998 CONSTITUTIONAL CASES

The Supreme Court's 1998 constitutional cases: The debate over judicial activism heats up

BY PATRICK J. MONAHAN

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It was another busy and controversial year on the constitutional front for the Supreme Court of Canada in 1998, as is demonstrated by the wide range of opinion reflected in this, the third annual *Canada Watch* special issue on the Supreme Court's constitutional decisions. The court issued a total of 25 constitutional decisions in 1998, representing just over one-quarter of the 92 judgments released during the year. Once again we have brought together leading commentators from across the country to debate and analyze the key developments. (The papers were originally presented at a conference held in Toronto on April 16, 1999, and have been revised for publication in *Canada Watch*.)

The Charter

Twenty-one of the 25 constitutional decisions in 1998 were Charter cases. In those cases, the court ruled in favour of the Charter claimant 8 times, in favour of the government 12 times, and the result in one case was inconclusive. This Charter "success rate" of 40 percent is slightly above the court's average of 33 percent over the past decade, but is not out of line with results obtained in individual years in the 1990s. (The highest "success rate" over the past decade was achieved in 1997, when one-half of the 20 Charter cases resulted in a ruling in favour of the claimant, while the lowest success rate was in 1993, when the Charter claimant succeeded in just 9 of the 42 decisions handed down that year, or about 21 percent.)

Sixteen of the 21 Charter cases in 1998 arose in the criminal law context, which, again, is consistent with past trends. The Charter claimant succeeded in six of those cases (37.5 percent). However, in only one criminal case, *R. v. Lucas*, did the court rule a provision in the *Criminal Code* to be unconstitutional. (Even in *Lucas*, the court largely upheld the defamatory libel provisions in the Code, while ruling that an incidental

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feature of the existing provision was unconstitutional. Thus, while *Lucas* is technically a "loss" for the government, in substance the government succeeded in defending the validity of the Code provisions at issue.) The other five cases in which the Charter claimant succeeded in 1998 involved decisions or actions of the police or the judiciary.[1]

The criminal law case that received the most media and public attention was *R. v. M.R.*—1 of the 10 criminal cases in which the court sided with the government rather than the accused. Here the court ruled that school authorities and the police can order searches of high school students without first obtaining a warrant from a judge or justice of the peace. (In order to obtain a warrant, the police must convince the justice that there are reasonable grounds to believe that they will find evidence of a criminal offence.) The court held that the normal requirement to obtain a search warrant before conducting a search could be relaxed in the case of high school students given the public interest in maintaining order and discipline within the school system. However, our court did not go as far as the U.S. Supreme Court in the 1995 *Veronica* decision, where the U.S. court allowed police to conduct random drug searches of students involved in extracurricular activities. In *M.R.*, our court noted that there was no need for a warrant because the school vice-principal had reliable information indicating that the student in question was involved in selling drugs. By emphasizing the fact that the vice-principal had reasonable grounds for searching the student in question, the court seemed to implicitly rule out random drug searches such as those that are permitted in the United States.

The other high-profile criminal law case in 1998 was *R. v. Schreiber*, another government "win," where the court held that a letter of request sent to the Swiss authorities seeking confidential banking information relating to the so-called airbus scandal did not violate the Charter. What was surprising about the majority decision, written by Madame Justice L'Heureux-Dubé, was her ruling that the guarantee in the Charter section 8 against "unreasonable search and seizure" did not even apply to the letter of request because it involved a request to a foreign government. Thus, the Canadian government is apparently free to send such letters and obtain sensitive information about Canadians from foreign authorities even if the government has no basis of any kind to believe that a criminal offence has been committed.

In previous years, the Supreme Court has been criticized for adopting an unduly activist stance in criminal law cases, such that the ability of the police and Crown to investigate and prosecute crime has allegedly been put in jeopardy. (For example, there was an outcry following the *Feeney* decision in 1997, where the court threw out a murder conviction, even though the accused was clearly guilty, because evidence had been obtained as a result of an illegal search. More on the aftermath of the *Feeney* case below.) The court did not make any similar bold or controversial moves in 1998, with the highest profile cases (*M.R.* and *Schreiber*) both favouring the government.

Of the five non-criminal Charter cases in 1998, the most significant by far was *Vriend v. Alberta*, where the court ruled that Alberta's human rights legislation violated section 15 because it failed to prohibit discrimination on grounds of sexual orientation. This decision attracted a good deal of public controversy, with Alberta Premier Ralph Klein giving some consideration to whether to invoke the Charter's "notwithstanding clause" and override the court ruling. (Mr. Klein ultimately accepted the court's ruling.) Much of the controversy over the case stemmed from the court's decision to amend the statute by "reading in" a prohibition against discrimination on grounds of sexual orientation. But the remedy of

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"reading in" is designed, in fact, to avoid the court's having to strike down offending legislation in its entirety when it finds legislation as currently drafted to be unconstitutional. As such, it reflects a desire on the part of the judiciary to narrow the impact of their rulings, rather than to encroach on the prerogatives of the legislature.

Far more significant than the decision to "read in," in my view, was the court's finding in *Vriend* that the mere failure of government to act could constitute a violation of s. 15. If this ruling is followed in future years, it will give Charter litigants an important tool to force governments to extend the reach of existing laws or to block the repeal of interventionist legislation. For example, a challenge to the Ontario government's repeal of employment equity legislation following the 1995 election has been dismissed by Ontario courts on the basis that government was under no obligation to enact the legislation and thus should be free to repeal it. But *Vriend* would suggest that the government's failure to remedy private acts of discrimination can itself amount to governmental discrimination for purposes of s. 15. On this "logic," the repeal of Ontario's employment equity legislation may be a violation of s. 15 and must be justified under s. 1 of the Charter as a "reasonable limit." This would force the court to evaluate whether, in fact, the employment equity legislation would have remedied discrimination, or whether the legislation was itself discriminatory in that it would have legislated racial quotas in the workplace. Courts are obviously totally ill-equipped to make that kind of evaluation; moreover, if they ever were forced into such an exercise, they would likely fall back on stereotypical reasoning and untested assertions about the nature and extent of private discrimination in the workplace.

The other significant non-criminal Charter case in 1998 was *Thomson Newspapers*, where the Supreme Court of Canada struck down a provision in the *Canada Elections Act* prohibiting the publication of poll results in the 72 hours preceding voting. Mr. Justice Bastarache, one of the newer members of the court, adopted a much more robust approach to s. 2's guarantee of freedom of expression than had been the case in the 1997 *Libman* case. (In *Libman*, while the court ruled that certain limits on third-party spending in a Quebec referendum campaign were unconstitutional, it suggested that the defects in the law could be remedied with very modest tinkering. The Bouchard government took up this invitation and made minimal amendments to the law in 1998 in accordance with the court's suggestions.) In *Thomson Newspapers*, the court rejected the argument that late-campaign polls should be banned in order to prevent a so-called "bandwagon" effect, in which voters supposedly flock to the side of the party predicted to win. Bastarache J. suggests that even if polls do produce a bandwagon effect (which is itself speculative), this is no reason to ban the information: a free society permits voters to decide for themselves which party or candidate to vote for, regardless of whether those choices are for the "right" reasons.

There was no doubt that the federal government would have been under a political obligation to respond to such a referendum result. What seemed difficult to follow was how the court was able to find that there would be a legal duty to negotiate in such circumstances.

FEDERALISM CASES

Six of the 25 constitutional cases in 1998 raised federalism issues involving the relationship between the federal government and the provinces. The most high-profile of these cases was undoubtedly the *Secession Reference*, in which the court answered three questions that had been posed by the federal government on whether Quebec had a right of unilateral secession. While the court agreed with the federal government that Quebec did not have the right, either under domestic Canadian law or under international law, to secede unilaterally, it surprised many observers (including this one) by creating a "duty to negotiate" secession.

Under the court's reasoning, if the Quebec government obtains a clear majority on a clear question in favour of secession, the federal government and the other provinces would have a legal duty to negotiate the breakup of the country. There was no doubt that the federal government would have been under a political obligation to respond to such a referendum result. What seemed difficult to follow was how the court was able to find that there would be a legal duty to negotiate in such circumstances. The court based its analysis on the fact that there was a "gap" in the constitution and that, therefore, it could look to certain underlying principles such as "democracy" in order to fill in that gap.

In the short term, the court's judgment has been well received by both federalists and sovereigntists, since it gave half a loaf to each. The longer-term implications of the judgment for a third

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sovereignty referendum are more difficult to gauge. The court did not define what would constitute a "clear majority" or a "clear question." It remains to be seen whether the federal government will attempt to define the meaning of these terms, either by introducing legislation or through a white paper. At the same time, Quebec Premier Lucien Bouchard has been handed an important political tool by the court, since Mr. Bouchard will be able to argue that a "yes" vote is simply a mandate to conduct negotiations, in accordance with the Supreme Court's judgment.

When we talk about "the court" as a single entity, we ignore the fact that the justices are often divided in controversial Charter and constitutional cases. Different members of the court have quite distinctive approaches to the Charter.

THE COURTS AND THE LEGISLATURE

The Supreme Court's role is becoming a source of increasing public debate and controversy, with a growing number of critics alleging that the court is becoming unduly activist. In order to test that criticism, *Canada Watch* undertook an analysis of the 98 constitutional decisions handed down by the Supreme Court over the past 3 years. What we found is that in only 13 cases over the past 3 years did the court rule a statute or part of a statute to be unconstitutional. (The 12 different statutory provisions that were ruled invalid are outlined in table 1.) We also found that in many of those cases, the court left ample room for the legislature to respond in a way that would remedy the constitutional defect in the law while still achieving the legislature's original objective. I already made reference to the fact that following the *Libman* decision in 1997 striking down part of Quebec's referendum legislation, the Quebec National Assembly made very modest amendments to the legislation to bring it into line with the court's ruling. Another illustration is the Ontario legislature's response to the 1998 decision in *Re Eurig Estate*, which ruled that Ontario's system of probate taxes (taxes imposed on the value of an estate when a will is accepted by a court) was unconstitutional. Ontario responded by quickly enacting new legislation that retroactively imposed identical taxes dating back to 1950. The end result was that no one received any money back from the government, even though the regulations under which the taxes had been imposed were found to be unconstitutional. (The only exception was the executor of the Eurig estate, who took the case to court and who received a refund of a grand total of about $5,700 dollars for his trouble. Consider the fact that it will typically cost a litigant well over $100,000 to take a case all the way to the Supreme Court of Canada!)

About half of the Supreme Court's Charter docket does not even deal with the validity of statutes or regulations. These cases focus on whether specific actions taken by government officials or the police involve a violation of Charter rights. Even where the court rules that the specific action or decision in question violates Charter rights, the difficulty can often be remedied for future cases through the enactment of legislation. For example, in the *Feeney* case (referred to earlier), the court ruled that a search warrant was required to enter a private residence in order to make an arrest. There was at the time no *Criminal Code* procedure for obtaining such a warrant. Since police officers had entered Feeney's home without a warrant, the evidence they obtained was excluded and his conviction was overturned. But the story doesn't end there. After the Supreme Court decision, Feeney was put on trial a second time for murder. Even though the police were prevented from introducing the illegally obtained evidence, he was convicted a second time. As lawyer Michael Code comments elsewhere in this issue, media commentary on the *Feeney* case has totally ignored the conviction at the second trial, continuing to refer to the case as an instance of the court "setting a murderer free."

But what about the impact of *Feeney* on the ability of the police to investigate crimes in the future? Within six months of the decision, Parliament amended the *Criminal* Code to establish a procedure for obtaining search warrants to enter private residences to make an arrest. By all accounts, this new procedure is working well. Thus, in the end, not only did Mr. Feeney end up in jail, but police in future cases should be able to effectively pursue and arrest murder suspects.

DIVISIONS ON THE COURT

When we talk about "the court" as a single entity, we ignore the fact that the justices are often divided in controversial Charter and constitutional cases. Different members of the court have quite distinctive approaches to the Charter.

As the data in figure 1 demonstrates, the most "activist" member of the court in Charter cases is Alberta's Jack Major. This is perhaps somewhat ironic given the fact that Alberta is the stronghold of the Reform Party, which has been the most outspoken critic of judicial activism. For example, in the 16 Charter cases in which Justice Major participated in 1998, he sided with the Charter

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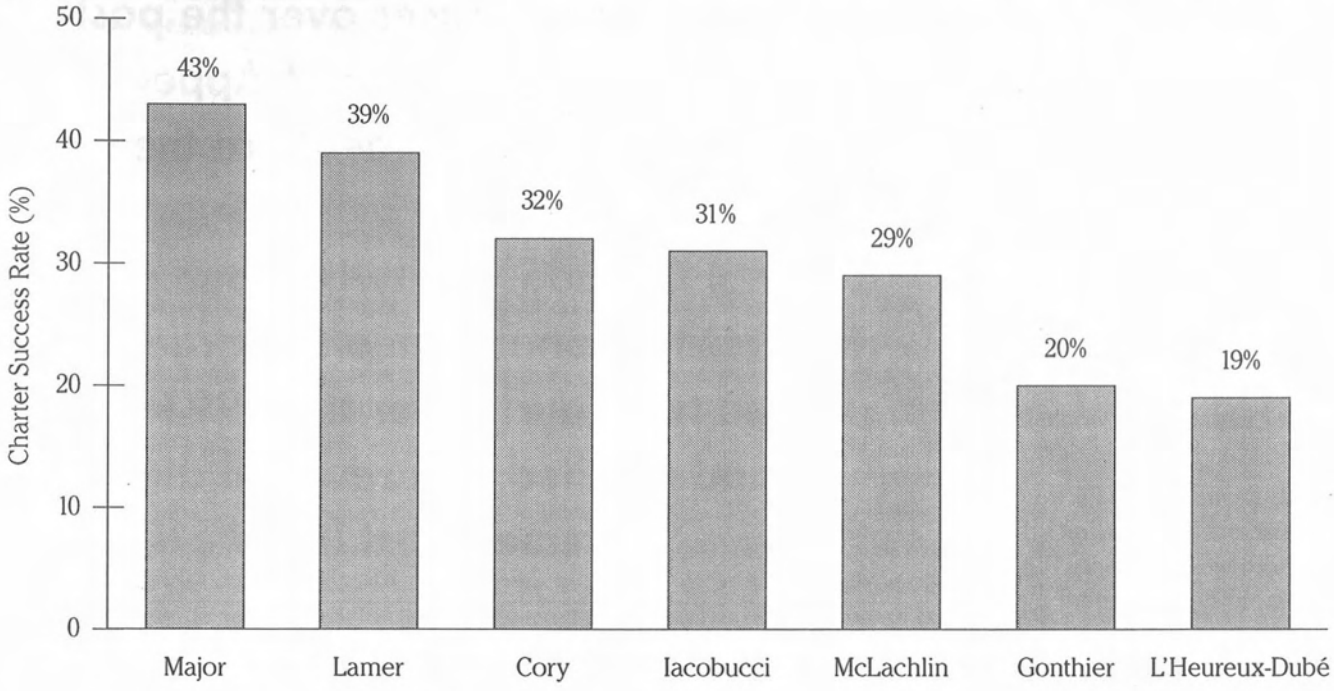
Voting Behaviour in Charter Cases, 1991-1998



Note: One additional case was inconclusive.

Table 1: Supreme Court Decisions Declaring Statutes Unconstitutional, 1996-1998

1998	*Re Eurig Estate*	Regulation under the Ontario *Administration of Justice Act* providing for probate fees ruled unconstitutional.
	Vriend v. Alberta	Provincial human rights code unconstitutional for failing to prohibit discrimination on the basis of sexual orientation.
	Thomson Newspapers v. Canada	Provision in *Canada Election Act* prohibiting publication of polls for 72 hours prior to election date ruled invalid.
	R. v. Lucas	Part of defamatory libel provision in *Criminal* Code ruled unconstitutional as an unjustified limit on free expression.
1997	*Godbout v. City of Longueuil*	Residency requirement by municipality of Longueuil ruled an unconstitutional infringement of liberty under s. 7.
	Re Remuneration of Provincial Court Judges (Manitoba, Alberta, and P.E.I. –3 separate cases.)	Legislation reducing salaries of provincial court judges in three provinces ruled unconstitutional as infringing judicial independence; provinces required to set up independent commissions make recommendations as to provincial court salaries.
	Libman v. Quebec	Spending limits in Quebec referendum legislation ruled unconstitutional limit on freedom of expression.
	Benner v. Canada	Provision in federal *Citizenship Act* requiring children born abroad of a Canadian mother prior to 1977 to undergo a security check ruled unconstitutional as a violation of equality rights.
1996	*R. v. Nikal*	Certain conditions attached to a fishing licence under B.C. fishing regulations violate aboriginal right to fish for food under s. 35(1).
	R. v. Cote: R. v. Adams	Regulations under Quebec *Fisheries Act* violate s. 35 aboriginal rights.

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claimant 11 times, or about 69 percent. All other members of the court favoured the government in at least one-half of the Charter cases in which they participated in 1998. Major J.'s tendency to side with the Charter claimant was revealed most clearly in cases where he dissented from the majority, including the following cases in 1998:

- *R. v. M.R.*, an 8-1 decision upholding warrantless searches of high school students, where Major J. was the lone dissenter who would have ruled the search unconstitutional;
- *CEMA v. Richardson*, a 7-2 decision ruling that an egg-marketing scheme in the Northwest Territories did not violate mobility rights under s. 6 or freedom of association under s. 2, where Major J. (along with McLachlin J.) would have struck down the scheme as a violation of mobility rights); and
- *R. v. Rose*, a 5-4 decision ruling that the requirement that an accused address the jury first at the end of a criminal trial where the defence has led evidence does not violate the right of an accused to make full answer and defence, with Major J. one of four members of the court who agreed with Justice Ian Binnie's dissent.

The other member of the court who might be described as a Charter "activist," in the sense that he rules in favour of Charter claims more often than the court's average of 33 percent, is Chief Justice Lamer. The chief justice, who of course has recently announced his intention to retire after close to 20 years on the court and over 9 years as chief justice, ruled in favour of Charter claimants in 39 percent of the cases in which he participated in the 1990s. This compares with Justice Major, who ruled in favour of Charter claimants in 43 percent of the cases on which he sat since 1991.

Justices Cory, Iacobucci, and McLachlin comprised a "middle ground" on the court over the past decade, ruling in favour of Charter claimants in close to one-third of cases, which is not far off the court's average as a whole. The clear Charter "conservatives" are Quebec judges Charles Gonthier and Claire L'Heureux-Dubé, who tended to side with the government in approximately four out of five Charter cases on which they participated.

In constitutional cases over the past decade, the Ontario Court of Appeal and the Federal Court of Appeal are the least likely to be reversed by the Supreme Court of Canada. Thirty-one percent of the constitutional appeals heard from those two courts over the 1991-98 period resulted in a reversal at the Supreme Court level.

At the same time, it should be pointed out that the generalizations set forth in the previous paragraph do not always hold true. For example, Madam Justice L'Heureux-Dubé, although tending to adopt a narrow interpretation of the Charter in criminal law cases, has taken a relatively activist stance in the interpretation of equality rights in s. 15. In contrast, the normally activist Justice Major has tended to favour a somewhat narrower application of s. 15. In *Vriend*, for example, while Major J. agreed with the majority that Alberta's human rights legislation violated s. 15, he would not have "read in" the term "sexual orientation" into the legislation, preferring to send the whole issue back to the Alberta legislature.

REVERSAL RATES

The court allows the appeal in about 45 percent of the cases it hears overall. It is surprising that the reversal rate in constitutional cases over the past decade has been somewhat lower, at about 40 percent. (I describe this result as surprising since constitutional cases tend to raise the most difficult issues, where one might expect the Supreme Court to differ with the provincial court of appeal.)

A reversal rate of 40 to 45 percent might sound high, until you recall that the court agrees to hear the appeal in only about 12 percent of the cases in which leave to appeal is sought. When this number is factored in, the court is overruling the provincial court of appeal in only about 5-6 percent of those cases in which one party is sufficiently dissatisfied with the result as to seek review from the Supreme Court. That number seems relatively modest.

In constitutional cases over the past decade, the Ontario Court of Appeal and the Federal Court of Appeal are the least likely to be reversed by the Supreme Court of Canada. (Thirty-one percent of the constitutional appeals heard from those two courts over the 1991–98 period resulted in a reversal at the Supreme Court level.) The other province with a reversal rate lower than the national average was Nova Scotia, with a 36 percent reversal rate. Three provincial courts of appeal, British Columbia at 46 percent, Alberta at 48 percent, and Quebec at 50 percent, have

reversal rates slightly higher than the overall average in constitutional cases. The number of cases heard from the other provinces are too small to be significant.

THIS ISSUE

Readers will find the developments referred to above considered in more detail in the papers collected in this issue. The papers fall into three groups. Given the significance of the *Vriend* case, not only for equality issues but for the court's overall approach to the Charter, four separate papers (Robert Charney, Mary Eberts, Bruce Ryder, and Ted Morton) examine its implications. Three papers examine the Supreme Court's decision in the *Secession Reference*, followed by three papers examining the court's criminal law decisions. Finally, papers by Jamie Cameron and Roslyn Levine discuss the court's decision in *Thomson Newspapers*.

As this issue goes to press, the court has already handed down a number of major constitutional cases in 1999. All of which means that there will be more grist for the constitutional mill at next year's *Canada Watch* conference, scheduled for April 7, 2000 in Toronto.

[1] The cases were: *R. v. Maracle* (involving unreasonable delay in prosecution); *R. v. Cook* (suspect arrested in United States has right to counsel); *R. v. Williams* (juror challenge for racial bias allowed); and *R. v. Smith* and *R. v. Skinner* (Crown failure to disclose violates accused's rights to full answer and defence).

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the bench. Will it inspire more of the same? Will it be the "moral supernova" that legitimates and further advances the court's new role as egalitarian social reformer? There are certainly reasons to think so. The Court Party continues to enjoy the resources that have contributed to its success to date. It has achieved near hegemonic control of Canadian law schools and legal commentary. Their graduates ensure that a growing percentage of the active bar is imbued with the spirit "Charter values." A new generation of Charter partisans—judges like Rosalie Abella, Jim MacPherson, and Lynn Smith—are being appointed to the bench. Elected governments continue to back-pedal in response to judicial policy making. Section 33 has not been used in a decade. Is it any wonder that, emboldened by their victory in *Vriend*, EGALE has launched a mega-constitutional challenge to 59 federal statutes?

There are, however, some signs of unrest in Charterland. There is growing support for both conservatism and populism in Canadian electoral politics. The success of the Reform Party nationally and the Harris and Klein governments provincially reflect growing middle-class disenchantment with the costs of the welfare state. This movement could collide with the Court Party's attempt to transform rights into entitlements, to more not less government. Recent populist measures such as referendum and recall stress more accountability in government, hardly the strong suit of unelected judges.

It has become politically acceptable to publicly criticize court decisions and judicial activism more generally. A year ago April there was a very public campaign in Alberta, which included radio, television and newspaper advertisements, to urge the Klein government to use s. 33 to overrule the *Vriend* decision. This failed, but last month the Alberta government announced that it would use s. 33 in response to any judicial attempt to impose "same-sex marriage" and that any other use of s. 33 would be decided by referendum.

The Reform Party has also begun to make judicial activism one of its staple issues. It pressed the Chretien government to invoke s. 33 in response to the B.C. child pornography ruling in January. In February, the United Alternative convention endorsed a policy condemning judicial activism and supporting the responsible use of section 33. This latter sentiment was subsequently endorsed by former provincial premiers Peter Lougheed and Allen Blakeney. Responding to the perception of the court's new power, most newspapers in the country have endorsed parliamentary hearings for Supreme Court nominees.

Are these just temporary eruptions or the beginning of something more permanent? The key, I predict, will be the court's ability to persuade the political class that its decisions are required by the Charter. The legitimacy debate is not about "text-driven" judicial activism, but judge-driven activism. To preserve their authority, judges must persuade those on the losing side that their decision is required by the constitution, not by their personal policy preferences.

The court-curbing periods in American history all occurred in response to decisions where the Supreme Court failed to persuade—the *Dredd Scott* ruling on slavery (1856), the "substantive due process" and New Deal cases (1930s), and the *Roe v. Wade* abortion ruling (1973). The current "legitimacy" controversy in Canada is a symptom that growing numbers of Canadians are not being persuaded.

[1] A more complete version of my criticisms of the *Vriend* decision may be found on the website of the Alberta Civil Society Association: www.pagusmundi.com/acsa/badlaw.htm.