Many Canadians believe that the judiciary—a group of unelected officials—is working to shape public policy. Are judges making political decisions? And why? **BY ALISON BREWIN**

Public policy and judicial activism: Who's really making decisions?

"The doctrine of the 'separation of powers' recognizes that each branch of government has a distinct role to play within the structures of democratic governance. All branches of government in the Canadian constitutional democracy have a duty to respect and comply with the Charter... One role of the courts is to review the actions and inactions of the legislative and executive branches of government to ensure their compliance with the Charter."

—LEAF argument in *NAPE v Newfoundland Government,* May 2004

THE REPATRIATION OF THE CANADIAN Constitution in 1982 and the inclusion of the new *Charter of Rights and Freedoms* brought home more than Canada's independence from our British motherland—it brought to Canada American-styled debates about the role of judges in directing, interpreting, even usurping the role of democratically elected governments. The nexus of the issue is this: at what point does the judiciary's interpretation of the law begin and the power of government to make decisions end? In other words, if we, the people, elect a group of people to make decisions for us, how can it be acceptable for a small group of nine men and women—very ambitious, successful members of the legal profession—to tell the government it has made the wrong decision?

Like many political debates in Canada, this one is based on similar debates in the U.S., debates that have raged since that nation wrote its constitution over 200 years ago. In truth, the Canadian constitution was written, debated, rewritten, and finally enacted with a very clear picture of the constitutional crises that had occurred for our southern neighbour over those years. In truth, the Canadian Charter was written very much with the American experience in mind and was designed to ensure that democracy in this country was robust, substantive, and allowed for a dialogue between Courts and governments.

Kent Roach, in his important book on this very subject, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, says it better than I ever could:

"Another element of popular discussions of judicial activism is the assumption that, because the judiciary is not elected, it must be undemocratic... The relation of both judicial and legislative law mak-

ing to democracy is, however, more complex than labels and name calling. In debates about judicial activism, democracy often means rule by the majority of the people and their elected governments. At the same time, however, many would define as undemocratic any actions by legislatures that denied fundamental freedoms such as freedom of expression. In any event, governments are not elected with a majority of votes and, between elections, those with a majority in the legislature have significant freedom to enact legislation that may not accord with what the majority wants."

As Professor Roach points out, governments with large majorities, such as the provincial government here in B.C., have a great deal of freedom to enact and change laws without any reference to the people of the province, including those who voted for them. In addition, the truth about many cases brought before the Supreme Court of Canada is that the court has been very reluctant to tell governments what to do; the Supreme Court has, in recent cases, accepted very simplistic arguments from governments about fiscal restraint as valid excuses for what might otherwise have been considered discrimination.

Guided by the Charter Alone

Our distinctly Canadian Charter, in fact, is admired around the world for the brilliance of its internal and deeply democratic approach to the interplay between governments, citizens, and minority groups. Recent experiences here in B.C. and with the federal government suggest that it is, in fact, governments themselves that are letting the courts define public policy approaches.

In a number of recent cases (*Law v Canada; NAPE v Newfoundland; Auton v B.C.; Gosselin v Quebec*) the Supreme Court has backed away from telling provincial governments how to spend their money. The *Law* case, in particular, has made it more difficult for those claiming that the government has breached their equality rights under section 15(1), by shifting the onus of proof from the government under section 1 of the Charter, to the claimant in his or her efforts to establish that discrimination occurred. Section 1 of the Charter is the very section that other countries—the United Kingdom, South Africa, and New Zealand, for example—have

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adopted to ensure elected officials continue to have the right to act according to democratic principles.

One glaring example of the federal government trying to avoid taking responsibility for public policy is the same-sex marriage debate. Instead of taking a position according to its obligations as defined by existing law (the Charter, human rights law, and a great deal of jurisprudence on similar issues), the Martin government put the question to the Supreme Court. The Court responded by refusing to answer one of the four questions put to them—whether or not certain laws regarding marriage were contrary to the Charter—by saying the provincial governments were already dealing with it, and clearly the federal government had already made a decision by already proposing their legislation.

"Nothing in our constitution states that democratically elected governments are only responsible to the Charter if the Court tells them they are. It is also the job of governments themselves."

Here in B.C., the courts versus government policy-making has been taken to new and interesting heights. The massive majority held by the current government has allowed them to move legislation though quickly and with little public debate. Any of us watching the movement of provincial laws in 2002 experienced a dizzying series of legislative changes affecting everything from legal services, to welfare, to how a person registers the birth of their child. Many of the changes related to the government's agenda of cutting the budget by one third.

Using Minimal Precedent

If one looks at the changes through the lens of Charter litigation, as West Coast LEAF did at the time, a striking pattern emerges—the government did its homework in making sure their policies and legislative changes complied with *past* Charter litigation. How so? Examples of this are reflected in the changes to legal aid, the human rights commission, the power of administrative tribunals, and income assistance. In each case, the government followed only court rulings on these issues, in some casess such as legal aid, very strictly. They did not, in fact, follow the Constitution as it was written, or as it was intended by the framers.

In the case of legal aid, for example, they forced the Legal Services Society to scale back all legal aid to the three things the courts have been clear on: criminal matters, child apprehension cases, and certain immigration and refugee matters. They allowed for a small amount of support for family law matters, and eliminated poverty law legal aid.

There was very little anyone could do about it. In fact, the Legal Services Society Board was fired and replaced for refusing to implement the changes—something made possible by one of the previous government's legislations—and

services were decimated.

Judicial Enforcers

By relying on past Charter litigation and its own interpretation of it, the government has said that the citizens of B.C. must take their government to court if we disagree with their interpretation of our Charter rights. If we believe that the lack of civil legal aid in this province is a breach of our right equal protection of the law, our rights to access justice, our rights to security of our person and the security of our children, our right to not to be deprived of these things without due process, then we have to find a way to have the court tell the government that they agree.

Nothing in our constitution states that democratically elected governments are only responsible to the Charter if the Court tells them they are. The promise of the Charter was to entrench *"values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."* (Chief Justice Dickson in *R. v Oakes*.)

It is not just the Court's job to determine if governments in Canada are upholding those values when enacting laws and policies, but also the job of the government itself. The question that remains is—who will hold governments to their obligations given the complexities of getting constitutional arguments before the Courts? ■

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Answer: **FALSE**

The SPARC BC parking permit does not authorize its holder to park or stop at any designated bus loading zone! It is illegal to park or stop at a bus stop. You will be ticketed, fined and towed, just like anyone else.

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Traffic laws apply to everyone, including parking permit holders. Possession of a parking permit does not allow you to disobey traffic rules that apply to all drivers. The parking permit only authorizes the holder to legally park in designated accessible parking spaces.

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