Book Reviews
Comptes rendus

Final Appeal. Decision-Making in Canadian Courts of Appeal.

BY IAN GREENE, CARL BAAR, PETER MCCORMICK, GEORGE SZABLOWSKI & MARTIN THOMAS.

Toronto: James Lorimer and Company Ltd. 1998.

Reviewed by Richard Devlin*

The five social science authors of this book have set themselves two tasks: first, on an empirical level, to provide both quantitative and qualitative criteria on how Canadian appellate courts (provincial appeal courts, the Federal Court of Appeal and the Supreme Court of Canada) actually function; second, on a normative level, to argue that the increasing power of the Canadian judiciary is no threat to democracy. While they succeed admirably in the first task, they fail in the second. Indeed, and perhaps ironically, a major reason why they fail in the second task is because of their success in achieving the first task.

On the empirical level, Greene et al conducted "objective" quantitative analyses of nearly 6000 court files in the ten provinces to assess case flow management practices. They also conducted "subjective" interviews with 101 of the 125 appellate court judges and received completed questionnaires from fifty six judges (plus ten resumes). As a result, the book is full of interesting insights that perhaps many lawyers might have intuitively known but are now empirically verifiable. Some of the more enlightening findings are:

- Canadian judges are unusually co-operative and open about judicial practices[1]
- when it comes to perceived judicial virtues, appellate judges seem to put greater weight on personal qualities than legal expertise[2]
- over the last decade there has been a substantial decline in the number of criminal appeals[3]
- the ratio of civil to criminal appeals varies significantly from province to province[4]

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1 Ian Greene, Carl Baar, Peter McCormick, George Szablowski & Martin Thomas, *Final Appeal: Decision-making in Canadian Courts of Appeal* (Toronto: James Lorimer, 1998) at vii.

2 P. 36, 102.

3 P. 46.

4 P. 47-51.

- the legal culture of different provinces suggests that different appeal courts have different responses to sentence appeals, some being stricter while others are more lenient[5]
- the number of cases reserved for decision varies enormously from province to province[6]
- all the Supreme Court of Canada respondents thought that as-of-right appeals should be reduced or eliminated[7]
- the number of dissents has been decreasing over the last fifty years[8]
- while the Supreme Court is increasingly keen to cite academics, most provincial courts of appeal are citing academics less than they used to[9]
- the pace of litigation at the appellate level varies significantly from province to province, some jurisdictions are distinctively less expeditious than others[10]
- crown appeals are successful significantly more often than accused's appeals, but the degree of variation can vary radically as between different courts of appeal[11]
- the majority of appellate court judges do not feel particularly constrained by the doctrine of precedent[12]
- there is increasing concern among appellate court judges about threats to judicial independence[13]

The primary finding of the book, indeed its oft repeated refrain, is that every stage of the appellate court decision-making process is pervaded by discretion or, as the authors politely put it, "the human element".[14] While there is nothing especially original in this argument (it is an insight that goes all the way back to the realists) what is new is that the evidence collected in this book confirms this indisputable fact in the Canadian context. Elsewhere I have described this same phenomenon as a "bungee cord theory of judgement", ie, judges are not totally untethered moral/political/juridical actors but the harnesses that constrain them are extremely elastic.[15]

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5 P. 49-50.

6 P. 73, 168-169, 206.

7 P. 100.

8 P. 153.

9 P. 137, 150.

10 P. 162-174.

11 P. 175-180.

12 P. 127, 129, 200-201.

13 P. 103, 183-186.

14 P. xi, 1-2, 18-21, 51-53, 79, 100, 129, 158, 159, 176, 180, 199.

15 R. Devlin & A.W. MacKay, "Democracy and the Judicial Appointments Process" (1999) Alberta Law Rev. [forthcoming].

The problem is that the authors' careful documentation of pervasive and inescapable discretion causes a problem for their normative argument: that the judiciary are no threat to Canadian democracy.[16]

The authors adopt five strategies to support this argument. The first is to suggest that other non-elected and unrepresentative persons (eg bureaucrats) also exercise large discretionary power.[17] This comes perilously close to a two wrongs make a right argument! The second strategy suggests that judges have always exercised significant power via administrative review, the only difference now is that it has been somewhat expanded and rendered more visible because of the Charter.[18] From the perspective of progressives who worry about excessive judicial power, administrative review is deeply problematic[19] (particularly, for example, in the realm of labour relations) and so, again, this slips towards the two wrongs make a right argument. Thirdly, Greene et al argue that appellate judges, due to their "intellectual prowess", are "in a good position to give social problems a thorough and thoughtful consideration [and] are well suited to take into account the complex factors that determine social issues."[20] This argument is not only elitist, it assumes that understanding, judgement and dispute resolution are primarily exercises in ideas rather than experience and compassion. Such idealist assumptions have been roundly criticized in recent years.[21] Moreover, Greene et al ignore the argument that it is precisely because of the narrowness of their education and experience that judges are not well suited to make complex social policy decisions, especially when it comes to assessing evidence from other disciplines.[22]

The fourth major strategy advanced by Greene et al to rebut the so called skeptics is that improved appointments procedures will avoid the democratic concern.[23] But again this is unpersuasive, both descriptively and analytically. While it is true that at the provincial level there has been some pluralization of the judiciary in the 1980s and early 1990s, judges remain elitist. Indeed, there is evidence that in the province which they celebrate most for its inclusive appointments processes, Ontario,[24] the Harris government may be retreating to

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[16] They advance this argument in response to what they portray as left and right wing critics of the judiciary.

[17] *Supra* note 1 at 5.

[18] P. ix, xi, 4-6.

[19] See e.g. P. Weiler, *In The Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974); H. Arthurs, "Protection Against Judicial Review" (1983) 43 Rev. du Bar. 277.

[20] *Supra* note 1 at 42.

[21] For discussion see Devlin & MacKay, *supra* note 15.

[22] See e.g. J.M. Evans et al, *Administrative Law: Cases, Text Materials* (4th ed) (Toronto: Emond Montgomery, 1995) at 30; J. Hiebert, *Wrestling With Rights: Judges, Parliament and the Making of Social Policy* (Montreal: I.R.P.P., 1999) at 12-13.

[23] *Supra* note 7 at 195-96, 201-202, 210-11.

[24] P. 38.

the old regime.[25] Moreover, at the federal level there is absolutely no indication of a willingness to surrender or modify the power of appointment. But even more seriously, the authors fail to pay sufficient attention to an important message derived from their own empirical work: structurally (ie socially, economically, politically and educationally), the judicial profession is an unrepresentative and powerfully socialized elite.[26] In short, they underemphasize the power of assimilation.[27]

The final, and most developed, argument is definitional and conceptual. Greene et al suggest that those who worry about democracy invoke too simplistic a notion of democracy, ie electoral majoritarianism. They argue that democracy has a more wide ranging meaning: it is a set of institutions and social norms that recognize "mutual respect".[28] Thus, to the extent that courts foster mutual respect, they can actually enhance rather than challenge democracy, especially if they operate as a check upon a rampant executive.[29] This more nuanced conception of democracy is superior to the vulgar majoritarian argument.[30] However, a mere change of definition cannot *demonstrate* that there is no threat to democracy, which is the authors' claim. Rather what is required are at least two further steps: a) a specific outline of the elements of mutual respect that can provide determinate criteria for a judgement as to whether the judiciary are approximating democracy or not; and b) an actual study of judicial decisions to assess whether the specified criteria are being fulfilled. Neither step is achieved in this book.

For example, in attempting to map out what they mean by mutual respect Greene et al. invoke the *Quebec Secession* case which draws on Dickson C.J.'s dicta in *Oakes* where he suggests:

> *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.[31]

Several pages later they expand their analysis to argue that:

> other important subprinciples include:
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> - Decision-making through consensus where possible and practical, and, if not, according to majority rule;
> - Respect for the principle of social equality, which, to use the words of Ronald Dworkin, means that "individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them";

[25] They even indirectly concede this at 196. See also Ontario Judicial Appointments Advisory Committee, *Annual Report 1997* at 2.

[26] P. 23-42.

[27] P. 195.

[28] *Supra* note 1 at xii, 2, 11.

[29] P. ix, 6.

[30] See also Devlin & MacKay, *supra* note 15.

[31] *Supra* note 1 at 10 [emphasis added].

- Respect for minority rights, meaning that minorities are owed the same concern and respect as majorities;
- Respect for fairness, meaning both sides in a dispute about the application of law have a right to a fair hearing before an impartial tribunal;
- Respect for the rule of law;
- Respect for the value of freedom, or the right of citizens to determine their own priorities and to develop their human potential except in a way that interferes with the equal right of others to do so (including freedom of expression and of the media, which were described in the 1938 Alberta Press Case as "the breath of life for parliamentary institutions");
- Respect for integrity, which we take to mean honesty implemented through compassion.[32]

A few lines later they refer to "social equality, protection of minority rights and freedom of expression."[33] Elsewhere they add to this holy trinity the rule of law and procedural fairness.[34] In the last chapter, they suggest several others including "deference to representative bodies...integrity, liberty..."[35]

From these preferred definitions one can identify at least a dozen dimensions to mutual respect. The problem is that such definitions are so encompassing, indeterminate and potentially contradictory that they provide little guidelines as to what is a more or less democratic judicial answer. Almost anything can be moulded to fit some aspect of mutual respect. Indeed, the five authors themselves acknowledge as much in their discussion of the *Morgentaler* case. Three support the decisions of Dickson C.J., Lamer and Wilson J.J., one supports the reasons of Beetz and Estey J.J. and one supports the reasons of McIntyre and La Forest J.J., in dissent. All these positions are explicitly justified on some dimension of mutual respect.[36] So too could an argument that a foetus has rights, though none have chosen to say so. In other words, the regulative criterion of mutual respect can merely serve as discursive garb for individual judge's (and academic's) ideological preferences; it does little to channel or constrain the arbitrary exercise of unaccountable power. In short, definitional expansion that results in definitional wantonness cannot carry the normative burden required by the authors.

However, even if Greene et al had been able to delineate helpful evaluative criteria, the second step that would have needed to have been pursued is an application of such criteria to the data, ie, the actual decisions of appellate courts. Greene et al's argument is that although widespread discretion *necessarily entails* judicial activism, judicial activism does *not*

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[32] P. 12. [footnotes omitted].

[33] P. 13.

[34] P. 193.

[35] P. 201-202.

[36] P. 14-16.

necessarily threaten democracy.[37] The problem with applying a "not necessarily" argument to what they acknowledge to be the political domain of the judiciary, is that it really does not tell us anything concrete. By analogy, nationalism does not necessarily threaten democracy or human rights or result in fascism, but sometimes it does, sometimes it doesn't. The hard work of analysing the data has to be pursued. The problem is that *methodologically* this is not what these authors have chosen to do in this book. Their data focuses on internal court processes and subjectivist judicial perceptions about their own conduct and role. This is, as I have suggested, extremely valuable research that provides us with vital information. However, it is not the sort of research that can provide much enlightenment on whether we are experiencing an emergent "judgocracy" in Canada.[38]

What light it does shine may, in fact, support the concerns of those who are worried about excessive judicial power. At one point, the authors report that all the Supreme Court of Canada respondents acknowledge that they fulfill a lawmaking role.[39] Elsewhere they note that all but two of the appellate court judges agree.[40] Greene at al also asked judges about their own perception of their lawmaking role and report that almost half were unconcerned about the legitimacy of such activism.[41] Indeed, all the Supreme Court respondents denied any crisis of legitimacy.[42] One particularly candid judge is quoted as saying "[a]fter the Charter gave the judges the right to strike down a statute, altering the common law was a piece of cake".[43] When these results, attitudes and comments are read in the light of other judicial trends (eg. decisions that judicial salaries cannot be rolled back in times of economic restraint, but everyone else's can, that executive discretion is subject to judicial review, and that judges can adopt the remedy of reading in[44]) that are not discussed by the authors, then the so-called "unnecessarily alarmist"[45] concerns about an emergent judgocracy cannot be so easily displaced.

In sum, given their twin goals of empirical insight and normative engagement, the authors have successfully achieved half a book. But an excellent half book is better than no book at all. For an extra $25 (which is cheap relative to the exorbitant prices charged by legal publishers) I eagerly await the second half.

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[37] P. ix, xi, 2, 9, 21-22, 193.

[38] Devlin & MacKay, *supra* note 15.

[39] *Supra* note 1 at 126-27.

[40] P. 95, 188.

[41] P. 187, 193.

[42] P. 188.

[43] P. 186.

[44] *Re Remuneration of Judges*, [1997] 3 S.C.R. 3; *Operation Dismantle* v. *The Queen*, [1985] 2 S.C.R. 441; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493.

[45] P. xii.