# Which way will the court lean?

Editorial

SINCE 1982, when the British North America Act was ?repatriated? to Canada and the government of Pierre Trudeau gave us the Canadian Charter of Rights and Freedoms, nearly every constitutional challenge has involved the Charter, and the Supreme Court of Canada tended to be activist in interpreting its provisions liberally.

But that was a court headed by Chief Justice Beverley McLachlin, a westerner who saw the court's job as requiring it to view the constitution as a living document that can be re-interpreted to deal with changing times.

That was in sharp contrast to the situation in the United States, where the top court has been dominated by Republican-appointed ?originalists? like the late Associate Justice Antonin Scalia and current Associate Justice Clarence Thomas, who hold that the U.S. Constitution has a fixed meaning from an authority contemporaneous with its ratification, and that it should be construed in light of that authority. Unless there is a historic and/or extremely pressing reason to interpret that Constitution differently, originalists vote as they think the Constitution as it was written in the late 18th Century would dictate.

Now that Chief Justice McLachlin has retired and been replaced by Quebec's Richard Wagner, only time will tell whether a Wagner-led court, a majority of whose members were appointed by the Stephen Harper Conservatives, will be as activist as the McLachlin court, which for many years was made up mainly of Liberal appointees.

The first tests of the Wagner court's leanings may well come as early as this year, thanks to several developments that have little or nothing to do with the Charter and everything to do with the BNA Act of 1867, which laid down rules for a division of powers between the new Government of Canada and those of the initial four provinces.

Although the BNA Act was a creature of the British Parliament, there seems little doubt that there was a lot of input from our Fathers of Confederation, and even less doubt that an important consideration for them was the avoidance of what they were witnessing to the south ? a bloody civil war that took upwards of 750,000 soldiers' lives.

Accordingly, it was likely no coincidence that the powers given the central government included both criminal law (something left to the U.S. states) and responsibility for ?peace, order and good government.?

The Act's Section 91 and 92 outlined the powers allotted to the federal government and the provinces. Section 91 gave Parliament jurisdiction over banking, interest, criminal law, the postal system and the armed forces, while section 92 gave the provinces jurisdiction over property, most contracts and torts, local works, undertakings and businesses.

Over the years, judicial interpretation has had a substantial effect on the division of powers. Until appeals to Britain were abolished in 1949, the Judicial Committee of the British Privy Council often expansively interpreted provincial powers when they came into conflict with those over peace, order and good government or the regulation of trade and commerce.

Today, several cases that seem headed to the Wagner court zero in on the division of powers. Debate over the proposed expansion of the Trans-Mountain oil pipeline has led to legislative acts in both British Columbia and Alberta that would curb inter-provincial trade, with B.C. trying to limit oil imports and Alberta curbing the flow of B.C. wines. Meanwhile, Ottawa faces challenges from Saskatchewan and a future Ontario Tory government in its efforts to have a nationwide tax on carbon as a means of curbing greenhouse gases.

It will be interesting, indeed, to see whether the Wagner-led court will lean in its interpretations toward expanding provincial or federal powers, and the extent to which it will consider the impact its rulings could have on such things as the economy and the environment.