

# Guarding the Guardians — Judicial Activism and Accountability in Canada

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## SUMMARY

In this paper, Stuart Langford argues that despite Chief Justice Antonio Lamer's recent contention that the *Charter of Rights and Freedoms* "did not really create a new function for the judiciary," Canadian courts have in fact assumed a far more activist role in the past 16 years. Judges have not, again to quote the Chief Justice, been "drawn into the political arena," but have stepped into it willingly by superimposing, in the Earl Warren tradition, their views over those of the Charter's framers. The results have been uncertainty in the minds of many court watchers as to what the fundamental law of our land is and calls from some quarters for judicial accountability to the electorate as a means of overseeing judicial law making.

The author contends that the uncertainty and demands for an accountable judiciary can only increase unless steps are taken either to curb Canada's "imperial" courts or further public appreciation of those courts. As well, he suggests that the use of the Charter's "notwithstanding" power to counteract judicial activism is inappropriate, that the problems resulting from an activist bench are judge-made and should be judge-solved. A first step would be to ensure that judgments effecting the balance between individual and collective rights be written in plain words thereby guaranteeing greater public understanding.

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There is an ancient curse that goes something like this : "*May you get what you wish for.*" Many of us of a certain age who were attracted to the law not for what it was in the late 1960's and early 1970's but for what we wished it to be may find ourselves fearing that our student dreams have caught up with us. We began our legal studies in the dying years of what might be called the age of legal interpretism — judicial torpor, most of us considered it — in Canada. Shortly we learned that the system we had was not the only one available, that in other lands, lands not very far flung, a more exciting approach to the law was not merely the stuff of dreams but the glorious norm.

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While judgment after dreary Canadian superior court judgment informed us that black letter law and the bench's duty to interpret it constituted rules of judicial process as inalterable as the basic laws of physics, in Washington to the south and London to the east judges like Warren C.J. and Denning M.R. dropped hint after tantalizing hint that this need not be so. Those of us reckless enough to risk enjoying a life outside the law library — these were you will recall the less than halcyon days of a fifty percent failure rate in some of Canada's law schools — were confirmed in our belief that an alternative process was not merely desirable but possible.

"The times," to paraphrase our gravel-voiced American prophet Bob Dylan, "they were a changing." From Liverpool across the pond, the Beatles sang of revolution and changing the world. In our own backyard, a middle-aged firebrand named Pierre Elliott Trudeau mesmerized us with visions of a dream he called "the just society."<sup>1</sup> All of this we read about in the *Globe and Mail* or listened to in smokey student bars. Meanwhile, there was the library and the never ending paper chase after what our professors called "propositions of law." This exercise, according to the rule of *stare decisis*, dictated that we spent our days hunched over case reports, attempting to find the path forward by looking backwards. In theory, we were assured, this was a reasonable enough approach to understanding the world we were apprenticed to but, as the cases we briefed repeatedly reminded us, in practice it was an exercise almost guaranteed to frustrate. The paths forward led not in glorious leaps and bounds to Utopia but in halting half steps to a status quo that would have fit almost as neatly into Gladstone's England as Trudeau's Canada.

What it came down to, we reasoned, was a simple lack of courage. The Americans it is true had been blessed with early statesmen insightful enough to arm their citizenry with a constitutionally enshrined Bill of Rights. It was equally true, or at least that is how it appeared to us, that they were blessed, as well, with judges active enough to use those enumerated rights creatively in search of equitable results. Canadians had no such sacred parchment but neither had the British and that had not prevented their brave and creative judges, the few they were lucky enough to have, from filling the gaps left glaringly open by Parliament and the common law. We had Fauteux C.J. and Justices Martland, Judson and Ritchie and though the last of that foursome had shown some promise in *Drybones*,<sup>2</sup> as a dream team for those of us yearning for an interventionist bench, they were, to put it gently, a disappointment.

When Trudeau bypassed the Diefenbaker appointments by fast-tracking an academic turned judge named Bora Laskin to the Chief Justice's throne, we held our breath and hoped. The Canadian version of the "Great Dissenter" further whetted our appetites but Chief Justice Laskin's all but permanent post on the minority side and his apparent inability to write clear and concise prose robbed us of the activist meal we had stood in line so long to enjoy. For that, we were forced to wait for the painful birth of the

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1. Trudeau's rallying cry may have been no more than one more example of importing from America, this time a variation of President L.B. Johnson's slogan "the great society."

2. *The Queen v. Drybones*, [1970] S.C.R. 282.

*Constitution Act of 1982* and the *Charter of Rights and Freedoms* that was its centerpiece.<sup>3</sup>

The waiting was made difficult, not merely by the blistering pace of activism in the United States with issues such as the busing of school children, but also by the documented evidence that judicial activism in Canada was not, in fact, unprecedented. There was a real belief that had our High Court wanted to, it could readily have followed Earl Warren's lead. Granted, the evidence to support this belief was not overwhelming, but solid hints and tidbits could be found.

When, in the 1930's, for example, governments in Alberta and Quebec attempted to control certain aspects of free speech, the Supreme Court stepped in to stop them.

"Under the British system, which is ours," Cannon J. wrote in the *Alberta Press Bill* case :<sup>4</sup>

[...] *no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlightened public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed [...]*<sup>5</sup>

In the *Quebec* case,<sup>6</sup> a Mr. Saumur was arrested and imprisoned for distributing religious tracts. The Supreme Court finally got hold of the case in 1953 and struck down the Quebec by-law. Mr. Justice Locke referred approvingly to the earlier *Press Bill* decision and provided the following words of hope for interventionists :

*The appellant in the present matter has exercised what, in my opinion, is his constitutional right to the practice of his religious profession and mode of worship [...]*<sup>7</sup>

In the 1945 *Wren* case,<sup>8</sup> Ontario's High Court cited public policy considerations in striking down contractual covenants restricting the ownership of land by "Jews or persons of other objectionable nationality." Unfortunately, between the *Press Bill* and *Wren* decisions, another ruling surfaced. In *Christie v. York Corporation*,<sup>9</sup> the Supreme Court relied upon the notion of freedom of contract to uphold a tavern owner's right to

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3. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter Charter].

4. *Reference re Alberta Statutes* [1938] S.C.R. 100.

5. *Ibid.* at 145.

6. *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299.

7. *Ibid.* at 378-379.

8. *Re Drummond Wren*, [1945] O.R. 778.

9. *Christie v. York Corporation*, [1940] S.C.R. 139.

refuse to serve blacks. Later Laskin Court decisions in cases like *Murdoch*<sup>10</sup> and *Becker*<sup>11</sup> brought only short-lived bouts of optimism to court watchers with Warren-envy. The decisions, justified by tortured interpretations of obscure propositions of trust law, offered little reason to rejoice among those waiting for signs that judicial activism had come of age in Canada.

In the United States, the courts had declared themselves the self-appointed watch dogs of the public interest as they saw it, judging both individual acts by governments and the law under which those actions were taken. What they disapproved of they forbade; what they found lacking they redrafted. In Canada, Parliament and the legislatures remained supreme so long as they did not overstep their constitutionally designated jurisdictional boundaries. By and large, our courts proudly upheld the Rule of Law, slavishly interpreted legislatively created laws, occasionally blended statutory and common law and only reluctantly made laws in rare situations when no other option existed. And always they operated economically, offering the public no more information and insight than was absolutely necessary to settle the disputes before them.

The Charter changed all of that suddenly and, it would seem, forever. Like their American cousins before them, our men and women in red found themselves called upon to define terms like "fundamental justice" and words like "fairness", "liberty", "freedom" and "democratic," and to pen these definitions in the public interest. But the public is a far from homogenous entity; it is composed of a wide variety of distinct societies some identifiable by the cultural roots they share but many others made up of individuals who on this or that issue share senses of entitlement and empowerment or frustration and, increasingly, anger. By the time, armed with the *Charter*, our courts finally decided to instruct our parliamentarians in collective values, the pronoun "we" had become all but meaningless.

In 1986, in an effort to free itself from the shackles of its past practices, the Court in the *B.C. Motor Vehicle Reference* case,<sup>12</sup> took an extremely bold step, indeed. It announced that, henceforth, in making the definitions it now saw itself charged to compose on our behalf it would be bound neither by the intent of the elected representatives who framed the Constitution nor by established public policies. Canada's age of judicial activism had begun in earnest. In short order key constitutional guarantees contained in Charter sections like 7 (legal rights), 23 (language rights) and 15 (equality provisions) were extended by the courts far beyond the clearly stated intentions of those democratically empowered and accountable representatives who in the run up to the patriation and extension of the Constitution in 1982 had spoken in Parliament, the legislatures, committee rooms or constitutional conferences.

Now, in Canada in these final years of the twentieth century, no one is surprised let alone shocked by public figures who stray in some way from the path they have

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10. *Murdoch v. Murdoch* [1975] 1 S.C.R. 423.

11. *Pettikus v. Becker*, [1980] 2 S.C.R. 834.

12. Section 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

promised and are expected to follow. Politicians do it all the time. But when they stray excessively, when they disappoint the expectations of the people, they are held to account for their actions at the next election. They are reminded by defeat at the polls and sometimes worse fates — Saskatchewan's treatment of the government of Grant Devine being a case in point — that the citizenry will be pushed only so far and no farther.

Perhaps in recognition of their own proclivities, the framers of the *Constitution Act of 1982* with its Charter provisions, went to great lengths to set their intentions not merely on parchment but in stone. They left behind a clear record on paper and on audio and video tape of what they intended, and equally important, what they did not intend. We know, for example, that until the very last second, well past the dramatic moment when Messrs. Chrétien, McMurtry and Romanow hammered out their famous "kitchen compromise," interest groups representing women's, aboriginal and homosexual rights lobbied hard for greater Charter protections. The pleas by women and aboriginals were heard and acted upon. The case made for the inclusion of sexual orientation in section 15 was rejected outright by the framers, though accepted some years later by the Supreme Court.

The production of a pellucidly clear record of intent was not the only technique employed by the framers to ensure that what they had done could not easily be undone. They created a constitutional amendment process so cumbersome that barring a nationwide groundswell of support for change it simply could not be relied upon to function at all. Memories of Elijah Harper with his eagle feather or Clyde Wells facing down Brian Mulroney with his hawk's eye are all the reminder we need that the term constitutional amendment is practically an oxymoron in this country.

A second method of alteration, the so-called notwithstanding provision, allows legislatures to make limited and temporary changes effective only in the jurisdictions they control. Wisely, most politicians have avoided using this power. They understand just how difficult it has become to define the public interest in this age of fragmented communities and jealously guarded advantages. Their pollsters warn them that the price of miscalculation is electoral defeat.

Judges, though, need overcome none of these democratic checks, balances or conditions precedent to altering the fundamental law of our land. They may do it with a stroke of the pen and without consideration for the record, established processes or electoral reaction. One need only tune into the latest Reform Party diatribe against unaccountable judges to comprehend just how unacceptable some segments of society consider this fact of Canadian life. The question is where might their anger lead? To seek the answer to this question, to attempt to catch a glimpse of what the future may hold for our new activist bench, all we can do is what jurists always do, look backwards for guidance.

Like so many trends, everything from fast food to adultery in high office, the Americans have set the pace. Judicial activism is a way of life south of the 49th parallel but it was not always so and the judiciary has paid a price for it.

In 1803 in *Marbury v. Madison*,<sup>13</sup> U.S. Chief Justice Marshall outlined his understanding of the division of powers in terms that would have warmed the cockles of the heart of Canada's Chief Justice Fauteux over 150 years later. "The powers of the legislature," and by implication the courts, Marshall declared, "*are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written.*"<sup>14</sup> By the time Felix Frankfurter was appointed to the Supreme Court of the United States, about a century and a quarter later, the notion that the Constitution ruled and that its first rule was to neatly compartmentalize power was still a popular one but was very much the stuff of fantasy. In a letter to Franklin Roosevelt, Associate Justice Frankfurter wrote :

[...] *people have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution. Whereas, of course [...] it is they who speak not the Constitution.*<sup>15</sup>

Between Marshall C.J. and Associate Justice Frankfurter, a quiet revolution had occurred in Washington resulting in a shift of power away from elected representatives and into the hands of an activist bench. In the last fifty years or so, despite cries of outrage from this or that interest group, and despite attempts by presidents — most recently Ronald Reagan — to stem that power shift by packing the court with conservative or black letter appointments, the situation has not noticeably altered. The justices of the Supreme Court are the ultimate law makers. When it comes to determining what is the fundamental law of the land in the United States, to borrow Frankfurter's words, "*it is they who speak and not the Constitution.*"

Such statements require authority, though those even vaguely familiar with the judicial history surrounding such issues as busing, pornography and the death penalty, to name but three, would surely be predisposed to waive an in-depth case analysis. Reference to just one of Chief Justice Earl Warren's decisions, provides a very real sense of how far America's highest court had traveled along the activist road since Marshall's time.

In 1954, in *Bolling v. Sharpe*,<sup>16</sup> Warren extracted the "equal protection" clause out of the U.S. Constitution's 14<sup>th</sup> Amendment and neatly inserted it into the 5<sup>th</sup>. He did this to achieve the result he believed fair even though America's constitutional framers had specifically excluded suffrage from the 5<sup>th</sup>. Warren justified his action as follows :

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13. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137.

14. *Ibid.* at 176.

15. *Roosevelt & Frankfurter: Their Correspondence, 1928-1945* (M. Freedman, ed., 1967) at 383.

16. *Bolling v. Sharpe*, 347 U.S. 497.

*In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.*<sup>17</sup>

Unthinkable, perhaps, but that is precisely what the Constitution did and precisely what the framers had intended it to do.

Driven by a philosophical pre-disposition or by an interpretation of the public interest that dictates one result over any other, or perhaps by a combination of both, the Warren Court re-drafted the Constitution to suit its purposes. The result may have been commendable but the technique set a precedent that is both unsettling and a recipe for uncertainty. Professor John Hart Ely, commenting on the quotation above in *Democracy and Distrust: A Theory of Judicial Review*,<sup>18</sup> described Warren's words as "gibberish both syntactically and historically."<sup>19</sup> Those who have traced the Charter-based transition of our own High Court from an interpretive to an activist body modeled on the Warren precedent will notice eerie similarities in some of its recent judgments, *Delgamuukw*<sup>20</sup> and *Vriend*<sup>21</sup> being prime examples. They may not yet be prepared to echo Ely's words of condemnation but even court-booster will admit to being troubled.

On the issue of the uncertainty caused by result-oriented constitutional rulings, consider the following comments delivered at a Toronto conference in April of this year. The focus was an analysis of where we stand 16 years after the proclamation of the *Charter of Rights and Freedoms*. "Every time I go to the Supreme Court of Canada," said Robert Hubbard a federal Justice Department lawyer, "I haven't a clue what will happen. The only trend I see is no trend." Osgoode Hall law professor, Jamie Cameron, put it this way: "There is a lack of principle to explain patterns of activism or deference in the past year. I can't make heads nor tails of them from one case to another." Mark Sandler, a Toronto criminal lawyer told the conference: "I see no trend. I see no pattern. I see confusion and inconsistency."<sup>22</sup>

If the academics and practitioners are confused, imagine how lost must be the Canadian version of "the reasonable person" that perhaps mythical being introduced to us not very charitably by Lord Greer in 1933 as "the man on the Clapham omnibus."<sup>23</sup> Call him Joe Lunch Bucket. Imagine how he must feel as he opens his morning newspaper to

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17. *Ibid.* at 500.

18. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

19. *Ibid.* at 32.

20. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

21. *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

22. K. Makin, "Rights rulings called contradictory, chaotic; one lawyer says you might as well flip a coin" *The [Toronto] Globe and Mail*, (April 18, 1998) at A1.

23. *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205 at 224. "God forbid that the standard of manners should be taken from the man on the Clapham omnibus."

discover that convicted murderers have been set free due to some evidentiary shortcoming or that the High Court has handed an elected provincial government a bunch of human rights amendments and ordered it to quick march them through the Legislature? The words of John Seldon, the 17<sup>th</sup> century English constitutional lawyer seem as apt as ever. Seldon was speaking of the Courts of Equity but his analogy, it seems to me, may fairly be applied to our activist Supreme Court of Canada :

"Equity is now the law." Seldon said. Then he issued this warning :

*Equity is a roguish thing. For law we have a measure and know what we trust to. Equity is according to the conscience of him that is chancellor : and, as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing as the chancellor's conscience.<sup>24</sup>*

The problem, of course, is that the High Court dictates a shoe size for all of Canada and leaves us to the miserable and often painful business of squeezing our feet into it. Those who complain are informed that there is no redress; whether or not the shoe fits, they must wear it. They can neither exchange it nor shop elsewhere. If the Court in its capacity as shop clerk proves completely inept we can neither insist it be retrained nor replace it at will. We are stuck with it. To many forced to endure the discomfort of incorrectly sized judicially-fitted footwear, the bargain seems a bad one and they are understandably anxious to remedy the situation.

To abandon Seldon's metaphor and return to actual cases in point, no decision more than the Supreme Court's recent ruling in *Vriend v. Alberta* so clearly demonstrates how far our justices have come along the trail first blazed over a hundred years ago in the United States — a trail later converted to a paved and arc-lit superhighway by Earl Warren. The facts are well known. Delwin Vriend worked as a lab-assistant in a religiously affiliated college. He was fired when the college learned he was a homosexual. When a wrongful dismissal claim failed, he went to court to challenge Alberta's refusal to add sexual orientation to its Human Rights Act. The provincial government's failure to protect him, he argued, violated the Charter's section 15 equality provisions. Vriend succeeded at trial, lost on appeal but was spectacularly successful at the Supreme Court of Canada. Joe Lunch Bucket can be forgiven for wondering why.

It has been 20 years since the run up to the federal-provincial agreement leading to the *Constitution Act of 1982* began in earnest. Memories fade but those, myself included, who sat through every minute of the 269 hours of Senate-Commons Committee hearings into the draft provisions, who attended the First Ministers' constitutional conferences in Ottawa's converted railroad station, who followed the hours of legislative and parliamentary debate, who witnessed the intense lobbying efforts of various interest groups and who sat through the arguments of Canada's legal elite before the Supreme Court of Canada, will go to our graves carrying a remarkably clear mental imprint of what

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24. *Table Talk* (Richard Milward, ed. 1689).



was said and what was decided in those historic months and years. As vivid, for example, as the picture of René Lévesque's fury over what he saw as betrayal, is that of the joy on the faces of those who lobbied successfully for the last-minute inclusion of stronger, arguably redundant,<sup>25</sup> protections for women and aboriginals. Should our memories fail, the record is clear and can be accessed, as I indicated earlier, in your choice of written, audio or video format.

A review of that record reveals a number of successes and a number of failures in terms of cases promulgated on behalf of this or that segment of society. Though all purported to represent the public interest, not all achieved the same results. Those seeking to enhance language and education protections, for example, succeeded. Those who called for entrenched property rights failed. The record, in toto, demonstrates beyond a doubt that those seeking to include sexual orientation in the list of specifics now contained in section 15 of the Charter, also failed. Svend Robinson's heroic efforts on behalf of the gay community are a matter of public record in the Hansard of the day. So is the fact that those efforts came to naught. Equally a matter of record is the framers' intention that section 32(1) of the *Constitution Act of 1982* limit application of the Charter to state actions only. That appeared to be the status quo as the Queen put her famous initials to the parchment and made the *Charter of Rights and Freedoms* the law of our land.

Every court watcher in Canada knows what happened in *Vriend*. Put simply, our High Court did in 1998 what Earl Warren's did in *Bolling* in 1954; it altered the Constitution in order to obtain the result it wanted. It chose a shoe size, to borrow Seldon's analogy, and ordered Premier Ralph Klein to wear it. What the Court did, we know; how it positioned itself to justify what it did is another question altogether, particularly in the understandably befuddled mind of poor Joe Lunch Bucket. How, Joe may be forgiven for inquiring, could anyone take a document like the Charter which on its face neither protects homosexual rights nor applies to non-governmental actions, and use it to strike down the dismissal of a homosexual from his job in a private school? Easily, is the answer.

The starting point to answering Joe's questions lies in a case already referred to, the *B.C. Motor Vehicle Reference* of 1986. There, to review, the Court held that it considered itself no longer bound by the intent of Canada's constitutional framers. As well, it converted the procedural nature of section 7 to a substantive test of fairness. Three years later, in 1989, in *Andrews v. Law Society of British Columbia*,<sup>26</sup> the Court extended the scope of section 15 to prohibit not only laws that intentionally discriminate but also those that unintentionally have that effect. The Court in *Andrews* took another dramatic step by expanding the list in section 15 to include what it called "analogous" though non-enumerated groups so long as such groups were "historically disadvantaged." Adopting this "analogous" test three years later, the Ontario Court of Appeal, in *Haig v. Canada*,<sup>27</sup> ruled that section 15 of the Charter protects homosexuals.

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25. See, for example, sections 15(1) and 28 of the Charter.

26. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

27. *Haig v. Canada*, [1992] 9 O.R. (3d) 495.

Shortly afterwards, in 1994, Ontario's elected and accountable representatives re-entered the fray. In a free vote, the Ontario Legislature rejected an attempt to amend the province's *Family Law Act* by redefining the word "spouse" to include homosexual partners. A year later, taking a leaf out of Earl Warren's book and riding the current activist wave generated by the courts above, a District Court Judge in Ontario ignored the recorded wishes of the province's elected representatives and amended the *Family Law Act* unilaterally by redefining "spouse" in precisely the terms rejected by the Legislature.<sup>28</sup> What that judge did is so familiar to American court watchers that they have given it a name, "reading-in." When seeking to achieve a certain result, a judge adds meaning to a piece of legislation in order to obtain that result. That is what Warren did in *Bolling* and what our Supreme Court appears to have done in *Vriend*.

By the time *Vriend* made it to the Court of Appeal of Alberta,<sup>29</sup> the trend lines were clearly established. Mr. Justice McClung sounded the alarm in these words: "When unelected judges choose to legislate, parliamentary checks, balances and conventions are simply shelved."<sup>30</sup> His warning appeared to fall on deaf ears in the court above. The Supreme Court, focusing on the result it thought appropriate and in language echoing Chief Justice Warren's in *Bolling*, brushed aside with barely disguised contempt the notion that *Vriend*'s firing by a private not public institution was relevant despite the clear intent of section 32(1) of the *Constitution Act of 1982* :

*It is true that the IRPA (Individual's Rights Protection Act) itself targets private activity and as a result will have an "effect" upon that activity. Yet it does not follow that this indirect effect should remove the IRPA from the purview of the Charter. It would lead to an unacceptable result if any legislation that regulated private activity would for that reason alone be immune from Charter scrutiny. (P.23, paragraph 65)<sup>31</sup>*

The fact that section 15 of the Charter contains no mention of sexual orientation was dealt with in the judicial equivalent of what a stage performer might call a throw-away line :

*It could therefore be assumed that the denial of the equal protection and benefit of the law on the basis of the analogous ground of sexual orientation is discriminatory.<sup>32</sup>*

Sixteen years after the Charter, then, and well over twenty years since we chased paper in the law school library, my fellow graduates and I have, as the ancient curse states,

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28. *M. v. V.* [1996] O.J. No. 365 (QL).

29. *Re Vriend v. The Queen in right of Alberta*, [1996] 132 D.L.R. (4th) 595.

30. *Ibid.* at 618.

31. Charter at 23, para. 65.

32. *Ibid.* at 29, para. 91.

gotten what we wished for : an activist court modeled on American lines with all the propensities for reading-in and result-based decision making that we found so enticing as students. Some of us may be pleased, others indifferent and, just as certainly, some must be furious. How does the Court react to the fallout from what it has become? If the hints its justices provide are any indication, it seems puzzled.

Speaking in St. John's at the annual meeting of the Canadian Bar Association in August, Chief Justice Antonio Lamer seemed unable to understand what all the fuss about a so-called activist bench was about. In his view, his court 16 years after the Charter's proclamation, is involved in nothing more noteworthy than business as usual : "Let me begin by reminding you of something you all know," Lamer C.J. told the Bar Association's governing Council :

*The enactment in 1982 of a constitutionally entrenched Charter of Rights and Freedoms changed the kind of constitutional cases the courts have been faced with and, in that sense, changed their role. It did not really create a new function for the judiciary since Canadian courts have always had the power to tell elected officials when they have gone too far. What has happened is that the basis on which the courts can, indeed must, do this has broadened considerably. There is no doubt that the judiciary was drawn into the political arena to a degree unknown prior to 1982.*

With the greatest respect, as we lawyers love to say, that as an explanation is the equivalent of the Son of Sam defence or of that old Vaudeville line : "the devil made me do it." Perhaps some outside force is the villain of the piece, but the real question is, who is the devil? The Chief Justice would have us believe it is the constitutional framers who dumped the *Charter* into the courts' laps in 1982 but an analysis of *Vriend* causes one to wonder. At a conference of judges, each of whom is regularly bombarded with Charter-based arguments, it seems highly unnecessary to pile further authorities on top of an analysis of *Vriend* simply to hammer home the point that the High Court demonstrates few of the classic indicia of the reluctant participant but I suspect that no matter which side of the judicial activism issue you come down on you would concede the point that such authorities are easily found. Small wonder that the lawyers and academics quoted earlier on the issue of uncertainty confess to being confused. "Where are we going?" asked the Department of Justice lawyer Robert Hubbard. "Don't know," he replied to his own question. "Where have we been? Not sure."<sup>33</sup>

In keeping with the modern notion of seeking solutions rather than villains, the no-fault approach, perhaps the issue of who did what is irrelevant. Facts tend to speak for themselves and the fact of this matter is that for whatever reason our judges are now making law more actively than anyone could have dreamed possible a generation ago. Whether forced to by the framers as Lamer contends or, as the cases appear to demonstrate, because the High Court's result-orientation has given it an insatiable appetite for seeing the Charter as a work in progress rather than a finished product, the unelected justices of our High Court are exercising powers that have far more sweeping effects than

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33. *Supra* note 22 at A1.

merely, to quote Chief Justice Lamer, telling "elected officials when they have gone too far." In my view, that is a fact. Another fact relevant to this situation is that a good many Canadians are not happy with the the post-Charter division of powers between the legislative and judicial arms of government. The question is, what if anything can be done about it?

Probably nothing, though something should be done. The judiciary has set out on an activist course to the cries of dismay of some but, thus far, not a clear majority of voters. Joe Lunch Bucket, though occassionally irked and regularly confused by newspaper accounts of Supreme Court decisions, has other more pressing things on his mind : the shrinking dollar, unemployment, Quebec's next referendum, the cost of winter wheat or the future of free trade, to say nothing of such everyday concerns as meeting the mortgage or wondering why his teenage daughter stayed out until two last Saturday morning. The American experience instructs us that those offended by what has been known for over 30 years in Washington as the "Imperial Judiciary" cannot sustain sufficient levels of outrage among the general voting public to do much about it. The American appointment process has become something akin to a blood sport, it is true, and Presidents are not opposed to packing the bench when the opportunity arises but, apart from these distasteful practices, judicial independence has been very little weakened by judicial activism. So, if it is only their jobs or their virtually unfettered freedom Canadian judges are concerned about, my advice for what it is worth is carry on.

If their concerns run deeper, however, they may wish to reconsider the wisdom of the current approach. If activism has resulted in politicization and independence in isolation, as arguably they have, the judiciary in Canada may wish to give serious consideration to amending its mission statement and mandate. It may, in the popular parlance of the private sector, be time for some self-initiated re-engineering. Why? Because if judges don't, even though it won't cost them their jobs or their independence, it may so damage their image in the minds of Canadians as to marginalize the work they do. Joe Lunch Bucket finds it difficult to simultaneously tug his forelock in a show of respect and scratch his head in confusion and amazement. Yet, when he is confronted, metaphorically to be sure but confronted nonetheless, by a red-robed High Court Justice reading passages from *Askov*,<sup>34</sup> *Vriend*, *Delgamuukv* or the recent *Quebec Secession Reference*,<sup>35</sup> that is precisely the position he finds himself in.

There is a case to be made for insisting that the trade-off for making laws is accountability to the electorate. Even if you assume, however, that in Canada as in the United States, neither Parliament nor the judiciary will voluntarily bow to that argument and, further, that those making the case will never be powerful enough to force the point, the need for creative problem solving does not disappear. There remains the question of what the judiciary can do to enhance its image as the protector of Canadians and to minimize the negative press it is getting. In his remarks to the Canadian Bar Association, the Chief Justice dropped this tantalizing suggestion :

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34. *R. v. Askov*, [1990] 2 S.C.R. 1199.

35. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

*[...] I wonder whether judges [...] should be rolling up the sleeves of their judicial robes and involving themselves in these public discussions more directly.*

The thinking behind this suggestion is that the tradition of not commenting either on judgments or "on any issue in the public domain touching on them," has, according to Chief Justice Lamer, left the judiciary with "no voice and no champion." The result, Lamer C.J. believes, is a misinformed public :

*[...] it seems to me, he said, that judicial silence sometimes means that the public misses out on a full understanding of what the courts are doing and why. Public debate on issues that come before the courts and, indeed, on the role of the judiciary itself is not as full as it should be because the perspective of the judiciary is usually absent.*

Again with the greatest respect, it seems to me that if the public is misinformed or deprived of "a full understanding," the remedy required to correct the situation lies not with some unidentified "champion" but with Canadian judges themselves. If "the perspective of the judiciary is usually absent," to borrow the Chief Justice's words, surely it is so because those who possess it, the judges, are withholding it. They have assumed the role of what Plato would have called a Guardian class but in this Age of Information they have taken no pains to communicate what they are doing to fulfill that mandate. Indeed, they have done quite the opposite, reading-in to legislation words and phrases that are absent, overstepping the job descriptions many Canadians think they are bound by and taking the public position that constitutional matters are so difficult to understand that only a select few can come to grips with them.

Consider this statement from the introductory pages to the recent decision in the *Quebec Secession Reference* :

*The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law and respect for minorities.<sup>36</sup>*

What this says to poor Joe Lunch Bucket is, "you are simply not brainy enough to understand what is being done here. Leave it to us, the elite, the Guardian class. We will look after this because we know better." Then, as if to drive home this point, the Court renders judgments that are impossible to comprehend. This passage from *Delgamuukw* is a case in point :

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36. *Ibid.* at 220.

*Aboriginal title is a right to the land itself. That land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title. Section 35(1), since its purpose is to reconcile the prior presence of aboriginal peoples with the assertion of Crown sovereignty, must recognize and affirm both aspects of that prior presence — first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land.*

*The test for the identification of aboriginal rights to engage in particular activities and the test for the identification of aboriginal title, although broadly similar, are distinct in two ways. First, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy. Second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.<sup>37</sup>*

Now if this is judicial communication in the Information Age, Chief Justice Lamer's belief that "the public misses out on a full understanding of what the Courts are doing and why" is an astute observation. His statement that "the perspective of the judiciary is usually missing" is equally accurate. His remedy, further clarification by some "champion" seems, however, to overlook the obvious point. The public misses out on a "full understanding" not because the Court lacks a champion but because the point is buried in what J. Ely called "gibberish both syntactically and historically." The average person must struggle mightily and too often in vain to understand what the Supreme Court is saying. There is no excuse for that.

It would seem to me that the Supreme Court must choose : either stay the course and suffer the consequences in terms of judge-bashing, calls for greater accountability and image problems, or change. It can change dramatically by limiting its powers to what existed in pre-activism times or it can stay the course in terms of mandate and vision but take far greater pains to speak to the public in terms the average person can understand. This should not be done through involvement in public discussion but by writing in plain words. The courts are the guardians of our individual freedoms and our protectors against government excess but they should not confuse this admirable mandate with membership in a Guardian class. To do so is to invite contempt. To earn our admiration, they must learn to speak "to" us as well as "for" us.

One final matter deserves attention in any analysis of the role of an activist Canadian judiciary. That is the provision contained in section 33 of the *Charter*, the opting-out power. A number of veteran academics and court watchers including the venerable Peter Russell of Toronto have stated that perhaps it is time for legislators to consider the notwithstanding power to be, not an extraordinary measure, but just one more tool of government. Mr. Justice John Major, in mid-August, appeared to be somewhat of

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37. *Supra* note 20 at 1016-1017.

the same view. When asked to respond to criticisms of the Supreme Court, Justice Major's remarks were almost challenge-like in tone and content :

*I think the ultimate decision on the Constitution as it's drafted, he said, "rests with the politicians. If they honestly think what we've done is so terrible, why don't they do something about it? I've never got a satisfactory answer to that question [...] if we're undisciplined, then surely the government has an obligation to put us back on the right track."*

In a 1991 *Alberta Law Review* article entitled "Standing Up for Notwithstanding,"<sup>38</sup> Peter Russell promoted the use of section 33 as preferable to the American practice, developed to something of an art form by Presidents Franklin Roosevelt and Ronald Reagan, of steering the Supreme Court away from a collision course with popular sentiment by packing the bench with appointments of a certain philosophical bent. Court-packing is to notwithstanding, Russell argued, as a sledge hammer is to a surgeon's scalpel. The American approach remakes the Court almost entirely, while section 33 allows parliamentarians to simply cut away selected judicial "mistakes."

Russell's suggestion is enticing but should be resisted no matter how tempted legislators may be to take up Mr. Justice Major on his invitation to put the Court, "back on the right track." Section 33 of the Charter, like the *War Measures Act*, must be regarded as an emergency power. To do otherwise, to adopt the Russell approach no matter how prudently, how selectively, is to run far greater risks than those posed by the unchecked continuation of law making by an imperial judiciary. At least the laws made by an activist High Court apply nationally. Over time, the employment of the notwithstanding power in section 33 would be bound to lead to a Canada with 10 or 11 charters. Certainty and universality would become things of the past, at least as far as individual rights and freedoms were concerned. Canada would become a community of communities with all the scope for forum shopping and divisive regionalism that term suggests.

Only if judges voluntarily curtail their over-reaching tendencies or if politicians find sufficient common ground to amend the Constitution, could judicial activism in this country be stopped at a stroke. As neither event appears likely, it seems safe to suggest that depending upon our philosophical bent we must either endure or enjoy the status quo for the foreseeable future. A less palatable, though perhaps as effective, instrument of change, American-style court packing also appears unlikely, at least in the short term. The current Justice Minister, Anne McLellan, presumably speaking for the Government, told delegates at the Canadian Bar Association conference in August that she saw nothing wrong with an activist High Court and by inference she counselled Canadians to be wary of those who do :

*Yet, some critics view this role as somehow improper or illegitimate. By focusing on some recent controversial judicial decisions, they are creating the impression that the courts are abrogating to themselves a role other than that contemplated in our democratic constitutional structure. In my view, this development raises the potential for serious*

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38. P.H. Russel, "Standing Up for Notwithstanding" (1991) 29 *Alta. L. Rev.* 293.



*harm to the credibility of the institution of the Canadian courts and the public perception of our system of justice as a whole.*

McLellan rallied Canadian lawyers to stand up against those "seriously misinformed" individuals who are attacking activist courts :

*As members of the legal profession, she said, we have a responsibility to dispel the notion that judicial review is anti-democratic — a notion often proffered when individual or minority rights have been protected against unconstitutional action.*

McLellan, also joined the Chief Justice in calling for an end to judge-bashing.

So, where are we in these closing months of 1998, 16 years after the birth of our constitutionally entrenched Charter? Many Canadians of a certain age have got what they wished for, an activist bench. Some, like the Justice Minister, appear well satisfied. Others, led by outspoken reform-minded politicians and interest groups, see the word "activism" as synonymous with "imperialism" and they are outraged. Dramatic change appears unlikely and the section 33 solution offered by some may be dangerous. We have, it would appear, the makings of a stand-off between two polarized camps. To ease tensions and do much to enhance the image of the judiciary during this uncertain period our courts should seriously consider reaching out to average Canadians not through champions, spin doctors or public relations exercises but by taking pains to make their judgments more readable and understandable. An informed public, one that feels part of the process, is rarely alienated.

Can judges change? Sounds a bit like a Bank of Montreal commercial, doesn't it? Conveniently, that brings this paper full circle back to an opening reference to Bob Dylan's anthem for the sixties and seventies and his most famous lyric, "the times they are a' changing." Interestingly enough, thirty years later Dylan's war cry has also become part of a Bank of Montreal commercial. The lead singer for the Beatles, Paul McCartney, has changed, as well, from a teen idol to a knight of the realm. He is now Sir Paul which perhaps is not all that surprising because those who remember the title song from the album *Revolution*, will also recall that its message was that revolutions accomplish nothing. "You ain't going to change the world," was how the refrain went.

Perhaps, like so many generations of young men and women who have longed for change, we never really believed it possible and didn't really want it anyway. More likely, we sought the comforts of understanding and membership. In Washington's activist Court and in the brave pronouncements of England's Master of the Rolls, we saw issues of immediate importance dealt with courageously and creatively. The impact of those decisions touched us only indirectly, providing examples of what was possible and, in comparison to our dull library-bound lives, they offered the promise of a truly brave new world.

All Canadians have now what we wished for then. Perhaps it need not be a curse if only our judges will take greater pains to add clarity to their new-found courage and creativity. Judges, it seems to me, have the capacity to be their own champions, to be their own agents of public understanding without, as the Chief Justice suggests, "rolling up the sleeves of their judicial robes and involving themselves in public discussions more directly." They have the capacity to end judge-bashing themselves by demonstrating to Canadians that though they guard us against government excess they do not see themselves as members of an elite Guardian class.