

# The Truth About Canadian Judicial Activism

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## Introduction

The topic of judicial activism in Canada generates considerable disagreement. At a recent conference, retired Supreme Court of Canada Justice John Major stated that “there is no such thing as judicial activism in Canada.”<sup>1</sup> In 2001, speaking in his capacity as the Canadian Alliance’s Justice critic, the current federal Minister of Justice and Attorney General, Vic Toews, told Parliament that the Supreme Court has “engaged in a frenzy of constitutional experimentation that resulted in the judiciary substituting its legal and societal preferences for those made by the elected representatives of the people . . . [producing] legal and constitutional anarchy.”<sup>2</sup> One prominent constitutional scholar fears that the debate on judicial activism in Canada has begun to produce excessive judicial deference that allows legislatures and officials to act without scrutiny by the judiciary concerning the effects of state action on vulnerable minorities.<sup>3</sup>

But it is impossible to properly discuss Canadian judicial activism without first defining the term. Although the components of judicial activism have been described slightly differently by a number of individuals,<sup>4</sup> these definitions either expressly incorporate or at least accommodate the following characteristics: the tendency for judges to make, as opposed to simply interpret, the law; the willingness of courts to issue rulings reversing or altering the legislative enactments of Parliament and the provincial legislatures; and the inability

of legislatures to effectively respond to such rulings, thereby giving judges the last word over matters involving rights and freedoms.

## Judges Making Law Without Relying Upon the *Charter*

It is commonly believed that, prior to the enactment of the *Canadian Charter of Rights and Freedoms*<sup>5</sup> in 1982, judges *interpreted* the law, and did not take it upon themselves to *make* law. Thus, many people view the *Charter* as ushering in an era of law-making by the judiciary. While there is truth in the statement that judges play a larger role in shaping government policy and legislation today than they did prior to 1982, it would be inaccurate to portray the judiciary of the past as not engaging in law-making. In many areas of private law, such as torts<sup>6</sup> and contracts, the law has been largely dependent on judicial decisions.<sup>7</sup>

A prime example of such judicial activism is the famous 1932 case of *Donoghue v. Stevenson*,<sup>8</sup> in which the plaintiff and her friend visited a café, and the friend ordered a ginger beer for the plaintiff. Unfortunately, the ginger beer bottle contained a decomposed snail. Upon discovering the remains of the snail after consuming a portion of the contents of the bottle, the plaintiff alleged she suffered shock and gastroenteritis. As a result, she sued the manufacturer for damages. Although a strong contention could be made that the manufacturer was in breach of its contract

with the café owner by supplying a defective bottle of ginger beer, a lower court, applying the judicially created precedents of the time, held that because the plaintiff was not a party to the contract, she was not eligible to sue for damages. However, the British House of Lords overturned the lower court's ruling, and held that a suit for damages in tort by the plaintiff against the manufacturer was not precluded. The Court reasoned that a duty of care was owed to all reasonably foreseeable victims of the defendant's negligent conduct. This judicial creation of a robust negligence tort continues to animate product liability cases today. In 1995, the Supreme Court of Canada held that women who received defective breast implants, and who were not the purchasers of these implants, since they were sold only to doctors and to medical establishments and not directly to the public, had viable tort actions against the manufacturers.<sup>9</sup>

Albeit that many people would applaud the Court's creation of a tort of negligence, there are times when judge-made law proves problematic. In 2004, the Supreme Court recognized a judicially created police power that represented a significant departure from the status quo. The traditional view had long been that the police could forcibly detain individuals, absent specific statutory authorization, only if they had reasonable and probable grounds to arrest them for an offence.<sup>10</sup> But in the 1990s, a number of appellate courts began to recognize a police power to detain and, in certain circumstances, search an individual, if the officer had a reasonable suspicion that the individual had committed an offence – a lower standard than reasonable and probable grounds.<sup>11</sup> In the course of endorsing this police power, the Supreme Court provided some guidance pertaining to the power by stating that any investigative detention must be brief in duration and that, where a police officer has reasonable grounds to believe that his or her safety is in issue or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual.<sup>12</sup>

However, the Court also failed to address some key matters and in doing so demonstrated the institutional limitations of courts to set

and implement public policy even within the criminal justice sphere. The Court did not articulate exactly how long is too long for an investigative detention. The matter of how the police are entitled to respond if they have well-founded safety concerns when detaining someone who happens to be carrying a bag or driving a car was similarly omitted. These shortcomings of the ruling are not surprising because the Court is limited to addressing only those issues that are raised by the parties that happen to come before it and, as a result, the rules emanating from the Court tend to be piecemeal, as opposed to comprehensive and prospective. In addition, when the Court carves out police powers, it does so in the context of a case involving a guilty person, which evokes a strong desire to affirm the conduct of the police and expand police powers.<sup>13</sup>

Sometimes when judges decide to advance the state of judge-made law, the result is to remove legislatures' impetus to examine and comprehensively address the matter differently after consulting more diverse sources and hearing alternate perspectives. If the Supreme Court had failed to endorse the common law police power of investigative detention, law enforcement organizations would have undoubtedly lobbied Parliament for the power to detain short of arrest. In the course of examining the issue, Parliament would likely have held hearings on the advisability of expanding police powers, and it could have heard from groups that have been subjected to police harassment and discrimination, such as the indigent, Aboriginal Canadians, and other visible minorities. After hearing from these groups, Parliament would have been well situated to fashion a limited, highly circumscribed, and detailed police power to detain short of arrest that took into account the experiences of these groups. As it stands, police officers have a potentially expansive power that they have obtained from the Court, and law enforcement agencies lack the motivation to lobby Parliament to regulate this area. Moreover, those groups most likely to be subject to investigative detentions lack the power to get this issue on the parliamentary agenda.

There are ways to ensure that issues like investigative detention, which have been ruled on by the Court, receive the attention of legislatures. In the federal sphere, the Senate and House of Commons have standing committees that periodically review proposed legislation for its relationship to protected rights. The duties of these standing committees could be expanded to include the preparation of reports, to be tabled in Parliament, identifying significant recent common law rulings issued by the Supreme Court of Canada, as well as possible legislative responses. In the course of preparing the reports, hearings could be held in which interested groups are invited to address the Court's rulings before the committee members. A similar type of process could be developed through modifying the mandate of provincial legislative scrutiny committees.

When a legislature passes a statutory provision that falls within its jurisdiction, judges are often called upon to engage in a process that, at times, blurs the distinction between making law and interpreting law. The best-known federal statute is the *Criminal Code*.<sup>14</sup> Section 43 of the *Code* reads, "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances." But what constitutes reasonable corrective force? Some people may believe that light spanking with a wooden spoon by a parent of a misbehaving one-year-old child constitutes an unreasonable amount of force, and that the parent should be subject to criminal prosecution for assault. Others may feel that such a parent used a reasonable amount of force, and his or her actions should come within the protective ambit of section 43. Recently, the Supreme Court of Canada ruled that using an object to discipline a child would not be considered reasonable force, nor would section 43 provide a defence to someone who applies corrective force against children under the age of two, against teenagers, or against children of any age who suffer from a disability that renders them incapable of learning from the correction.<sup>15</sup> This case serves to bolster the

assertion made by the Chief Justice of Canada at a conference that "there is no clear demarcation between applying the law, interpreting the law, and making the law."<sup>16</sup>

## Judicial Activism Under the "Old" Constitution

Despite the fact that legislatures were often content with the common law rules prevailing in an area, if a legislature disapproved of a certain judge-made law, it could pass legislation to replace the judicially constructed rule as long as it respected the division of powers between the federal government and the provinces found in the *Constitution Act, 1867*.<sup>17</sup> Although judicial enforcement of this division of powers has not formed the basis of contemporary claims of judicial activism, this was not always the case. In an effort to alleviate conditions caused by the Great Depression of the 1920s and 1930s, the federal government drafted legislation providing for unemployment insurance, minimum wages, maximum hours of work, and marketing legislation to raise low farm commodity prices. Prime Minister Mackenzie King then referred the legislative package to the courts for an opinion as to its constitutionality. The Judicial Council of the Privy Council, which at that time was the final court of appeal for Canada, failed to accept that the legislative package constituted an emergency measure allowing the federal government to legislate on the basis of its general power to make laws for the Peace, Order and Good Government of Canada.<sup>18</sup> Nor did the Court conclude that Parliament could pass the package on the basis of its power to make laws regulating trade and commerce.<sup>19</sup> In the end, the Court determined that the proposed legislation unconstitutionally infringed the provincial jurisdiction over property and civil rights. The difficulty of coordinating the various provincial governments into passing similar statutes proved insurmountable, and no effective set of provincial legislation was passed. A 1939 Senate report described the Privy Council decisions as having repealed by judicial legislation the centralized federalism intended by the Fathers

of Confederation, and the report accused the Court of seriously departing from the actual text of the constitution.<sup>20</sup>

Eventually the discontent arising from these decisions, and others in which the Privy Council was perceived as widening the ambit of provincial powers and, correspondingly, restricting the scope of federal powers, led the federal government to act. Ottawa abolished appeals to the Privy Council and, in 1940 the Constitution was amended to give the federal government power to implement unemployment insurance.<sup>21</sup> Consequently, what was perceived as inappropriate judicial activism was met by legislative activism.

However, faced with a similar situation today, the federal government would likely not have to change the Constitution in order to achieve its desired legislative objectives. Ottawa has increasingly used its spending power to effectively influence those areas in which it has no authority for law-making under the division of powers. For example, the provision of health care services comes within the legislative competence of the provinces, but the federal government has used its spending power to persuade the provincial governments to impose certain national standards for hospital insurance and medical care programs as a condition of federal contributions to these provincial programs. Moreover, the Supreme Court has affirmed Parliament's power to authorize grants to the provinces for use in fields of provincial jurisdiction, as well as the power to impose conditions on the recipient provinces.<sup>22</sup> So today, if the federal government wants to create certain national programs as it did during the Depression, and the Court rules that Ottawa's legislation infringes upon provincial jurisdiction, the federal government can use its spending power to persuade each of the provinces to adopt identical legislation establishing these programs. In effect, Ottawa can achieve indirectly what it cannot legislate directly.

## Judicial Activism Under the *Charter*

Because it is more difficult for legislatures to achieve their legislative objectives in the face of contrary *Charter*<sup>23</sup> rulings than when confronted with unsatisfactory common law rulings, or unsuccessful division-of-powers judgments, it is understandable that judicial activism under the *Charter* garners the most attention and concern. However, the judiciary has responded in a curious and unpersuasive manner to claims that it is judicially active under the *Charter*. In 1997, then-Chief Justice Lamer stated that, under the *Charter*, "very fundamental issues of great importance to the kind of society we want are being made by unelected persons." He pointed out, "Now that's a command that came from where? It came from the elected [representatives of the people]. . . . [T]hat's their doing, that's not ours."<sup>24</sup> However, the governments that agreed to the *Charter* may have had very different conceptions of the way *Charter* rights should be interpreted by the Court.<sup>25</sup> As Christopher Manfredi observes, "If judicial review evolves such that political power in its judicial guise is limited only by a constitution whose meaning the courts alone define, then judicial power is no longer itself constrained by constitutional limits."<sup>26</sup>

Nevertheless, the idea that the rights contained within the *Charter* should be interpreted by using the intent of the framers of the Constitution is controversial. Some critics of this approach point out that it risks freezing rights as they were understood at the time of the *Charter's* enactment,<sup>27</sup> and that such an approach is incompatible with the manner in which the courts have approached constitutional interpretation under the *Constitution Act, 1867*.<sup>28</sup> In the decision that interpreted the constitutional provision that allowed for the appointment of persons to the Senate, the Privy Council ruled that women were "persons," and in doing so, the Court concluded that the Constitution had "planted a living tree capable of growth."<sup>29</sup> Others have argued that the use of framers' intent to interpret the meaning and scope of *Charter* rights is unworkable because it is difficult to ascertain who should be



categorized as framers, and because competing and contradictory positions were often presented by those involved in negotiating and drafting the *Charter*.<sup>30</sup>

Yet, there exist cogent responses to these concerns about using framers' intent to interpret *Charter* rights. One of the reasons for entrenching rights within the Constitution is to freeze certain concepts for the long-term future – to make them hard to change.<sup>31</sup> But this freezing of concepts does not mean that the Constitution cannot be a living document accommodating new facts and developments. For example, it is not suggested that the scope of freedom of expression guaranteed by the *Charter* be regarded as frozen in the sense that it only protects those forms of expression that existed in 1982. Such an approach would mean that expressive content on the Internet would not come within the scope of *Charter* protection. The principle of expressive freedom should remain the same, and simply grow to accommodate new technologies. Entrenched freedoms should simply be applied to new facts so that the rights themselves remain unchanged. The elm must remain an elm; it can grow branches, but it does not transform itself into an oak or a willow.<sup>32</sup> Morton & Knopff eloquently refute the argument that a frozen rights approach is antithetical to the metaphor of the living tree: "For all its flexibility and adaptability, a living tree, in the strict biological sense, is a frozen concept."<sup>33</sup> Morton & Knopff are correct when they argue that what is acceptable under a "framers' intent" approach is to apply existing rights to new facts and what is unacceptable is to create new rights and apply them to old facts.<sup>34</sup> It must be acknowledged that the demarcation between the enforcement of existing rights and the creation of new rights is sometimes difficult to discern. Continuing with the elm and oak metaphor, the fact that it may be difficult to tell the difference between an elm and an oak does not mean that the attempt to differentiate between the species should be abandoned. As for the argument that it is impossible to identify the framers, Kelly convincingly argues that only those participants who succeeded in having their intentions entrenched in the *Charter* should be labeled as framers.<sup>35</sup>

Using framers' intent to interpret the scope of *Charter* rights does not necessarily mean that the rights will be read restrictively. The testimony of specific individuals before the Special Joint Committee on the Constitution of Canada, which held hearings on proposed drafts of the *Charter*, and the writings of then-Prime Minister Trudeau, perhaps the individual who was most responsible for the constitutional entrenchment of a bill of rights,<sup>36</sup> can be used to argue that a consensus emerged that the *Charter* was to be an activist document.<sup>37</sup> Thus, there exists an important link between judicial activism under the *Charter* and representative democracy. But an activist court promotes democracy in yet another fashion. Roach observes:

The Court promotes democracy not because every one of its decisions is consistent with or required by democracy, but because it requires the elected government to take responsibility for and justify to the people its decisions to limit or override rights that are liable to be neglected in the legislative and administrative process.<sup>38</sup>

Even though a consensus emerged that the *Charter* "will confer new and very important responsibilities on the courts because it will be up to the courts to interpret [it] . . . to decide how much scope should be given to the protected rights and to what extent the power of government should be curtailed,"<sup>39</sup> the drafters also agreed as to the substantive meaning and scope of certain key *Charter* rights. For example, the legislative record is clear that the drafters of the *Charter* agreed that the section 10(b) right to retain and instruct counsel without delay, and to be informed of that right, does not include a right to state-funded counsel.<sup>40</sup> In its rejection of the argument that free duty counsel was part of the protection of section 10(b), the Supreme Court relied on the framers' intent pertaining to the interpretation of this section.<sup>41</sup>

Whether the framers intended to protect individuals against discrimination on the basis of sexual orientation under section 15 of the *Charter* is a more contentious matter. Section 15(1) states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is evident that the text of section 15(1) does not include the words “sexual orientation.” However, the provision is worded such that the enumerated grounds for equality rights protection are simply examples of the types of discrimination that are prohibited. The enumerated grounds are not a closed list. Because the Special Joint Committee on the Constitution of Canada debated whether to include sexual orientation as an enumerated ground and ultimately rejected doing so, it has been argued that the Supreme Court’s subsequent interpretation of sexual orientation as being analogous to the enumerated grounds in section 15(1), and hence a prohibited ground of discrimination,<sup>42</sup> constitutes a direct violation of framers’ intent.<sup>43</sup> But Kelly’s analysis of the Special Joint Committee testimony reveals that the Committee excluded sexual orientation largely because it posed a drafting difficulty.<sup>44</sup> In addition, there is substantial evidence that the framers contemplated that new categories of discrimination could be added to section 15(1) once they matured in terms of Canadians’ acceptance of these new prohibited grounds. The comments of Robert Kaplan, who appeared before the Committee as Solicitor General of Canada, are illustrative of the thinking of the drafters:

I think there might be found a consensus among Canadians that these grounds which are enumerated are those which have the highest degree of recognition in Canadian society as being rights which ought to be recognized and the general statement gives the possibility down the road not only of those on Mr. Robinson’s list being recognized [Robinson wanted discrimination on the basis of marital status, political belief, sexual orientation, and disability explicitly prohibited under section 15(1)], but of others which may not have occurred to him of being in the future as being unacceptable grounds of discrimination.<sup>45</sup>

Thus, it seems as if the Supreme Court’s interpretation of section 15 of the *Charter*, as prohibiting discrimination on the basis of sexual orientation, is consistent with the framers’ intent, and does not constitute an example of inappropriate judicial activism.

Alas, the Supreme Court has not acted in accordance with framers’ intent in interpreting section 7 of the *Charter*. Section 7 provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” In its 1985 ruling in the *Motor Vehicle Reference*,<sup>46</sup> the Supreme Court cited ample documentary evidence clarifying that the framers intended “fundamental justice” to be interpreted as synonymous with “natural justice.” The rules of natural justice are rules of procedure. They require a hearing, unbiased adjudication, and a fair procedure. If the principles of fundamental justice were interpreted as meaning principles of natural justice, the state could deprive individuals of life, liberty, or security of the person as long as it did so in a procedurally fair manner. Yet, the Supreme Court rejected the original intent doctrine in interpreting section 7, and instead ruled that the phrase “fundamental justice” prohibited substantive as well as procedural injustice. Understandably, some critics have charged that through this ruling, the Court has conferred upon itself the status of a judicial super-legislature.<sup>47</sup> Indeed, the Court has utilized this interpretation of the principles of fundamental justice to strike down a number of pieces of legislation, including the criminal provisions prohibiting abortions that occur outside a hospital and without the approval of a committee of at least three doctors,<sup>48</sup> and Quebec legislation prohibiting the purchase of private health insurance for services that are covered by the public plan.<sup>49</sup> In litigation involving the Quebec government’s decision to reduce the welfare payment of an individual because she did not participate in stipulated educational or work experience programs, the Court did not find for the *Charter* claimant.<sup>50</sup> Likewise, no *Charter* relief was granted when the Government of British Columbia refused to fund Lovaas therapy for autistic pre-schoolers.<sup>51</sup>

Yet, the Court did not preclude the possibility that, given a slightly different factual context and more extensive submissions from counsel, section 7 could encompass economic rights, require that governments fully fund vital programs and treatment, and place a positive obligation on the state to ensure that all persons can enjoy life, liberty, and security of the person.

## Legislatures Responding to *Charter* Rulings

History has demonstrated the futility of legislatures relying on section 1 of the *Charter* to protect the constitutional validity of a statute that is found to infringe section 7. Section 1 allows legislatures to justify reasonable limits on the rights that the court finds in the *Charter*. Yet, a majority of the Supreme Court has never held that a particular breach of section 7 was justified under section 1.<sup>52</sup>

Despite this fact, Canadian legislatures have responded to court rulings striking down legislation on the basis of section 7 *Charter* violations, by enacting new laws that simultaneously achieve the government's original legislative objectives while conforming to *Charter* standards. To ensure that the newly enacted legislation passes constitutional muster, legislatures often tailor their statutes so that they largely accord with the suggestions given by the Court when it struck down the original laws. For instance, in *Seaboyer*<sup>53</sup> the Supreme Court ruled that the *Criminal Code*'s<sup>54</sup> categorical restrictions preventing evidence of a complainant's prior sexual conduct from being admitted in a criminal trial violated the accused's section 7 right to a fair trial. The Court was particularly concerned that such evidence could bolster the accused's defence that he had an honest but mistaken belief that the complainant consented to the sexual activity. Although the Court struck down Parliament's legislative "rape shield" laws, it established common law rules that prevented the admission of evidence of the complainant's prior sexual conduct, with the accused or others, to support an inference that she consented, or that she was

not a credible witness. Thus, the Court replaced the legislative categorical rape shield law with a common law near-categorical rape shield law. Parliament responded with a comprehensive legislative reform package that codified the Court's common law rules in *Seaboyer*, but the government also included, among other things, protection for complainants from having to testify at the evidentiary hearings to determine if their prior sexual conduct was admissible. The Supreme Court subsequently upheld this new rape shield law, including the legislature's new protection for complainants.<sup>55</sup> Thus, Parliament's initial rape shield legislation, which was animated by a desire to shield complainants from the often humiliating experience of being cross-examined on their previous sexual history and to encourage the reporting of sexual assault incidents to the authorities, but went too far by preventing some accused from advancing a viable defence, was eventually replaced by legislation that arguably achieves the legislature's objectives as effectively as the original legislation while preserving the fair trial rights of accused. The legislative response was creative and did not constitute slavish parliamentary compliance with judicial policy prescriptions.

The Supreme Court has often upheld legislation under section 1 that infringed *Charter* rights other than section 7. Despite the fact that the *Criminal Code* proscriptions against the wilful promotion of hatred against identifiable groups and obscenity were ruled to constitute infringements of the section 2(b) *Charter* right of freedom of expression, the legislation was upheld in its entirety under section 1.<sup>56</sup> More recently, the Supreme Court declared the offence of simple possession of child pornography to be constitutionally valid. Although the provision also infringed section 2(b), it was saved under section 1 by reading in two extremely limited exceptions into the statutory definition of child pornography.<sup>57</sup>

However, the Court has not always capitulated to Parliament's arguments that legislation infringing section 2(b) is nonetheless justified under section 1. For example, in *RJR-MacDonald*,<sup>58</sup> the Court decided that federal

legislation requiring an absolute restriction on tobacco advertising and the placement of unattributed health warnings on cigarette packages infringed the freedom of expression of tobacco companies. In holding that the government had not justified its legislation under section 1, the Court suggested that a more minimally-impairing rights mechanism would be a prohibition only on lifestyle advertising and a requirement that health warnings on cigarette packages be attributed to Health Canada. It would be difficult to conceive that such changes to the government's legislation would seriously hamper the legislative objective of decreasing smoking among Canadians. Parliament responded to the Court's decision by passing the legislation suggested by the Court and, consequently, there is a significant possibility that the new statute will pass constitutional muster.

But what if it does not? Will the judiciary have the last word, thereby depriving Parliament of a potentially effective tool to combat the problems posed by tobacco consumption in society? Not necessarily, because of the notwithstanding clause. Section 33 of the *Charter* allows legislatures to enact laws that override certain *Charter* rights, including: the "fundamental freedoms" of freedom of religion, freedom of expression, freedom of the press, and freedom of association; the "legal rights" such as the right to be secure from unreasonable search and seizure, and the right not to be arbitrarily detained or imprisoned; and the equality rights. In order to re-enact legislation that the Court has struck down under the *Charter*, or to shield a particular statute from judicial review, section 33 simply requires a legislature to declare expressly in its statute that the law will operate notwithstanding one or all of the *Charter* rights in section 2 and sections 7-15. The section 33 protection from judicial review expires after five years, but it can be renewed an indefinite number of times.

Unfortunately, use of the notwithstanding clause has become politically taboo, despite the central role it played in ensuring provincial agreement to the constitutional entrenchment of a bill of rights. A number of the premiers

insisted on the inclusion of section 33 because they feared that without it, Canada's system of parliamentary supremacy would be replaced by a system of judicial supremacy. Indeed, without the inclusion of the notwithstanding clause, the negotiations that led to the enactment of the *Charter* might have failed.<sup>59</sup> Yet, Ottawa has never used the override, and the provinces have only resorted to it a few times to respond to the Court's decisions.

One of these provincial uses of the notwithstanding clause was in response to the Court's decision to invalidate a Quebec statute requiring commercial signs to be only in French.<sup>60</sup> When the Quebec legislature re-enacted the law and protected it by utilizing the notwithstanding clause, the reaction outside of Quebec was extremely negative. In response, then-Prime Minister Brian Mulroney characterized section 33 as "that major fatal flaw of 1981, which reduces your individual rights and mine, which holds them hostage."<sup>61</sup> He also stated that any constitution "that does not protect the inalienable and imprescriptible individual rights of individual Canadians is not worth the paper it is written on."<sup>62</sup>

The perception that the notwithstanding clause is "at best inconsistent with the idea of constitutionally entrenched rights, and at worst a constitutional abomination,"<sup>63</sup> has persisted. During the last federal election leaders' debate, then-Prime Minister Paul Martin pledged to remove by "constitutional means the possibility for the federal government to use the notwithstanding clause, because quite simply, I think governance says that the courts shouldn't be overturned by politicians."<sup>64</sup> Although the man who won the election, current Prime Minister Stephen Harper, refused to match the pledge, he has indicated that he would not use the notwithstanding clause should his government decide to repeal Parliament's same-sex marriage legislation and enact a statute adopting the traditional heterosexual definition of marriage.<sup>65</sup>

But opposition to the use of the notwithstanding clause is not necessarily immutable. British Columbia's Attorney General, as well as the federal opposition leader,



had urged Ottawa to use the notwithstanding clause if the Supreme Court struck down the *Criminal Code's* child pornography provisions.<sup>66</sup> Thus, a politically unpopular *Charter* decision may breathe life back into the notwithstanding clause.

This is important because section 33 is a positive aspect of Canadian constitutionalism. Judges may be above playing petty politics with important social issues. In addition, access to the courts due to programs such as legal aid and the federally funded Court Challenges Program of Canada<sup>67</sup> may be more of a reality for lower and middle income individuals than is the prospect of influencing their elected representatives. However, the adversarial process does not ensure that judges are presented with all the information required to make complex policy decisions. The judiciary must render its rulings based on the evidence presented before it, which may be particularly one-sided because of the inequality of resources of the parties and/or the disparate quality of the advocates. Judges, unlike politicians, cannot commission reports or create public inquiries to establish the real facts. Moreover, judges may not have the experience or information to properly assess how scarce government resources should be allocated. Yet, the Court cannot abdicate its responsibility to decide the cases that are brought before it. Because of its institutional shortcomings, it is likely that the Court will render a flawed *Charter* ruling. Legislatures must have the legal and political means to override such a ruling. The presence of section 33 provides governments with the legal means to do so, but only public education about the legitimacy of governments using the notwithstanding clause will provide them with the political means.

## Conclusion

By examining the Canadian experience through the lens of the definition of judicial activism provided at the beginning of this article, a number of truths have been revealed. The first of these truths is that judicial activism is a real phenomenon in Canada. Moreover, judicial activism existed and concerns about it were expressed long before the enactment

of the *Charter*. However, for the most part, judicial activism is legitimate and democratic. Despite the fact that there have been important instances in which the Supreme Court has been inappropriately activist, the extent of inappropriate judicial activism engaged in by the Court has been exaggerated. Judicial activism in Canada has produced results that have been perceived as problematic by legislatures, and they have responded and prevailed with activism of their own. Yet, positive results can emanate from legislatures becoming even more activist through a number of different means, including eschewing the growing constitutional convention prohibiting the use of the notwithstanding clause.

The importance of creating and preserving a just society is too great to be entrusted to only one branch of government. Although constitutional amendments are not required to make the system work, different mechanisms and processes can enhance it. The most important of these processes is public education. When the public stops scrutinizing the work of important public institutions, the failure of these institutions may follow. This failure is the real risk with which Canadians should be concerned.

## Notes

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- 1 26<sup>th</sup> Annual Community Seminar: The Role of Canadian Judges as Makers or Interpreters of the Law, Calgary Institute for the Humanities, University of Calgary, Calgary, Alberta, 15 June 2006.
- 2 *House of Common Debates*, 024 (1 March 2001) at 1398.
- 3 See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 89-95 and 277-85 [Roach].
- 4 For a flavor of the variety of judicial activism definitions, see: F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto:

- Broadview Press, 2000) at 15 [Morton & Knopff]; Christopher P. Manfredi, “Judicial Power and the *Charter*: Reflections on the Activism Debate” (2004) 53 *University of New Brunswick Law Journal* 185 at 188 [Manfredi]; and Sujit Choudhry, “Book Review: *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed.” (2003) 1 *International Journal of Constitutional Law* 379 at 386; and Roach, *ibid.* at 10.
- 5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].
  - 6 The classic textbook definition of a tort is: “a civil wrong, other than a breach of contract, which the law will redress by an award of damages” (Allen M. Linden, *Canadian Tort Law*, 7<sup>th</sup> ed. (Markham, ON: Butterworths, 2001) at 2, citing John G. Fleming, *The Law of Torts*, 9<sup>th</sup> ed. (Sydney: LBC Information Services, 1998) at 1. In *Hall v. Hebert*, [1993] 2 S.C.R. 159 at 200, 1993 CanLII 141, Justice Cory explained the law of tort in the following manner:

It provides a means whereby compensation, usually in the form of damages, may be paid for injuries suffered by a party as a result of the wrongful conduct of others. It may encompass damages for personal injury suffered, for example, in a motor vehicle accident or as a result of falling in dangerous premises. It can cover damages occasioned to property. It may include compensation for injury caused to the reputation of a business or a product. It may provide damages for injury to honour in cases of defamation and libel. A primary object of the law of tort is to provide compensation to persons who are injured as a result of the actions of others.
  - 7 See Lewis Klar, *Tort Law*, 3d ed. (Toronto: Carswell, 2003) at 2, where the author states that “Canadian tort law is principally judge-made law, notwithstanding the growing encroachment of statutory modifications.” See also John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 8, where the author observes: “The term ‘common law’ is . . . used to refer to judge-made law as opposed to laws generated by legislative enactment. For the most part, the general principles of contract law are common law in this sense.”
  - 8 [1932] A.C. 562 (H.L.).
  - 9 *Hollis v. Dow Corning Corp.* (1993), 103 D.L.R. (4<sup>th</sup>) 520, 1993 CanLII 949 (B.C.C.A.), *aff’d*, [1995] 4 S.C.R. 634, 1995 CanLII 55.
  - 10 For many years, *Koechlin v. Waugh and Hamilton* (1957), 11 D.L.R. (2d) 447 (Ont. C.A.), was cited for this proposition.
  - 11 The common law police power to detain a person for investigatory purposes was created in *R. v. Simpson* (1993), 12 O.R. (3d) 182, 1993 CanLII 3379 (C.A.); it was expanded in cases such as *R. v. Lake* (1997), 113 C.C.C. (3d) 208, 1996 CanLII 5094 (Sask. C.A.), and *R. v. Ferris* (1998), 162 D.L.R. (4<sup>th</sup>) 87, 1998 CanLII 5926 (B.C.C.A.), to permit a search of the person as an incident of the detention under certain circumstances.
  - 12 *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52 (CanLII).
  - 13 James Stribopoulos, “A Failed Experiment? Investigative Detention: Ten Years Later” (2003) 41 *Alberta Law Review* 335 at 379.
  - 14 R.S.C. 1985, c. C-46 [*Criminal Code*].
  - 15 *Canadian Foundation for Children, Youth and the Law v. Canada* (A.G.), [2004] 1 S.C.R. 76, 2004 SCC 4 at paras. 25 and 40.
  - 16 Beverley McLachlin, “Respecting Democratic Roles” (2005) 14:3 *Constitutional Forum* constitutionnel 15 at 19.
  - 17 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*].
  - 18 *A.G. Canada v. A.G. Ontario (Employment and Social Insurance Act)*, [1937] A.C. 355 (P.C.).
  - 19 See *A.G. British Columbia v. A.G. Canada (Natural Products Marketing Act)*, [1937] A.C. 377 (P.C.), and *A.G. Canada v. A.G. Ontario (Labour Conventions)*, [1937] A.C. 326 (P.C.).
  - 20 Canada, Senate, *Report Relating to the Enactment of the British North America Act, 1867, any Lack of Consonance between Its Terms and Judicial Construction of Them and Cognate Matters* (Ottawa: Queen’s Printer, 1939) at 12-13.
  - 21 For a more detailed description of these events, see Roach, *supra* note 3 at 39-44.
  - 22 *Reference re Canada Assistance Plan* (B.C.), [1991] 2 S.C.R. 525, 1991 CanLII 74.
  - 23 *Charter*, *supra* note 5.
  - 24 Quoted in Stephen Bindman, “‘Thank God for the Charter’: Top judge staunchly defends Charter of Rights on its 15<sup>th</sup> anniversary” *Ottawa Citizen* (17 April 1997) A1. In *Reference re s. 94(2) of the Motor Vehicle Act* (B.C.), [1985] 2 S.C.R. 486 at 497, 1985 CanLII 81 [*Motor Vehicle Reference*], Justice Lamer stated: “[T]he historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility.”
  - 25 Roach, *supra* note 3 at 219.

- 26 Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Don Mills, ON: Oxford University Press, 2001) at 22.
- 27 Roach, *supra* note 3 at 238.
- 28 *Supra* note 17.
- 29 *Edwards v. Attorney-General for Canada*, [1930] A.C. 123 (P.C.).
- 30 James B. Kelly & Michael Murphy, "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" (2001) 16 *Canadian Journal of Law & Society* 3 at 9.
- 31 Morton & Knopff, *supra* note 4 at 45.
- 32 *Ibid.* at 46.
- 33 *Ibid.* [emphasis in original].
- 34 *Ibid.*
- 35 James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: University of British Columbia Press, 2005) at 87 [Kelly].
- 36 Interestingly, Prime Minister Trudeau never appeared before the Special Joint Committee.
- 37 Kelly, *supra* note 35 at 88.
- 38 Roach, *supra* note 3 at 250.
- 39 Kelly, *supra* note 35 at 89.
- 40 *Ibid.* at 93.
- 41 *R. v. Prosper*, [1994] 3 S.C.R. 236, 1994 CanLII 65.
- 42 The case that first held that s. 15 prohibited discrimination on the basis of sexual orientation was *Egan v. Canada*, [1995] 2 S.C.R. 513, 1995 CanLII 98.
- 43 Morton & Knopff, *supra* note 4 at 43.
- 44 Kelly, *supra* note 35 at 98-99.
- 45 Quoted in Kelly, *supra* note 35 at 100.
- 46 *Supra* note 24.
- 47 Rory Leishman, *Against Judicial Activism* (Montreal: McGill-Queen's University Press, 2006) at 139.
- 48 *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 1988 CanLII 90.
- 49 *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 (CanLII).
- 50 *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 (CanLII).
- 51 *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, [2004] 3 S.C.R. 657, 2004 SCC 78 (CanLII).
- 52 Peter Hogg, *Constitutional Law of Canada*, 4<sup>th</sup> ed., loose-leaf (Scarborough, ON: Carswell, 1997) at 44.3, and Michel Bastarache, "Section 33 and the Relationship Between Legislatures and Courts" (2005) 14:3 *Constitutional Forum constitutionnel* 1 at 4. In *R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CanLII 46, the Supreme Court indicated that four criteria must be satisfied by a law that qualifies as a reasonable limit that can be demonstrably justified in a free and democratic society: i) the law must pursue an objective that is pressing and substantial in a free and democratic society; ii) the law must be rationally connected to the objective; iii) the law must impair the right no more than is necessary to accomplish the objective; and iv) the law must not have a disproportionately severe effect on the person(s) to whom it applies. Although the s. 1 test appears objective and onerous, the scrutiny with which the minimal impairment branch of the test applies, varies depending on the context. For a concise summary of how the Court has distinguished between stricter and more deferential forms of s. 1 scrutiny, see Roach, *supra* note 3 at 160-66.
- 53 *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 1991 CanLII 76 [Seaboyer].
- 54 *Supra* note 14.
- 55 *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46 (CanLII).
- 56 For the ruling pertaining to the offence of wilfully promoting hatred, see *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1990 CanLII 24; and for the judgment concerning the obscenity provisions, see *R. v. Butler*, [1992] 1 S.C.R. 452, 1992 CanLII 124.
- 57 See *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (CanLII). The two categories of material that the Court held shall no longer come within the scope of the offence were any written material or visual representation created by the accused alone and held by the accused alone exclusively for his or her own personal use, and any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use (*ibid.* at para. 128).
- 58 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 1995 CanLII 64.
- 59 See Roy Romanow, John Whyte & Howard Leeson, *Canada...Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 193-215.
- 60 *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 1988 CanLII 19.
- 61 *House of Commons Debates* (6 April 1989) at 153.
- 62 *Ibid.*
- 63 Manfredi, *supra* note 4 at 186.
- 64 Canadian Press, "Transcript of Jan. 9 English Leaders' Debate (9 January 2006), online: CTV.ca <[http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060109/ELXN\\_debate\\_transcript\\_060109/](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060109/ELXN_debate_transcript_060109/)>.

- 65 Canadian Press, "Martin targets Harper in election debate, vows to end federal notwithstanding clause" *Canadian Press Wire Service* (9 January 2006).
- 66 Canadian Press, "Dosanjh would override unfavourable porn ruling" *Canadian Press Wire Service* (1 March 1999).
- 67 The Court Challenges Program of Canada is a national non-profit organization established in 1994 to provide financial assistance for important court cases pertaining to the language and equality rights guarantees in the Constitution. See online: <[www.ccppcj.ca](http://www.ccppcj.ca)>.