

Don't Blame the Judges

Roger Kerans, Globe and Mail
March 23 2000

Mr Stockwell Day, a newly announced candidate for the leadership of a gestating political party, last week opened his candidacy with a call for Canada to limit the scope of the Canadian Charter of Rights and Freedoms because it impedes the traditional liberties of Parliament and legislature.

Mr Day went out of his way to avoid blaming judges for his present dissatisfaction, saying they are merely doing the job set for them. I congratulate him for that. Canadian judges did not seek the Charter. On the contrary, Canadians thrust it upon them. The Charter undeniably makes judges the referees between Government and the people. Like any good umpire, the judges call 'em the way they see 'em, and then stand quietly while the crowd roars its disapproval with choice epithets. These days, suggesting that a judge may be merely blind is mild. Critics also refer disparagingly to age, gender, and state of mind, to mention a few.

Activist is the epithet that most confuses me. Would the critics prefer judges to be inactive? I have never quite understood why some Canadians complain when judges do the job Canadians ask them to do. Is it so rare these days to see public officers actually doing their jobs that people are shocked at the sight? It is true, I admit it, that judges are guilty of making decisions, guilty of facing issues squarely and honestly, and guilty of not sending problems off for study to committees, or Royal Commissions.

Most uses of the "activist" epithet are shorthand for dislike of the decision. That dislike should not surprise judges. It goes with the territory, like having people complain that we overpay them in their cushy jobs. Almost by definition, Charter decisions will be unpopular. This is because the Charter offers to individuals trump-cards against the popular will. In other words, the Charter is most likely to be invoked by those Canadians who - momentarily at least - are unpopular. Judges who apply the Charter to protect the unpopular can expect to be bashed - along with gays, criminal defendants, accused pornographers, and those who come into this country illegally.

This unhappiness is sometimes difficult to understand. The Charter, after all, expresses values most Canadians treasure. Ideas, for example, like fairness and equality. We would be shocked if the Charter failed, for example, to protect women who are pregnant from losing sickness benefits just because they are pregnant. So why do other cases cause such controversy? My theory is that people forget about these values sometimes, particularly when excited or outraged by more novel claims. But judges cannot forget, and must face the demands of the Charter in ways Canadians need not. And they know they must be consistent in their approach.

Consistency seems elementary to the Canadian notion of fairness. If there is a statute, the ruling must comply with the statute. If there is a rule, judges should follow it. The demands of consistency prevent the judge from applying his or her

own sense of the rightness and wrongness of things. Judges must instead tie legal decisions to values that seemed to have gained wide acceptance. They do that largely by testing the proposed rule against other legal rules, which clearly have gained social acceptance, and finding the best fit. Finding the best fit is principled consistency. The Charter cannot, for example, protect Roman Catholics but not Sikhs.

Take the *Vriend* case as an example of the need for consistency. *Vriend* was a teacher fired simply because he was gay, not because of anything he did. One task of the thirteen judges who dealt with that case was to decide if a homosexual has, in the words of Article 15 of the Charter, "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." The added words "in particular" are key. They tell us that the Charter protects more than just the named groups. The legal issue, then, is whether there is an appropriate analogy between those groups and homosexuals. Of the thirteen judges on the case, eleven agreed that the social status of homosexuals in Canada has been very much like that of the other groups: They too have been the victims of historic discrimination and hostility simply because they belong to this group, and despite the fact that, like the others, their homosexuality is a personal characteristic like race, colour or disability. (One judge disagreed, and the thirteenth did not find it necessary to deal with the issue.) It was, from a legal point of view, a straightforward case.

Was this decision a usurpation of democracy by power-crazed judges? It was not. It was, rather, a demand by judges that the people of Canada be consistent. If we fire all the Canadian judges and hire a new batch, they will perceive the same need for consistency. If we make the judiciary an elective office, the newly elected judges will face the same challenge. Do Canadians want it any other way? Do they want judges who play favourites? I doubt it. The truly scandalous judge in *Vriend* would have been the one who said this: Even though the other judges are being consistent with the logic of the Charter and the tradition of tolerance, I personally think homosexuality is immoral and should be condemned, and I take comfort in the fact that many outspoken Canadians agree. So I shall apply my views, and not the law. That is a judge who does not understand the judicial role.

In the United States, judges and others fight over different theories of constitutional interpretation. One reads about the "founders' intent", "strict constructionist", and "activist" schools, among others. But the authors of the Charter knew all about those debates, and the wording of the Charter largely obviates them for Canada. There is some room, to be sure, for some debate about the judges' role. For example, there are differing views about the application of section one and about the scope of relief. But that has nothing to do with defining the scope of the rights.

Perhaps having a debate about the Charter is now appropriate for Canada. It

