CURBING THE POWER OF THE SUPREME COURT OF CANADA

The Supreme Court of Canada is relentlessly pushing ahead to rearrange Canadian laws to fit the ideological and philosophical views of its judges.

Examples of this include the removal of religion from the public schools; striking down the abortion law; ordering the government to provide family benefits to same-sex unions; requiring pro-homosexual material be provided in public schools, and inserting loopholes in the child pornography law.

These judges - accountable only to themselves - demonstrate the confidence, even the arrogance at times, to interpret laws and reach conclusions as they see fit, no matter what the consequences. The judges know that there is little to be done to reverse their decisions, no matter how whimsical or irrational they may be.

How did these judges achieve this absolute power?

The story behind the power of the Supreme Court of Canada originates in 1982, when the Charter of Rights was passed into law by the Liberal-dominated federal Parliament. The provincial legislatures took no part in the Charter debate and were never asked to approve it. Consequently, it remained a federal Act only, although the provincial premiers (with the exception of the premier of Quebec) approved the Charter becoming part of our Constitution.

By the terms of the Charter, judges of the Supreme Court of Canada were invited aboard the Ship of State to join with the legislators, both provincial and federal, to co-pilot the Ship through our nation's perilous waters.

It was never intended that the judges would have the authority to actually decide public policy or serve as arbiters of the correctness of such decisions. Rather, judges were to accept the policies, as determined by the elected legislature and executive bodies, and become partners with the elected representatives in the government to share the responsibilities of the Ship of State. Once on board the Ship, however, the courts quickly changed this understanding and took over. Judges relegated the legislators to the lower deck to 'stoke the engines' of government by passing legislation to move the Ship forward – but only on the basis that the legislation be subject to the approval of the appointed judges.

Some Supreme Court of Canada judges, especially former Chief Justice Antonio Lamer, claimed that it was their right and duty to assume control

3. Madam Justice Beverley McLachlin

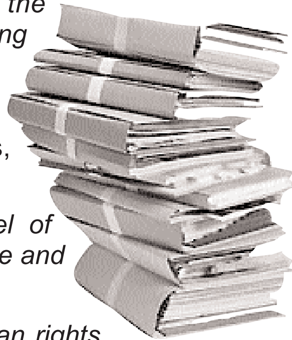
In the **Surrey School Board** case (December 20, 2002) the Court held that pro-homosexual material should be provided in schools for all ages including Kindergarten and Grade 1 students, even though the School Board had rejected these books as unsuitable. Madam Justice Beverley McLachlin asked:

> *… who is better placed to make the decision, the board or the court?…*

She concluded it was the court.

She proceeded to "read in" to the BC School Act the words "tolerance" and "diversity" which were not in the Act itself. She stated that the BC Act required that schools teach "tolerance" (in effect the unconditional support of homosexuality), and "diversity" which also includes homosexuality. She then stated:

> *Courts are well placed to resolves human rights issues. Hence, where the decision to be made by an administrative body has a human rights dimension, this has generally lessened the amount of deference which the Court is willing to accord the decision:*



She then concluded that the Court was better placed to make decisions than elected school trustees, because:

> *… courts must exercise a fairly high level of supervision over decisions involving tolerance and diversity. …*
>
> *These goals, touching on fundamental human rights and constitutional values, suggest the legislature intended a relatively robust level of court supervision.*

4. Madam Justice Louise Arbour

In a decision handed down on December 19, 2002 for **Gosselin v. Attorney General of Quebec**, the Supreme Court of Canada narrowly concluded that the Charter of Rights did not include a 'social charter', requiring that individuals be provided economic and social security. In this narrow 5 to 4 decision the Court temporarily concluded against this position, but left the matter open for future consideration. The case dealt with a tough Quebec social welfare policy which, if found to be invalid under the Charter, would have resulted in the Quebec government having to pay out hundreds of millions of dollars in compensation. In her dissent, Madam Justice Louise Arbour concluded that S.7 of the Charter (liberty and security of the person) required that the state provide for a person's basic needs. This argument, had it been acceptable to the majority, would have led to a massive expansion of judicial review and scrutiny in the modern welfare state.

(b) Limiting the Long-term Tenure of Judges.

Human nature remains constant and power has a tendency to corrupt over time. Lord Acton's oft-quoted dictum, "Power tends to corrupt and absolute power corrupts absolutely", has relevance here when one considers that **judges in Canada today possess power that comes closer to being absolute than any other participant in our system of government**. Instead of permitting judges to remain on the Court until they reach 75 years of age (if she remains until retirement, Chief Justice Beverley McLachlin will have spent 29 years on the Court), judges should be given a limited tenure, of ten years, for example.

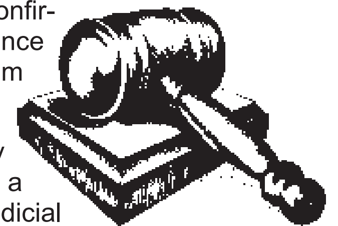
(c) Nominating Committees

In 1988, Prime Minister Mulroney did establish an Advisory Committee to seek advice from representatives of the legal profession, judges and two lay persons – one appointed by the Minister of Justice and the other by the Provincial Attorney General, to review the possible appointments to the courts. This Committee does not function as a Nominating Committee; rather, it serves only as a Screening Committee to advise the Prime Minister about whether the nominees for appointment are qualified.

It is necessary that a proper Nominating Committee be established to advertise positions, carry out intensive background inquiries, interview the candidates, and submit to the Minister of Justice and the Prime Minister a list of the most outstanding candidates from which the Prime Minister must be required to select the candidate for appointment.

(d) Confirmation Hearings Prior to Appointment

It is significant that Canada is one of the few modern democracies that does not allow candidates of the judiciary to first be screened and questioned by, or to testify before, members of the legislature. It is apparent that some form of confirmation hearing is required as a defence against our present very disturbing system of backroom judicial appointments.

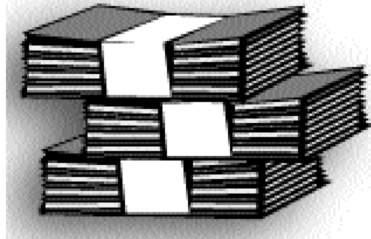


Even if the nominee has been screened by a Nominating Committee, there is still a genuine need for public scrutiny of judicial nominees, who are destined, since the Charter, to assume politically active roles on the Bench. Canadians should be fully aware of candidates' legal philosophies and of their Charter perspective, considering their role in shaping and making policy – in effect, their rule over our lives. Such hearings would also reduce the tendency to stack the courts with big money donors and third-rate hangers-on.

Madam Justice Louise Arbour

Madam Justice Louise Arbour is a lawyer trained in Quebec's civil law who graduated from the University of Montreal in 1967. She taught criminal law at Osgoode Hall in Toronto from the mid-1970s to 1987. Her common-law partner and father of her three children, Larry Taman, was Deputy Attorney General, serving under Ontario's influential Attorney General, Ian Scott. Madam Justice Arbour was appointed to the High Court of Justice (Supreme Court of Ontario) in 1987, and then to the Ontario Court of Appeal in 1992, despite her lack of training in Ontario's common law. These appointments were facilitated by her common-law partner's close association with the Ontario Attorney General, Ian Scott, whose brother is the equally influential Ottawa lawyer, David Scott. The latter, until October 1996, served as a member of the Justice Department's Judicial Appointment Advisory Committee, and was also on the (federal) Judges Salary Commission. He was the very influential person who was able to 'arrange' in his official capacity, the appointment of Madam Justice Arbour as a judge on the Ontario court.

This was not the end of Madam Justice Arbour's colourful career. She separated from her common-law partner in 1996 and, desiring a change, was appointed prosecutor of the International War Crimes Tribunal for the former Yugoslavia and Rwanda in The Hague. This appointment was made, despite the fact that it was both illegal and unconstitutional under Canadian law. The federal *Judges Act* requires that federal judges may only engage in matters within the legislative authority of Parliament. S.100 of the *BNA Act* requires that judges' salaries be paid only by the federal Parliament. As prosecutor of the War Crimes Tribunal, Judge Arbour was paid by the UN, approximately $250,000.00 US annual salary tax free, and received her instructions from the UN Tribunal. These provisions posed no difficulty for this well-connected, ambitious judge. Then Minister of Justice, Allan Rock, arranged to have an amendment to the *Judges Act* to accommodate Madam Justice Arbour's unprecedented appointment to the UN Tribunal. (This amendment has since become known as the "Arbour" amendment.) The constitutional dilemma created by the provision of S.100 of the *BNA Act* was simply ignored.



Madam Justice Arbour was not particularly successful in the frustrating job of prosecutor of the War Crimes Tribunal. Consequently, she desired a return to Canada in 1999 when, happily a vacancy appeared for an appointment to the Supreme Court of Canada from Ontario. Prime Minister Chrétien appointed her to the Supreme Court, because she is a "star", a woman, and a media darling, not to mention extremely well-connected politically. At 56 years of age, she will remain on the Court until 2022, when she reaches retirement at 75 years of age. – a great deal of time in which to impose her views on Canadians.

Judges as Politicians

The truth is that judges do not have special or secret knowledge with which to interpret the general and ill-defined words in the Charter of Rights. Instead, they come to the bench with their own political and ideological axes to grind and make decisions accordingly.

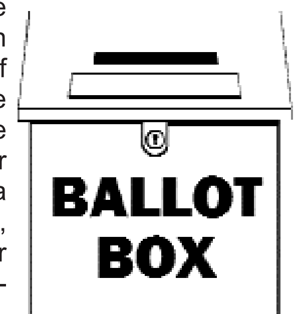
As a result, it is arrogant of judges to assume they know what is best for us. This assumption also ignores the reality that the very basis of a judge's appointment is political. Judges are not above the political passions of the day, but are, in fact, part of them.

It is significant that according to a poll conducted by the Léger Marketing survey in October 2002, it was found that 52% of Canadians were unable to name any of the rights guaranteed under the Charter. This lack of knowledge about the Charter has given the Court even further freedom to arbitrarily make decisions affecting our lives.

Should Canadians be governed by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own, or should we be allowed to assume responsibility for our own destiny in accordance with the democratic process? It is our duty to involve ourselves in this decision.

Widespread Concern About the Power of the Supreme Court of Canada

Concerns about the arbitrary powers of the Supreme Court of Canada are now widespread in Canada. An Angus Reid poll, taken in 1997, indicated that 52% of the Canadian population does not have confidence in our judiciary. This is a concern, not only for the general public, but also for judges on the lower courts. Mr. Justice John McClung of the Alberta Court of Appeal, in the **Vriend** case in 1996, described judicial activism as judicial 'midwifery' or 'carpentry', and criticized judges "who choose to privateer in parliamentary sea lanes."



For this challenge, he received criticism from both Mr. Justice Frank Iacobucci and Madam Justice Claire L'Heureux Dubé when the case was appealed to their Court.

More recently, in December 2002, three judges on the Newfoundland Court of Appeal gave an extraordinary ruling, when they stated boldly that judicial activism has 'gone too far in Canada" and called for the curtailment of judges' powers to second-guess politicians. The judges warned of potentially widespread unrest arising from "undue incursions by the judiciary into the policy domain of the elected branches of government." They also said that the sepa-

ration of powers between legislatures and the judiciary was forged 'in bloodshed', a historical reality that has been forgotten as contemporary judges override legislation.

The Newfoundland judges also stated that criticism of judicial activism is growing and "despite protestations to the contrary, it has to be acknowledged that there is an air of legitimacy to many of these complaints." In their summary, they concluded that while the Charter gives judges new powers to pass judgment on the goals of legislation, "it does not confer on the judiciary untrammelled licence to usurp the policy domain of the elected branches of government beyond that point."

Suggestions for Curbing the Power of the Court

A constitutional amendment that would clarify the right of the legislature to make public policy which cannot be "overturned" by the appointed judges, would be truly the most effective solution to the problem. It is, however, an option that few wish to take at this time since this would require another rollicking and controversial national, constitutional debate. Moreover, the Charter of Rights has kicked in an amending formula that is extremely difficult to comply with. Therefore, it is necessary to explore other options. These include:

(a) <u>The Notwithstanding Clause</u>

The simplest solution to judicial activism is for the federal or provincial legislatures to pass legislation overriding the Supreme Court's extreme decisions. This is permitted under S.33 of the Charter (commonly referred to as the "notwithstanding" clause). After a few instances of the overturning of the decisions of the Supreme Court of Canada, the judges might become more even-handed. That is, implementing the notwithstanding clause might lead to more accountability from the judges. Certainly S.33 is a valid and operational provision of the Charter. Nevertheless, there appears to be considerable reluctance by the federal government and the provincial legislators to implement S.33 of the Charter on the grounds this provision, if implemented, might eventually undermine the Charter completely, as well as the credibility of the judges. Moreover, the Court declaring a particular law "unacceptable", is to create an intense burden on a political leader, who must then contend with a divided caucus and the public to overrule a law that was found by the Court to be invalid or "unconstitutional."

However, in the long-run, if the decisions of the Supreme Court cease to be final because of the implementation of the S.33 "notwithstanding" clause, the elected legislatures might then regain their power and influence.

Madam Justice Arbour stated, in paragraph 332 of her judgment:

> *… The role of courts as interpreters of the Charter and guardians of its fundamental freedoms against legislature or administrative infringements by the state requires them to adjudicate such rights based claims.*

In short, she has put forward the astonishing doctrine that judges know better than legislators how to allocate the scarce resources of the public purse.

Court's Unaccountable Power is Wrong in Principle

Even if the entire Supreme Court consisted of conservative leaning judges supporting traditional values, rather than the liberal ones that rule today, it is still very wrong, <u>in principle</u> for judges in Canada to use their power to usurp the role of legislators and second-guess their policies. It is legislators who are to determine policy issues in a democratic country, not unelected, unaccountable judges.

Judges are Merely Well-Connected Lawyers

Also, it is important to bear in mind that judges are merely lawyers who have the political connections to make their appointments to the courts` possible. These political connections are either personal ones held by the judge himself/herself or by those of his/her law firm, which has made generous financial donations to the party in federal power. Each judge has a political tale to tell as to how he/she was appointed to the Supreme Court. Two examples of appointments – one under the Mulroney Conservatives, and the other made under Chrétien's Liberal government – are instructive in this regard.

Mr. Justice Frank Iacobucci

Mr. Justice Frank Iacobucci was one of the mourners and an official pallbearer at the funeral, on December 23, 2002 of former Governor-General, Ramon (Ray) Hnatyshyn, whose political influence vaulted Mr. Justice Iacobucci to his appointment to the Supreme Court of Canada. During Mr. Justice Iacobucci's tenure as Deputy Minister of Justice (1985-1988), he served under Mr. Hnatyshyn, who was the Minister of Justice in the Mulroney Cabinet (1985-1988). Through the influence and good graces of his good friend Mr. Hnatyshyn, Mr. Justice Iacobucci was suddenly appointed in 1988, with no previous judicial experience, as Chief Justice of the Federal Court of Canada and, in 1991, he was appointed to the Supreme Court of Canada. At that time, Mr. Hnatyshyn was serving as Governor-General (1990-1995) and had both a personal and professional relationship with then-Prime Minister Mulroney, the man in power directly responsible for making Mr. Justice Iacobucci a Supreme Court judge.

> Judges should be appointed because of merit, not their political connections. They must be trusted individuals, impartial and objective in their judgments, as mandated by S.11(d) of the Charter, which provides that there must be fair and public hearings by an independent and impartial tribunal (court).

Far too many decisions in recent years by judges appointed under the present system have been based on political and ideological grounds, rather than on the impartial application of the law. How can we expect to have an independent judiciary if the process itself does not guarantee or, at least, provide the possibility of bringing forward individuals who are not only competent, but who also will not impose their own prejudices and biases on the public by way of their judgments.

Whenever public confirmation hearings are suggested, however, several former members of the Supreme Court of Canada, namely Chief Justice A. Lamer, Madam Justice Claire L'Heureux and Mr. Justice Peter Cory, have publicly indicated their opposition, stating that they would not have considered accepting their appointments had they been subject to any kind of public grilling such as those carried out by the US Senate Justice Committee of US judicial appointments.

Other members see no conflict. Mr. Justice Jack Major, in an interview with **The Lawyers Weekly** in January 2003, stated that he was not concerned about questions raised by a parliamentary committee:

He also stated that he was sceptical of the claims by his fellow jurists that they would have turned down their prestigious posts had they been required to undergo the same committee hearing.

"I don't believe them at all," he told **The Lawyers Weekly**, "I think most lawyers and judges think it's a substantial appointment and it's quite an honour to be picked, and are you going to be so touchy that you wouldn't go before a committee after you are picked?"

Mr. Justice Major conjectured that candidates for the high court would only object if confronted by personal questions that intruded into their private lives. "If we assume that it's a hearing conducted along the highest principles, then I think that most people would show up at it."

Paul Martin Speaks Out on Judicial Reform

In October 2002, Liberal leadership candidate Paul Martin expressed concern about the present system of appointment of federal judges. He stated that, in his view, Supreme Court nominees should be required to appear before a Standing Committee of the House of Commons – a procedure he would initiate if he were to become Canada's next Prime Minister. With customary political rhetoric, and to reassure future nominees, however, Mr. Martin stated he would

This position by Madam Justice Abella was in strong contrast to the one she took in 1986 at a feminist conference before her appointment to the Ontario Court of Appeal. In a speech at that conference, which was subsequently included in the 1987 feminist book *Equality and Judicial Neutrality,* she complained about the power and biases of judges, stating:

> *Every decision-maker who walks into a courtroom to hear a case is armed not only with the relevant legal text but with a set of values, experiences and assumptions that are thoroughly imbedded.*

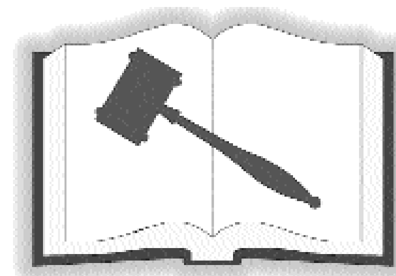
With her appointment to the Ontario Appeal Court, It seems that Madam Justice Abella has adjusted her views to suite her own purposes.

2. Madam Justice Claire L'Heureux-Dubé

Madam Justice Claire L'Heureux-Dubé was one of the founders, in 1976, and a board member, from 1976–78, of the feminist organization, the Canadian Research Institute for the Advancement of Women (CRIAW) while she was sitting as a member of the Quebec Superior Court.

She was appointed to the Supreme Court of Canada in 1987. In 1991, while a member of the Supreme Court of Canada, she served as Canadian Vice-President of another feminist organization, the International Federation of Women Lawyers (FIDA).

On July 1, 1999, Madam Justice L'Heureux-Dubé stated the following at a conference on Same-Sex Partnerships at the University of London, England:



> We, the Supreme Court of Canada, noted that the democratic process had not adequately taken into account the needs of gays and lesbians or recognized their status and disadvantages as a vulnerable minority in Alberta society. The judgment in M v. H closely built upon this victory.
>
> Changes in the legal realm, however, have been accompanied by a general failure of the political process to recognize the rights of lesbians and gays without the pressure of court decisions behind them.
>
> … courts are taking the lead in changing society's attitudes to same-sex partnerships …
>
> Despite these developments, however, there is much work to be done.

Madam Justice L'Heureux-Dubé has never reclused (withdrawn) from any court case argued before her dealing with feminist or homosexual matters.

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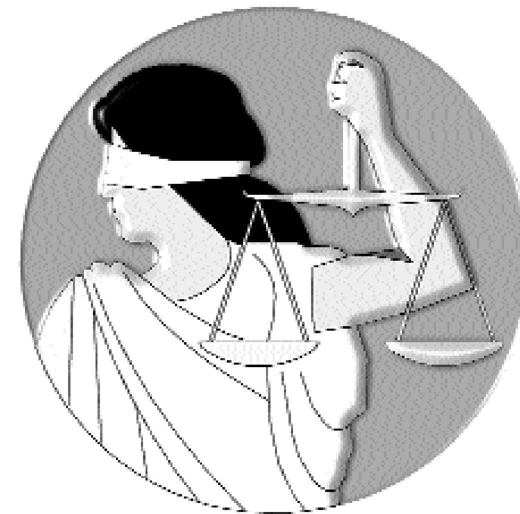
CURBING THE POWER OF THE SUPREME COURT OF CANADA



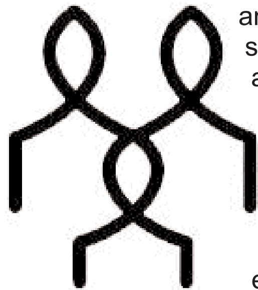
The Supreme Court of Canada is relentlessly pushing ahead to rearrange Canadian laws to fit the ideological and philosophical views of its judges.

because of S.52 of the Charter, which provides that all laws must be consistent with the Charter. This provision does not state, however, that judges may act as they choose, without restraint, or that they may proceed without deference to the intentions of Parliament.

S.24 of the Charter has been used by judges as an excuse or shield to extend their reach and, in effect, has become a second-level legislature to set public policy. S.24 provides that a court may produce “such remedy as the court considers appropriate and just in the circumstances.” This has proven to be the window used by judges to ‘write in’ or ‘write out’ words at will, and to implement “guidelines” in their judgments to ensure that future legislation adheres to the judges’ own personal ideology.

Astonishing Views of Some Judges

Not only do some of Canada’s judges believe they have a right to set public policy, some also appear to be under the misapprehension that, by virtue of their appointment to the courts, they have acquired special insight and understanding with regard to public policy, which is superior to that of the elected legislators. Some of these astonishing judgments are as follows:



1. Madam Justice Rosalie Abella

In May 1998, Madam Justice Rosalie Abella on the Ontario Court of Appeal, decided in the **Rosenberg** case that homosexual partners are entitled to survivor benefits equivalent to legally married heterosexual couples under the *Income Tax Act*,. In making this decision, Judge Abella ignored the 1995 decision of the Supreme Court of Canada in **Egan and Nesbitt**, which held that the word “spouse” applied to married couples only because of their unique contribution to society – namely by giving birth to and raising children. Under our judicial system, Madam Justice Abella was obliged to apply the Supreme Court precedent. However, she disregarded this obligation in reaching her decision, which directly contradicted the plain and straightforward words in the *Income Tax Act*. She stated:

> … elected governments may wait for changing attitudes in order to preserve public confidence and credibility. Both public confidence and institutional credibility argue in favour of courts being free to make independent judgments notwithstanding those same attitudes.

In October 2000, Madam Justice Abella made a biting attack in a public speech against those challenging judicial activism, describing them as the ‘new inhibitors’ for trying to prevent the Court from expanding minority rights in Canada. In her speech, she stated that the judiciary “ … is accountable less to public’s opinions and more to the public’s interest,” and that judges “serve only justice.”

create a ‘responsibly executed’ process of public review of Supreme Court nominees, not a ’partisan circus.” He gave no elaboration on how this would be achieved.

Conclusion

There is no question that the power of the Supreme Court of Canada must be curbed in the best interests of Canadian public policy – and soon. How is this is to be achieved?

The establishment of a judicial Nominating Committee, as well as a Parliamentary Committee to confirm the appointments to the judiciary, is our best starting point. Since the current Prime Minister, Mr. Chrétien, has continuously resisted any changes to the 127-year old tradition that gives the Prime Minister the exclusive prerogative to name Supreme Court judges, our hope for making changes in the appointment system of Canadian judges lies with the successor to Prime Minister Mr.Chrétien, pending his promised resignation in February 2004.

In the meantime, it is our duty to begin the struggle for change by insisting on establishing a proper Nominating Committee and Confirmation Hearings for prospective judges. We must become the voice of reason in our democratic society. It is time our judicial appointment system be changed.

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