THE COURTS HAVE CHANGED CANADA'S JUDEO-CHRISTIAN CULTURE

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A bloodless revolution took place in Canada in 1982 when the Charter of Rights, promoted by Liberal Prime Minister Pierre Trudeau, became a part of our constitution.

Prior to the Charter, Canadian laws and democracy were based on Judeo-Christian principles, anchored in the common good. These Judeo-Christian-based laws allowed Canadian society to flourish and thrive. These laws, however, have been eliminated by judges under the Charter so that Canada has become a secular humanist society.

Judges have deflected criticism of their new powers by arguing that they did not seek the Charter, but that it was thrust upon them. To a certain extent, this is true, but the courts could at all times have developed a doctrine of self-restraint and respect for Parliament. Instead, they seized on the Charter as an opportunity to substitute their will for that of Parliament. The courts have also further extended their jurisdiction by using a number of tactics, which has culminated in the courts now determining public policy.

Chief Justice Beverley McLachlin of the Supreme Court of Canada gave her approval for the Courts to fundamentally change Canada's laws in two revealing speeches. In a speech given on May 5, 2001[1] she exhorted judges to step fully into a new role, claiming that the law-making role of judges has dramatically expanded, and now consisted of "invading the domain of social policy". She claimed this was necessitated by "the inability or unwillingness of legislative social bodies to deal with pressing social issues". This claim was not true.

In a later speech in December, 2005,[2] Chief Justice McLachlin asserted that judges can render their opinions based on "unwritten" constitutional norms, even in the face of clearly-enacted laws or hostile public opinion (emphasis mine). She defined unwritten norms as those "essential to a nation's history, identity, values and legal systems". Justice McLachlin explained that judges have a legitimate role to play in determining these "unwritten" laws because judges have a "judicial conscience" which is founded on the judges' "sworn commitment to uphold the rule of law".

Judge McLachlin appears to have appointed judges as seers or oracles who acquire special insight upon their appointment to the Bench. This is nonsense.

The reality is those who become judges are primarily well-connected lawyers, who have the political clout and contacts to secure an appointment to the Bench. They have no

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[1] McLachlin, Beverley, Chief Justice of Canada, P.C., *The Role of Judges in Modern Society*; Fourth Worldwide Common Law Judiciary Conference, Vancouver, British Columbia, Canada, May 5, 2001;

[2] McLachlin, Beverley, Chief Justice of Canada, Lord Cooke Lecture, Unwritten Constitutional Principles: What is Going On? Wellington, New Zealand, December 1st, 2005;

special or esoteric knowledge to make these revolutionary decisions which are undermining our traditional Judeo-Christian values.

The problem is that the courts were never intended to make public policy decisions and are unsuited to do so. Unlike Parliament, courts do not have access to the social facts relevant to the issues before them; they do not have the luxury of time to adequately reflect on issues; they do not have access to research facilities available to parliamentarians; they do not have the same powers or institutional competence to make full and public inquiries as parliamentary committees do; and, they do not have access to the practical experience of the public and elected representatives on issues which are growing increasingly complex, economically, socially and scientifically. They're just well-connected, powerful lawyers.

The Courts Are Now the Sole Authority to Determine Canadian Values

The courts have assumed the authority to be the sole arbiter of Canadian values, from two sources: (1) their interpretation of the indeterminate wording of the Charter; and (2) their own judicial decisions by which they expanded their powers.

(1) The Charter Provisions

The courts have based their authority on s. 24 and s. 52 of the Charter.

S. 24 provides that the courts may provide remedies they consider appropriate when the Charter has been infringed, and s. 52 provides that the Charter is the supreme law of Canada and that any law inconsistent with it has no force and effect.

The courts have exploited these provisions to substitute their own will for that of Parliament. They now treat the Charter as their exclusive domain to be interpreted according to their ideological preferences, rather than by law and precedent. The courts have interpreted s. 7 of the Charter which provides that "everyone has the right to life, liberty and security of the person …" as providing rights for individuals. However, giving priority to individuals has masked the harm it causes to collective rights. S. 7 of the Charter has also been especially useful for the courts to overturn legislation. The laws prohibiting abortion, prostitution, drug injection sites, and assisted suicide, etc. have all been overturned under s. 7 of the Charter.

Special interest organizations of feminists and homosexuals, among other left-wing organizations, funded by the infamous Court Challenges Program from 1985 to 2006 have used the Charter to do an end run around Parliament. By bringing litigation before a handful of appointed judges, they have effectively imposed their ideology on the nation.

(2) **Court Decisions That Expanded Their Jurisdiction**

The courts appear to have little concern or deference for the will of the public, as reflected by legislation passed by Parliament.

The courts have self-empowered themselves and widened their jurisdiction by applying the following tactics:

1. Extending Their Power to Strike down Legislation

In the case of *R. v. Oakes*[3] (a case dealing with drug trafficking) the Supreme Court abandoned the well-established common law review standard of determining the "reasonableness" of legislation, which required a court strike down legislation only if the legislation was so exceedingly unreasonable as to venture beyond the grant of power that Parliament contemplated.

In the Oakes case, the court determined that a law could be struck down if it was of the opinion that the law was disproportionate to the harm it purported to alleviate.

This decision created a new tool for judicial activism in that it allowed the court to weigh policies and their effects, so as to make qualitative judgments on them.

2. Rewriting Legislation

Although the Charter did not give the courts the authority to amend legislation, the courts concluded that they could strike down, write in, or write out, words and expressions, as well as re-interpret legislation to give it meaning never intended by the legislators. This was decided in *Schacter v. Canada*[4] which dealt with unemployment insurance awarded during parental leave. Since giving themselves this authority, the courts have "read in" some very significant matters. For example, they amended the definition of "marital status" to provide tax benefits for same-sex couples under the *Income Tax Act, (Rosenberg v. Canada (Attorney General)),*[5] and amended the provincial *Family Law Acts* in *M v. H;*[6] to provide family benefits to same-sex couples. This was never the intention of the legislators, which provided benefits to opposite sex couples only.

3. The Equality Provisions of The Charter Apply to Groups Only

The Supreme Court stated that the purpose of the Charter was to promote and protect "disadvantaged" groups rather than individuals under s.15 (the equality provision) of the Charter. This was astonishing since s.15 of the Charter plainly states that "every

[3] *R. v. Oakes,* [1986] 1 S.C.R. 103;
[4] *Schacter v. Canada,* [1992] 2 S.C.R. 679;
[5] *(Rosenberg v. Canada (Attorney General)),* (1998), 158, D.L.R. (4th) 664;
[6] *M. v. H.,* (1999) 2 S.C.R. 3;

individual is equal before and under the law and has the right to equal protection, etc. …" (emphasis mine)

Instead, the courts interpreted this provision to mean that the person has to be a member of a socially or historically, disadvantaged minority in order to obtain protection. If individuals are so unfortunate as to belong to a historically so-called "advantaged" group such as a member of the traditional natural family, then there is no protection pursuant to s.15 of the Charter. This interpretation was given in *Schachtschneider v. Canada*,[7] where the Federal Court of Appeal unanimously concluded that traditionally-married couples, although paying higher taxes than that of common-law couples, were not protected against discrimination under S.15(1) of the Charter because traditionally-married opposite sex couples were not "historically disadvantaged",

The court has concluded that individuals are NOT equal under the law after all, and do NOT have equal protection and benefit of the law *unless* they belong to a *group* that is "socially, politically, or historically disadvantaged" except when there is direct evidence of prejudice or stereotyping.

4. Groups Protected Under the Charter

Although the Charter did not include sexual orientation as a protected right under s. 15, of the Charter, the Supreme Court thought otherwise, and added it as a protected right on the basis that it was analogous to the other protected rights listed in s.15 (*Egan & Nesbitt v. Canada)*.[8] By including sexual orientation as a protected right, the Court uncritically accepted the argument that homosexuals constitute a historically disadvantaged "discrete and insular minority" in Canadian society, which was the test proposed by Madam Justice Bertha Wilson in *Turpin v. R.*[9].

In an earlier decision, In *Haig and Birch v. The Queen,*[10] the Ontario Court of Appeal ruled that it was unconstitutional for an officer in the Canadian Armed Forces to be denied promotion due to his/her sexual orientation. No party in that case questioned the assumption that homosexuals constituted "a discrete and insular minority". The Attorney General accepted this without providing evidence or arguments to support this proposition.

All the enumerated grounds prohibited in s.15 are morally neutral such as discrimination on the basis of gender, race, place of origin, etc. Mr. Justice La Forest in *Andrews v. Law Society of British Columbia*,[11] stated that: the characteristic in the enumerated grounds in s. 15 are: "not alterable by conscious action". Homosexuality is a controversial lifestyle, and judging by those individuals who have changed their

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[7] *Schachtschneider v. Canada,* [1993] 105 D.L.R. (4th) 162;
[8] *Egan & Nesbitt v. Canada,* [1995] 2 S.C.R. 513;
[9] *Turpin v. R.* [1989] 1 S.C.R. 1996;
[10] *Haig and Birch v. The Queen,* (1992) 9 O.R. (3d) 495;
[11] *Andrew v. Law Society of British Columbia,* [1989] 1 S.C.R. 143;

orientation by counselling, it can be changed by "conscious act". Also, it is not the same as being black or female which characteristics give rise to no moral concerns. It is doubtful therefore that homosexuality can reasonably be considered analogous to the other protected groups set out in s. 15 of the Charter.

5. Courts' Approach to Fact Finding

The Supreme Court determined that it is required to accept the "factual determinations" of the first instance judge as the facts of a case. This is disturbing when these facts are determined by summary proceedings by which evidence is limited to affidavits only, and the judge does not hear or speak to the witnesses directly, or test or supplement the evidence as occurs in private law disputes. The judge in private disputes is responsible to determine facts such as "was the light red or green when the accident occurred?" However, in Charter cases, the issue transcends the parties, and broadly relates to society as a whole. The Supreme Court, however, treats the facts in Charter cases as ordinary adjudicative facts made by a trial judge in private law disputes.

In Charter cases these "facts" are not actually "facts" but are, in reality, policy choices determined according to the judge's ideological preference.

This effective consecration of the opinion of a solitary judge at first instance occurred in major decisions such as the Vancouver drug injection site, (*Canada Attorney General v. PHS Community Services Society),*[12] the prostitution case, (*Attorney General v. Bedford)*,[13] and in the decision legalizing assisted suicide *Carter v. Canada (Attorney General).*[14]

This practice of accepting the facts determined by the judge of first instance means that a single trial judge may now impose his or her social world view on the entire country.

6. Reinterpreting the Purpose of Legislation to Permit Charter Scrutiny

In order to render the court challenges amenable to Charter scrutiny, the courts have mischaracterized the purpose of legislation. In the case legalizing the drug injection site, the Supreme Court disregarded the broad, clearly stated purpose of the *Controlled Drugs and Substances Act,*[15] to protect the public from drug use and addiction by criminal prohibition, and, instead, artificially characterized the purpose of the Act the protection of public health and safety. In this way the legislation fell within s. 7 scrutiny. The court concluded that the addict was deprived of his "right" to security of person i.e. access to a drug injection site.

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[12] *Canada Attorney General v. PHS Community Services Society,* [2011] 3 S.C.R. 134;

[13] *Attorney General v. Bedford*, (2013) SCC 72;

[14] *Carter v. Canada (Attorney General)*, SCC 5, [2015] 1 S.C.R. 331;

[15] *Controlled Drugs and Substances Act* (S.C. 1996, c. 19)

In the prostitution case, *Attorney General v. Bedford*,[16] the court mischaracterized the purpose of the prostitution laws stating they were to deter community disruption. Prostitution laws, however, have a much broader purpose. They serve as society's moral objections to the selling of a human body for sex; provide protection for prostitutes from pimps, and prohibit the encouragement and spreading of prostitution, and the establishment of brothels.

The mischaracterizing of the prostitution laws permitted the court to strike down the laws on the grounds they violated the "security of the person" of the prostitute in s.7 of the Charter in that they harm prostitutes by preventing them from using a "safer" fixed indoor location (brothels) and preventing them from employing security measures such as drivers and bodyguards (formerly known as pimps).

7. Disregarding Legal Precedent

The Supreme Court threw out the fundamental legal principle of stare decisis. This legal principle, developed over the centuries, required a court to be bound by its previous decisions.

In 1990, in a previous decision, the Supreme Court had concluded that the laws on prostitution were constitutional. In 2013, in the Bedford case, the Supreme Court reversed itself by disposing of the troublesome legal principle of stare decisis. It declared that in circumstances where new legal issues were raised (lawyers, as a matter of course, raise new legal arguments in each case, or else why bring the case forward?) or when the circumstances were significantly changed by newer richer research (which always occurs over time) then stare decisis did not apply.

The rejection of stare decisis occurred also in the assisted suicide case *Carter v. Canada (Attorney General),*[17] when the court concluded that its previous decision in 1993, which upheld the law prohibiting assisted suicide *Rodriguez v. British Columbia (Attorney General*),[18]no longer applied, and struck down the law.

As a result, laws are no longer predictable or consistent and will be determined by social trends.

8. Misapplication of the "Living Tree" Constitutional Interpretation

The Supreme Court has justified itself by the misapplication of the "Living Tree" concept in constitutional interpretation. This concept was determined by the Privy Council in England in 1929 in the *Person's* case.[19] (The Privy Council was the final Court of Appeal for Canada until 1949). In that case, the Supreme Court had previously ruled

[16] Supra footnote 13

[17] Supra footnote 14

[18] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519;

[19] In the matter of Reference as to the meaning of the word "Persons" in Section 24 of the British North America Act, 1867 [1928] S.C.R. 276;

that women were not eligible to be appointed to the Senate. In 1929 The Privy Council declared that women were eligible to be appointed to the Senate. In reaching this conclusion, Lord Sankey, applied the Living Tree Constitutional Interpretation. The Supreme Court has interpreted Lord Sankey's statement that the constitution was "capable of growth and expansion within its natural limits" to mean that it could take political and social changes into account when interpreting the constitution. An alternative interpretation of Lord Sankey's statement, having more modest application, is that it was intended for the court to look at "internal" evidence to determine the meaning of words in the Constitution. That is, to look at not what were the words stated in any one instance in the constitution, but rather what was intended by the constitution by looking at the entire text to decipher what was the meaning of words. For example, the Privy Council noted that some sections of the *BNA Act* use the word "person" to include both sexes, while other sections specifically used the expression "male person" or "male British subject". Therefore, it concluded that "person" could be interpreted to include both men and women since it did not specify only the male sex in respect to appointments to the Senate. This latter interpretation, has been rejected by the Supreme Court.

Specific Court Decisions Overturning Social Values

Religious Rights

The first hint that the courts did not accept Judeo-Christian-based laws, occurred in 1985, at the time the equality section of the Charter came into effect. *R. v. Big M Drug Mart Ltd.*,[20] dealt with the 1906 *Lords Day Act* which provided that it was unlawful to carry on business on Sunday. In a unanimous decision, the Supreme Court ruled that the *Lord's Day Act* infringed freedom of religion provided in s.2 of the Charter in that it compelled observance of the Christian Sabbath by all Canadians. *The Lord's Day Act*, however, did not force anyone to renounce their faith, to force them to profess the Christian faith, its effect was that non-Christians had to abstain from commercial activities on a common day of rest set aside by the majority, on the day of the week that had existed for centuries. The Court inferred there was something inherently wrong in adopting religious values rooted in Christian morality. The decision ignored Canada's past history and trivialized the historic role of the Christian faith in Canada, which influenced law, politics, and social values.

The result of this decision was far-reaching. It set in place a secular and multicultural society in which all religions and cultures were levelled in the name of "pluralism" and "religious freedom". It led to the eradication of the Christian faith from schools, city councils, and even the removal of Bibles from hotel rooms.

[20] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295;

Abortion

Regina v. Morgentaler [21]

The abortion law was struck down by the Supreme Court in the *Morgentaler* case. The decision did not establish a constitutional right to abortion, but merely stated that the law was discriminatory, in that women did not have 'equal access" to abortion, contrary to s. 7 of the *Charter.* When the abortion law was struck down, no new law was enacted, although the Supreme Court specifically stated that Parliament could do so.

It is significant that four of the five judges, who struck down the law, relied on a document prepared by a pro-abortion physician activist, Dr. Marion Powell, a member of Doctors to Repeal the Abortion Law.[22] She had been commissioned by the Ontario Liberal government to review the application of the abortion law in Ontario. In her report, Dr. Powell based her conclusions on pro-abortion references that women did not have equal access to abortion. The "Powell Report" was tabled in the Ontario provincial legislature in January 29, 1987, but the arguments in the *Morgentaler* case were heard by the court three months previously, in October 1986. A search of the Supreme Court's dockets has revealed that no Notice of Motion to submit the Powell Report as evidence was made. The "Powell Report" was used as evidence, notwithstanding the fact it was not in existence at the time the case was argued. It was unknown to the parties, but was relied upon as conclusive evidence by four of the five majority judges. Since there was no opportunity to cross-examine on the document and to question its credibility, it was improper evidence . Hopefully, the *Morgentaler* case, at some future time, can be set aside on the basis of this serious error.

Borowski v. Canada (Attorney General)[23]

Borowski was granted leave to appeal in July 1987 by the Supreme Court of Canada, prior to the *Morgentaler* decision which struck down the abortion law in January, 1988. Subsequently, on October 3rd and 4th, 1988, the Supreme Court heard arguments in the *Borowski* case challenging the abortion law, which had been previously struck down. The Supreme Court exercised its discretion and declared *Borowski's* case to be moot because the concrete legal dispute disappeared when the abortion law was struck down.

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[21] *Regina v. Morgentaler*, [1988] 1 S.C.R. 30;

[22] Report on *Therapeutic Abortion Services in Ontario* (Powell Report). Ministry of Health, January 29, 1987, Toronto, Ontario;

[23] *Borowski v. Canada (Attorney General*, (1989) 1 S.C.R. 342;

This decision was in sharp contrast to the Supreme Court decision a year later, in *Tremblay v. Daigle*,[24] where the court refused to find the case moot, despite the fact that the woman seeking the right to an abortion, contrary to the wishes of her partner, had already obtained an abortion in another jurisdiction. Consequently, the concrete legal dispute had disappeared. Despite this, the Supreme Court proceeded to hear the case, and held that only women had the right to decide whether an abortion could be performed, not the father of the child.

Same-sex Marriage

In June 2003, the Ontario Court of Appeal in *Halpern v. Canada (Attorney General)*[25] concluded that marriage restricted to a man and a woman was discriminatory, since it did not include same-sex partners. One of the panelists was Chief Justice Roy McMurtry, whose daughter was living in a lesbian relationship. The Court's decision allowed the daughter of the Chief Justice to legitimize her relationship by legal marriage. This decision gave rise to an apprehension of bias, in that Mr. Justice McMurtry had a personal interest in same-sex marriage since it directly affected his daughter. Due to this apparent conflict with his duties and responsibilities, Judge McMurtry should have recused (disqualified) himself from the case. He did not.

Mr. Justice Rosenblatt, a member of the New York Court of Appeal, when addressing the issue of same-sex marriage in 2003, recused himself from the case because he had a conflict of interest due to the fact that his daughter was a lesbian.

The Ontario Court of Appeal not only struck down the marriage law, but decreed that the marriage law must be immediately rewritten. This unprecedented act of judicial imperialism prevented an appeal, or any legislative response.

Within five hours of the decision being handed down, a marriage license was issued at Toronto City Hall and a marriage took place between the homosexual litigants.

In 2005, in *Reference re Same-sex Marriage*,[26] the Supreme Court held that same-sex marriage (heretofore an unknown right) was constitutional under the *Charter of Rights*. In June 2005, with uncharacteristic alacrity, Liberal Prime Minister Paul Martin, together with his homosexual Minister of Justice Martin Cauchon, successfully passed same-sex marriage legislation.

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[24] *Tremblay v. Daigle* [1989] 2 S.C.R. 530

[25] *Halpern v. Canada (Attorney General)*, (2003), 65 O.R. (3d) 161;

[26] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79;

Indecency

In *Regina v. Labaye,*[27](The sexual swingers' case), the Supreme Court concluded that the operation of a commercial sex club in Montreal was not indecent. The sex club permitted couples and single individuals to meet each other for sex. The court held the community standard of tolerance, formerly used to determine indecency, no longer applied. Henceforth, indecency would be determined by whether it "caused a substantial risk of harm incompatible with the proper functioning of society." That is, morality was no longer to be considered.

The effect of this decision was to strip from "indecency" all relevance of social values, and in particular, predominantly Judeo-Christian values.

Pornography

(a) Child Pornography

In *R. v. Sharpe* [28]the Supreme Court upheld in a 6-3 decision the constitutionality of the 1993 law on child pornography. In doing so, it re-wrote the law by "reading in" exceptions to the law such that any sexually explicit writing, drawing of children, videos or photographs of children were lawful if they were not distributed, i.e. used only for private pleasure.

(b) General Pornography

In *Regina v Butler,*[29]the Supreme Court of Canada narrowed the definition of pornography in s. 163 of the Criminal Code by deciding that obscenity occurred only if it involved:

- Sexually explicit material with violence and/or;
- Sexually explicit materials that are degrading or dehumanizing to women and children;
- Sex with children.

By this landmark case, the court removed obscenity (pornography) from being a moral issue and, instead, made it mainly an equality issue for women and children. It did reaffirm at that time, however, that the test for obscenity remained a national community standard.

Ignored in this decision was the fact that pornography harms men as well as women and society, since it encourages promiscuity, and leads to breakdown of

[27] *Regina v. Labaye,* [2005] 3 S.C.R. 728;

[28] *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2;

[29] *R. v. Butler*, [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449-499;

the family, as pornography is a major factor in over half of the divorces in Canada.

Drugs

(a) Legalizing Medical Use of Marijuana

In July 2000, the Ontario Court of Appeal in *Regina v Parker*,[30] without any evidence to support its conclusions, stated that the *Controlled Drugs and Substances Act* deprived individuals requiring marijuana for medical purposes, of their right to liberty and security of the person, contrary to S. 7 of the *Charter*. The Ontario court ordered the federal government to amend its regulations to permit marijuana for medical purposes. Never before had a court declared a drug safe for medical purposes without review and authorization from Health Canada.

This decision was not appealed by the Liberal Minister of Justice, Allan Rock.

The Canadian Medical Association has repeatedly objected to the use of marijuana for medical purposes on the grounds that it has never been tested for such use, and physicians cannot conscientiously prescribe it, since there is no knowledge as to the appropriate dosages for prescription.

(b) Drug Injection Sites

In *PHS Community Services Society v Attorney General of Canada*,[31] drug injection sites were legalized by the Supreme Court.

The drug injection site in Vancouver, called "Insite," was established in 2003. Supporters of Insite commenced a legal action in the Supreme Court of British Columbia to keep the facility open. In May 2008, B.C. Supreme Court Judge Mr. Justice Pitfield concluded, contrary to federal Conservative government policy, that the drug injection site ought to remain open. His reason was that to deny addicts the use of the site contravened S.7 of the *Charter* "the right to life, liberty and the security of the person". On appeal, the Supreme Court ordered the Minister of Health to continue the operation of this controversial drug injection site despite the fact the legislation specifically authorized the Minister of Health to make this decision. The latter had the resources and authority to obtain data to make this determination whereas the court relied on the questionable data provided by the facility's supporters.

[30] *Regina v. Parker,* (2000) 49 O.R. (3rd) 481;

[31] *PHS Community Services Society v. Attorney General of Canada* (2008) BCSC 661;

Other Court Decisions

There are other significant issues where the courts have changed Canadian values, including changing the age of consent for anal intercourse; redefining the family; declaring the unborn child has no legal rights; restricting the authority of parents etc. among other issues.

Conclusion:

The Charter has relegated the Canadian public to be an observer or onlooker in determining our nation's laws, which are now solely decided by the nine, appointed and unaccountable judges on the Supreme Court.

U.S. Supreme Court Judge, Samuel Alito has stated that only an arrogant legal culture that has lost all appreciation of its own limitations, can regard this system seriously. [32]

In a democracy, it is unacceptable that unelected individuals can possess the power to obstruct the wishes of a properly elected Parliament – but this is now the situation in Canada.

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[32] Dissent by Mr. Justice Alito in *United States v. Windsor,* 570 U.S. __(2013) at p.21