The Judiciary in Canada

There is a mistaken assumption that, prior to the *Charter*, Canadians did not have any secure liberties and fundamental rights. This is altogether wrong. Canada's civil liberties have always been a part of our judicial system, based on centuries of precedent that promoted our rights with clarity and stability. Today, under the *Charter*, however, the rights and freedoms of Canadians are constantly being revised and updated in an arbitrary manner by judicial activists who have declared our constitution a "living tree" to which they add their own "adornments" by re-interpreting our rights according to their own personal, social, economic and political values.

This undemocratic state of affairs has developed because s. 52 of the *Charter* provides that the Constitution (which includes the *Charter*) is the supreme law of Canada and any law that is inconsistent with it has no force or effect. This provision, therefore, gives judges authority to review legislation in order to determine whether it conforms to the *Charter.* As a result, judges have become the rulers of last resort, which is a dramatic shift in power, since it gives the courts and unelected judges precedence over Parliament.

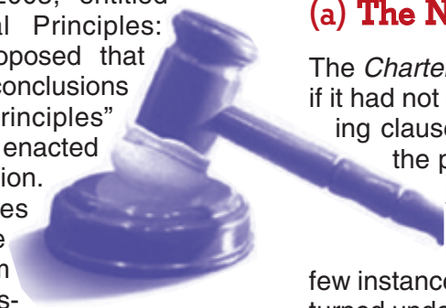
Unfortunately, the C*harter of Rights* is written in broad and ambiguous language, which allows judges to interpret it as they wish – and therein lies our problem.

Canadian judges, who are unelected, are all drawn from the same profession, are accountable to no one and hold office until they reach 75 years of age. Judges are, in effect, no more than well-connected lawyers, who have the political clout to secure their appointments to the bench: but have no special or secret knowledge with which to interpret the general and ill-defined words in the *Charter*.

Moreover, unlike Parliament, courts do not have access to the social facts of 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; and they do not have access to the practical experiences of the public on issues which are growing increasingly complex, economically, socially and scientifically. Nor are the courts equipped to evaluate the full range of policy alternatives that are available to a government. As a consequence, it is not possible for the courts to always understand the long-range implications and ramifications of the arguments on the narrow facts placed before them by the litigants.

Because of the difficulties inherent in judges determining public policy, Canadian judges would have been wise to choose the route of self-restraint and deference to Parliament, which, after all, is elected by the public and which is designed to make political decisions. Instead of this, however, Canadian judges seized opportunities to substitute their own will for that of Parliament, even on some of the most controversial issues of our day, such as abortion, euthanasia and same-sex marriage. Judicial decisions on these issues were frequently based, not necessarily on law, but often on the judges' own ideological and philosophical perspective.

For example, in the case of Schachter v. Canada, [1992] 2 S.C.R. 679, the Supreme Court made the significant decision that it had the authority to read-in and read-out specific words in legislation. That decision, in effect, gave the courts the power to rewrite legislation. Further, Chief Justice Beverley McLachlin, in a speech in New Zealand in November 2005, entitled "Unwritten Constitutional Principles: What is Going on?" proposed that judges could also reach conclusions based on "unwritten principles" even in the face of clearly enacted laws or hostile public opinion. She claimed that judges could arrive at these "unwritten principles" from the "culture, values and history of the nation". It is a mystery, however, how judges, isolated from the struggles of society and accountable to no one but themselves, can claim to know the "culture, values and history of the nation" better than our elected representatives. Judge McLachlin also claimed in her speech, that judges could apply "unwritten" laws because they have a "judicial conscience" which is founded on the judges' "sworn commitment to uphold the rule of law". If only that were the case! Judges' so-called "upholding the law", according to their "judicial conscience", in reality, is pure fantasy, and not fact.



Judge McLachlin's claims are nothing less than judicial overreach and power seeking — which is totally unacceptable in a sovereign and democratic country.

Curbing Judicial Activism

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

(a) The Notwithstanding Clause

The *Charter* would never have been passed if it had not included s. 33 (the notwithstanding clause), which allows Parliament and the provincial legislatures to override judicial decisions. It was this provision that induced the premiers to accept the *Charter*. A few instances of having their decisions overturned under s. 33 would likely cause judges to become less fanciful in their decisions. That is, applying the notwithstanding clause would lead to more accountability from the judges.

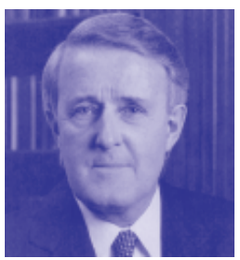
Unfortunately, there is considerable reluctance by political leaders to implement S.33 of the *Charter*. They apparently believe that if the courts' decisions on the *Charter* were overturned frequently, this would eventually undermine the *Charter* completely (not to mention the credibility of the judges!). Moreover, if a Court declared a particular law "unacceptable," this would create an intense burden on the political leader who invoked S. 33, as that person would then have to deal with both a divided caucus and the public in order to reinstate a law that the court has ruled to be invalid.

The Rt. Honourable
Pierre E. Trudeau

(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 that possessed by any other participant in our system of government.** Instead of permitting judges to remain on the Court until they reach 75 years of age, judges should be given a limited tenure, e.g. of ten years.

(c) Nominating Committees



The Rt. Honourable Brian Mulroney

In 1988, Conservative Prime Minister Brian Mulroney established an Advisory Committee to provide 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 Attorneys General – to review appointments to the courts. This Committee did not function as a true Nominating Committee; but served only as a Screening Committee to advise the Prime Minister about whether the nominees for appointment were qualified.

This process was expanded by the Conservative government in 2007 by the addition of police officials to the Committee and the requirement that judicial candidates be subject to Parliamentary review. This change was long overdue, as Canada is one of the few modern democracies that did not allow candidates for the judiciary to first be screened and questioned by, or to testify before members of the legislature. This confirmation hearing offsets to a degree the established and very disturbing system of making backroom judicial deals.

Further, 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. Considering judges' role in shaping and making policy – in effect, their rule over our lives, Canadians should be fully aware of candidates' legal philosophies and of their *Charter* perspective. Such hearings would also reduce the tendency to stack our courts with big money donors and third-rate hangers-on.

Judicial Appointments Based on Merit

Judges should be appointed based on merit, not their political connections. As mandated, they must be trusted individuals, and impartial and objective in their judgments.

How can we expect to have an independent judiciary if the appointment process itself does not guarantee this? We need a new process to ensure that the individuals appointed to the Bench are not only competent, but will not impose their own prejudices and biases on the public by way of their powerful position.

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REAL WOMEN OF CANADA

THE JUDICIARY IN CANADA

A revolution took place in Canada in 1982 while most Canadians slept. This bloodless revolution was carried out, more or less, by ten men. These included Liberal Prime Minister PierreTrudeau and the provincial premiers – well, at least nine of the premiers, as Premier René Lévesque of Quebec was not a part of the fatal agreement to entrench a *Charter of Rights* into our Constitution. This was a decision that dramatically changed Canada. The *Charter* was passed by the Liberal dominated House of Commons and Senate, and came into effect in April, 1982. None of the provincial legislatures voted on the *Charter* since the provincial agreement was provided solely by the provincial premiers, acting on their own initiative.

The Supreme Court of Canada Building - Ottawa, Canada