“Judge-made law”: judicial excess or sore losers’ sour grapes?

Stanley Hartt examines some of the thorny questions around the issue of “judge-made law”. Does such a thing exist or is it essentially the handy default construct of those who rail against rulings with which they disagree? Would less ambiguity in legislative texts limit the ability of judges to interpret according to their experiences and assessments of evolving societal values? Is it possible legislators sometimes intentionally leave some ambiguity, in order to avoid taking clear positions on contentious issues?

Stanley Hartt

Strict construction of legislative texts by members of the judiciary has been a watchword of the right-wing of American politics for a long time. If changes to the law as written are needed, the argument goes, then it is the job of the legislative branch of government, not the courts, to design and implement those changes.

Canada has had its fair share of commentary on the subject too, less strident perhaps in the terms in which it is expressed, but present and earnestly advanced nonetheless. But do we actually have a problem with judges who overstep the limits of their authority by deciding what the law ought to have been instead of what it is?

And if it is true that some learned titans of the bench do occasionally see constitutions and statutes as evolving documents, intended to be adapted to situations not contemplated at the time of their enactment, is this an attribute more common in left-leaning magistrates than in their conservative colleagues?

The famous American jurist, Oliver Wendell Holmes Jr., referred to the intellectual, philosophical and social baggage with which all human beings approach issues and decisions as the “inarticulate major premise”. It is undoubtedly the case that background, experience, outlook and education form part of the individual’s make-up which will invariably, if unconsciously, play a significant part when a jurist is engaged in what appears to be “reasoning”. Many lawyers believe that a judge is perfectly capable of first deciding what the proper outcome of a case should be and only then developing the rationale to support that result. That, after all, is how lawyers are trained to present briefs and arguments in our adversarial system – make the best case for your client given what you have to work with.

Let’s apply the foregoing to the Supreme Court’s decision in Reference re Supreme Court Act, ss. 5 and 6, 2014. That was the case in which the Court, by a significant majority, found that The Honourable Marc Nadon was ineligible to be appointed to Canada’s highest tribunal because he was not, at the time of the appointment, either a Judge of the Court of Appeal or the Superior Court of the Province of Quebec or one of the “advocates of that Province”.

Justice Nadon’s ineligibility was attached to the fact that, as a supernumerary judge of the Federal Court of Appeal and not a current member of the Barreau du Québec, he did not meet the test that a careful scan of the words of Section 6 of the Supreme Court Act would appear to impose. The Court acknowledged that he *had* been a member of his Province’s Bar for more than ten years (the criterion stipulated in Section 5 for appointments generally), but concluded that for Quebec, unlike any other province, current membership in the Bar or the named courts was required by the wording of Section 6.

Section 6 is where the guarantee that no fewer than three of the nine Justices must be from Quebec is found. The majority held that it required *current* membership in the Bar, or a *current* seat on the Court of Appeal or Superior Court bench, presumably to ensure a more up-to-date connection with the civil law regime of that Province.

Justice Nadon was appointed to the Federal Court bench because of his expertise in maritime law, an important discipline though not in every-day demand on the Supreme Court. But who was he named to replace? The answer is a pre-eminent expert in criminal law, the Honourable Mr. Justice Morris Fish. While criminal law matters do indeed frequently come before the Supreme Court, and expertise in that field is vital to have in the mix on that bench, it would be fair to say that Fish J’s qualifications, much like Nadon J’s, were rooted in an area of law other than Quebec’s Civil Code. While Mr. Justice Fish did sit on Quebec’s Court of Appeal for 14 years before his elevation to the top court, the accumulated experience which qualified him

to be nominated in the first place was not in the area Section 6 is presumed to have been enacted to protect.

Mr. Justice Michael Moldaver was the sole dissenting judge. He argued that Sections 5 and 6 of the Supreme Court Act were intended to be read together, so that Section 6 was viewed as allotting three seats on the Court to jurists learned in Quebec Civil Law, but not as imposing more stringent qualifications on Quebec nominees than applied to those in other provinces by insisting that *former* members of the Bar with 10 years standing, eligible elsewhere, were not eligible in Quebec.

Yet here we have an ironic example of strict construction working against a conservative government's attempt to elevate a candidate of clearly conservative outlook to our most senior bench. Insisting on reading enactments literally as written and not "reading in" some intended (or even extended) purpose is usually the viewpoint defended by persons of a conservative bent who hold that judges have not been appointed to make laws, but rather to apply the laws duly passed by the legislative branch of government. Six eminent and erudite experts making up the majority here seem to have practised what the mantra of rigorous and precise interpretation required!

So what really went on in the Nadon case? Whenever a judicial nomination is made public, especially one at the level of the Supreme Court of Canada, pundits, commentators and elites who see themselves as the arbiters of conventional wisdom pounce on the name (and the process, as we shall see later) and deliver a self-justifying analysis on the merits of the appointment. When Judge Nadon's name surfaced, this intellectual flurry produced a *bon mot* from one wag who declared that, "He wasn't on anyone's short list. He wasn't even on anyone's long list".

Well, he clearly was on the Prime Minister's list, and, in our system, after consultation with the bench and provincial law societies, the prerogative to make this appointment rests with the Governor General on the advice of the Prime Minister. Is it possible that the decision in the Reference case was influenced, even subconsciously, by the view that Judge Nadon was not up to snuff in the eyes of observers and some of his putative future colleagues? Look at the opinions that were offered to the media after the appointments of the next two Justices named, Clément Gascon and Suzanne Côté. In the first case, the grousing was all about changes made to the process of nominating Supreme Court Justices and, in the second, the reviews blended into a consensus of universal acclaim!

The Supreme Court has made plenty of decisions that have disappointed the left of the political spectrum, those who

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Margaret Thatcher dismissively referred to as the "wets", precisely on the ground usually reserved for the purists, namely that the Court had created rather than interpreted law.

In *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, a majority of the Court decided that the prohibitions against private health insurance in Quebec's *Health Insurance Act and Hospital Insurance Act* were unconstitutional (as a violation of the guarantees of the rights to life and personal inviolability protected by s. 1 of the Quebec Charter of Human Rights and Freedoms) when necessary medical care is not delivered in a medically advisable time under the universal, state-paid health care system. While it appeared obvious that, if a patient fell between the cracks created by budgetary constraints and demands on the supply of physicians and facilities through no fault of his own, the arbitrariness of condemning him to tissue damage, pain and even death could not possibly be consistent with the principles of fundamental justice or with reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, the outcry from the defenders of the status quo palpably demonstrated their innate terror that requiring medical services to be delivered in a medically timely fashion would destroy their beloved system.

The rhetoric that followed was so over the top as to make clear that the defenders of the Canadian system of health care delivery believed it could not be repaired and that the guideline drawn by the Court for constitutional survival, namely timely

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delivery, was not possible to achieve. From the left came the accusation that the judgment was the work of Zombie Masters, who had created a monster that would inevitably lead to two-tier medical care delivery in this country. The concept that how much health care delivery can be afforded is a matter of public budgetary policy, not of protected Charter rights, presumably even when viewed from the perspective of the individual suffering or dying because of wait times, lives on among opinion elites, for example in Jeffrey Simpson's 2012 book *Chronic Condition*.

So the left can have its ox gored as much as the right by judges said to be making it up on the basis of their prejudices.

Do judges really think they are making law when they see legislative enactments through the lens of their personal perspectives? The evidence appears to be to the contrary. Rather, the problem may lie in ambiguous drafting which permits more than a single interpretation of a given text. In any case that reaches the courts, there are likely to be good lawyers who differ on the meaning to be given to the words that the skilled draftsmen in the Department of Justice have used to express what they consider to be the intent of the legislator. Could the legislator sometimes prefer to avoid the political fallout that an apparently clear and harsh text on a sensitive subject might engender?

In the Nadon case, the government sought an opinion from a former Justice of the Supreme Court, concurred in by two other former Justices of the same body, which endorsed the government's reading of the Act. The nature of the judicial system is that a submission of some learned counsel is accepted and that of others is rejected.

What if anything can be done to take the personal preconceptions of candidates for a rarified place on the court of last resort out of the process of judicial judgment-crafting? The chattering classes are at pains to insist that the system of vetting of nominees with bench and bar is not sufficient, particularly if the Governor General, on the advice of the Prime Minister, is free to arrive at a different conclusion and nominate a candidate not universally conceded to have sufficiently liberal, socially concerned and educated views to please the elites.

Prior to the nomination of Justice Gascon, a system had been developed whereby a panel made up of government MPs and opposition members was asked to narrow the list of candidates to a short list of three for consideration by the Prime Minister, followed by the holding of public hearings in Parliament at which the nominee could be questioned. The commentators who watch such developments have deplored the return to the time-honoured system of simply treating judicial appointments as an executive prerogative, with the public able to express approval or otherwise at election time.

Certainly we should not be attempting to create a Canadian version of the judicial confirmation process used in the United States. If it is true that we want judges without prejudices to render decisions based on the law and nothing but the law, we should resist fiercely the notion that the sample judgments that a candidate for elevation would be asked to produce to a Parliamentary panel vetting him or her for the short list would be predictive of that individual's views in cases yet to arise. Inducing judges to write popular judgments just in case the opportunity for a promotion might present itself is equally offensive. What can a candidate for the bench say to a vetting committee or a public Parliamentary review process that would help the citizenry decide if we wanted that person as a judge, other than a commitment to uphold and enforce the law without preconception or favour?

The politicization of the judiciary is but one step beyond the politicization of the nomination, approval and confirmation process. No human being can leave their personal makeup, antecedents, influences, beliefs and ideas in the robing room, but if we want an unbiased, competent judiciary, nor should we select its members based on those considerations. Opinions on current, burning social policy issues should not be a criterion for appointment, because we ought to want decisions based on the facts of each case applied to a precise and accurate reading of the law.

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