

Judging the Judges

By Chris Schafer and John Carpay

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When it comes to defending the constitutional freedoms of Canadians from the onslaught of government coercion and control, not all judges are created equal. The 25th anniversary of the *Charter of Rights and Freedoms* on April 17 provides an opportunity to examine the track records of Canada's Supreme Court judges in protecting our rights from violation by government. In light of this occasion, the Canadian Constitution Foundation has just released *Judging the Judges*, a new study that analyses the Supreme Court's performance in cases which impact the citizen's personal and economic liberty.

Based on Supreme Court decisions from 2000 to 2006, *Judging the Judges* reveals that retired Justice John Major consistently adopted a wide and liberal interpretation of freedom of speech, freedom of religion, freedom of association, and other individual rights. In stark contrast, retired Justice Claire L'Heureux-Dube consistently voted for the state and for its power over individuals' lives, by adopting a narrow and restrictive view of fundamental freedoms.

For example, in *Harper v. Canada* (2004), Justice Major rejected new amendments to the Canada Elections Act which restrict citizen activism during elections and give political parties a virtual monopoly on political debate. In contrast, Justice L'Heureux-Dube voted to uphold these restrictions on freedom of speech (a constitutional right) in the name of a vague theory about "electoral fairness" (not found anywhere in the constitution), thereby denying citizens the right to freely and effectively communicate their views on issues during the 2000 federal election.

In *Gosselin v. Quebec* (2002), Justice Major joined the majority in upholding a Quebec welfare regulation which reduced benefits for able-bodied adults under 30 who refused to enter job training, community work or school. Justice L'Heureux-Dube would have prevented the government from encouraging people to get off welfare, and went so far as to assert a constitutional right to collect welfare as part of the *Charter* right to "security of the person."

In *Trinity Western University v. British Columbia College of Teachers* (2001), Justice L'Heureux-Dube voted to discredit a private Christian university's education program merely because the school's code of conduct condemned homosexual behaviour. Her narrow interpretation of religious freedom was made in the absence of any evidence that Trinity Western graduates, as teachers, had ever mistreated or disrespected students in schools. Justice Major joined the majority in respecting religious freedom.

When it comes to Canadians' economic freedom, *Judging the Judges* shows that we have no stronger defender than Chief Justice Beverley McLachlin. Her rulings tend toward respect for freedom of contract and for the individual's right to earn, own and enjoy private property. Her vision of equality tends towards equality of *opportunity* rather than equality of result or condition, and towards the equality of individuals before the law rather than the equality of groups. In contrast, Justice Louis LeBel displays less enthusiasm for individual freedom – and more sympathy for government control – than any other current member of the Court.

Some say that judges decide all cases "according to law" and without influence from their own beliefs and prejudices. It is certainly true that most judges sincerely desire to be impartial, to listen to all

submissions and arguments with an open mind, and to apply precedents in a fair and reasonable manner. But it's inevitable that judges will ultimately be influenced by their own assumptions about human nature, about the economy, about the appropriate role of government, about religion, And even about metaphysics and life itself.

As government expands, liberty contracts. Through legislation and regulation, the state diminishes the sphere of individual freedom and responsibility. The *Charter* has the potential to protect individual freedom from state intrusion and interference. It's up to Canada's judges to uphold constitutional freedoms. As our report shows, some do a better job of this than others.

Chris Schafer is an Associate with Gowling Lafleur Henderson LLP in Ottawa and is a director of the Canadian Constitution Foundation. John Carpay is executive director of the Canadian Constitution Foundation. "Judging the Judges" is available at www.CanadianConstitutionFoundation.ca.