Review of the Attorney General of Canada's Recent Supreme Court Appointees

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The preamble of the Canadian Charter of Rights and Freedoms states that:

> *Canada is founded upon principles that recognize the supremacy of God and the rule of law.*

Inherent in the Canadian concept of the rule of law is the principle that all Canadians are equal before the law and can expect justice from the courts.

The judiciary are the guardians of this principle. The judges are appointed by an Attorney General to preserve the rule of law. In Canada, the Attorney General also doubles as the Minister of Justice – a person elected to Parliament as a political representative for a riding who is then appointed to the job by the leader of the ruling political party in Parliament.

Considerable discussion has taken place about the political nature of the federal judicial appointments in Canada and the social engineering of Canadian society by the judiciary. The Attorney General of Canada, Irwin Cotler, has emphasised that judicial appointments in Canada are not political but based on the preservation of the principles upon which the Charter of Rights and Freedoms is based.

Is there a way to test this? Of course, looking at the performance of the Attorney General in the appointment of judges is one test. This Attorney General has made two high profile judicial appointments – the appointment of Justices Abella and Charron to the Supreme Court of Canada.

Chief Justice McLaughlin on her appointment suggested to Christin Schmitz in the Hill Times ("Powerful new chief justice of Supreme Court opens up" [January 17, 2000])

> *"Anybody who wanted to find my views on certain things could look at the judgements I had written and draw up tables, statistics, whatever. That is probably is (sic) the best evidence of how a person is going to perform in their new role."*

It seemed appropriate therefore to examine, as did the Attorney General, the record of these two new judges to ensure that these appointments are indeed maintaining the principles of the Charter.

Data Sources

Pursuant to Chief Justice McLachlin's suggestion, the tables and statistics for these two judges have been assembled based on their decisions in the Ontario Court of Appeal in the area of Family Law. Both judges sat on the Ontario Court of Appeal immediately prior to their appointment to the Supreme Court for some length of time.

Court of Appeal decisions are a good set of decisions to examine the performance of judges for a number of reasons.

1. All cases appealed are required to be heard. This ensures that the cases are not a selected subset of issues as occurs with the Supreme Court's selection process.

2. All Court of Appeal decisions are reported, even those made "in chambers". For normal day-to-day cases, especially in motions courts, generally only special cases are reported so we do not have access to a consistent and complete set of a judge's decisions.

3. The Court of Appeal does not serve as a fact-finding body. Fact-finding and screening of evidence has taken place in the lower courts – also bound by the rule of law usually by federally appointed judges. The Court of Appeal is deciding on the validity of a decision that has already been made by a lower court.

4. Finally, there are many issues that are forced before a court whether people involved want it here or not. This includes things, like divorces, which only a judge can issue. The Court of Appeal is not like this. There is a complicated, formal, costly process to an appeal. The Appellants clearly want to be in front of the Court and will have reasonable expectation of finding a favourable resolution by the Court.

For this examination, I have examined a wide spectrum of family law issues related to children and their parents' divorce and separation. This provides a broad spectrum of family law decisions rather than looking at a small, and perhaps insignificant, subset of decisions.

Specifically, I examined the Ontario Court of Appeal decisions that Justice Abella and Justice Charron participated in, and the results thereof based on the gender of the parental appellants.

A Court of Appeal, pursuant to the rule of law, is required to treat appellants equally. We therefore expect to see the Ontario Court of Appeal would treat the male and female appellants, appealing the decisions of lower court judges, roughly the same. Many lawyers have told us that appeals rarely succeed, irrespective of whether this is true or not, we can look at the outcomes of the Appeal Court's review process and see if fathers and mothers are indeed being treated equally well or badly.

In order to identify the relevant Ontario Court of Appeal cases two data sources were utilised. The search engine of the Court of Appeal website at www.ontariocourts.on.ca was searched for the occurrence of the words "child" or "children" for each judge. As well, the QuickLaw database (CJ) was searched for each judge by surname, for the "Ontario Court [of] Appeal", and for either the word "child" or "children". There was no date limits so the entire body of their decisions was examined.

The resultant cases were then individually examined. Cases that were criminal (i.e. the "R. v." cases) or that involved an institutional party as an appellant or respondent were eliminated. Cases were then individually selected to include all cases between parents (or commenced by parents – in one a parent had pre-deceased the decision), and that involved issues related to parents and:

- mobility (moving the child's primary residence, including internationally),
- custody,
- parental access,
- child support, and
- spousal support.

Excluded from the survey were issues that dealt with property, procedural (including jurisdictional) issues, and spousal support if "child" or "children" were not included in the judgement (spousal support and child support are intrinsically intertwined in child issues).

All the cases that met these criteria are listed in Appendix A1 for Justice Abella and in Appendix A2 for Justice Charron.

Methodology

Each of the identified cases was then individually examined. The gender of the appellant was identified. In all cases identified, the couples were heterosexual. The requests of the primary appellant, as stated in the judgement, were noted by the appropriate category or categories.

Based on the comments made (including dissenting opinions) or concurred with, the opinion of the justice in that case was noted. Some issues, such as mobility, custody, access and child support are inevitably inter-related, but the decisions on each issue was identified for each case.

Success for a primary appellant was assigned if the requested relief was granted. Please understand that some appeals asked very open relief be granted, and we ascribed success if the decision met that request, even if what was granted was nominal. For example, if a parent is requesting "more parenting time" with their child and is assigned one minute a year more time, we treated that as a "success". This was done for measurement purposes, to reduce the amount of legal expertise required to check the results, and to allow any other researcher to be able to duplicate the results of this analysis without having to resort to any form of opinion on what was a "real success" and what simply a token award.

Results

The judges' decisions, by the nature of the issue, the number of appeals heard, and the results are summarised as follows:

Issue	Abella			Charron		
	Appellant	Number	Appellant Succeeds?	Appellant	Number	Appellant Succeeds?
Mobility	Male	3	0	Male	2	0
	Female	1	1	Female	2	1
	Appellant	Number	Appellant Succeeds?	Appellant	Number	Appellant Succeeds?
Custody	Male	4	0	Male	5	0
	Female	3	2	Female	2	1
	Appellant	Number	Appellant Succeeds?	Appellant	Number	Appellant Succeeds?
Access	Male	6	0	Male	7	1
	Female	3	3	Female	2	1
	Appellant	Number	Appellant Succeeds?	Appellant	Number	Appellant Succeeds?
Child Support	Male	9	0	Male	8	1
	Female	5	5	Female	1	1
	Appellant	Number	Appellant Succeeds?	Appellant	Number	Appellant Succeeds?
Spousal Support	Male	14	1	Male	9	1
	Female	7	6	Female	2	2

A case may have, or may not have, dealt with more than one issue. In order to deal with question of treatment, we examined each case to determine whether all the issues were decided in favour of the appellant ("win all"), all in favour of the respondent ("lose all") or some sort of split decision was made ("win some/lose some"). The split decisions were few, and usually related to very minor points.

For Justice Abella we can summarise the total cases as follows:

Appellant	Number	Win All	Lose All	Win Some/ Lose Some
Male	26	1	25	0
Female	13	11	1	1

For Justice Charron, the similar summary produces:

Appellant	Number	Win All	Lose All	Win Some/ Lose Some
Male	22	2	19	1
Female	7	5	2	0

Statistical Analysis

For a statistical test, we went to tests that were related specifically to the issue at hand – whether the differences between the outcomes by the gender of the primary appellant are significant. The decisions considered were of the win all/lose all types in the above tables (the "win some/lose some" have been excluded and are not material in the outcome). Since there are smaller numbers of cases, we utilised the *exact Fisher test* to analyse the resultant table. This test is more precise than the approximate "chi-squared" test but involves considerable more computation. In order to do these computations, we utilised a commercial computer program.

Justice Abella

For Justice Abella we see that the outcomes in respect of male appellants are statistically an "extremely significant" ($p<0.0001$) difference than decisions made in respect of female appellants.

Statistical significance is associated with the probability "p" that hypothesis, in this case, that there is no difference, may be incorrect. Statistical significance in small sample studies is usually considered to be at the level of $p<0.05$ – the "correct 19 times in 20" that is quoted on surveys. Strong scientific statistical significance is associated with a level of $p<0.01$ (less than 1 in 100 chance of the conclusion being incorrect).

In this case, the $p<0.0001$ is the maximum level of significance produced by the program, and at least 100 time stronger (less than 1 in 10,000 chance of being incorrect). This is as close to certainty as statistics allow.

These measurements are much more stringent measures than the "balance of probabilities" used by the courts.

Justice Charron

For Justice Charron we see that the outcomes in respect of male appellants are statistically a "very significant" ($p=0.0038$, $p<0.005$) difference than decisions made in respect of female appellants.

With a smaller sample size and not quite as definitive results, Justice Charron's decisions still show a very significant bias against male appellants, but statistically it is not quite as strong as that indicated by Justice Abella's record.

Conclusions

In the case of both Judges Abella and Charron, on family law issues, we see significant bias in the outcome of the appeals they participate in based on the gender of the appellants. It is difficult to understand how a Canadian coming before either judge on a family matter could feel ensured of equal standing in court with other Canadians of opposite gender. This conclusion is based specifically on the type of analysis previously suggested by the Chief Justice of Canada.

Irwin Cotler, the Attorney General of Canada, was well aware of the "track record" of these judges before he appointed them to the Supreme Court. He is aware and has stated that the rule of law, including unbiased treatment before the courts, is a key and fundamental principle of justice in Canada. Were these appointments an unintentional error by Mr. Cotler due to lack of scrutinising the history of these judges?

The Attorney General of Canada however has glossed over the problem of the delivery of equal justice and comments "*in my view, I think that there would be no reason for judges to have to recuse themselves*" when faced with such definite judicial bias ("Recusal not the norm, Cotler says: It's unlikely Abella, a new judge on the Supreme Court, will remove herself from future cases to avoid accusations of bias, minister says" Kirk Makin, Globe and Mail, November 22, 2004).

In the same article Minister Cotler continues "*the country should really be proud of the people on the bench and be utterly secure not only in their experience and expertise, but in the fairness of their judgement and integrity of their persons.*" Yet, his selection process to screen these the judges would have been exactly the same track record as has been analysed here.

Clearly this is an Attorney General that is aware that he is not delivering a judicial environment compatible with the Charter. Certainly this is not the justice system that Canadians expect. The results strongly suggest that a different, more stringent and public review of judicial appointments is required in order to ensure that the rule of law is indeed the cornerstone of Canadian jurisprudence.

In addition, these two Supreme Court judges have some extremely significant issues with their clear stand on family law appellants. Judges with conflicts of opinion have traditionally recused themselves on cases dealing with their preconceived and prejudiced positions. We have certainly not seen this happening currently with these judges with the apparent full support of the Attorney General of Canada.

I would note that this report has *not* examined all judicial appointments made in Canada by all the Attorney Generals. It has examined only the two significant appointments made by Mr. Cotler under his own "impartial" process. The report has not examined whether similar bias is rampant throughout the entire family law system as the result of these historical judicial appointments, but it suggests that further study may well be justified as both judges have been on the Ontario Court of Appeal for not insignificant periods of time.

The report *has* identified a problem with the current government's appointments to the Supreme Court, and indicates that a different process, or different people, than was used is needed to ensure that the "principles that recognise the supremacy of God and the rule of law" are retained in Canada.

Appendix A1 — Cases Examined for Justice Abella

1. Allaire v. Allaire (March 28, 2003)
2. Andrews v. Andrews (September 29, 1999)
3. Barakat v. Barakat (February 11, 1994)
4. Bosanc v. Bosanc (March 27, 2003)
5. Cox v. Stephen (November 17, 2003)
6. Duma v. Mathews (December 4, 1996)
7. Elik v. Elik (February 2, 1993)
8. Filipich v. Filipich (September 10, 1996)
9. Farrar v. Farrar (January 27, 2003)
10. Francis v. Baker (March 10, 1998)
11. Goldenberg v. Wolf (May 22, 2002)
12. Hall v. Hall (October 28, 1999)
13. Irwin v. Irwin (September 10, 1998)
14. Jacobs v. Jacobs (February 23, 1996)
15. Lougheed v. Sillett (June 30, 1994)
16. Macedo v. Macedo (April 29, 1993)
17. MacGyver v. Richards (March 23, 1995)
18. Martinuzzo v. Janssen (March 17,1998)
19. Maule-Ffinch v. Maule-Ffinch (May 7, 1996)
20. Maurici v. Maurici (August 9, 1996)
21. McGeachy v. McGeachy (September 5, 2003)
22. Meiorin v. Meiorin (January 17, 1996)
23. Merikallio v. Merikallio (March 22, 1999)
24. Miglin v. Miglin (April 26, 2001)
25. Miranda v. Bossio (June 18, 2001)
26. Montgomery v. Montgomery (October 30, 1992)
27. Munro v. Munro (October 17, 1997)
28. Pollastro v. Pollastro (March 31, 1999)
29. Punzo v. Punzo (March 4, 1996)
30. Rumanek v. Rumanek (November 15, 1993)
31. Shefsky v. Shefsky (September 11, 1996)
32. Sherman v. Sherman (April 16, 1999)
33. St. Clair v. St. Clair (November 20, 1995)
34. Tauber v. Tauber (March 31, 2003)
35. Veneziale v. Veneziale (April 21, 1994)
36. Walsh v. Walsh (July 20, 1998) d
37. Woodcock v. Woodcock (September 10, 1996)
38. Woodman v. Deremo (July 23, 1996)
39. Wunsche v. Wunsche (April 25, 1994)

Appendix A2 — Cases Examined for Justice Charron

1. Best v. Best (October 3, 1997)
2. Boers v. Boers (December 3, 1996)
3. Campbell v. Campbell (February 15, 1996)
4. Choquette v. Choquette (July 28, 1998)
5. Cornfeld v. Cornfeld (December 4, 2001)
6. Duma v. Mathews (December 4, 1996)
7. Farrar v. Farrar (January 27, 2003)
8. Francis v. Baker (March 10, 1998)
9. Gordon v. Solmon (December 2, 1996)
10. Lachapelle v. Lachapelle (November 15, 2000)
11. Layzell v. Layzell (December 8, 1997)
12. Lee v. Lee (August 5, 1999)
13. Marino v. Touil (June 26, 1997)
14. Marson v. Marson (May 15, 2001)
15. Munro v. Munro (October 17, 1997)
16. Otterbein v. Otterbein (August 13, 1999)
17. Parks v. Barnes (March 7, 2002)
18. Pollastro v. Pollastro (November 17, 1998)
19. Pope v. Pope (February 3, 1999)
20. Rosien v. McCulloch (May 8, 2001)
21. Sangster v. Sangster (January 15, 2003)
22. Sleiman v. Sleiman (May 7, 2002)
23. Sodhi v. Sodhi (June 19, 2002)
24. Stanghi v. Stanghi (May 24, 2001)
25. Tauber v. Tauber (March 31, 2003)
26. Taylor v. McWhirter (December 2, 1996)
27. Williams v. Ellul (February 2, 1996)
28. Woodman v. Deremo (July 23, 1996)
29. Wright v. Zaver (March 26, 2002)