

<http://www.familyaction.org/Articles/issues/politics-law/courts/supreme-court-hubris.htm>

**The Globe and Mail – December 16, 2005**

**Gods – or nine well-paid lawyers with jobs for life**

**By Gordon Gibson**

The Greeks had a word for it: hubris. It means overweening or excessive pride and arrogance. It is a disease of the powerful.

Two weeks ago, a very powerful person, Chief Justice Beverley McLachlin of the Supreme Court of Canada, gave a speech in New Zealand that contained one big worry for those concerned with our democratic balance.

She said, in effect, that the law is what the Supreme Court says the law is. “The task of the judge, confronted with conflict between a constitutional principle of the highest order on the one hand, and an ordinary law or executive act on the other, is to interpret and apply the law as a whole – including unwritten constitutional principles.”

Think about that. Who decides what these “unwritten constitutional principles” are? Why, the judges. This can trump clearly enacted laws?

Might this amend even the Constitution? Well, yes. Judge McLachlin also said that “even inclusive, written constitutions leave much out, requiring us to look at convention and usage.” So the judges may supplement that list. They may discover new constitutional doctrine. And if they do, remember they really are “supreme.” Jurists may properly argue that someone has to “fill in the blanks” in legal interpretation, but the Canadian experience shows they may do so even in direct contravention of the intent of the constitutional framers. Two great examples over the past 15 years include Indian law and moral law.

In Indian law, the intent of the framers was quite clear: Aboriginal rights were to be confined to those existing in 1981, and the word “existing” was added in the final draft to underline that meaning. That did not constrain the Supreme Court from adventuring in this area: Simply include “existing” in whatever might be hidden, latent and as yet undiscovered, then get on with the discovery of new “rights.” In moral law, Parliament, in designing the Charter, deliberately excluded sexual orientation as a constitutional element. The court, nevertheless, added this claim to the Charter on its own initiative in the 1998 Vriend gay-rights case.

And the court does what it wants. In a Nov. 22 speech, the Chief Justice said: “When a legal issue is properly before a court, not deciding is not an option.” Oh? Just a year earlier, the court declined to answer the most important of four questions posed to it by the Martin government on same-sex marriage, namely whether existing law was valid. An answer was refused notwithstanding that the Supreme Court Act explicitly requires one to be given.

The court is well known for its “living tree” view of the Constitution – that the meaning must change as society changes. But there is a danger here. Given a pair of shears, fertilizer and a number of years, a skilled gardener can shape a tree in any direction. So can the court. With parliamentary supremacy eroded, the check and balance for this no longer exists.

Strip away the grand stone building of the Supreme Court and the judges’ ermine robes and what do we really have? God-like creatures? No. Something much less: nine well-paid lawyers with jobs for life.

And how were these lawyers appointed? By our elected representatives after due debate? By cardinals in solemn conclave? By peers of the realm? No. These people were appointed at the whim of one person, the prime minister. And why were they appointed? Undoubtedly, for their good legal minds. But also, well, politics? One kind is the usual regional, gender, ethnic balance that, at any given time, rules out 90% of the best candidates. That is political life. The second is of a far baser kind: What will make the prime minister look good? Imagine, to give a far-fetched example, if a prime minister appointed someone with no civic record as governor-general because it would please a fawning media and gain some ethnic votes.

In Canada, the provenance of the Supremes is the arbitrary choice of one person. For these arbitrary fortunate few to infuse themselves with the power to not just interpret law but to make the law is surely a bridge too far. But that claim is another part of the culture of entitlement. We have learned that the top elected people in Ottawa think they own the power of government and the money of taxpayers to use as they wish. But at least we can throw them out.

Another bunch of top people in Ottawa, these ones with jobs for life, think they own the law. And you know what? They do. Because they say so.

Who in this election campaign will have something to say about that?