Canadian Supreme Court on the Loose

When Pierre Trudeau introduced individual rights as a method of muddying the waters in the onslaught by Quebec nationalists on the division of federal-provincial rights in 1968, I supported it, although I was one of the many who predicted that the Charter of Rights and Freedoms, adopted in 1982, would turn our judges into chronic and often idiosyncratic meddlers in almost every aspect of life. The recent Supreme Court of Canada judgments on strikes in the public sector and assisted suicide have confirmed this widespread fear, which is amplified by the Harper government's aversion to contentious non-fiscal issues. In this legislative vacuum, courts, usually with feckless glee, interpret generally formulated rights according to their own tastes in social policy or the state of current opinion.

Our bench, as my distinguished colleague George Jonas wrote several years ago, is "the zeitgeist in robes." The Charter asserts that Canada is founded on recognition of "the supremacy of God and the rule of law." Judicial decisions are not laws, and with this Supreme Court on the loose, God's position should not be a subject of complacency.

The 5-2 decision of the Supreme Court of Canada on Jan. 30 in Saskatchewan Federation of Labour v. Saskatchewan, interpreting the Charter of Rights guaranty of freedom of association (section 2) as the right of public service employees to strike is, on its face, nonsense. Freedom of association does not normally imply any such right. Even before any consideration of matters of public interest and the maintenance of essential services, the court pronounced that that right of association is infringed if there is "substantial interference with a meaningful process of collective bargaining." There is no authority for this

definition other than that, on behalf of the majority of the court, Justice Rosie Abella, a delightful person but a militant supporter of organized labour all her adult life, including carrying water on both shoulders for all the unions in Ontario when she was on that province's Labour Relations Board, said so.

Justices Rothstein and Wagner, in dissent, flatly contradicted the majority and correctly stated that "Democratically elected legislatures are responsible for determining the appropriate balance between competing economic and social interests in … labour relations. Constitutionalizing a right to strike restricts governments' flexibility, impedes their ability to balance the interests of workers with the broader public interest and interferes with the proper role and responsibility of governments … [and] enshrines a political understanding of the concept of 'workplace justice' that favours the interests of employees over those of employers and even over those of the public."

Of course it does. The high court has no authority to try to asphyxiate the rights of the public and its governments in homage to Rosie Abella's nostalgic affection for organized labour, which is a retrograde, Luddite anachronism in an era of proper legislative protection for the rights of employees. The Saskatchewan Legislature would strike a powerful blow for sane government and the public interest if it invoked the Notwithstanding Clause (section 33 of the Charter), and vacated the applicability of this absurd decision, that is of a piece with the rest of this court's passion for affirmative action, feminism, and the soft faddish left. The federal and provincial parliaments should assert their right to define statutes, including the Charter of Rights, and it is time to smack these courts back into their place. The people elected the legislators and the legislators installed the judges, not the other way round.

More serious in its implications was the Supreme Court of

Canada's unanimous decision on Feb. 6 in Carter v. Canada, a British Columbia case, revoking the illegality of doctor-assisted suicide. Again the Charter of Rights and Freedoms was invoked, this time, just as implausibly. Section 7 holds that "Everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice." There is only the most laboured and threadbare attempt to explain how anyone's life, liberty and security are assisted by the right of a doctor to help them commit suicide.

Illogical though the reasoning is, and although it is ostensibly an alteration of the (federal) Criminal Code, this is another egregious direct trespass in the provincial authority over property and civil rights and can be, and should be, partially overturned in the individual provinces. The high court takes unto itself the imposition of the only acceptable grounds for assisted suicide – "the irremediable discomfort (of a) terminal illness" provoking a spontaneous will to die, or the fear of a lingering helpless death. This makes no allowance for doctors' errors, surprising recoveries, or the agitation of greedy or lazy relatives and doctors.

The Supreme Court piously asserts that "a permissive regime will protect the vulnerable" and that "eight jurisdictions," including the demographic immensities of Luxembourg and Switzerland, three U.S. states containing 3% of the American population, and that pillar of the rule of liberal law, Colombia, have "produced a body of evidence about the practical and legal workings of physician-assisted death and the efficacy of safeguards for the vulnerable." Only in the absence of those who were killed. Obviously the survivors who advocated them thought the suicides a howling success. The Supremes scraped the barrel and triumphantly cite the recommendations of the Royal Society of Canada and a committee of the National Assembly of Quebec, giving no hint of what colour of legitimacy distinguishes the opinions of those

unlikely sources (many of the Quebec legislators, it should be noted, were not re-elected last year).

The high court is, but should not be, an opinion-sampling organization, but if it performed that task efficiently, it would not confine recognition of the opposition of jurisdictions representing 99.5% the world's population to superficial references to a few U.S., British and Irish cases.

The experience of the jurisdictions that have taken this step is ambiguous. Canadian adults who want to commit suicide can do so now and doctors so inclined can provide them the best medical methods of doing so, and say that if the dosage is substantially exceeded, death will result. Legally enabling doctors to do that, as many already are, is the farthest we should go. This is a phony issue that makes no allowance for fluctuating mood or conditions, and throws open the door to wholesale disposal of the (usually aged) inconvenient. In the same way, we have fumbled our way into a pandemic of abortions at the opposite end of the cycle of life, because the federal government refuses to address life and death issues, or even to tolerate a debate and non-partisan vote on the point at which the rights of the unborn compete with the right of a woman to control all activity within her own body. A valid case can be made for every variation of the answer, but we should have the debate and the vote.

The court unctuously claims an interest in balancing "the autonomy and dignity of a competent adult" with "the sanctity of life." There is, in fact, not even a doffing of a judicial wig toward the sanctity of life. This is a step to the commoditization of life, the debunking of any spiritual notions of life, and is a usurpation of jurisdiction from legislators who have abdicated their responsibility to clarify the Charter of Rights and to determine who has a duty to live and who may legally dispose of their own or others' lives, sanctity and all. Of course, people will commit suicide, for many reasons and not just that authorized by the Supreme

Court. This measure is redundant in practical terms, and odious in its self-arrogation of rights ultra vires to any court.

The legal disarray is aggravated by the government’s tendency to jam measures together in omnibus bills and ram them through by enforcement of closure of debate. The parliamentarians don’t debate, the legislators don’t legislate, and the judges are writing important laws with spurious rationalizations of vague enabling statutes like the Charter. The one area of federal government proactivity is in its substitution of itself for judges in matters of sentencing, to truckle to the Neanderthals in the most tenebrous thickets of Reaction (who are unlikely to vote for the Liberals or NDP anyway).

Canada’s true path to greatness is as an innovative laboratory for intelligent social and fiscal policy. The high court seems perversely to grasp some of this. But transforming the legislators into mute robots, and leaving a vacuum to be filled by trendy judges who should have bells on their heads like medieval lepers to warn the unsuspecting of their approach, will not get us where we should be going.

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