

**J.J. McCullough**

HuffPost Canada Media Critic

THE BLOG

Canada Is Corrupt When it Comes to Choosing Judges



Here's a fun fact you probably didn't know -- Canadian judicial appointments are among the most corrupt in the entire world. That's the opinion of the human rights watchdog group Global Integrity, at least, who gave the integrity of Canada's judicial appointments a pitiful 32 out of 100 in their 2010 survey on good governance around the globe.

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On whether there's "a transparent procedure for selecting national-level judges" Canada received a flat "no." Our rating on whether "judges are appointed fairly" received an astonishing 17. Angola got 25. Hell, *Bangladesh* got 83.

The Global Integrity people observed a reality Canadians are taught to ignore: a political system in which senior judges are appointed solely by the Prime Minister, with no effort exerted whatsoever in making these appointments publicly visible or democratically accountable.

True, they concede, the current government has started convening a small parliamentary committee to vet appointments to the Supreme Court. Yet this committee "does not exist in law, but simply at the whim of the Prime Minister" and was specifically constructed to have "no power of any kind to resist let alone reject the Prime Minister's appointment." All other judges, and the members of most other senior quasi-judicial tribunals, are selected "without any public process," period.

Official Canadian mythology dictates this secrecy equals independence, which is to say, if ordinary Canadians or their elected representatives -- basically anyone other than the PM and whatever circle of flunkies have his ear -- were allowed to properly scrutinize judicial nominees before installation, the neutrality of the appointees would be compromised. Opinions would be learned, some wouldn't like what they heard, and the ideal of superhuman judges free of any human bias or failing would be lost.

It's a logic that crumbles if you think about it for more than a minute. Faith in an appointment process that's based around *not learning things* in favour of blindly trusting the man doing the picking is astonishingly naive and obviously prone to abuse -- particularly if the man in question delegates his powers to someone else entirely.

Yes, it gets worse. Because they're so busy with other things, our prime ministers have taken to outsourcing responsibility for judicial appointments to small committees of non-government lawyers. The lawyers pick names for the PM and expect a rubber stamp, which they usually get.

Such cliquey committees are dominated by members of the federal and provincial bar associations, and as such constitute a muscular assertion of special interest control over a critical government function. The tradition's helped breed a culture in which Canada's lawyer-judicial complex understands itself to be entirely self-governing, self-regulating, and self-perpetuating. One could say the Canadian judiciary is barely a branch of the government at all

these days, but simply a free-floating thing unaccountable to anyone but the lawyers who get jobs and money from it.

Indeed, the fact that Prime Minister Harper's efforts to democratize Supreme Court appointments have gone nowhere -- why the parliamentary advisory committees have been so pathetic and toothless -- can be directly credited to the strength of the legal community's strident campaigning against anything remotely resembling the dreaded "American model" in which a candidate's fitness for judicial appointment is assessed in (gasp!) an open hearing where their resume and philosophy is permitted to be scrutinized by folks other than their lawyer buddies.

Another good case study was the current Chief Justice's eagerness to lobby Prime Minister Harper about a supposed "issue" with the proposed appointment of Justice Marc Nadon to the Supreme Court last year, as recent gossip has now publicly exposed.

The controversy of Nadon's appointment centred around a vague clause of the Supreme Court Act which left it ambiguous whether the Court's Quebec seats had to be filled by a *current* member of the Quebec bar (which Nadon wasn't) as opposed to a *former* one (which Nadon was).

In March, the Supreme Court itself ruled 6-1 that Nadon was not qualified for an appointment. But we now know the Chief Justice already decided that months earlier.

In defending her lobbying, Chief Justice McLachlin's spokesman claimed her calls to the Prime Minister were merely to raise concerns "well-known within judicial and legal circles" about appointing a judge from Nadon's background, which presumed there not only existed an establishment consensus regarding what the vagaries of the Supreme Court Act really meant, but that the Chief Justice -- despite being only one vote on the court -- was qualified to share it.

It was a tremendously revealing episode of both the single-mindedness of the Canadian legal community and its expectation of preemptive veto over any idea (or judge) that contradicts their conventional wisdom. The Canadian Bar Association, needless to say, expects Harper to apologize.

The press has beenkeen to portray the Prime Minister's discomfort at the Chief Justice's lobbying as a sort of petty "spat" between a principled paragon of judicial virtue and a crass politician craving judicial subservience. And to be sure, the story has legs because of its usefulness as a cipher for the larger conflict between a right-leaning government with a tough-on crime agenda and a left-leaning judiciary eager to undermine it.

But the issue is much broader than a prime minister's satisfaction or displeasure with specific court rulings.

Canada's judicial branch does not exist to uphold the interests of lawyers' guilds or bow to their esoteric groupthink. It exists to ensure that justice is done, and when subjective ambiguities arise in laws and cases (which, let's be clear, is often) they are settled through debates that reflect a diversity of perspectives and opinions representative of Canadian society as a whole.

Canada's closed-door, special interests-driven system of judicial appointments may be efficient and it may be non-partisan (though certainly not non-*ideological*), but it's also a system whose unaccountable, cliquy nature is fundamentally at odds with the substantially more important legal principles of transparency and impartiality.

Thankfully, as establishment figures like the Chief Justice become ever-more brazen in asserting their imagined privileges, we're beginning to get a clearer glimpse at a disgraceful side of Canadian government that's gone ignored for far too long.

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The 2010 GIR covers Albania, Angola, Argentina, Bangladesh, Bolivia, Bulgaria, Cameroon, Canada, Czech Republic, Egypt (Arab Rep.), Ethiopia, Guatemala, Hungary, Italy, Malaysia, Moldova, Morocco, Nigeria, Pakistan, Peru, Philippines, Poland, Romania, Russian Federation, Somalia, South Africa, Tanzania, Timor-Leste, Turkey, West Bank, and Yemen (Rep). This is the complete dataset for 2010.

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