

# Against Elected Judges in Canada

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## **Abstract**

This paper was originally written for Clare McGovern's Political Science 151 course *The Administration of Justice*. The assignment asked students to construct a logical and reasoned argument in four pages or less on a topic that has to do with the Canadian legal system, the one in which I chose was about whether or not judges in Canada should be elected. The paper uses APA citation style.

Regardless of our traditional respect for the courts many today question the legitimacy of the courts decisions and call for some form of judicial accountability, where judges need to answer to the public in some way to maintain the legitimacy of their decisions, which stands in stark contrast to the nature of Canada's judicial independence (Haussegger et al, 2015). After all, the courts have made many controversial decisions that oppose what the public deems right for their society. Look no further than *R v Daviault* (1994) as an example. To this, many people, such as Minkow (2010), suggest that the best course of action is to have judges be elected to their posts. However, one must be wary of the large and numerous potential negatives that come with judicial elections. It is because of the harmful implications on both judges and the court system as a whole that judicial elections should not occur in Canada, while many claims in support of such elections can be dismissed.

There are two major implications on judges when having to participate in elections. The *first* is that an election creates a heavily politicized atmosphere separated upon ideology, and therefore will cause judges to become more ideological in their campaign and their decision-making. This is cemented in Weiden (2011) through the judicial politicization theory where "a politicized judicial selection culture results in a greater tendency for judges to be chosen based on partisan and ideological grounds"(336). Continuing on that, Weiden (2011) then shows how the US court system is far more politicized, and also ideologically influenced, in comparison to that of Canada. What does this have to do with elections? The process of an election is one of the most politicizing events in our society as it puts people against each other based inherently on what their beliefs are. This ideological divide and decision-making within a court system is harmful because it not only creates an institution exactly the same as an elected Parliament, thereby making it useless, it also may cause judges to make bad decisions based on their beliefs and not what the law says.

The *second* implication is that it may cause judges to make decisions in favour of the majority of the public opinion, regardless of the implications or intended meaning of a law, especially if an election is approaching. Some may point to decisions such as the controversial *R v Daviault* (1994) decision to say this is a good thing, but what if the case involved a systematically oppressed minority such as an Aboriginal-Canadian. Whether consciously or unconsciously, discrimination against Aboriginals in Canada still exists today, and this is reflected in public opinion regarding cases involving an Aboriginal individual. If, for example, an Aboriginal was brought before a judge who

had an election coming up and the individual was already perceived guilty by a large part of society, the judge may decide to vote guilty as well to gain favour of the public. It is also shown that judges in the US tend to give harsher punishment, possibly even maintaining a death sentence, to offenders close to an election (Haussegger et al, 2015). This is because “judges facing competitive elections were more likely to vote with the majority and avoid unpopular dissents on politically sensitive issues” (Haussegger et al, 2015, 168). Appointed judges do not have such concerns and can therefore make these types of unpopular but necessary decisions.

Further examination beyond the impacts on individual judges shows how judicial elections will also negatively impact the judicial system as a whole. *First*, elections will draw the attention of judges away from the courtroom to focus on their campaign. This would create a large backlog of cases in an already packed system. For example, in the 2011-2012 year the s.92 “Ontario Court of Justice heard almost 4.9 million ‘events’” (Haussegger et al, 2015, 40). If judges have to do anything other than focus on this large number of cases then most will not be heard. Even in higher courts like a provincial court of appeal or the Supreme Court of Canada, where every case holds a lot more significance due to their constitutional nature, every case that is not heard can have major implications for our society and our rights.

*Second*, with every campaign there is donations, and it is possible that major donors could use their money to exploit judges and their decisions. Take the Supreme Court of Canada for example, which has the power to choose around 70 to 85 percent of the cases that it hears (Haussegger et al, 2015). If a very wealthy individual or large corporation has a case being presented to the court, or is waiting for a case to be heard by the court, and it has given large sums of money to members elected to the court, this individual or corporation could use its donation to exploit and extort judges to hear its case and decide in its favour. If the judge hopes to be elected again they may rely on this individual or corporations donation to finance their campaign and will thus do what is asked of them, the same way it works for elected politicians.

Despite these many reasons against elected judges in Canada, there are still three arguments that people make to support this reform. *First*, judges make bad decisions, such as *R v Daviault* (1994) that gave defendants the right to use “extreme intoxication” as a defence, and are not held responsible. In response to this, the majority of such cases can be overcome by s.1 of the Charter of Rights and Freedoms that allows the government to put restriction on certain rights if it can justifiably demonstrate reasonable limits. If the court still rules against the government and the public and makes a bad decision, such as with *R v Daviault* (1994), the government still has the ability to amend its laws so to make them constitutional under a reference, such as what the government did in quick response to *R v Daviault* (1994). These systems that are in place in Canada still allow the public to have a say in trials even if judges are appointed.

Yet critics will respond further, pointing out a *second* problem about the particular lack of responses available to the governments to check judicial power. There are really only two ways governments can check judicial power: s.1 and s.33 (the ‘notwithstanding’ clause) of the Charter. Even within these two, critics such as Morton (2001) argue flaws. To s.1 critics say that since the

courts actually get the final say on whether a law is justified or not “any half-clever judge can use procedural objections as a pretence to strike down legislation that he opposes for more substantive reasons” (Morton, 2011, 113). As well, to respond to s.33, Morton (2001) states that the costs of using such a clause is very politically high and relatively frowned upon by the media and public, in other words, it’s not really a viable option. However, the courts often lay out what the government can do to justify the use of s.1, such as what happened in *R v Daviault* (1994), where it can then make a new lay that will be justified. As well, in regards to s.33, even though it may not be popular to use a lot of the time, it can be when certain scenarios call for it, such as when Quebec used it on Bill-101 after being struck down by the SCC in *Ford v Quebec* (1998). Therefore, the ability of governments to challenge bad decisions or follow public support on a bill is still readily available if the political will exists. If there isn’t the will to do so then it is probably best to leave the decision in the hands of the courts, and the Charter, anyways.

*Third*, “the court system is no better at deciding what our rights are or should be than are the elected executive and legislative branches of government” (Minkow, 2010, 40) and therefore the “non-elective nature of the judiciary...undermines our democratic character”(40). The response to Minkow (2010) is simple: courts like the Supreme Court of Canada make decisions based only on our society’s most coveted document, the Constitution, and thus serve as a crucial component to our democracy by holding our elected officials accountable to said document, and in turn protecting individuals in our society. Our Constitution exists above that of politics and subjecting the judges to elections and politicizing them will only taint the Constitution’s reputation.

Due to the negative impact on judges and the court system listed above Canada cannot allow our judiciary to be subject to elections. The government has made numerous mistakes itself. Without the ability of the court to correct its mistakes, without consequence, such action could have continued to affect minorities in Canada who are not represented. and need the courts protection the most. An appointed court is the only way to maintain the independence necessary to protect everyone in our society.

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