CANADA'S NEWEST SUPREME COURT JUDGE: HON. MICHEL BASTARACHE

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In hiring and recruitment, it is received wisdom that the best indicators of future performance lie in the past. In the case of the appointment of Justice Michel Bastarache to the Supreme Court of Canada, there is ample evidence that he will be exceptionally prolific, scholarly, clear and concise — a law student's dream. As a member of the Court, he will be a consensus builder who is engaged by the challenges of judicial office: he likes this kind of work. These two observations by themselves support a prediction that Justice Bastarache, with his appointment at the age of 50, will make a significant impact on Canadian jurisprudence.

The appointment of Justice Bastarache might, in some regards, be considered to be against the odds. He succeeds a francophone New Brunswicker, Justice Gerard La Forest. It was claimed by some to be Newfoundland's "turn," or at any rate the turn of one of the Atlantic provinces other than New Brunswick. With Justice Bastarache's appointment, New Brunswickers will have held the "Atlantic seat" on the Court three times out of the most recent four, counting Justices Rand (1943-59) and La Forest (1985-97). On the other hand, it might have been argued, in light of the contributions of Justices Rand and La Forest, that appointing a New Brunswicker *ipso facto* means you get a top-calibre jurist. There were also pressures to appoint another woman to the Supreme Court. At the end of the day, without suggesting that there were not other qualified candidates, Justice Bastarache's appointment went forward on the basis of his merits and the proven quality of his work.

On the face of Justice Bastarache's *curriculum vitae* we can identify a number of important qualifications for a Supreme Court appointment. He is trained in both common law (Ottawa) and civil law (Montreal), and holds a graduate law degree (Nice). He is fluently bilingual; his first professional work was as a legal translator. He has been a law professor, including a period as Dean of Law at Moncton and as Associate Dean at Ottawa. He has practiced, primarily litigation, with Lang Michener in Ottawa and with Stewart McKelvey Stirling Scales in Moncton. He has run a business enterprise, as Vice-President and later President and CEO of Assumption Life, a large Moncton-based company with national and international interests in insurance and real estate.

In addition to these involvements, Justice Bastarache has an extensive record of public service. In the early 1980s, he co-chaired two important committees on language policy in New Brunswick. The Poirier-Bastarache Committee, which held province-wide hearings and prepared a report that continues to serve as a foundation language-policy document, was exposed to a wider range of views and demonstrations of temper than Justice Bastarache can expect to see in the Supreme Court of Canada. He served as the first Director General of the Office for the Promotion of Official Languages for the federal Secretary of State, and as national co-Chair of the "Yes" Committee during the Referendum on the Charlottetown Accord.

In his scholarship, Justice Bastarache has been prolific. While he was a full-time academic for only eight years, he has authored or co-authored three books, *Les droits linguistiques au Canada* (1988), *Language Rights in Canada* (1989) and *Précis du droit des biens réels* (1993), and more than twenty articles, reviews, and other works dealing with minority and linguistic rights, legal education, constitutional reform, real property law and international law, even with judicial selection. Many of these works were completed while Justice Bastarache was engaged full-time as a practising lawyer or as a public servant. The book on real property law was written while he was president of a large business enterprise. Given the quality, extent, and regularity of his scholarly contributions, there can be no doubt that Justice Bastarache has the capacity, the intellectual ambition,

and the discipline to deliver as a Supreme Court Justice.

In the context of these many professional qualifications and formative experiences, Justice Bastarache readily concedes that his most significant experience has been as a father. His two children, Émilie and Jean-François, died from an extremely rare and disabling condition. In an interview with the *Ottawa Citizen* at the time of his appointment, Justice Bastarache acknowledged a particular sensitivity to how the law affects children:[1]

> I think I am much more sensitive [because of personal experience] to the rights of children, and everything that has to do with family law concerns me profoundly. And maybe because of my own life experience I see these things in a different light.
>
> I have looked at many decisions concerning youth violence, for instance, and violence against children. I've done no scientific research on the subject. But very often the crimes committed against children bring smaller sentences than do accusations under the (Criminal) Code that are less important... And I personally can't understand that. My personal experience brings me to question a lot of things... that just seem to be done because they were done before. I like to question the underlying values.

During his two-and-one-half years on the New Brunswick Court of Appeal, Justice Bastarache wrote opinions in almost 100 cases. Of these, a very small fraction are dissenting judgments, and approximately eighty per cent are unanimous. In all but a rare case, judgment was delivered within one month of the appeal being heard. Each of the decisions is a model of clarity, organization, scholarship and, by the standards of the Supreme Court of Canada, conciseness. As was noted earlier, Justice Bastarache will be a law student's dream. His work on the Court of Appeal covers a wide range of subjects, with the greatest impact being in family, administrative, and a mix of private law issues. His constitutional law work has been occasional, the most significant being a ruling that an attempt to extend provincial sales tax to goods purchased off-reserve by Indians for on-reserve consumption violates section 87 of the *Indian Act*. From the perspective of the audience of this quarterly, the most sure predictions about Justice Bastarache's constitutional jurisprudence must rely on his professionalism, his scholarship, his intellectual ability, his experience in public and private life, and his manifest desire to be a good judge.❑

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Judging the Judges

With this number, we begin a new series of comments and essays that evaluate the character, conduct, and record of the judiciary in constitutional matters. We welcome original contributions on the work of judges or courts from a variety of perspectives and disciplines.

[Ed.]

[1] "In touch with the underdogs: Life has taught Michel Bastarache that minorities and children are often seen but not heard" *Ottawa Citizen* (5 October 1997) A7.

CONSTITUTIONAL OPINIONS:

Irving Oil Ltd.* v. *Industrial Inquiry Commission (N.B.) (1996), 174 N.B.R. (2d) 37 (N.B. C.A.)

The issue in this case was whether the Commissioner of the Industrial Inquiry Commission could constitutionally compel the attendance of witnesses. The case involved an application to the Court of Appeal to have the Court set a date for the hearing of an application for an Order quashing a Summons issued to Robert Chalmers, the General Manager of Irving Oil's Refining Division, and prohibiting the Commissioner from attempting to compel the attendance of witnesses in purported exercise of powers granted under section 67(2) of the *Industrial Relations Act*.

Two constitutional grounds were offered in support of the Order. The first ground was that section 67(2) was *ultra vires* the provincial government as an invalid attempt to transfer to a provincial tribunal, powers reserved for superior and county courts under section 96 of the *Constitution Act, 1867*. The second ground was that the summons issued by the Commissioner was a violation of Mr. Chalmer's right to "life, liberty and security of the person" under section 7 of the *Charter of Rights and Freedoms*.

The application was heard by Bastarache J.A., who held that these constitutional issues were not matters properly decided by a motions court and should be decided at trial in the usual way. His reasoning was that the expeditious nature of the motions process is not well suited to constitutional litigation, and only in the rarest of cases should a motions judge decide a constitutional issue. In his opinion this was not such a case. Accordingly he refused to set a date for the hearing of the application.

Miramichi Agricultural Exhibition Association Ltd.* v. *Lotteries Commission (N.B.) (1995), 126 D.L.R. (4th) 557 (N.B. C.A.)

The constitutional issue in this case was whether an Order in Council establishing the Lotteries Commission of New Brunswick was *ultra vires* the province. The Order was not supported by provincial legislation, but was enacted pursuant to authority given to the Lieutenant Governor-in-Council, under section 207 of the *Criminal Code*. In writing the unanimous decision of the Court, Bastarache J.A., held that the matter was governed by the Supreme Court of Canada decision in *R.* v. *Furtney et al.*, [1991] 3 S.C.R. 89, where Stevenson J. held that delegation under section 207 was not a prohibited form of interdelegation. Accordingly, Bastarache J.A., held that the Order-in-Council was *intra vires* the province.

R.* v. *Desjardins (F.) (1996), 182 N.B.R. (2d) 321 (N.B. C.A.)

The issue in this case was whether the imposition of a minimum fine calculated pursuant to section 240 (1.1) of the *Excise Act*, for an offence of illegal possession of tobacco under section 240 (1)(a) of the Act, violated the accused's right not to be subjected to "cruel and unusual punishment" under section 12 of the *Charter*.

Justice Bastarache, writing the unanimous decision of the Court, held that the test to determine whether there was cruel and unusual punishment was one of "gross disproportionality," which would only be found where, having regard to the offence and the circumstances of the offender, the sentence was so unfit as to be grossly disproportionate. Applying this test, Bastarache J.A. determined that the punishment was not cruel and unusual. Three main factors appeared to influence his decision: evidence that smuggling is a major problem in Canada; the provision in question operated on a scale which allowed punishment to be commensurable with the seriousness of the offence; and the fact that the offence in question involved a large-scale operation which increased the seriousness of the offence.

R.* v. *Ouellette (1996), 182 N.B.R. (2d) 306 (N.B. C.A.)

The issue in this case was whether the accused's right, upon arrest or detention, under section

10 (b) of the *Charter* to "retain and instruct counsel without delay and to be informed of that right" had been violated and whether the violation rendered a "certificate of analysis" subsequently obtained inadmissible under section 24 (2) of the *Charter*.

The accused had been charged with impaired driving. He had been informed of his right to counsel, but only after the constable had required him to perform four coordination tests and had demanded that he take a breathalyzer test. Counsel for the accused argued that the certificate of analysis, prepared after the accused had been informed of his right to counsel and had consulted with a lawyer, was inadmissible on two grounds.

The first ground was that the section 10 (b) caution lacked clarity and could be construed to mean that the right to free legal advice was dependent on proof of financial need. Justice Bastarache, writing the unanimous decision of the Court, held that since the accused did in fact consult with a lawyer after the caution was read to him, the effectiveness of the caution in this case was not in issue. He reasoned that the purpose of the caution is to inform detainees of their rights and obligations, and to allow them to obtain legal advice, and this purpose was fulfilled.

The second ground was that the constable's failure to inform the accused of his right to counsel prior to the coordination tests and the demand to take the breathalyzer test, violated the accused's section 10(b) rights and that the certificate of analysis was therefore inadmissible under section 24(2) of the *Charter*. Justice Bastarache held that in order to have evidence deemed inadmissible under section 24(2), two things are necessary. First, the evidence must have been obtained in the course of a *Charter* breach, and secondly, having regard to all the circumstances, admitting the evidence would bring the administration of justice into disrepute. In his view the evidence was not obtained in the course of a *Charter* breach, because the alleged breach had been satisfactorily corrected by the reading of the section 10(b) caution and the opportunity to consult with a lawyer. He further held that in regard to the circumstances, admission of the evidence would not bring the administration of justice into disrepute. Accordingly, the Court found that the certificate was admissible.

R.* v. *Woods (D.J.) (1996), 179 N.B.R. (2d) 153 (N.B. C.A.)

The issue in this case was whether a stay of proceedings was the appropriate remedy for a purported violation of the accused's right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" under section 11(d) of the *Charter*.

A Provincial Court Judge had determined that he was not independent, as a result of his outstanding lawsuit with the province of New Brunswick, and that it was incumbent upon him to issue a stay of proceedings, as the appropriate remedy, to anyone who objected to his hearing the matter. On this basis he stayed the proceedings against the defendant Woods.

In delivering the unanimous decision of the Court, Bastarache J.A. held that a stay of proceedings, under section 24(1) of the *Charter* is available only in the clearest of cases. He determined that the trial judge ought to have asked himself whether the impugned violation was curable by other means, and that there was an absence of evidence justifying a stay of proceedings. Accordingly, he allowed the appeal, and remitted the matter to be assigned for trial.

Saunders* v. *MacMichael (1996), 173 N.B.R. (2d) 49 (N.B. C.A.)

The issue was whether the appellant could raise a *Charter* argument on appeal, despite not having raised the issue at trial and not having submitted the required notices to the Attorney General of Canada and the Attorney General of New Brunswick. Justice Bastarache, writing for a unanimous Court, held that since the required notices were not made in accordance with section 22(3)(b) of the *Judicature Act*, the Court did not have jurisdiction to hear the *Charter* argument.

Smith* v. *Human Rights Commission (N.B.) (1997), 143 D.L.R. (4th) 251

The issue in this case was whether the Human Rights Commission of New Brunswick was a suable entity. The Commission argued that the decision of the Supreme Court of Canada in *Westlake* v. *Ontario* (1973), 33 D.L.R. (3d) 256, was determinative of the issue. That decision held that bodies, like the Human Rights Commission, though legal entities, in that their decisions were subject to judicial review by way of *certiorari*, were not suable entities if the incorporating statute did not expressly or impliedly impose liability to be sued.

However, the respondent Mr. Smith argued that *Westlake* was not determinative of the issue because section 32(1) of the *Charter* had since made such bodies suable entities in order to prevent government evasion of effective *Charter* scrutiny. Justice Bastarache, writing for a unanimous Court, pointed out that Mr. Smith essentially was advancing a "constitutional tort" argument under section 24 of the *Charter*. He reasoned that the raising of a *Charter* argument did not allow the claimant to bypass the ordinary rules of the legal system and that the court must still have jurisdiction over the party being sued in order to deal with the matter. In his view the *Westlake* test was the appropriate one to determine this issue. Applying this test he held that the Commission was not a suable entity, as nothing in the enabling legislation established that the Commission had the legal status to be sued, nor was there anything which suggested that such capacity ought to be implied.

Union of New Brunswick Indians and Tomah* v. *New Brunswick (Minister of Finance) et al. (1996), 126 D.L.R. (4th) 193 (N.B. C.A.)

At issue in this case was whether Indians and Indian Bands were exempt from tax on personal property purchased at an off-reserve location for on-reserve consumption. The case turned on the interpretation of section 87 of the *Indian Act*, which provided a tax exemption for property of an Indian or Band situated on a reserve. The respondent (Minister of Finance) acknowledged that the federal legislation was paramount, but argued that the section did not prevent the province from levying a tax on personal property purchased at an off-reserve location by an Indian or a band, and that such a tax was therefore *intra vires* the province. The respondents' position essentially was that the words of the statute were plain; to attract the exemption, the property must be situated on a reserve at the time when the tax would attach, and thus it was open to the province to attach a sales tax to property purchased off a reserve.

Justice Bastarache, for the majority of the Court, held that the correct test to determine whether the impugned property was tax exempt was one that took into account the purpose of section 87. The purpose, he determined, was to protect Indians and Indian Bands from taxation on personal property which was for "use and consumption" on a reserve. Accordingly, he held that the appropriate test to be applied was the "paramount location test", which focused on the pattern of use and safekeeping of the property; property that was destined for use and consumption on a reserve would be exempt. In applying this test he held that the impugned property satisfied the appropriate nexus to the reserve and therefore allowed the appeal.

OTHER CONSTITUTIONAL CASES:

C.A.S. v. *D.L.S.* (1995), 160 N.B.R. (2d) 316
R. v. *A.T.* (1997), 185 N.B.R. (2d) 397
R. v. *B.P.* (1995), 162 N.B.R. (2d) 62
R. v. *Foster (W.)* (1996), 173 N.B.R. (2d) 289
R. v. *Hachey (P.A.)* (1996), 173 N.B.R. (2d) 17
R. v. *Tomah (L.)* (1996), 183 N.B.R. (2d) 232

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M. Bastarache, *Implementation of the Official Languages Act of the Northwest Territories* (Ottawa, 1987).

M. Bastarache, ed., *Les droits linguistiques au Canada* (Montreal: Éditions Yvon Blais, 1986).

M. Bastarache, *Les droits linguistiques dans le domaine scolaire: guide d'interprétation de l'article 23 de la Charte canadienne des droits et libertés* (Ottawa: Fédération des francophones hors Québec, 1986).

— *Vocabulaire anglais-francais et lexique francais-anglais de la "common law"* (Moncton: Éditions du Centre universitaire de Moncton, 1980).

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M. Bastarache, "Judicial Merit and Selection" (1996) 45 U.N.B.L.J. 21.

— "Language Rights in the Supreme Court of Canada: the perspective of Chief Justice Dickson" (1991) 20 Man. L.J. 392.

— "Les Droits linguistiques (articles 16 à 22)" in G.-A. Beaudoin & E. Ratushny, eds., *Charte canadienne des droits et libertés* (Montreal: Wilson & Lafleur, 1989) 721.

— "Les Droits scolaires de minorités linguistiques provinciales: l'article 23 de la Charte canadienne des droits et libertés" in G.-A. Beaudoin & E. Ratushny, eds., *Charte canadienne des droits et libertés* (Montreal: Wilson Lafleur, 1989) 757.

— "L'accord consitutionnel de 1987 et la protection des minorités francophones hors Québec" (1989) 34 McGill L.J. 119.

— "Education Rights of Provincial Official Language Minorities (section 23)" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1989) 687.

M. Bastarache & A. Tremblay, "Language Rights (Sections 16-22)" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1989) 653.

M. Bastarache, "L'impact de l'entente du Lac Meech sur les minorités linguistiques provinciales" (1989) 38 U.N.B.L.J. 217.

— "La Clause relative à la dualité linguistique et la reconnaisance du Québec comme société distinct" in *L'Adhésion du Québec à l'Accord du Lac Meech: points de vue juridiques et politiques* (Montreal: Éditions Thémis, 1988) 33.

— "Les difficultés relatives a la reconnaissance constitutionnelle des droits linguistiques en Ontario" (1988) 10 R Nouvel Ont 51.

— "Pour une nouvelle loi sur les langues officielles du Canada" (1988) 19 R.G.D. 203.

— "La place du francais dans la common law" in R. J. Matas & D. J. McCawley, eds., *Legal Education in Canada* (Montreal: Federation of Law Societies of Canada, 1987) 513.

— "Commentaire sur la décision de la cour suprême du Canada dans le renvoi au sujet des droits linguistiques au Manitoba, jugement rendu le 13 juin 1985" (1985) 31 McGill L.J. 93.

— "Pour réussir le bilinguisme judiciare au Nouveau-Brunswick" (1983) 24 C. de D. 55.

— "Dualism and Equality in the New Constitution" (1981) 30 U.N.B.L.J. 27.

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