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Straight Talk

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Straight Talk: Dwight Newman

In the latest instalment of its *Straight Talk* series of Q and As, MLI spoke with Dwight Newman, Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan and an MLI Senior Fellow, about a series of high-profile Supreme Court of Canada decisions and their impact on Canadian public policy and democracy.

Dwight Newman is a Senior Fellow at the Macdonald-Laurier Institute and is a Professor of Law and the Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan. He has published numerous journal articles, books on topics ranging from constitutional law to the duty to consult to natural resource jurisdiction, and past reports for the Macdonald-Laurier Institute.

MLI: Why is the Supreme Court getting so much attention these days?

Newman: The Court always plays a major role in the interpretation of Canadian law. But it has also been making decisions on a lot of topics with major policy implications recently, and many observers think it has veered further into policy-making than at some times in the past. MLI recognized it as "policy-maker of the year" last year in recognition of influential decisions on prostitution, Senate reform, and the makeup of the Court itself among others. And it hasn't slowed down, with decisions so far in 2015 on assisted suicide and public servants' right to strike that have made headlines. In addition to this, the Court has decided to overturn a number of its own precedents in recent months and years, so this has grabbed extra attention.

MLI: Do you think the decisions on *Carter* (assisted suicide) and *Saskatchewan Federation of Labour* (government workers' right to strike) are part of a larger trend, and does that concern you?

Newman: Both of them are examples of the Supreme Court of Canada overturning its own very clear precedents, without a lot of explanation of why. In *Carter,* it overturned the *Rodriguez* case and in *Saskatchewan Federation of Labour*, it overturned early case law on freedom of association. In *Carter,* it seemed to imply that the experience of other jurisdictions with assisted suicide showed it was possible to protect vulnerable individuals – but without a detailed engagement with that material. In *Saskatchewan Federation of Labour*, it cited a lot of material that existed at the time the issue was heard before and somehow now reached a different conclusion.

In these recent cases, starting with the *Bedford* case on prostitution, the Court has also put out an invitation of sorts to trial judges to overturn the Supreme Court's decisions when enough circumstances have changed. Although nobody would say the law should be static, these moves are concerning insofar as they really take away from the predictability of the law – that makes life more difficult for everyone. A move away from past precedent should be very carefully explained, and the Court is not doing that.

Unless there's a very good reason for a change, the court should stick with the decision that has been made, otherwise people won't know what the law is. One can only follow the law based on past precedents. So if the court is to overturn previous decisions, it should offer very well-articulated reasons. I'm not convinced in every recent case that they've articulated a sufficiently powerful set of reasons for changing precedent.

MLI: Would you say that there's also a trend that the federal government is at odds with the Court, despite Stephen Harper having appointed most of the current justices?

Newman: The MLI paper on the Court as policy-maker of the year authored by Benjamin Perrin shows that the federal government was on the losing side in almost all the big cases of the past year, and this has not changed in the months since. It is interesting that many of the judgments – like *Bedford* on prostitution or like *Carter* on assisted suicide – are unanimous judgments despite a diversity of viewpoints one would expect from the Court. Chief Justice Beverley McLachlin seems to be getting a lot of unanimous judgments on very controversial constitutional law issues. That may speak to many of the current Prime Minister's appointments not having worked principally in constitutional law before and thus not being as inclined to challenge her long-standing experience in this area as yet, but that could change.

MLI: Do you disagree with some of the legal reasoning in these decisions?

Newman: Aside from the concern about precedent, there is just some surprising legal reasoning in these decisions. Whatever you think of the outcome on the legal issue to be decided, courts have to explain why their decisions are legally correct – their giving of reasons is how we hold them accountable.

In the *Saskatchewan Federation of Labour* case, which affirmed public servants' right to strike, the majority judgment offers up a mass of international and comparative law material and then suggests this determines the contents of a section of the Canadian *Charter*, without a real explanation of why. The majority also simply ignores several important criticisms in the dissent, without trying to offer any answer to them. For example, the dissenting justices point out that international law is less clear than Justice Abella's majority judgment suggests, and she does not really respond to that very central point.

In the *Carter* case, the part that strikes me as very peculiar is that the Court does not draw any careful distinction between "assisted suicide" and "assisted death" and uses the terms quite interchangeably. It is possible for someone to take the view that it does not matter if a doctor helps someone commit suicide versus actually killing someone, but that is a controversial viewpoint – the Court just ignores it in the lack of care in its language and reasoning. I find that very concerning.

MLI: Is the Court making it difficult for Parliament to play its role in legislating contentious social issues?

Newman: The Court's decisions end up creating a lot of constraints. In some instances, Parliament could potentially even find a better way of dealing with some of the issues, but the way the Court's decisions are framed may actually close that off. If governments found some innovative new labour relations system, the Court's recent decision still implies that a public sector right to strike has to be part of it – the Court has made rigid things on which there should be more room for governments to find creative policies.

In many of the toughest cases, these are often difficult questions where there is a balancing of rights or interests. It is quite possible for the Court to make a decision that leaves no opportunity for a policy to be decided democratically, by our elected representatives in open debate, representing the intentions of the electorate.

If the Court's decision applies for some period of time, the consequence is that debate is essentially shut down on the issue, so I think citizens should be concerned about that because on these big issues citizens should be engaged in these issues. They won't all agree, but we'll have a stronger democracy.

In the case of assisted suicide, the court has put Parliament in a situation where it has to do something and do it very fast. Parliament has considered this issue in the past, with legislation that was not passed. The court says that if nothing is done in the next year a declaration comes into force that strikes down the law in part.

MLI: Could one argue that Parliament has failed in its obligation with regard to assisted suicide, and the court has been the last resort?

With regard to constitutionally recognized harms, there is a role for courts to step in, but it could have done it differently. Parliament might want to respond in different ways than what the Court has effectively forced.

If, for example, Parliament wanted to respond with a really good palliative care strategy for Canada to

address the issue of suffering at the end of life, without changing the law regarding physician-assisted suicide, the Court's decision no longer allows for that.

MLI: What is the proper role of the Supreme Court?

Newman: The Court's role is to serve as our final appellate court of law. It needs to interpret and apply the law. Where there are unanswered legal questions, it needs to face those in a manner consistent with our broad legal traditions and develop workable answers that respect its institutional role as a body that decides on legal questions and maintains the rule of law for legislators and citizens to operate within.

MLI: Many express concern about an activist Supreme Court, and many of those simply disagree with the Court's rulings. How does one determine if the Court is being activist in an inappropriate way?

Newman: I think we can look at the strength of its legal reasoning. We can look at whether its answer is explained in terms of law. We can look at whether the way it is put forward is consistent with our legal traditions or seems to depart from them so as to reach a particular result. There are ways to try to define judicial activism more precisely in terms of whether the Court is acting within its role. When it takes on very novel interpretations of certain rights, there is room to say that it has engaged in some degree of activism.

MLI: And do you see evidence of what you call judicial activism with this Court?

Newman: The very novel interpretation of certain rights in these recent judgments seems to reflect a degree of judicial activism. The response of the courts of course is sometimes that their hand is forced, that they are sitting there having to apply the *Charter*. But nothing says they have to keep changing the interpretation of rights that have been long-established in Canadian tradition as opposed to interpreting those rights carefully, in accordance with Canadian legal traditions.

That said, there are areas where I would acknowledge that the Court has what I would call a policy-making role thrust upon it. Section 35 of the *Constitution Act, 1982* on Aboriginal and treaty rights has very broad language and did not have the same kind of tradition of interpretation in Canadian law and related legal systems as something like freedom of expression or freedom of association in the *Charter*. So, the Court has had to make some decisions. In the *Tsilhqot'in* Aboriginal title decision, it made some very important decisions to apply the legal tests it had developed previously, and so I think that's an example where some people may think it was being activist but I think it actually did engage simply in an exercise of legal interpretation. However, I do have some different concerns about that judgment in that when it does have a forced policy-making role, I think the Court needs to think about the consequences of its decision. In that case, they threw in stray lines that they didn't need to that are creating a lot of legal uncertainty, and that's a different problem.

MLI: Does the Court risk being sidelined, for example by use of the notwithstanding clause in the *Charter*?

Newman: If the Court renders decisions that our legislative bodies do not accept, that possibility arises. The *Saskatchewan Federation of Labour* case perhaps raises this prospect the most. In it, the Court created a right to strike within our *Charter* freedom of association guarantee. I think the result is that every limit on strikes will be subject to constitutional litigation.

It is very possible that governments passing back-to-work legislation – in the exceptional circumstances

where they take that step – might not want their back-to-work legislation under an ongoing *Charter* challenge that calls its authority into question. They might start using the notwithstanding clause. And the more precedents there are for it, the more possibility the Court will be increasingly sidelined.

MLI: Use of the notwithstanding clause has been considered to be extremely difficult politically. Could that change?

Newman: That could change in a single moment if the Court rendered a judgment strongly out of step with Canadian values. A few years ago, the lower courts had all struck down the Criminal Code provisions on child pornography, and if the Supreme Court of Canada had not found a way to overturn their judgments and uphold the provisions, I think we would have seen the notwithstanding clause immediately be politically acceptable.

But it could also change gradually. The labour context is one where governments have used the notwithstanding clause before, and the Court has just set things up so that governments may find reason to use it in that area simply to ward off the uncertainty that could be created by ongoing litigation. If it became widely used there, it might lead people to be less wary of it generally. So, I think that the dynamics around it could end up shifting because of that context.

MLI: How should this federal government approach this Court when it comes to drafting legislation that will survive a *Charter* challenge?

Newman: Governments always receive advice on the constitutional validity of their legislation, and this government is no different. I am not sure what to advise when the Court has become less predictable. The government may also wish to be assertive in respect of its policies, even if the Court's new interpretations of the *Charter* would interfere with some of them. So there is always a complex give-and-take, and I am sure the federal government can find constructive paths forward.

RECOMMENDATIONS:

MLI was able to draw the following recommendations from its interview with Dwight Newman.

1. The Supreme Court should be very cautious about overturning precedent and should take great care in explaining its reasons for doing so.
2. The Court should try to leave room where possible for legislators to find solutions to *Charter* issues that are in line with public opinion and democratically debated.
3. Government needs to find a constructive way forward and remain assertive in respect of its policies.

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