Judging Judges: Controversial Projects Survey Lawyers and Law Clerks

Recent academic research projects examining the work of judges have raised questions of ethics, confidentiality, and government funding. Also at issue is the value of such scholarly research.

Surveying Supreme Court Clerks

An American political scientist, David Weiden, has been blocked from inquiring about the inner workings of the Supreme Court of Canada.[1] Weiden's project is funded by the Canadian Studies Grant Program, a federal program to further knowledge and understanding of Canada in the United States.[2] The funding enabled him to contact former law clerks of past and present justices of the Supreme Court.[3]

As soon as she learned of the project, Supreme Court Executive Legal Officer Jill Copeland alerted former law clerks that participation in Weiden's study would violate confidentiality.[4] Copeland warned, "The Court takes the view that confidentiality obligations of current and former law clerks are not limited to information about cases, but also extend to internal processes of each Justice's chambers."[5]

Copeland said Weiden had provided inaccurate information to at least one former law clerk, suggesting that the Court supported the project when they did not.[6] All nine current Supreme Court justices have declined to be interviewed by Weiden and the Court has warned its current law clerks against participating in the project.[7]

According to *Lawyer's Weekly*, who contacted several former clerks of the Supreme Court, opinions on the importance of the project and whether past clerks were bound by confidentiality agreements ranged from one extreme to the other. Université de Montréal law professor Stephane Beaulac, who once clerked for former Justice Claire L'Heureux-Dubé, suggested that the Court went too far in trying to muzzle law clerks. He argued that a rigorous academic study could help dispel myths about the Supreme Court and the roles of law clerks in the

Court's decision making. He believes the confidentiality obligations only extend to specifics of cases and decisions, not to the process itself.[8]

However, David Stratas, a Toronto litigator who once clerked for Justice Bertha Wilson, said that he found the survey offensive and inappropriate. He insisted, "What assignments Justice Bertha Wilson gave me to do 25 years ago is trivia of no scholarly value. When we were employees, we were expected to keep confidences. There is no expiry date on that obligation. It's dubious information of little value and questionable ethics." Stratas also feels that the processes of the Supreme Court are already very open, as their work is scrutinized by lower courts: "You don't need a government grant [to analyze their work], you just need to be able to type at a computer."[9]

Lawyers' Views on Judges

The survey of clerks is only the latest academic survey of the Canadian judiciary to ignite legal controversy this year. In March, concerns surfaced when a federally funded study contacted several hundred lawyers to ask their perspectives on the competency and biases of various judges in Canada. A journalist found "[a]pprehension running high that the results could be used to discipline or discredit judges whose leanings on controversial criminal law issues or the Charter of Rights run counter to the conservative philosophy of the Harper government."[10]

The project, funded by the Social Sciences and Humanities Research Council, was shared between two professors: Lori Hausegger of Boise State University and Matthew Hennigar of Brock University.[11] Their survey asked for evaluations of judges based on fairness, courtroom demeanour, temperament, legal knowledge, willingness to buck public criticism, attitude to defendants based on gender and their general attitude towards the Charter.

Ontario's Ministry of the Attorney General told prosecutors it would not be appropriate to participate in the survey. Some provincial law societies voiced concerns that critiquing judges would violate lawyers' codes of conduct. [12]

Hennigar suggested that discord among lawyers about the survey was not necessarily a bad thing. A concern about "outing of particular judges who have bad evaluations" need not mean harm to the legal system. Instead, the project

could expose problems within the justice system so that they may be dealt with. He emphasized that the aim of the research was to identify weaknesses in the judicial system so that they may be examined and fixed. He and his research partner had considered making the results available only to judges, but felt "that defeats the purpose. If no one else sees it, you don't need to pay too much attention to it."[13]

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[1] Kirk Makin, "Top court order clerks to keep quiet" *The Globe and Mail* (19 June 2009).
[2]Canadian Studies Grant Program *Foreign Affairs and International Trade Canada* (5 March 2009).
[3] *Supra* note 1.
[4] Cristin Schmitz, "Supremely Secret: top court wants law clerks muzzled" *The Lawyers Weekly* (26 June 2009).
[5] *Supra* note 1.
[6] *Ibid.*
[7] *Supra* note 4.
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*