

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

H. Wade MacLauchlan

---

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:<sup>1</sup>

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. □

## H. Wade MacLauchlan

Faculty of Law, University of New Brunswick.

### *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.]

<sup>1</sup> "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.