

Harper attacks head of Canada's Supreme Court

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Canadian Prime Minister Stephen Harper and his Conservative government have mounted an unprecedented attack on the Chief Justice of the Supreme Court, all but accusing her of professional misconduct.

The spat—which has been played out in public over the past two weeks—has caused dismay and alarm in Canada's elite. Numerous legal authorities and newspaper editorialists have taken Harper to task for provoking an unprecedented clash between the judicial and executive branches of government. By impugning Chief Justice Beverley McLachlin, and by implication the Supreme Court, the Harper government is recklessly undermining the legitimacy of the judicial system, they warn.

Harper and Justice Minister Peter MacKay are nonetheless refusing to retract their insinuations of inappropriate conduct.

Many highly cautious legal observers have been forced to concede that the government is seeking to bully the court so as to make it more amenable to its wishes.

"These circumstances leave us concerned that the Prime Minister's statements may intimidate or harm the ability of the Supreme Court of Canada to render justice objectively and fairly," declared eleven past presidents of the Canadian Bar Association in an open letter to the prime minister this week.

The immediate cause of the conflict between the prime minister and the head of the Supreme Court lies in the government's unsuccessful attempt to appoint an obscure Ottawa-based Federal Court judge to one of the three seats on Canada's highest court reserved for Quebec judges or members of the Quebec Bar Association.

Harper's naming of Federal Court Justice Marc Nadon to the Supreme Court last fall stunned the legal community and political commentators.

Already in semi-retirement, Nadon is an expert in a narrow area of law that is rarely the subject of cases argued before the highest court (maritime law) and has no reputation within the legal community for authoring important decisions. His one claim to fame—and no doubt the real reason for his attempted elevation to the Supreme Court—was that he was the only judge to rule that the Canadian government had not violated the rights of Omar Khadr when it participated in his torture.

Thirteen justices, serving on three different courts, ruled on the case the Canadian-born, Guantanamo Bay detainee Khadr brought against the Canadian government for having connived in his illegal detention and torture by US authorities. Of these, only Nadon

ruled that the rights guaranteed Khadr under Canada's Charter of Rights and Freedoms had not been violated when CSIS (Canadian Security Intelligence Service) agents interrogated him at Guantanamo Bay after he had been subjected to sleep deprivation and other forms of abuse by US officials, then handed what information they had pummeled from him to his captors.

From the get-go, the Harper government knew not just that Nadon's appointment would be controversial, but that it could well be successfully challenged on the grounds he didn't fulfill the requirement of being an expert in Quebec's Civil law.

But this gave the government no pause. It was determined to elevate Nadon to the country's highest court, so as to add a judge ready to countenance the most flagrant violations of basic rights and demonstrate in the strongest terms its dissatisfaction with the court's ruling in the Khadr case.

That ruling, it need be noted, was itself a travesty from the standpoint of democratic rights. Although the Supreme Court did unanimously rule that Khadr's Charter rights had been trampled on, it refused to order the government to take any remedial action, saying it didn't want to intrude on the Canadian government's authority to conduct foreign policy. (See: "Canada's Supreme Court rules foreign policy trumps citizens' rights")

In any event, Nadon's appointment was challenged in the courts, including by the Quebec government. This forced Ottawa to refer the matter to the Supreme Court for an expedited judgment. In a 6-to-1 decision issued on March 21, Canada's highest court ruled Nadon's appointment unconstitutional.

The Harper government was clearly incensed by the rejection of Nadon. It let it be known that it was considering flouting the court's verdict. Under one scenario, it was to name Nadon to the Quebec Superior Court and then, having thereby given him the requisite "Quebec" credentials, the very next day reappoint him to the Supreme Court. The better part of a week passed before the government finally confirmed that it would select someone other than Nadon to Canada's top court.

There matter lays until last week, when the government put out the story that Chief Justice McLachlin had sought to speak to Harper and Justice Minister MacKay about the Nadon appointment, but that they, deeming it improper, had refused to take her phone calls. The insinuation was that she had violated the constitutional convention that politicians and judges must not confer about cases before the courts.

Many legal experts have said that had McLachlin acted as the

government has suggested she would likely have to resign.

However, it quickly emerged the events were not at all as the government has sought to construe them. Her attempt to speak to Harper and MacKay occurred before Harper had even named Nadon to fulfill the Supreme Court vacancy. In keeping with her responsibility to advise the government about the working of the court, explained McLachlin in her rebuttal of the government, she merely sought to alert it that there could be legal problems in appointing a Federal Court judge resident in Ontario to one of the three seats on the court reserved for Quebec judges and lawyers.

Harper and MacKay have ducked the question as to why if they thought McLachlin had acted improperly they did not raise it at the time, nor ask the Chief Justice to recuse herself from the Nadon case when it came before the court

The underhanded attack on the Chief Justice has been accompanied by a spate of leaks to the press about the depth of anger and frustration within the government and the Conservative parliamentary caucus over a number of recent Supreme Court rulings. These include cases concerning the federal government's power to make changes to the Senate without provincial approval and elements of the government's reactionary "law and order" agenda, such as mandatory sentencing.

As a show of defiance of the court, the Harper government is reportedly considering invoking the constitution's "notwithstanding clause" so as to give legal force to one or more of their "tough on crime" measures that have been found unconstitutional. Under Canada's constitution, the federal and provincial legislatures can invoke the "notwithstanding clause" to pass laws that violate the rights "guaranteed" in the Charter of Rights and Freedoms. However so controversial is this clause, no federal government has ever dared use it.

In so far as the media has provided any explanation for the government's attempt to sully the head of the Supreme Court—a development they concede has taken the Canadian state into uncharted waters—they attribute it to Harper's penchant for bullying and hyper-partisanship.

In reality much more profound processes are at work.

The government's attack on the head of the judiciary is symptomatic of a mounting crisis and breakdown of Canadian bourgeois democracy.

To uphold the vast increase in social inequality of the past three decades and make working people pay for the global capitalist crisis that erupted in 2008, Canada's capitalist elite is increasingly turning to state repression. Social protests, especially strikes and other working class struggles, are routinely criminalized. Meanwhile, under the guise of the war on terror, longstanding legal-judicial principles like the right to be fully informed of the state's evidence and the right of silence have been overturned and the powers and reach of the national security apparatus vastly expanded.

No section of the ruling elite is fundamentally opposed to big business's class war agenda nor are they committed to defending democratic rights. But the turn toward authoritarianism is generating acute tensions within the political establishment and state institutions; for in breaking with constitutionalism, the bourgeoisie is breaking with forms of rule that have served to

buttress its domination by giving it a facade of popular legitimacy.

The Harper Conservative government has very much spearheaded the assault on democratic rights. Earlier this year it baldly asserted the right to spy on Canadians' electronic communications—telephone calls, text messages, internet use, etc.—at will. And it has defended CSIS and the Communication Security Establishment Canada after they were found to have lied to the courts about their collaboration with the US National Security Agency-led "Five Eyes" spying network.

But in running roughshod over democratic norms, the Harper government has been egged on by much of the elite and faced no serious opposition from any section.

In 2008, when the Conservatives used the arbitrary powers of the unelected Governor-General to shut down parliament so as to prevent the opposition parties from exercising their constitutional right to defeat the government, the support from the corporate media was all but unanimous. The NDP and the Liberals, for their part, meekly submitted, abandoning their challenge to the government and voicing their support for protecting the Governor-General's office and its vast "reserve powers."

The Supreme Court, as illustrated in the aforementioned Khadr decision, has repeatedly accommodated itself to the executive's illegal actions and push for more powers, and often times has itself taken the lead in attacking fundamental rights. In 2011, Canada's highest court ruled that the right to association guaranteed in the Charter of Rights and Freedoms implies no constitutional right to collective bargaining, let alone to strike; it merely means that workers have the "right" to have an organization that will from time to time bring their grievances to the attention of management.

The defence of democratic rights today falls to the working class. It requires the development of an independent political movement of the working class to prosecute the struggle for social equality and against big business and its program of imperialist war and social reaction.



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