

## A rare view into 1980s top court

New book reveals frustrations, divisions among the judges on the Supreme Court

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An unprecedented trove of memos by Supreme Court of Canada judges in the late 1980s reveals a highly pressured environment in which the court's first female judge threatened to quit while another judge was forced out after plunging into a state of depression.

The internal memos -- quoted in a new book about former chief justice Brian Dickson -- provide a rare view into the inner workings of the country's top court, which showed itself to be badly divided at the time. The book portrays a weary bench, buried under a growing pile of complex cases and desperately worried about its eroding credibility.

One faction complained bitterly about their colleagues' dithering and failure to come to grips with their responsibilities, according to memos seen for the first time by the authors of *Brian Dickson: A Judge's Journey*.

The authors -- Mr. Justice Robert Sharpe of the Ontario Court of Appeal and University of Toronto law professor Kent Roach -- also interviewed many former judges and ex-clerks privy to the inner workings of the court at arguably the lowest point in its history.

"The court was struggling with very difficult issues under very difficult circumstances at the time," Prof. Roach said yesterday.

"It was a court that had an incredible amount on its plate and, in retrospect, we were well served by that court."

The chief agitators were Mr. Justice Antonio Lamer and Madam Justice Bertha Wilson.

They attacked colleagues they viewed as unacceptably slow in writing and responding to draft rulings issued by others -- especially Mr. Justice Gerald Le Dain and Mr. Justice Jean Beetz.

"Wilson and Lamer became exasperated by what they regarded as their colleagues' failure to come to grips with the problem," the book says. "Weeks or even months would go by without a whisper of either agreement or dissent from some members of the court."

Judge Lamer was incensed and embarrassed when a ruling dealing with unreasonable court delays was itself delayed for 18 months. He threatened to report the tardy judges to the court registrar with a memo that would be deposited in a special file.

After one of her rulings was delayed for two years, Judge Wilson speculated that "some form of discrimination is at work here." She hinted darkly that she might have to resign.

Mr. Justice Willard Estey also waded into the fray, complaining that the backlogged court had become the target of "journalistic and academic sniping."

The authors said that while Mr. Justice Gerard La Forest was exceptionally hard-working, he consistently took on more work than he could manage.

They said Judge Beetz and Judge Le Dain were perfectionists whose propensity for crafting and polishing was ill-suited to a court that was being overwhelmed by a flood of cases.

"They agonized over every case and, at times, were plagued by indecision," the book says. "Even when they agreed with the result and had only to concur with any opinion written by a colleague, it could take them months to come to grips with having to sign their name."

When Chief Justice Dickson finally launched diplomatic attempts to prod their production, the book says, they resented him for it.

In 1987-88, Mr. Justice Julian Chouinard developed cancer. Judge Estey disappeared for a year to preside over an inquiry and recover from a blood clot. Judge Beetz became seriously ill, while Judge Le Dain broke down under the pressure of writing a ruling on Quebec's language law, Bill 101, and was quickly removed by Chief Justice Dickson.

Judge Lamer later expressed shock when he examined Judge Le Dain's case files and discovered his torment. "He was arguing with himself and sending himself memos and raising issues he really didn't have to raise," Judge Lamer wrote in a memo.

Another internal dispute was fought on allowing intervenors to argue in appeals. Judge Wilson was a major booster of the practice, whereas Judge Estey detested it.

"This court no longer has the time to fritter away sitting and listening to repetition, irrelevancies, axe-grinding, cause-advancement, and all the rest of the output of the typical intervenant," Judge Estey said in a memo, complaining that they were turning the court into "a non-elected mini-legislature."

The book details a fascinating contretemps in 1984 over whether to invalidate all Manitoba's laws because they were never translated into French. One faction feared creating a state of chaos in the province. The other felt Manitoba's intransigence had sealed its fate.

"If Manitoba wants chaos, let them have chaos," Judge Lamer said in a memo.

Chief Justice Dickson ultimately crafted a halfway-house measure, effectively suspending the province's laws while leaving it capable of functioning until they were translated.

The book also quotes former Supreme Court judge William McIntyre as saying the court threw caution to the wind when it came to interpreting the Charter, acting "irresponsibly."

"I agreed with one or two judgments that I would not agree with today," Mr. McIntyre told them. "I think the country was ill-served by the court in the first 10 years of the Charter."

### **Behind the scenes**

*Authors Professor Kent Roach and Mr. Justice Robert Sharpe describe Madam Justice Bertha Wilson's anger over fellow judges who were exacerbating the court's backlog:*

"There was no doubting the depths of Wilson's frustration. . . . Wilson delivered a thinly-veiled threat that she would resign if the situation were not remedied. 'Since I am a reasonably conscientious individual, I am finding the frustration quite intolerable. Is there any solution to this problem, or is it something the first woman on the Supreme Court is expected to endure? I find that at age 60, one is less disposed to bat one's head up against a stone wall! There are more useful things one could be doing with one's remaining time.' "

*The authors describe Mr. Justice Gerald Le Dain's 1988 ouster:*

"For this intense man, who held himself to the highest standards, the burden of writing the Bill 101 judgment proved to be the breaking point. In the late summer of 1988, he suffered a major depressive illness. He never returned to the court. By the fall, he was hospitalized. . . .

"His wife, Cynthia, encouraged by Le Dain's psychiatrist, hoped that he would recover and return to work. It was apparent, however, that even on the most optimistic prognosis, Le Dain's recovery would be slow at best. Dickson was not prepared to wait. He decided early on that Le Dain was incapable of ever resuming his judicial duties. Furthermore, despite Le Dain's outstanding legal ability, from Dickson's perspective he had not been the easiest colleague. Le

Dain's painstaking work habits made him very slow with his judgments, and at times he suffered mood swings that seemed to affect his ability to function.

"Dickson advised Le Dain's wife that he would insist upon the strict application of the Judge's Act, which at the time, required an order-in-council when a judge is absent from judicial duties for more than three months. Le Dain, his family and some of his former colleagues . . . bitterly resented . . . Dickson's . . . action. . . ."