

Supremely secret: top court wants law clerks muzzled

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"It's a very strange mix of awesome responsibility and complete subservience:" an former U.S. Supreme Court law clerk sums up his old job.

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A recent effort by the Supreme Court of Canada to permanently muzzle its law clerks from publicly discussing most of the court's inner workings is "presumptuous" and overbroad, several former law clerks complain.

As more than 300 of Canada's brightest legal minds converged in Ottawa at a Supreme Court-sponsored law clerk reunion June 19, there was a quiet buzz about a recent memo that emanated earlier this month from the office of Chief Justice Beverley McLachlin. The memo advises the court's former law clerks not to participate in an academic survey they received last month from an American political science professor asking detailed questions about their role in the court's ultra-secret decision-making process.

In a June 3 e-mail Supreme Court Executive Legal Officer Jill Copeland warned dozens of former clerks that "the court" considers they would be breaching their confidentiality obligations if they participate in the survey by Indiana University professor David Weiden, co-author of the 2006 book "Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court."

Writes Copeland, "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."

Copeland explains her memo is intended to set straight "inaccurate information" about the court's stance on law clerk participation in the survey. She also notes that the nine current Supreme Court judges have declined to be interviewed by Weiden, and "current law clerks have been advised not to participate in the survey, as doing so would violate their confidentiality obligations."

The Lawyers Weekly sought reaction from seven randomly selected lawyers who clerked at the Supreme Court during a period spanning more than 20 years. They expressed widely divergent views about the possible utility of Weiden's survey, ranging from "important" to "useless" and "boring." The lawyers also differed about what information law clerks can (and should) divulge, and about their own confidentiality obligations.

However, most indicated that they thought the judges were overreaching in their apparent insistence on very broad law clerk secrecy in perpetuity. Commented one recent law clerk who requested anonymity, "I think the court overreacted. There has got to be a statute of limitations on this. It cannot be that 30 years later the chambers of some long-dead justice can't discuss publicly how stuff operated. Canadians are entitled to understand how a public institution operates." Added a longtime practitioner, who said he complied with the court's request not to fill out the survey, "I felt it was presumptuous." In his view "it's a [law clerk's] decision on an individualized basis, but the kind of test I would apply to it is: 'Which parts of the relationship [with my judge] did I regard as the equivalent of the solicitor-client relationship?'"

Another recent former clerk noted, "I found the court's almost obsession with confidentiality a bit strange, simply because if there was a little bit more transparency about how the court worked, I don't think it would in any way harm the court's reputation."

Université de Montréal law professor Stephane Beaulac, who clerked for Claire L'Heureux-Dubé, told The Lawyers Weekly he was "shocked" by the present court's expansive view of secrecy.

"It's barely an exaggeration to say that they would want to shut us up," he said. "I was pretty surprised to see what I think amounts to no less than a blanket prohibition to discuss anything revolving around the process of decision-making at the Supreme Court."

Added Beaulac, "I think it was a little overboard. More specifically it lacks nuances and it's pretty surprising, especially in a court that is in the business, especially when it comes to Charter issues, of balancing interests. I think there are indeed several types of interest at stake and... I don't think this would pass the [Charter's] s. 1-type-test of minimal impairment."

Beaulac said a rigorous academic study would refute widely held misconceptions about the role of law clerks, such as that they function as a junior Supreme Court that actually writes judgments. Generally, he said he sees his own confidentiality obligations as extending to case-specific matters and discussions. "[The judges] seem to really not be willing to be transparent about anything that has to do with the process, and the process, in my opinion, has no need for confidentiality."

Weiden's research project aims to collect the first systematic empirical data on the role and impact of the Supreme Court's law clerks, who number about 700 lawyers, professors and judges. Weiden had not responded to an interview request by press time. The political science professor informed the clerks that his project is funded by the Government of Canada's faculty research program

His study of U.S. Supreme Court law clerks, culminating in *Sorcerers' Apprentices*, is based on the survey responses of 160 former clerks. The authors acknowledge in their book that many of the 600 law clerks they contacted refused to participate in the survey because they considered that doing so would betray the court and violate their confidentiality obligations.

When asked to explain the Supreme Court of Canada's rationale for its position, Copeland told *The Lawyers Weekly* via e-mail "all law clerks sign a conflict of interest and confidentiality declaration at the start of their clerkship. Law clerks have always been subject to confidentiality obligations, and a written confidentiality declaration has been used since the early 1990s. In addition, law clerks are required, under the terms of the Public Service Employment Act, to take the oath set out in s. 54 of the Act, which imposes an obligation of confidentiality."

She elaborated "the confidentiality obligation would not cover information in the public record, for example the fact that law clerks prepare bench memos for the justices, or the criteria for analysis of applications for leave to appeal, which are discussed in a widely available speech by the late Justice John Sopinka given in April 1997."

Added Copeland, "the Supreme Court respects the ability of former law clerks to exercise their professional judgment in abiding by their confidentiality obligations."

But most of the former law clerks who spoke with a reporter were vague and/or hazy about the contents of confidentiality undertakings they might have given the court. One lawyer, who clerked decades ago, said he couldn't recall ever signing such a pledge. "We 100-per-cent signed something," observed another, who clerked after 2000. "I just don't remember what it was or what it said."

Copeland's memo sparked a spirited group e-mail exchange amongst former law clerks. A couple of them said they abided by the court's wishes, but one law professor challenged Copeland to explain "the court's analysis in support of this position. Given past articles written about the role of law clerks at the Supreme Court, and the public importance of the clerk position, it is not obvious to me that answering the questions asked by Professor Weiden would properly be considered a violation of confidentiality, especially after the passage of a period of time... To the extent that specific questions posed by him are objectionable on confidentiality grounds, I would like to know why, and also what questions the court is prepared to answer [and] have law clerks address."

By contrast to south of the border - where U.S. Supreme Court law clerks have featured in academic research and fueled bestsellers like *The Brethren* and *The Nine* - there is little empirical data on the nature and extent of law clerks' influence on Supreme Court of Canada decision-making, said University of Toronto professor Lorne Sossin. In 1996 the former clerk for the late Chief Justice Antonio Lamer published one of the few studies of Canadian law clerks "The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada."

Sossin argues Canadians would benefit from a full and open debate about the appropriate

parameters of Supreme Court secrecy pertaining to law clerks and the decision-making process. "Things that don't pertain to individual cases - such as the life of the court - are a legitimate area for academic inquiry and for greater public awareness," he said.

Weiden's 11-page, multiple-choice survey guarantees anonymity to the participants, who are not asked to identify themselves. However, respondents are asked to disclose when, and for whom, they clerked. Among the 31 questions is: "How frequently were you able to change your justice's mind about a particular case or issue (never, seldom, sometimes, frequently, always)" (see sidebar at left). The ex-clerks are also asked to reveal their "gender, race, religious orientation," their law school and type of law degree, whether they are bilingual, as well as what their political views were at the time they were law clerks: "extremely liberal, slightly liberal, moderate, slightly conservative, extremely conservative. Stated another way, when you were a law clerk, which general ideological framework did you most agree with? Left. Right. [check one]"