Citizens Centre for Freedom and Democracy

Just Between Us

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We can't 'depoliticize' the courts without scrapping the Charter

There was a time when it didn't much matter who sat on the Supreme Court of Canada. All the court did was adjudicate legal disputes. But that was long ago.

Since the Charter of Rights was enacted in 1982, the Supreme Court has taken upon itself to decide what sort of books go in Kindergarten libraries, which medical procedures will be covered by medicare, when stores may be open, how young the age of consent for sodomy will be, where and when Indians may fish and hunt, how many hoops police must jump through to arrest someone, and whether incarcerated criminals may vote.

They rewrite laws, overturn laws and cancel public policies.

We used to elect people to Parliament and Legislatures to make all these decisions after democratic debate, and often to remake them. Now they get handed off as "rights" questions to be arbitrated for all time (whether they make sense or not) by judges appointed by the prime minister.

You'd think that politicians would object to having their most important responsibilities taken away from them, but they don't. It transfers all the most troublesome political controversies to the courts.

Yet, even though the courts now decide political questions, we are endlessly lectured by people like Justice Minister Irwin Cotler and Chief Justice Beverley McLachlin that we must not "politicize" or "screen" judicial appointees to discover what their basic beliefs are.

Which is nonsense. The whole business of judging was thoroughly politicized when Parliament shifted the role of the courts from law to politics in 1982.

It reached a crescendo of hypocrisy this week with the appointment of two feminist Ontario judges, Rosalie Abella and Louise Charron, to fill vacancies on the nine-member Supreme Court.

Paul Martin had campaigned on the need to "democratize" the appointment process. Apparently it was to be somehow "democratized" without being "politicized."

Last week a committee of MPs was therefore hastily assembled and given one day to "screen" the candidates. Except that they couldn't actually talk to the candidates, only to Justice Minister Cotler, who declared proudly that he hadn't interviewed the candidates either.

The two Conservative MPs in this impromptu little posse objected that the whole procedure was a charade, but then didn't dare ask any probing questions themselves about the candidates. Not that Cotler would have answered them if they had.

Such as why the prime minister would appoint two noted gay rights judicial activists to the court just as it prepares to hear his "reference" question on whether Parliament can institute gay marriage, and whether the provinces can refuse to go along if it does.

No politics there!

Instead of this farcical pretense of democracy, the system should be quite straightforward. Candidates should go before a committee of elected MPs from all parties. Candidates should explain their general Charter of Rights attitude, and comment on whether they agree or not with earlier Supreme Court decisions and why.

Parliament should decide which candidate they want in a free vote. The Prime Minister should then submit that choice to the Governor General for appointment.

This would be legal, proper and democratic.

The most important questions by MPs would not be whether the candidates support gay rights and abortion, but whether they will respect the constitutional supremacy of Parliament and the provincial legislatures to make laws.

Only when judges stop ruling on political questions can we avoid "politicizing" the courts.

- Link Byfield

Link Byfield is chairman of the Edmonton-based Citizens Centre for Freedom and Democracy.

"Just Between Us" is a feature service of the Citizens Centre for Freedom and Democracy. The purpose of the Citizens Centre is to improve the quality of life for all Canadians by promoting policies that foster individual initiative and personal responsibility.