

Canadian Justice Review Board

In Alta Certe, Integritatem Hete Principiaque.

The Honourable Irwin Cotler
Minister of Justice & Attorney General of Canada
House of Commons
Ottawa, Ontario,
K1A 0H9

June 24, 2004

Dear Mr. Cotler,

On behalf of the Board, I thank you for your informative response of June 1st to my letter of March 18th to the Prime Minister concerning the issue of judicial appointments to the Supreme Court.

In the interim, the allegation has re-surfaced that the Supreme Court has been stacked with appointees holding certain views that translate into law under the powers given to the Court under the Charter. Whatever the truth of this allegation, the very possibility of abuse and the extent of the mistrust in the current appointment process undermine the reputation of the Court and diminish the respect for the rule of law that is the basis of a just society.

While the Charter is lauded as a shield to protect minorities against the excesses of the majority, we should not forget the struggles over many centuries to achieve our democracy that in essence protects the majority from the excesses of minorities. Clearly there is an innate tension between the Charter and democracy, demanding wisdom and sensitivity on the part of the judiciary.

We must avoid the trap of according a quasi-religious notion of infallibility either to the Charter or to the Supreme Court. The Charter was created by Parliament and the authority to define what is a right and what is not a right must remain with Parliament. A prime new qualification for judges in the Charter era must be a profound understanding and respect for representative democracy and its instrument, the House of Commons.

All this serves to underline the need for substantive Parliamentary involvement in the judicial appointment process. The concern that the process would become politicised overlooks the fact that the current process is already politicised – surely the Prime Minister and his cabinet are not above politics. The objective should be to devolve the power of selection to include Parliament.

Another concern is that substantive Parliamentary involvement would result in a “circus” as has been seen in the USA, and that the threat of such scrutiny would deter some potentially excellent candidates from applying. However, history shows that these “circuses” are very rare occurrences; moreover the transparent selection of suitable candidates is so important to the health of our democracy and justice system that the loss of some candidates must be outweighed by the benefit of assuring the prudence and integrity of the process.

The report of the Parliamentary justice committee tabled on May 10th represents an important symbolic break from the past. However, we remain very concerned that it does not go far enough to give Canadians confidence that an acceptable balance between democratic majority rights and Charter minority rights will be achieved.

Yours sincerely,

David A. Kahn
Vice Chairman