APPELLING SUPREME COURT JUSTICES

The recent appointments to the Supreme Court and the prospect of a few more with impending retirements raise the recurring question of how the members of our highest court are appointed. The present situation leaves much to be desired.

In response to concerns that the public should play a role in appointing those who occupy the increasingly visible and important policy-making role of a Supreme Court Justice, the present Minister of Justice invited the public to make submissions to her concerning the most recent vacancy created by the tragic death of Justice Sopinka. Unfortunately, the result of this well-intended gesture produced the worst of all possible worlds.

The appointment process was no more transparent than past ones. There was still a sense that it was insiders who were asked for and offered opinions. Press reports also suggest that the process became as nasty and divisive as the American confirmation process surrounding Judge Bork and Justice Thomas. The difference, however, was that the public did not see what was happening, those offering advice did not have to take public responsibility for their arguments and the candidates did not have an opportunity to answer questions and defend themselves. We had many of the costs of the American process without any of its benefits.

To be sure, the American process is rough on candidates, but it can serve important educational purposes. The Bork hearings were an unprecedented opportunity for Americans to debate the role of the Supreme Court. A similar wide-ranging discussion in Canada would also be healthy given the new role of our judiciary under the Charter. It would also be dangerous because there is absolutely no consensus about the proper role of the Charter or the judiciary in Canadian society. It is a healthy sign of our ideological diversity that many on both the right and the left take intelligent issue with the whole Charter project and those in the middle hardly agree on issues such as the margin of deference under s. 1, the meaning of equality rights or when unconstitutionally obtained evidence should be excluded.

If we are to move to a more public appointment process, we must be mature about it. We must recognize that we cannot ask those considered for appointment to make campaign promises. There is a wide range of reasonable and legitimate approaches to the difficult questions that the court faces. We should also recognize that a court should have a wide range of
perspectives and views. We should not punish candidates because they have a written record to defend. There is something to be said about knowing more rather than less about a candidate’s opinions and approaches.

At some level, the Supreme Court should be reflective of Canadian society, but it will never be fully representative if only because the pay is so good. What is more important is the ability of judges to put themselves in the shoes of those who must look to the court as an anti-majoritarian institution for justice. In the criminal justice matters which dominate the Supreme Court’s docket, this requires that judges be able to see things from the accused’s perspective and also perhaps from the crime victim’s perspective. Being a woman, a minority, or an Aboriginal person may help a judge to see things from another’s perspective. There are, however, no guarantees.

The Supreme Court is largely concerned with criminal justice matters, but it would not be healthy to have a court of nine criminal justice specialists. A specialist who had made his or her living as a defence lawyer or prosecutor may not have the same openness of mind as someone who is encountering criminal justice for the first time. It is healthy that traditional concepts be challenged by those who approach criminal justice anew. Nine without any criminal justice experience would not, however, be a good idea. All members of the court will have to contribute to the complex debates about criminal justice.

The court’s involvement in criminal justice matters also counsels against an openly partisan approach such as allowing a Parliamentary committee to confirm candidates. Politicians often try to win votes on crime issues and it would be unedifying to require candidates to explain whether their view on crime was closer to the Liberals, Reform or the Bloc Quebecois, even if these questions were nominally couched in terms of questions about the candidate’s interpretive approach to the Charter.

A nominating council with diverse and notable representatives from the public, the bar, the academy and various non-governmental organizations may be a better idea. They could nominate a short list of candidates who could be publicly interviewed by the council. This would provide the benefits of transparency and public education available in the American system without the costs of partisanship that would occur should a Parliamentary committee conduct confirmation hearings. A similar approach is now used in South Africa. Candidates could provide an opening statement about their approach to judging, something like the speeches that justices frequently give on that topic after their appointments. Candidates should not be questioned about their private lives or how they would decide specific cases, but their general approach to judging and past experience should be open for discussion. Someone not willing to go through this public process is probably not well-suited to the public exposure and criticisms that eventually fall on all members of the court.

After this process, however, the ultimate call should probably remain the Prime Minister’s if only to preserve some link to the electorate. The decision should, however, be based on the candidates’ merits and performance at the public interviews and not on the basis of whatever private information or opinions come over the transom from the well-connected and the unaccountable.