

A tale of two (Supreme) courts

EDITORIAL

THEY BOTH HAVE NINE judges, but the highest courts of the land in Canada and the United States could hardly be more different in both their makeup and their behaviour.

Members of the U.S. court are lifetime appointees, and their positions on the law invariably reflect the party that appointed them, and while 40 per cent of American voters describe themselves as independents, none of the nine Supreme Court judges currently seems capable to adopting positions that reflect any independence.

At present, five of the nine are Republican appointees, and all but two are from the east coast, the exceptions being Stephen Breyer, a native of California appointed by Bill Clinton, and Colorado native Neil Gorsuch, Donald Trump's first appointee.

The methods of appointment could also hardly be more different. In Canada, the appointments are by order-in council, with the prime minister having an unfettered right to pick the appointee, subject only to provisions of the British North America Act. In recent years, the only time a prime minister has failed in a bid to name a Supreme Court judge was when Stephen Harper nominated a member of the Federal Court of Appeal to one of the three positions on the court which the BNA act has reserved for Quebecers, the Supreme Court ruling that he was disqualified because at the time he wasn't a member of the Quebec bar.

U.S. presidents have an unfettered right to nominate appointees but the U.S. Senate has the final say on whether a nominee will sit on the court. This requirement became a stumbling block for Barack Obama when the Republican-dominated Senate refused even to hold hearings on his nominee to fill a vacancy on the court, on grounds it was too close to the 2016 presidential election.

One area where the two courts have followed similar paths is in the gender of appointees. Both courts were male bastions until the 1980s, but President Ronald Reagan broke the gender bar in 1981 with his nomination of Sandra Day O'Connor, who retired in 2006. Pierre Trudeau followed a year later with his appointment of Bertha Wilson, who retired from the court in 1991.

Today, both courts have three female members. In the U.S., all three ? Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan ? were appointed by Democratic presidents Clinton and Obama, all Republican presidents since Mr. Reagan having picked males, the latest being Brett Kavanaugh. (In 2006, George W. Bush replaced Ms. O'Connor with Samuel Alito, leaving Ruth Bader Ginsberg as the only woman on the court until Ms. Sotomayor's appointment in 2009.)

One of the ironies in the current situation is that while only the U.S. Constitution requires a division of powers among the executive (headed by the president), the legislature (Senate and House of Representatives) and judiciary, politicization of the judiciary has led to a single party having effective control of all three branches.

Thanks largely to tradition and our parliamentary form of government, we actually enjoy something closer to a division of powers. Although we currently have a majority government with a prime minister therefore able to pick both the head of state (the governor-general) and members of the Supreme Court, tradition holds that both the G-G and our top court are above politics. Little, if anything, is known as to how U.S. presidents go about picking Supreme Court nominees, but obviously the selection is made from among judges known to be members of the president's party.

Here, on the other hand, the current process involves the prime minister selecting from a short list provided by a panel with some expertise.

And the one thing we don't have and hopefully never will, is the sort of fractious Senate hearing we witnessed concerning Justice Kavanaugh.