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Activists should turn to courts to protect individual freedoms

The charter of rights has given Supremes vast power over public policy

JOHN CARPAY

In view of how powerful are nine lawyers on Canada's highest court, the nomination of Marshall Rothstein should have earned far more media coverage than it did. And the questions put to Rothstein by MPs, prior to his elevation to the Supreme Court, should have been far more probing.

Most Canadians don't yet appreciate the full impact of the Canadian Charter of Rights and Freedoms that was added to our constitution in 1982. Canada abandoned its parliamentary democracy for an American model of "constitutional democracy," in which non-elected judges exercise substantial legislative power. Before 1982, Canada's Parliament and legislatures were sovereign; activism in the democratic political arena was the only way to bring about policy change. But now Canadian judges - like their U.S. counterparts - play a very active role in shaping public policy on complex issues like abortion, the rights of criminals, the

definition of marriage and the scope of health care and other government programs.

The Americans have had their constitutional democracy for 230 years, so they know that court decisions are inherently, necessarily and unavoidably political. For example, in the 1857 Dred Scott decision, the U.S. Supreme Court upheld slavery, ruling that the abolition of slavery violates the property rights of white men. Those who think that judges are more enlightened than elected representatives should consider the words of the then chief justice Roger B. Taney, who described blacks as "beings of an inferior order and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they have no rights which the white man is bound to respect."

It is because Americans recognize that their judges do, in fact, exert vast political power that the president's nominee is subjected to

questioning by senators, who have the power to reject that nominee. In Canada, the very political process of appointing judges takes place behind the closed doors of the prime minister's office, without transparency or accountability.

In recognizing the courts' power to shape public policy, Americans have also created numerous legal foundations that advocate philosophies from across the political spectrum. For example, the Institute for Justice in Washington, D.C. represents individuals in their fight for private property rights, economic liberty, freedom of speech, commercial freedom, racial equality and the right of parents to raise their children free from state interference.

The institute recently won a victory for Lillian Anderson to earn a living by braiding hair. The Minnesota Cosmetology Board had shut down Anderson's clean hair-braiding salon because she had not taken 1,550 hours of cosmetology training. Ironically, this cosmetology training teaches nothing about hair braiding, while costing up to \$14,500 in

tuition. The institute sued the cosmetology board, which then agreed to change its rules and policies.

In Canada, judicial advocacy has been dominated by taxpayer-funded left-wing groups like the radical feminist Legal and Education Action Fund (LEAF). The secretary of state and the Court Challenges Program have given millions of tax dollars to special interest groups to advance their political agendas through Canada's courts.

LEAF and other groups have argued that the Charter's Section 15 equality rights do not mean that the law must be applied equally to all people regardless of race, age, gender and other factors. Courts have gradually adopted the view that Section 15 equality rights should mean equality of condition, or equal outcomes, to the detriment of individual freedom and true equality before the law.

However, last year's Chaoulli decision by the Supreme Court on health care is a welcome sign that litigation on matters of

public policy need not always favour a philosophy of larger government at the expense of individual freedom. In striking down Quebec's law that prohibited the purchase of private medical insurance, the court noted that access to a waiting list is not access to health care, and that waiting lists cause irreparable physical harm and even death. While not expressly affirming property rights or other economic liberties, three judges ruled that a rigid government monopoly violates the Canadian Charter's Section 7 right to life, liberty and security of the person.

Looking to the Institute for Justice as a model, concerned Canadians should build on the Chaoulli decision by challenging repressive health-care laws in other provinces, as well as other laws that run counter to individual freedom, property rights and economic liberty.

In a constitutional democracy, where judges wield real power over public policy, those who cherish individual freedom cannot afford to remain silent in court.