

Damn The LawProfs!

Stephen Harper Makes Sense

By Professor Ted Morton

The Globe And Mail - January 27, 2005

In our book *The Charter Revolution and the Court Party*, Rainer Knopff and I describe the Supreme Court of Canada as the new vanguard of the intelligentsia. By this, we mean that the court has become the preferred means of the "new" post-materialist left to bypass the democratic process and impose its preferred "progressive" policies by means of judicial fiat.

This informal alliance of new left groups and causes - the Court Party - includes the official (i.e., publicly funded) advocates of feminism, aboriginal rights, gay and lesbian rights, official bilingualism, environmentalism, and multiculturalism and immigration rights. Court Party partisans are especially numerous in the national media, government bureaucracies, public-sector unions, the legal profession, the upper Liberal and NDP echelons and, of course, universities.

While the professoriate is generally aligned with the Court Party, law professors are uniquely privileged. They speak the same language as the judges, and the same dialect: Charterese. Unintelligible to the rest of Canadians, these legal syllogisms now purport to dictate public policy in broad swaths of Canadian life. LawProfs are instrumental in developing Charter arguments to advance their political causes; play an active role in the advocacy groups that bring these cases to the courts; then praise and defend the judges who accept these novel interpretations. Many, of course, not so secretly aspire to judicial appointment. Knowledge is power, and the new knowledge class is not keen to give it up.

Thus it should come as no surprise that 134 law professors have banded together to attack Conservative Leader Stephen Harper's claim that Parliament can and should reaffirm the traditional definition of marriage and can do so without resorting to the use of the dreaded notwithstanding power.

When you clear away the legal obscurantism, the LawProfs' message is quite simple: The Charter is Canada's new religion; the judges the new priests; the notwithstanding clause original sin; and Stephen Harper the devil.

So what is the basis of Mr. Harper's great sin? He has observed, correctly, that lower court rulings declaring traditional marriage unconstitutional were dealing with a common-law definition of marriage that was more than a century old. This made it easy to attack in court. First, it was alleged to be out of date. Second, common law means "judge made" law, a legal precedent. All the lower court judges were being asked to do was to "update" a decision made by other judges long since dead. No judicial activism or democratic deficit in this.

The picture changes, however, if Parliament were to restate the traditional definition of marriage as a statute, as Mr. Harper and the Conservatives advocate. Gone would be the self-serving legal chestnut about judicial updating of the living constitution. Gone would be the simple invitation for new judges to update the decision of old judges. Now the courts - and, ultimately, the Supreme Court - would be asked to overrule the official law of

Canada, a contemporary expression of the considered judgment of the body elected by Canadians to make the laws that govern Canadians. Is this an invitation that the Supremes are going to accept?

Mr. Harper suggests not. He says the Supreme Court, when given the opportunity to rule on the constitutional validity of traditional marriage last month, declined. The Supremes not only declined, they said it was for Parliament, not the courts, to take primary responsibility for resolving the marriage issue. To their credit, they refused to do Paul Martin's dirty work for him.

What Mr. Harper is suggesting is that, in this new context, the Supremes might again defer to their elected counterpart - Parliament. He also pointed out, correctly, that lower court judges are supposed to follow Supreme Court precedents, not vice versa.

The real howler in the LawProfs' Harper letter

is their warning that Mr. Harper's position "leads us to suspect that you are playing politics with the Supreme Court and the Charter." This - from a group that has perfected the use of strategic interest group litigation to advance their favourite political causes through the courts. This - from the same group that lobbied for Paul Martin's appointment of two well-known pro-gay-rights activist judges to the Supreme Court just six weeks before the court was to hear the gay-marriage reference.

The Supreme Court lost its political virginity a long time ago, and it is a bit late in the day for the LawProfs to pretend otherwise. They close their letter with a warning to Mr. Harper that "you must be completely honest with Canadians about the unconstitutionality of your proposal." Yes, a little honesty about the courts and the Charter would indeed be refreshing, but don't expect it from the LawProfs.

Ted Morton is a professor of political science at the University of Calgary and the Tory MLA for Foothills-Rocky View