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## SELECTING THE SUPREMES: THE APPOINTMENT OF JUDGES TO THE SUPREME COURT OF CANADA

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### I. INTRODUCTION

The classic problem in political theory and institutional design is the simple question, “Who shall guard the guardians?” Especially when judicial power is an increasingly visible dimension of legitimate political authority, a challenge of comparable significance is, “Who shall appoint the judges?”—particularly the judges of the nation’s highest court. For much of the country’s history, Canadians have shown a surprising indifference to this question, despite the fact that our southern neighbours from their beginning established a check-and-balance mechanism for this important function. The fact that the use of that mechanism has been sporadically controversial has somehow always seemed to suggest only that the Americans had gotten the answer wrong, not that Canadians had somehow missed the question.

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But a new Canadian prime minister may have nudged the country beyond its indifference. Shortly after taking office in December 2003, Liberal Prime Minister Paul Martin spoke of the need to address a “democratic deficit,” with the appointment of Supreme Court judges as one element of this larger problem. He promised to make the process more transparent and more accountable, and charged the House of Commons Justice Committee with conducting public hearings in order to come up with a set of recommendations or alternatives. The context of these comments was an anticipated retirement in 2006, but they became more pressing in the spring of 2004 when two Supreme Court justices unexpectedly announced their retirement. As if to demonstrate precisely what was at stake, the Supreme Court ended the term with several five-to-four decisions, including the clearest statement to date of the meaning of “freedom of religion” under the Canadian Charter of Rights and Freedoms.<sup>1</sup> The reduction of the Liberals to a weak minority position in the June election highlighted the anomaly of an unfettered Prime Ministerial discretion in making appointments; but when two new Supreme Court appointments were announced in August 2004, the “new” process involved only the most minimal of concessions.

With that recent history as background, this paper will begin by identifying five important but easily overlooked differences between the American and Canadian judicial systems. From that point, it will describe the Supreme Court of Canada and its place in the Canadian judicial system, explain the appointed process for the Court and the way this process has changed in recent decades, identify the major challenges in devising a functional appointment process, and describe and discuss some of the proposals that have been made for change.

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1. The two cases were *Syndicat Northcrest v. Anselem* 2004 SCC 47 and *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)* 2004 SCC 48; both were handed down on June 30, 2004. Even more intriguing: The five-judge majority in both cases included both the judges (Arbour and Iacobucci) who have since retired from the Court.

## II. THE CANADIAN AND AMERICAN COURT STRUCTURES BRIEFLY COMPARED

At first glance, the Canadian and American judicial systems—and specifically the place of the respective Supreme Courts within them—could scarcely be more similar. Viewed in a global context, this initial impression is fully justified. Both high courts operate within a federal system based upon the English common law, assuming generalist judges with explicit and effective guarantees of judicial independence; multi-judge panel appeal courts immediately below the highest court; and solo-judge trials (sometimes with juries) in the courts of first resort. These characteristics sharply differentiate them from the world's most common and most widely imitated judicial system, the continental European model.

At the same time, however, the similarities do not run as deep as might at first be assumed, and several discontinuities are important:

*First:* The United States Supreme Court is fully entrenched within the American Constitution; although Congress may make some constrained unilateral interventions regarding its jurisdiction and procedure, the basic elements of the Supreme Court and its practices are protected not only by a strong public opinion but also by a formal document that can only be altered through difficult formal procedures.<sup>2</sup> The Supreme Court of Canada, by contrast, appears only in the form of a permissive clause in the Constitution Act 1867,<sup>3</sup> and was created (and continues to be sustained) by a simple Act of Parliament, several times amended, which defines the institution, its composition, its jurisdiction, and its practices.<sup>4</sup> Although the subsequent

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2. See U.S. Const. art. III, § 1 (establishing Supreme Court); U.S. Const. art. V (describing procedures for amendment of Constitution).

3. 30 & 31 Victoria (U.K.), available at [http://laws.justice.gc.ca/en/const/c1867\\_e.html](http://laws.justice.gc.ca/en/const/c1867_e.html). The relevant provision is in Art. VII c. 101 (accessed Feb. 22, 2005; copy on file with Journal of Appellate Practice and Process).

4. The current version of the Supreme Court Act is available at <http://laws.justice.gc.ca/en/S-26/text.html> (accessed Feb. 22, 2005; copy on file with Journal of Appellate Practice and Process).

Constitution Act 1982<sup>5</sup> purports to put some features of the SCC beyond simple parliamentary control (such as the “composition” of the Court), this is done in such a clumsy fashion that many constitutional experts believe these clauses to be of no effect at all, leaving the Court as an artefact of the legislative will of the national Parliament.<sup>6</sup>

*Second:* Both the USSC and the SCC stand simultaneously at the top of a structure of purely national courts and the parallel pyramids of state and provincial courts; each is the highest court of appeal and the source of binding authority for both sets of courts. But in the United States, the overlap is not complete and there is an important category of law—questions of the meaning or the validity of purely state law—that cannot be referred to the USSC. In Canada, the Constitution Act 1867 provides for the establishment by Parliament of a “General Court of Appeal” and there is no question of law that could not at least theoretically rise to consideration on the merits by the Court.

*Third:* The American system of federal courts is extremely extensive, comparable in terms of both the number of judges (trial and appellate) and the size of its docket to the judicial system of the largest of the states; but in Canada the federal courts are much more modest in scope and jurisdiction, comparable at most to one of the smaller provinces. (The numbers for Nova Scotia provide the best fit.) This is reflected in the caseload of the respective Supreme Courts: In recent years, eighty-five percent of the docket of the USSC has been devoted to appeals from the federal courts, and fifteen percent to appeals from state courts; over the same period, the docket of the SCC is a perfect mirror image, with eighty-five percent of the cases coming from provincial courts and only fifteen percent from the federal courts.<sup>7</sup> It is also reflected in the personnel who staff the respective courts: At present, and not atypically, seven of the justices of the USSC have been elevated from federal

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5. Enacted as Schedule B to the Canada Act 1982 (U.K.). See *id.* at Part V c. 41 (allowing for amendment of provisions relating to Supreme Court only upon resolutions of the Senate, the House of Commons, and the legislative assembly of each province).

6. See e.g. Peter W. Hogg, *Constitutional Law of Canada* 78-79 (4th ed., Carswell Leg. Publications 1997).

7. Peter McCormick, *Elections, Presidents and American Federalism: The Lessons of Bush versus Gore 2000*, in *Braving the New World: Readings in Contemporary Politics* 221 (Thomas Bateman & Roger Epp, eds., 3d ed., Thompson Nelson Learning 2004).

courts and one from a state court, while one came to the USSC without prior judicial experience; but as a regular practice over several decades, seven of the judges of the SCC have been elevated from provincial courts of appeal, one from the federal court, and one lacks prior judicial experience.

*Fourth:* In the United States, judges of the federal courts of appeals and justices of the Supreme Court are appointed in similar ways, but the staffing of state courts is completely separate (and varies significantly from one state to another<sup>8</sup>); in Canada, the staffing of the provincial superior courts (i.e., all but the very lowest level of trial court), of the federal courts, and of the Supreme Court itself is handled by the same set of authorities on similar principles and criteria. There is therefore a recurrent potential for friction between the higher state courts and the USSC that has no counterpart in Canadian practice.

*Fifth:* It is widely accepted in American practice that partisan differences have deeply penetrated the judiciary, less in the sense of any patronage than in the form of ideological differences that are both intentional and persistent. Judges appointed by (or elected as) Democrats behave differently and support different legal values and priorities than judges appointed by (or elected as) Republicans, not to such an extent that these different judges cannot engage in a professional discourse and work from a considerable set of shared values and procedures, but certainly to such an extent that any study of judicial behavior will routinely include the partisan variable. In Canada, the situation is rather different. Studies of judicial behavior do not generally include the partisan variable and when they do, it yields nothing of value; but, more importantly, it is not generally accepted that the appointment process is or should be driven by considerations of this sort.

This leaves us with something of a paradox: The Canadian and American judicial systems in general, and their Supreme Courts in particular, are arguably more similar to each other in

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8. See e.g. Paul Brace & Kellie Sims Butler, *New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project*, 22 *Just. Sys. J.* 243, 247 tbl. 1 (2003) (showing different selection methods for judges of state appellate courts) (available from the National Center for State Courts at [http://ncsconline.org/WC/Publications/KIS\\_AppCtsJSJV22No3.pdf](http://ncsconline.org/WC/Publications/KIS_AppCtsJSJV22No3.pdf)) (accessed Feb. 22, 2005; copy on file with *Journal of Appellate Practice and Process*).

more respects than either is to any other judicial system in the world; but at the same time, there are important structural differences between them that make casual generalization extremely dangerous.

### III. A BRIEF HISTORY OF THE SUPREME COURT OF CANADA

#### *A. The Early Supreme Court*

The Supreme Court of Canada was not created by the 1867 British North America Act,<sup>9</sup> which is the closest thing to a founding document as one can find in Canada's gradualist evolution to full formal independence. There are several reasons for what now appears to be a curious omission. One may simply be that the notion of complete appellate hierarchies, topped by national high courts, is standard today but was considerably less so in the nineteenth century.<sup>10</sup> A second is that Canada already had (and retained even after the creation of the Supreme Court) a "higher" court in the form of the Judicial Committee of the Privy Council, a court-like body whose membership partially overlapped the House of Lords, and which had ultimate judicial authority over the off-island parts of the British Empire.<sup>11</sup> And a third was the reluctance of a not inconsiderable number of Canadians—most critically, the French-Canadians of Quebec, for whom a Supreme Court would necessarily be dominated by their not-always-understanding English-Canadian compatriots—to accept the authority of a national high court, which made the distant Judicial Committee a more attractive and more plausibly neutral final authority. A highly unpopular Judicial Committee decision (dealing with the burial of a suicide in a Catholic

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9. The British North America Act was subsequently renamed the Constitution Act 1867. See *supra* n. 3.

10. Until as recently as the 1960s, only some of the Canadian provinces had established separate full-time courts of appeal to cap the provincial judicial hierarchy, with a number of provinces relying instead on en banc panels drawn from the provincial superior trial bench. The tenth and last province—Prince Edward Island—established its Court of Appeal in 1987. Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson 1987).

11. For a description of the Judicial Committee, see Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* ch. 2 (Lorimer 2000).

cemetery)<sup>12</sup> created the window of opportunity, however, and in 1875 the Canadian Parliament passed the *Supreme Court Act* (although the Court was not strictly Supreme in that its decisions could still be appealed to the Judicial Committee, and by mutual agreement of both parties an appeal from a provincial court of appeal could bypass the Supreme Court and go directly to the Judicial Committee).<sup>13</sup>

For a considerable period after its creation, the Supreme Court of Canada did not enjoy a high profile or reputation. Several factors contributed to this. One, of course, was the fact that Canada did not then have an entrenched bill of rights, so the Court's constitutional cases were almost entirely concerned with the federal/provincial distribution of legislative powers. More generally, judges were constrained by conventions directing a strictly formalist, rather than a creative or activist, reading of legal and constitutional texts. The second was that it existed under the shadow of the Judicial Committee; it was not that an inordinately large number of decisions were appealed, or that they were reversed unusually frequently, but the Supreme Court was diminished both by the possibility of appeal and also by the rather casual indifference with which the Judicial Committee often treated the Supreme Court's deliberations.<sup>14</sup> And a third was the high stature of some of the provincial courts of appeal, most notably that of Ontario. To put it delicately, it was not always the case that appointments to the Supreme Court could draw the strongest candidates, and this created something of a vicious circle: Appointment to a mediocre court was not attractive to the best potential judges, but the court could not rise above mediocrity until it began drawing stronger appointments.

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12. *Brown v. Les Curé et Marguilliers de l'Oeuvre et Fabrique de Notre Dame de Montreal* (1874) L.R. 6 P.C. 157. This decision is commonly referred to as the "Guibord case." For an interesting discussion of the case, see Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* 15-18 (McGill-Queen's U. Press 1992).

13. The bypass was not an uncommon procedure; a total of 667 cases were appealed to the Judicial Committee after 1867, and 414 of them went directly from a provincial court of appeal, bypassing the Supreme Court altogether. James G. Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* 180 (U. Toronto Press 1985).

14. This is perhaps best illustrated by the famous occasion in the nineteenth century when the Chief Justice of Canada announced a decision but declared that the Court would not be delivering reasons because the losing party had already indicated an intention to appeal and (he suggested) the Judicial Committee rarely paid any attention to the reasons. McCormick, *supra* n. 11, at 9.

When Americans debate who were the best USSC justices in history, the lists reach right back to the early years; when Canadians do so, the lists are completely dominated by recent justices with at best one from the Court's second quarter-century (Duff) and one from the third (Rand).

### *B. The "Truly Supreme" Supreme Court*

It was not until 1949 that Canada formally ended appeals to the Judicial Committee. A previous attempt having failed, the amendment to the Supreme Court Act was delayed until an advisory opinion of the Judicial Committee confirmed the capacity of the Canadian Parliament validly to enact such a measure.<sup>15</sup> At the same time, the Court was expanded to its current size of nine justices, at least three of whom must be appointed from the bar of the province of Quebec.<sup>16</sup>

There was clearly a double reason for the shift to an ending of appeals beyond the Supreme Court of Canada. The more general one was that it was a logical culmination of the shift from Empire to Commonwealth, from countries subordinate to the "Imperial Parliament" to kindred nations allied to Britain, that had been formalized after World War I in the Statute of Westminster.<sup>17</sup> In the light of this evolution, it became increasingly anomalous for the all-but-formally independent countries of the Commonwealth to remain subordinate to an English quasi-court.<sup>18</sup> The more specific reason was a profound dissatisfaction with the way in which the Judicial Committee had handled the question of the federal/provincial distribution of

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15. *A.-G. Ont. v. A.-G. Can.* (Privy Council App.) [1947] A.C. 127.

16. The reason for this guarantee of representation, not paralleled for any other province, is the fact that Quebec is the only civil-code province in an otherwise common-law country.

17. Statute of Westminster, 1931 (22 George V, ch. 4).

18. It is striking, however, to consider that decisions of the High Court of Australia could be appealed to the Judicial Committee until 1985. See Australia Act of 1986 (No. [142] of 1985) § 11 (available at [http://www.foundingdocs.gov.au/places/transcripts/cth/cth\\_pdf/cth17\\_doc\\_1986.pdf](http://www.foundingdocs.gov.au/places/transcripts/cth/cth_pdf/cth17_doc_1986.pdf)) (accessed Mar. 11, 2005; copy on file with Journal of Appellate Practice and Process). Similarly, New Zealand decided only in 2003 to end appeals to the Judicial Committee. See Commonwealth Jurisdiction, Judicial Committee of the Privy Council, <http://www.privacy-council.org.uk/output/Page32.asp> (noting that appeals to the Privy Council from the Court of Appeal of New Zealand were abolished in 2003) (accessed Mar. 7, 2005; copy on file with Journal of Appellate Practice and Process).



legislative authority in the context of the economic crisis of the Great Depression, hamstringing the ameliorative efforts of the national government by a strict and narrow reading of the 1867 constitution. Many in the legal and political community welcomed a patriation of judicial authority as a way of developing a truly Canadian jurisprudence that would better reflect Canadian circumstances and realities.

This being the case, it is anticlimactic to conclude that the newly supreme Supreme Court was something of a disappointment for several decades. It promptly declared a firm adherence to the doctrine of stare decisis that embraced Judicial Committee decisions right up to 1949, and although there were some indications of a more generous reading of federal legislative authority and even a string of cases showing greater sympathy on human rights issues,<sup>19</sup> on closer inspection these really did not add up to very much. Law professor Bora Laskin (as he then was) decried the Court's embrace of its English captivity.<sup>20</sup> Disappointment was compounded by the Supreme Court's handling of the 1960 Diefenbaker Bill of Rights,<sup>21</sup> a piece of ordinary federal legislation (and therefore not binding on the provinces) that is regarded as a quasi-constitutional halfway house to an entrenched rights document. The Supreme Court effectively eviscerated this measure, sometimes by observing that on its face it simply acknowledged previously existing rights rather than creating new ones, and sometimes by invoking the principle of supremacy of Parliament to keep it from having an impact on subsequent legislation.<sup>22</sup>

In short, the new beginning of 1949 turned out to be not very much of a new beginning after all.

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19. For a discussion of this line of cases, see McCormick, *supra* n. 11, at ch. 3.

20. Bora Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, 29 Canadian Bar Rev. 1038, 1075 (1951) (noting that the Supreme Court had "for too long been a captive court so that it is difficult, indeed, to ascribe any body of doctrine to it which is distinctively its own, save, perhaps, in the field of criminal law").

21. See An Act for the Recognition & Protection of Human Rights and Fundamental Freedoms, 1960 c. 44.

22. See e.g. Ian Green, *The Charter of Rights 24-25* (James Lorimer & Co. 1989).

### *C. The "Modern" Supreme Court of Canada*

The 1970s are a watershed decade for the Canadian court system in general and for the Supreme Court in particular; a court system that had hardly changed since Confederation (the only major innovation had been the development of Family Courts and Juvenile Courts early in the twentieth century) was transformed from top to bottom. A full catalogue of these changes is beyond the scope of this paper, but the changes to the Supreme Court itself were striking.

The first change was a transformation of the credentials of the typical Supreme Court Justice to emphasize appellate experience, an academic connection, and some demonstration of public service, with the new judges adopting a new style of decisionmaking (the Supreme Court's own term is "contextualism") and a new mode of explanatory justification that is far more expansive and accessible than pre-1970s practices. Although the transition was not a smooth one—I often use the phrase "the great Laskin-Martland wars"<sup>23</sup> to describe the decade of the 1970s, as the new style of judging gradually displaced the older formalism—a steady attrition of the longer-serving judges meant that by the end of the decade, the new style was firmly entrenched and has not been subsequently challenged.

The second change was the shift in the balance of the Supreme Court docket between appeals by right and appeals by leave. Before 1975 most of the Supreme Court caseload was composed of appeals by right, which lay with the losing party in any civil case involving more than \$10,000 and any criminal case involving major charges. As might be expected, the effect was to push the Supreme Court caseload steadily upward, and therefore the amount of time and attention that the Supreme Court could apply to any specific case steadily downward; the sensible strategy for dispatching this caseload was to use the

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23. The reference is to Bora Laskin, who joined the Court in 1970, and was its Chief Justice from 1973 to 1983, and Ronald Martland, who served on the Court from 1958 to 1982. As seniority has always been an important consideration in naming the Chief Justice, one can only conclude that Martland, then the senior member of the Court, was deliberately passed over when Laskin was named Chief Justice in 1973. This slight may have added to the tensions between the two.

minimum five-judge panel for the vast majority of cases, reserving larger panels for unusually important occasions. But as the Supreme Court began its second century, the Supreme Court Act was amended to shrink the category of appeals by right (essentially, to criminal cases in which there is a dissent on a question of law in the provincial court of appeal, or in which the court of appeal has allowed a Crown appeal from an acquittal).<sup>24</sup>

The implications of this second change are two-fold. First, the Court can control the timing of most matters that appear before it, developing a long-term (or at least a medium-term) strategy rather than simply reacting to cases; this capacity for strategic choices is enhanced by the fact that since 1963 the Supreme Court's policy has been to conference after every set of oral arguments to deliberate on the matters before it. Second, because the Supreme Court can largely control the size of its own docket, it can deploy its limited resources more effectively on a smaller set of more important matters, signalled by the steady rise in the size of the average panel (and arguably also by a steady growth in the length of the Court's reasons for judgement).

The third change—the most visible and the most important, but only because it could build upon the first two—was the 1982 constitutional entrenchment of the Canadian Charter of Rights and Freedoms, representing a shift from the traditional values of parliamentary supremacy to the new values of constitutional (some would say “judicial”) supremacy.<sup>25</sup> Two developments that were controversial in the United States—the Marshall Court's establishment of judicial review,<sup>26</sup> and the Warren Court's shift to a broad and socially progressive notion of entrenched rights<sup>27</sup>—have been less controversial in Canada because they are directly sanctioned by the Canadian text, through both the “supreme law” terminology of Section 52 of

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24. The original listing of appeals by right appears in the Criminal Code at [R.S. 1985, c. C-46], s. 691, which was narrowed by the amendment appearing at 1997, c. 17.

25. The Charter of Rights and Freedoms was enacted as Part I of the Constitution Act 1982. See *supra* n. 5.

26. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (declaring that it is “emphatically the province and duty of the judicial department to say what the law is”).

27. See e.g. *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) (recognizing a right to attend desegregated public schools).

the Constitution Act 1982,<sup>28</sup> and the transparently open-ended terminology of some sections of the Charter (most notably the “un-enumerated rights” of the Section 15 equality rights).<sup>29</sup>

The combination of these three developments, under the leadership of a string of unusually prominent Chief Justices, has created an extremely powerful Court that enjoys such a strong base in public opinion as to be, for all practical purposes, immune to direct political confrontation. And (to bring us full circle from my opening comments) in the process it has heightened the institutional similarities of the Canadian and American Supreme Courts, both of which deploy judicial review (sometimes aggressively) in the defence of a set of constitutionally entrenched values including an extensive charter of rights, with a willingness to over-rule and frustrate democratically elected legislatures in the process. The counter-majoritarian difficulty—the fact that judicial review gives a formally unaccountable body appointed from an elite profession, and not the elected representatives of the citizen public, the final word on many matters of law and public policy—is blunted by the fact that the Supreme Court of Canada and the substance of its decisions enjoy wide public support, especially among the social and political and legal elites.<sup>30</sup>

#### IV. THE APPOINTMENT OF JUDGES TO THE SUPREME COURT OF CANADA

##### *A. Pre-1970*

Section 4.2 of the Supreme Court Act provides that the judges of the Supreme Court of Canada “shall be appointed by

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28. “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Constitution Act 1982 § 52(1).

29. “Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination.” *Id.* at § 15(1).

30. The two issues that have come the closest to provoking a backlash have been the “rape shield” provisions for sexual assault trials and the “kiddie porn” issue. See *R. v. Seaboyer* [1991] 2 S.C.R. 577 (addressing provisions prohibiting the use of the complainant’s sexual history in a prosecution for rape); *R. v. Sharpe* [2001] 1 S.C.R. 45 (addressing the regulation of child pornography).

the Governor in Council by letters patent under the Great Seal.” In Canadian practice, however, the phrase “Governor in Council” does not actually mean the Governor-General, but rather the federal cabinet giving the Governor-General advice that to all intents and purposes cannot be refused. And the critical thing about the advice-giving cabinet is that it has always been dominated by the Prime Minister (never more so than in recent decades), although the Minister of Justice is usually involved in the judicial appointment process as well, and at some points (such as the late 1960s) may well have been afforded a considerable discretion in this regard.

There are only two formal restraints on the discretion of the appointing minister or ministers. The first is that the person appointed must have been a judge of a superior court, or a lawyer (a “barrister or advocate”) of at least ten years standing in the bar of a province. The second is that three of the judges must be from the bar of the province of Quebec,<sup>31</sup> although only Quebec is singled out in the legislation, a very strong convention has extended the principle to assign every seat on the court to a specific region. It is almost invariably the case that three of the judges on the Court will be from the Ontario bar, one will be from one of the four Atlantic provinces, and two will be from the four western provinces (possibly refined to a rule that one will be from British Columbia, and one will be drawn in rotation from the three Prairie provinces).<sup>32</sup>

There are two general observations that can be made about appointments to the Supreme Court before 1970. The first is that a partisan political connection was often a significant and visible factor. As Brown has observed, “Of the fifty justices appointed before 1949, twenty-two had been politicians.”<sup>33</sup> Some (such as Abbot in 1954) were appointed straight out of the federal cabinet; others (like J.W. Estey in 1944 and Rand in 1943)

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31. Between 1875 and 1928, the requirement was two Quebec judges on a six-judge court; between 1928 and 1949, it was two Quebec judges on a seven-judge court. The current “three of nine” was established in 1949.

32. The single exception to this general pattern since 1949 was the appointment of McIntyre (British Columbia) to replace Spence (Ontario) in 1979, briefly dropping Ontario to two judges and pushing the West up to three; this was corrected in 1982 by appointing Wilson (Ontario) to the vacancy created by the retirement of Martland (Alberta).

33. R. Blake Brown, *The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff*, 47 McGill L.J. 559, 566 (2002).

directly from provincial cabinet posts; still others had served in the federal Parliament (Crockett in 1932 and Hudson in 1936) or provincial legislatures (Taschereau in 1940, Cannon in 1930). Even where such direct service was absent, personal connections to politically important figures were often significant.

The second is that prior judicial service was not particularly important. About half of the pre-1970 appointments, including two of the post-war Chief Justices, had never served as judges before joining the nation's highest court. Even where there was prior judicial service, it was slightly more likely to have been trial court experience than appellate court experience, and often it had been very brief.

### *B. Post-1970*

The decade of the 1970s saw a complete transformation of the Canadian judicial system, so pronounced and pervasive that I refer to it as the "Great Canadian Judicial Revolution." One of the aspects of this change was the way in which judges were appointed to all levels of Court, including the Supreme Court. These practices have continued to evolve in the following decades, and my comments that follow will not deal with these incremental changes but more generally with the current procedures.

The critical date was the appointment of Pierre Trudeau as Minister of Justice in 1967; after Trudeau became Prime Minister, John Turner and Otto Lang later served in the Justice portfolio and continued the changes. As a result of those changes, the general approach to all federal judicial appointments can now be summarized as (1) an expanded process for generating a list of names for consideration; (2) the collection of relevant information including (where appropriate) prior judicial performance; and (3) wide consultation with a variety of legal, judicial, and political professionals. For provincial superior court judges, this evolved into a judicial appointments advisory committee struck for each province to consider candidates and recommend a short list; for Supreme Court judges, this last step was suggested by the Canadian Bar Association but rejected.

The current process for appointments to the Supreme Court was described by the Commons committee as follows:

[T]he consultative process is comprised of two key steps. In the first step, the Minister of Justice identifies potential candidates. Such candidates typically sit on provincial Courts of Appeal, although names can also be drawn from senior members of the Bar or from academia. Any interested person may also put a name forward for consideration. The Minister specifically consults with the following individuals when assembling his or her list of candidates: the Chief Justice of the Supreme Court of Canada and sometimes the puisne judges, the Chief Justice(s) of the court(s) from the province or region with the vacancy, the Attorney(s) General of the province or region, and at least one senior member of the Canadian Bar Association and the law society from the relevant region. The Chief Justice of the Supreme Court of Canada is also consulted about the needs of the Court.<sup>34</sup>

There is sometimes an additional element to the process. It is not unknown for certain constituencies to react to (or, given the mandatory retirement age of 75, to anticipate) a vacancy on the Supreme Court by putting pressure on the government in support of specific candidates, pressure that can operate behind the scenes (working on the participants indicated above) or more openly, in the form of laudatory letters or articles in professional or public media.

The introduction of the new procedures in the 1970s was accompanied by a significant change in the credentials of the typical Supreme Court of Canada judge. This change has survived a string of Prime Ministers (Trudeau, Clark, Mulroney, Chrétien, Martin) and four changes in government, which suggests that we can realistically treat it as permanent shift rather than temporary aberration. The new emphasis is on prior judicial experience at the appellate level,<sup>35</sup> familiarity with the

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34. House of Commons Standing Comm. on Justice, Human Rights, Pub. Safety and Emerg. Preparedness, *Improving the Supreme Court of Canada Appointments Process Report of the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness* 3 (May 2004) (available at <http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/justrp01-e.htm>) (accessed Feb. 24, 2005; copy on file with Journal of Appellate Practice and Process).

35. All but five of the twenty-seven Supreme Court judges appointed since 1967 were elevated from the (provincial, or more rarely, the federal) courts of appeal.

academic as well as the practical aspects of law,<sup>36</sup> and a concern for public service, but not partisan political service.<sup>37</sup> As Snell and Vaughan point out, the Trudeau justices were “the most learned and scholarly set of judges ever to join the Supreme Court.”<sup>38</sup>

Most lawyers, academics, and other commentators would agree that the changes in both process and substance have been positive; few, if any, would favor a return to the older practices. However, three aspects of these changes need to be highlighted. First, the procedures are not particularly transparent, and appointments are made without any indication of how the names came up, or who was consulted, or which qualities and experiences the evaluation of judicial performance revealed as the candidate’s strengths or possible weaknesses. Second, the practices are conventional and voluntary, not formalized in legislative (let alone constitutional) form. And third, they were introduced at the fiat of a particular political leader (or trio of political leaders) without any broader discussion or approval or formal ratification. We therefore cannot say that the current appointment process is innocuous because no Prime Minister and cabinet would ever “stack” the Supreme Court with a particular set of qualities and attitudes. To the contrary, it is unambiguously true that Trudeau, Turner, and Lang did stack the Court, utterly and irreversibly transforming it in the process; general approval of the “stacking” does nothing to neutralize the power or its potential to work harm instead of good.

## V. CONCERNS ABOUT THE APPOINTMENT OF JUDGES TO THE SCC

Peter Russell has described Canada as “the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit

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36. Four of the last twenty-seven Supreme Court justices had served as Deans of Faculties of Law: Beetz (appointed 1974), Le Dain (1984), La Forest (1985), and Bastarache (1997); a number of others (such as Laskin and Sopinka) were academics of considerable reputation.

37. None of the last twenty-seven Supreme Court judges had served as members of provincial or federal legislatures or cabinets, but a number had served as public servants, as special counsel to governments, or on Law Reform Commissions.

38. Snell & Vaughan, *supra* n. 13, at 236.



on the country's highest court."<sup>39</sup> To say this is simply to make an observation about constitutional design, not to impugn any specific actions of those who do the appointing or to belittle the capacities of those they appoint. We can take Russell's statement as setting out the essential core of the problem: Canada has never really worked through the implications of wedding (in Ted Morton's terms) an American-style interventionist court with a traditionally English style of appointing judges.<sup>40</sup> This is simply bad institutional design.

But it is not enough to describe the current procedures as deficient; what is necessary is to spell out why they are deficient, and what dimensions of a fully adequate appointment process are being ignored. I would suggest that there are six different dimensions that need to be identified and addressed, these being the *professional* dimension, the *federal* dimension, the *political* dimension, the *representation* dimension, the *accountability and transparency* dimension, and the *independence* dimension.

#### A. The Professional Dimension

The professional dimension is the most thoroughly addressed by the current process. For one thing, the federal Department of Justice evaluates the credentials, the performance, and the reputation of all candidates. For a second, the comments of a number of provincial superior court judges and of the provincial justice department are actively solicited for any candidates who are being seriously considered for appointment or elevation to the Supreme Court. For a third, the Canadian Bar Association—the national professional organization for Canadian lawyers—has the opportunity to submit its own evaluation. And finally, almost all of the appointments to the Supreme Court of Canada over the last three decades have served (sometimes for considerable periods) on

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39. Peter Russell, *A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada* 1 Br. to Standing Comm. on Justice, Human Rights, Pub. Safety and Emerg. Preparedness (Mar. 23, 2004).

40. F.L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition* 1, Presentation. to Standing Comm. on Justice, Human Rights, Pub. Safety and Emerg. Preparedness (Apr. 1, 2004).

provincial or federal courts of appeal before their elevation, providing everyone associated with the appointments process ample opportunity to assess their competence, their professionalism, and their performance. This four-pronged scrutiny is fully appropriate; the first requirement for any member of a national high court is surely a knowledge of the law and a demonstrated capacity for solid judicial performance.

But although this is arguably the preemptive consideration, the hurdle that must be cleared before anything else enters the calculations, it is not enough in itself. It is regularly said of new Supreme Court appointees—including the two appointed in August 2004—that they are simply the best candidates for the job, and the finest judges in the country. Without denying that they are among the best, and while fully understanding the institutional functionality of such hyperbole, I think it is important to unravel the rhetoric a little.

What does it mean to say that something or someone is “the best”? There is no Olympic-style competition for judges, but it is possible to invent one.<sup>41</sup> Suppose we could identify a string of objective measurable components of good judicial performance in intermediate appellate courts—factors such as the rate at which judges clear their writing assignments, their reversal rate when their own decisions are appealed, and the frequency with which they are cited by their own and other similar courts.

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41. This thought experiment has been thoroughly examined in a series of papers by Stephen Choi of the University of California at Berkeley's Boalt Hall Law School and Mitu Gulati of the Georgetown Law Center. See Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, \_\_\_ N.Y.U. Ann. Survey Am. L. \_\_\_ (forthcoming 2005) (abstract and link to full article available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=647738](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=647738)) (abstract and article accessed Mar. 6, 2005; copy of abstract on file with Journal of Appellate Practice and Process); Stephen J. Choi & G. Mitu Gulati, *A Tournament of Judges?* 92 Cal. L. Rev. 299 (2004); Stephen J. Choi & G. Mitu Gulati, *Who Would Win a Tournament of Judges*, Boalt Working Papers in Pub. L., No. 19 (available at <http://repositories.cdlib.org/boaltwp/19>) (accessed Feb. 16, 2005; copy on file with Journal of Appellate Practice and Process); Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance*, U. Cal. Berkeley Pub. L. Research Paper No. 141 (abstract and link to full article available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=473281](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=473281)) (abstract and article accessed Feb. 16, 2004; copy of abstract on file with Journal of Appellate Practice and Process). Their suggestions have been (to put it mildly) controversial, provoking extended discussion on a number of law blogs and, most recently, a symposium. See generally *Symposium: Empirical Measures of Judicial Performance*, 32 Fla. St. U. L. Rev. \_\_\_ (forthcoming 2005).

Suppose we could gain consensus within the judicial and professional community on both the elements to be measured and the weighting to be assigned to each one. At any given moment, we would then have to plug the numbers in, run the program, and see who came out with the highest score—and when there was a vacancy on the Supreme Court, that would be the winning judge's prize.

But of course, this is not how it is actually done. It would be futile to ask the federal Department of Justice for the sets of scores to validate the Justice Minister's claims. One could argue that it couldn't be done because we could never come up with all the things that really matter, or totally objective ways to measure them, or presumptively credible ways of weighting them. And it has been argued that it shouldn't be done. Solum, paying Choi and Gulati the left-handed compliment of coming up with "that rare and wonderful thing: an idea that is both completely wrong and wonderfully illuminating," worries that the apparently objective measures are all proxy rather than direct measures, and could be manipulated and "gamed" with undesirable consequences.<sup>42</sup>

What is really going on in terms of the professional dimension is something rather different, worthy in its own right but somewhat more modest. To make a slightly extravagant comparison: When the cardinals go into conclave to elect a new pope, Vaticanologists can always identify the "*papabile*"—the really serious candidates, the men who could become pope. To coin a term: they are "pope-able." Similarly it is reasonable to think that legal professionals could identify the strongest members of any court of appeal, the ones we could think of as "supreme-able." But just as every conclave has several *papabile* but, in the end, only one new pope, so for any vacancy on the Supreme Court there will be an indefinite number of credible candidates but only one who can wear the ermine robe. We are really talking about a merit threshold that yields a surplus of candidates, and therefore the professional-merit argument gives

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42. Lawrence B. Solum, *A Tournament of Virtue*, 32 Fla. St. U. L. Rev. \_\_\_\_, \_\_ (forthcoming 2005) (referring to the work of Stephen Choi and Mitu Gulati, citations to which are collected above in note 41) (abstract and link to full article available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=588322](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=588322)) (abstract and article accessed on Feb. 16, 2004; abstract on file with Journal of Appellate Practice and Process).

us a pool of possibles, not a clear-cut single winner. This being the case, so long as the process honours the establishment of a solid merit threshold, nothing is compromised by ensuring that other elements are appropriately acknowledged as well.

### *B. The Federal Dimension*

One of the important functions of a national high court with the power of judicial review is to interpret, apply, and enforce the constitutional division of legislative authority between the various levels of government. This, of necessity, is a job that is never complete; the Supreme Court of Canada has in recent years been refining this jurisprudence, with regard to both longstanding if slightly esoteric issues of Canadian constitutional law (such as the relatively recent activation of a long-empty “second branch” of the trade and commerce power first hinted at by the Judicial Committee in 1881), and new or newly salient issues such as the environment.<sup>43</sup> But if this is a shifting border that must be policed and updated, then it is anomalous in the extreme for one of the levels of government to have unfettered discretionary control over the entire membership of the allegedly neutral refereeing body, and professionalism alone cannot be a complete answer if the process suggested in the previous section leaves a selection zone within which “centralists” can be systematically favoured over “provincialists.”

To be sure, this is not the Court’s only function. It is also responsible for error correction and judicial leadership bearing on general questions of law, and for two decades it has protected a set of individual rights from governmental interference. But even if the list of duties is more extensive than it might once have been, federalism issues are still important enough to be addressed in the appointment process. The American solution was to require the consent by the upper chamber of the national legislature, envisaged by the Constitution’s framers as a type of

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43. See e.g. *Gen. Motors Canada v. City Natl. Leasing* [1989] 1 S.C.R. 641 (addressing trade and commerce power); *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R. 401 (addressing environmental issues).

“states house” within the national process;<sup>44</sup> Canada did not follow suit, and in any event its upper chamber is, to put it mildly, not a credible counterpart.

The last time that Canadians considered broad constitutional change, the Supreme Court was on the agenda and it was the federalism issue that drove the discussions. This occurred during the 1980s and early 1990s, when Conservative Prime Minister Brian Mulroney spent most of his nine years in office in the ultimately futile pursuit of a constitutional package that would overcome Quebec’s rejection of (and continued rhetorical attack on) the 1982 constitutional settlement. Legally, of course, the new constitutional provisions were as valid and binding on Quebec as on the other provinces, but politically, the issue represented a standing invitation to Quebec separatists to exploit Quebec’s isolation and humiliation. Both the early “Meech Lake” package and the subsequent “Charlottetown” package (both named for the locations in which the critical meetings took place) would have had the Prime Minister making Supreme Court appointments from lists of nominees submitted by provincial premiers. However, both sets of constitutional proposals failed (consuming almost a decade of political energy and attention in the process) and ultimately nothing came of the idea.

### *C. The Representation Dimension*

For most of the Court’s history, the basic characteristics of its justices were easily described: They were middle-aged (or older) white professional males of British or French ethnicity. Some modest regional representation was provided by the statutory requirement that three judges be appointed from the bar of the province of Quebec and the conventional expectation that the other seats would be similarly drawn in predictable ways

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44. It is, of course, an open question whether the United States Senate is in the modern era a “states house” in a way that would satisfy the federalism concerns that I am raising, but I am making the smaller point that at the time of the drafting of the United States Constitution, it was seen in this light. See e.g. Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121, 141-43 (1996) (suggesting that the so-called Connecticut Compromise—which provided for two senators from each state—was regarded by the Founders as a means of ensuring that the government outlined in the Constitution would survive).

from other identifiable regions. There has also been some suggestion of further representation complexities—for example, that at least one of the non-Quebec judges shall be francophone (examples would include LeDain, La Forest, Arbour, Bastarache, and most recently Charron). The reverse convention—that one of the Quebec judges would be an anglophone—seemed to have gone into suspension after the 1954 appointment of Abbott, but may have been revived by the 2004 appointment of Fish.

More recently, the matter has become more complex. The first Jewish judge was Bora Laskin, appointed in 1970, and Fish became the second Jewish member of the Supreme Court in 2004, joined by Abella later the same year. The first woman, Bertha Wilson, was appointed in 1982, and has been followed by L'Heureux-Dubé in 1987, McLachlin in 1989, Arbour in 1999, Deschamps in 2003, Abella in 2004, and Charron in 2004. John Sopinka, a Ukrainian-Canadian, was (apart from Laskin) the first person appointed who was not clearly of British or French descent, and Frank Iacobucci, an Italian-Canadian, was the second.<sup>45</sup>

One must acknowledge, however, that representational factors, however defensible and well-intentioned, inevitably complicate the professionalism of a merit-based system. What if the best woman candidate, or a credible potential Asian-Canadian judge, or the only available native Canadian judge, is from the wrong region? And what if the objectively best judges at the occasion of any vacancy, over and over again, are sitting on the Ontario Court of Appeal, easily and always the country's strongest provincial court of appeal?<sup>46</sup>

But the problem really starts one step earlier: How do we decide (and who decides) what group deserves a turn? At the moment, we can only be observers trying to guess what is going on behind the closed doors. One can only tell after the fact

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45. Similarly, the last thirty years has seen the first woman Governor-General (Jeanne Sauv ), the first European-but-not-British-or-French Governor-General (Ed Schreyer), and the first Asian-Canadian Governor-General (Adrienne Clarkson).

46. This is not an idle question. Australia's seven-judge High Court, for example, is usually dominated by judges from New South Wales; although it has never been the case that every single member of the Court has been from that state, it has several times come very close, as the biographies of the High Court's current and former justices make clear. See <http://www.hcourt.gov.au/justices.html> (accessed Feb. 17, 2004).

which groups deserve continued representation (such that they get a new representative when somebody leaves),<sup>47</sup> and which groups have to wait their turn to enjoy sporadic representation in some grander cycle,<sup>48</sup> and which groups are still waiting to pass the threshold.<sup>49</sup> And how hard do we push to represent the groups that have emerged: Do we have firm quotas? “Tie breakers” in favor of the group in question? “Bonus points” awarded to pre-empt tight races? Only the opacity of the current process, and the tentative nature of the representational list itself and of the relative priority of its various elements, prevent these questions from being discussed directly. Indeed, when announcing the two most recent appointments, the Minister of Justice explicitly (and not very credibly) denied that any concern for representation issues influenced the choices in any way.

Although it is a problem that there is no firm rule as to which groups deserve how much representation with what degree of priority, it would be unwise to solve that problem by stipulating representational requirements in the legislation, let alone the constitution, because it would tend to “freeze” the institution to match the priorities of one passing political moment. As Pildes observes, “one of the iron laws of democratic institutions is that institutional structures, once created, become refractory to change.”<sup>50</sup>

This concern apart, the representation element fits well with a formal nomination process; emulating some of the mechanisms for choosing judges used by some international courts, we could direct either the voting of each member of the nominating commission, or the outcome itself, by stipulating

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47. The assumption that there are three seats that “belong” to women was put in doubt when Wilson was not replaced by a woman in 1992; it was revived by the fact that Arbour was so replaced in 2004, although it seems premature to think of women judges having an entitlement now of four seats.

48. We cannot quite talk of a “Jewish seat” on the Court, because it was more than fifteen years after Laskin’s death that a second Jewish judge was appointed; but the appointment of a second Jewish judge in 2003, not to mention a third in 2004, suggests that this group is “in the mix” for occasional representation on the Court.

49. Just as the United States is awaiting the appointment of its first Native-American, Latino, or Asian-American justice, knowing it is only a matter of time, so Canada is awaiting the appointment of its first Asian-Canadian justice or its first justice from the First Nations.

50. Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 84 (2004).

that the list must include at least one woman, at least one man, at least one person whose ethnic origin is neither French nor English, and so on. Absent such a mechanism, there is often a tendency to assume that the current set of incumbents being meritorious, the merit criterion directs one to find candidates who are as much like them as possible. But such an attitude necessarily creates a barrier to minorities of all kinds.

#### *D. The Accountability and Transparency Dimension*

The current process of seeking evaluative input from a fairly wide range of responsible professionals is, of course, a critically important dimension. But the problem is that it is to all intents and purposes invisible. This means that the appointment of a Supreme Court justice in Canada takes the form of a period of building speculation about the possible alternatives (to such an extent that the media can publish lists of possible names with the alleged odds of their success). The speculation is resolved (sometimes after some delay) by the announcement of the name of the new judge, which is followed by a brief celebration of the appointment. Then, the professional media comments enthusiastically on the credentials and personal history of a person who was, for most members of the public, totally unknown until that moment.

The *ex post facto* rationale is desirable, but it is really answering the wrong question. We want to know, from the background facts of education and experience and prior decisions delivered, that the new judge will be competent—or better—on the highest court, but we also want to know what there is about this particular candidate that made him or her more deserving of the honour and responsibility than the dozen or hundred other judges who might have been picked instead. We need some idea of what kept some people off the short lists and other people on, of what put people at the top of the list and at the bottom, and who was translating these factors into specific decisions. And apart from the (possible) involvement of the Minister of Justice and the (definite) final discretionary decision of the Prime Minister, we know nothing of this save in the vaguest and most platitudinous of terms. It may well be that the right people are involved, that they are making their decisions



on defensible criteria, and that their advice is strictly followed by the politicians, with purely professional considerations always being preemptive—but since we do not know that this is the case, we have to take it on faith, and this phrase is the very antithesis of transparency.

One argument against more transparency is the suggestion that judges who are considered but passed over will suffer embarrassment, and possibly even a diminution of reputation. The suggestion seems exaggerated (surely one could just as easily argue that judges who are passed over will be gratified by the knowledge that they were on some formal short-list), and in any event the supposed embarrassment would seem to be triggered just as much by the current media speculation as it might be by the institution of a more formal process.

The flip-side of the lack of transparency is an effective lack of accountability. In a democracy, one can always say that a government stands or falls on its actions, and the voters can hold it to account at the next election, but the next election is often years away, and events like wars joined or not joined, economies surging or sagging, and valued major programs threatened or promised usually loom far larger. At any rate, the time lag for the effective evaluation of a Supreme Court justice is such as to vitiate such democratic responsiveness. Over the last five years, the two most significant members of the Supreme Court of Canada were clearly McLachlin and Iacobucci, neither of whom was appointed by the current government, let alone the current Prime Minister, and the two judges appointed in the summer of 2004 will both still be serving in 2020, by which time the Prime Minister who appointed them is most unlikely to be in office.

### *E. The Partisan Political Dimension*

It is widely accepted in American scholarship that there is a partisan dimension to the selection of judges, and this partisan dimension has significant ideological overtones. If there had been any doubt about this, the Bork nomination would have dispelled it. Curiously, in Canada this is widely denied; there are critical voices insisting on the matter, but they are generally from the margins and from outside the legal profession. The general assumption is that judges leave their ideology and their

political connections at the door (or at least the definition of a good judge includes the capacity to do so), and therefore given an adequate screening mechanism we do not need to worry about these matters.

There are probably two reasons for this attitude. The first may be the English style, which always treated the courts as apolitical and the judges as neutral and above politics. The plausibility of this contention in England was enhanced by (or even purely the artefact of) the very narrow pool from which high court judges were recruited, creating a group of judges and potential judges who were extremely homogeneous in terms of class, social circumstances, and education.<sup>51</sup> The second (and more specifically Canadian) reason for accepting this assertion is that for much of our history, and certainly for the last four or five decades, the two major Canadian political parties have not differed consistently or significantly on ideological grounds, so this has never been an axis over which the selection of judges has ever organized itself on an extended basis.<sup>52</sup> The last time that the Supreme Court divided regularly on the basis of who had appointed them was the 1970s, as the “Trudeau judges” (Laskin, Spence, Dickson) gradually took control from the “Diefenbaker judges” (Martland, Ritchie, Judson); since then, the question of which Prime Minister of which party appointed the judges has not been a significant factor in the apparent formation of voting blocs.

In the federal general election of 2004, this particular veil was almost pierced. The old Progressive Conservative party has vanished, and the new Conservative party has a pedigree that gave it more ideological separation than usual.<sup>53</sup> One of the sub-

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51. See e.g. J.A.G. Griffith, *The Politics of the Judiciary* (Fontana Paperbacks 1981).

52. We often talk about Canadian politics as if Liberals and Progressive Conservatives were simply the northern counterparts of Democrats and Republicans, but this has never been true. The formula for success in Canadian politics is firmly to occupy the centre of the political spectrum, leaning slightly left or slightly right as circumstances require; and the major parties have competed for this advantaged position not by staking out a permanent ideological position but by manoeuvring opportunistically around each other. The Conservatives had their “red Tories” and the Liberals had their business and corporate wing; only if these groups had changed places could the parties have approached ideological consistency.

53. The Canadian political party system is going through an evolution that defies simple explanation. The Progressive Conservative Party collapsed as a major political force in the 1993 election, squeezed out of Quebec by the Bloc Québécois and replaced in

themes of the campaign, particularly when it briefly seemed that the Liberals might be replaced in office, was a concern about the kind of judicial appointments that a new Conservative Prime Minister would make; but instead of opening up a debate on the dangers of broad Prime Ministerial discretion, let alone an awareness that it involved a value-driven choice directed toward generally predictable consequences, this just seemed to suggest that there were some decisions so sensitive and important that the new party could not be trusted with them.

### *F. The Independence Dimension*

One could argue that, strictly speaking, there is no independence dimension to the appointment debate, because judicial independence is a question of institutional arrangements dealing with judges after they have been appointed. Traditionally, the Anglo-American tradition has seen these as including security of tenure, financial security, and non-interference with adjudicatory matters; recent decisions of the Supreme Court of Canada have been extending this list to include salaries, facilities, and curbs on the powers of chief judges.<sup>54</sup> However, a complete insulation of the pre-appointment period from what follows is not possible; for example, independence would surely be compromised if a judge were appointed only after promising to decide a particular case (or a particular set of cases) in a specific way.

But the principle takes us farther than that. As Choudhry points out, the basic message of the Remuneration Reference, the Supreme Court decision that radically expanded the notion of judicial independence in Canada,<sup>55</sup> was that government must not have the potential to put pressure on the judges by reducing (or declining to increase) judicial salaries when they do not like

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Western Canada by the more ideologically strident Reform Party (which later became the Canadian Alliance). In 2004, what was left of the Progressive Conservatives merged with the Alliance, but it will be some time before anyone can say with assurance whether this represented the co-optation or the final success of the challengers.

54. See Peter McCormick, *New Questions About an Old Concept: The Supreme Court of Canada's Judicial Independence Decisions*, 37 *Canadian J. Political Sci.* 1 (2004).

55. *Reference re Remuneration of Provincial Ct. Judges of P.E.I.*, [1997] 3 S.C.R. 3.

the trend of decisions.<sup>56</sup> By extension, having judicial promotions subject to some kind of parliamentary review would create the same problem: In effect, judges' career prospects would be enhanced or confined by the legislators' reactions to their judicial performance.

The thrust of Choudhry's argument is the implications of the principle for Parliament, and he is critical of the idea that parliamentary committees should play any real role. But surely the point can be made even more strongly with reference to the political executive, which in a parliamentary system always plays the dominant role. Legislators may be subject to short-term politically motivated sensationalism or over-reaction, but it is governments that can have long-term agendas. Nor is the concern simply theoretical: The research of Salzberger and Fenn led them to suggest that promotions from the English Court of Appeal to the House of Lords demonstrably reward compliant judges and punish the critics,<sup>57</sup> and Ramseyer and Rasmusen suggest that such considerations are so pervasive in the Japanese court system as to seriously undermine judicial independence in that country.<sup>58</sup>

This is just a small introduction to a very large issue. The point is, as the *Economist* recently editorialized, "the independence of the judiciary depends on the way judges are selected."<sup>59</sup> The principle of judicial independence puts some constraints upon the methods that we use to appoint our judges; this is particularly important when the people we are considering for such appointment are already judges of provincial or federal courts of appeal, as is almost always the case for the Supreme Court of Canada.<sup>60</sup>

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56. Sujit Choudhry, *Judging Supreme Court Judges—Finding a New Way to Pick Them That's Legal Might Not Be Easy*, *Montreal Gazette* D8 (Apr. 25, 2004).

57. Eli Salzberger & Paul Fenn, *Judicial Independence: Some Evidence from the English Court of Appeal*, 42 *J. L. & Economics* 831 (1999).

58. J. Mark Ramseyer & Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (U. Chicago Press 2003).

59. *Economist* 11 (Nov. 15, 2003). The specific proposal under discussion was that judges would be appointed by an independent commission that is itself appointed by a non-partisan body, and the suggestion drawing the editorial ire was that the government might under some circumstances be able to veto a judicial appointment.

60. Calabresi sees the emergence of a "career judiciary," and consequently of judges who may have some real desire to be promoted, as a significant problem for judicial

## VI. TOWARD A SOLUTION: COMPETING MODELS

*A. Expanded Consultation: A Prime Minister's Court*

For those who are not convinced by the complaints of the critics—and this would include much of the organized legal profession—there is no need for major reform, and all that is required is at most to refine some details of the current practice. For them, the primary consideration is professional merit, and this is best served by a process that involves the collection of information by the legal professionals in the Justice department, input from the organized bar (specifically the Canadian Bar Association), and a decision made by the Prime Minister with the advice of the Minister of Justice (both of whom are usually lawyers). Indeed, the current process is closely patterned on the recommendations made by the Canadian Bar Association twenty years ago.

This is essentially the spirit that guided the process for the two appointments made in the summer of 2004. After the usual consultations, ending in a decision by the Prime Minister, the Minister of Justice announced the names of the two “nominees” for the Supreme Court, and at the same time announced a first-ever “parliamentary review” of the candidates. But the review was limited to a single session held on the day after the announcement of the nominations; it involved only a handful of parliamentarians, and they questioned neither the candidates nor the Prime Minister who selected them, but only the Minister of Justice, who stated explicitly that it had not been his decision; and the parliamentarians lacked the power to delay (let alone to veto) the appointments. Any resemblance between this and American-style “advise and consent” is purely superficial.

The constrained nature of the new process is obvious. Short of an all-out assault on the professional credentials of the candidates (an unlikely tactic at any time, doubly so for two judges elevated from the country's most respected court of appeal), the panel is left with nothing to talk about except the process itself. Because the candidates were not present, one

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independence. See Guido Calabresi, *The Current Subtle—and Not So Subtle—Rejection of an Independent Judiciary*, 4 U. Pa. J. Const. L. 637 (2002).

could hardly seek enlightenment on the values and the conception of the judicial role that would inform their performance of the office; because the Prime Minister who made the selection was not present, one could hardly ask for an elucidation of the calculations and priorities that made these candidates preferable to their equally reputable colleagues. But the process presumably gave the Supreme Court and its new members a measure of publicity, and a publicization of the consultation process that surrounded their selection—a small “plus” in terms of legitimacy, undercut by the fact that it took place with little notice during the summer vacation. A smaller change could hardly be imagined, but for supporters of the status quo, that was precisely the point.

It hardly needs to be pointed out that the Prime Minister remains totally in charge of the selection, continuing to enjoy (as Prime Ministers always have) the power to tilt the future of the Supreme Court in any direction that he chooses. The hottest topic on the Supreme Court’s fall agenda is the question of same-sex marriage, so controversial that the Prime Minister deliberately delayed oral hearings on the reference question until after the federal general election. One of the new Supreme Court judges sat on the Ontario Court of Appeal panel whose ruling in favor of same-sex marriage touched off the political controversy, and the other is arguably the most high-profile feminist judicial activist on the federally appointed bench. It is simply not credible to suggest that the Prime Minister was unaware of these facts, or that they were irrelevant to his choice; and for the next two decades these two judges will help set the tone and the direction of Canadian law.

### *B. Meech Lake and Charlottetown: A Premiers’ Court*

A concern for the federal dimension informed the reforms to the Supreme Court appointment process that were seriously considered in the late 1980s and early 1990s, although ultimately they were abandoned. Under this process, the Prime Minister would have been limited to making Supreme Court appointments from (short) lists of nominees proposed by the provincial premiers. To be sure, there was a certain lack of clarity about the way this would have worked. When a vacancy

occurred for, say, Ontario, would it be only the premier of Ontario who submitted the names of eligible judges and lawyers, or would all the premiers have the opportunity of suggesting names, or would it be the premiers as a collective group who were involved? My impression is that it was the first that was taken for granted, although this would work smoothly only for those provinces that are understood to have either statutory or conventional entitlement to specific Supreme Court seats: clearly Quebec (from the statute), almost as clearly Ontario (by strongly established convention), and possibly British Columbia.<sup>61</sup> It might also work for the Prairie provinces, because it is generally understood that the seat rotates in turn among the three provinces; the only premier involved would presumably be the one whose province's turn was next. There is no convention, however, for rotating the seat assigned to the four Atlantic provinces: New Brunswick's Rand was replaced by Nova Scotia's Ritchie in 1959, and Ritchie by New Brunswick's La Forest in 1985, but when La Forest retired in 1997, his replacement was Bastarache, also from New Brunswick. Prince Edward Island has not had a seat on the Court since Davies (1901-1924), and Newfoundland & Labrador has never had one.

Undoubtedly, something could have been worked out (although it seems a little awkward to have three slightly different appointment tracks for a nine-judge Court); the result would definitely have been to restrict, even completely to contain, Prime Ministerial discretion. To the extent that some judges and lawyers establish reputations as "centralists" who favor a strong reading of the powers of the national government, we can assume that premiers would tend under this system not to put their names on the short lists; and premiers from different regions or parties might also have other priorities that they would look for in the judicial record of possible candidates. Without a uniform process presided over by a continuing set of officials, there would probably be greater diversity in the views of judges appointed to the high court, and possibly greater

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61. I think of British Columbia as having one seat on the Court and the three Prairie provinces as having a second, but many commentators continue to describe the Court in terms of two seats normally assigned to the four Western provinces. See e.g. Hogg, *supra* n. 6, at 213.

differences in scholarly background and practice experience among them.

But this new process would be open to a variant of the same criticism as the one it replaced. The current problem is that we have a national high court whose appointment process is heavily skewed toward a single level of government, the national government, rather than reflecting a balance between the two levels that honours the federal principle and equips the Court for a fair consideration of division-of-power issues. But the Meech Lake proposals involved an appointment process that is also skewed (albeit not quite so heavily) toward a single level of government, the provincial governments, again failing to reflect a considered balance. The fragmentation of the nominating authority suggests less likelihood that the Court could be deliberately structured in a calculated way over time, but the mode is still predominance rather than partnership, when what is needed is a court whose inherent design is neither *provincialist* nor *centralist* but *federal*.

Rather surprisingly, the concern that was so strong a dozen years ago has almost vanished from the current discussions. The Commons Justice Committee received presentations from more than a dozen individuals, but only two brought this matter up at all, nor have the premiers (individually or collectively) seen fit to chime in by raising the Meech Lake theme. Their silence notwithstanding, the federal dimension represents a legitimate concern that should be, but so far has not been, addressed by the reform process.

### *C. The "American Model": A Parliament's Court*

Not surprisingly, the American example often informs the discussion of reforms to the judicial appointment procedure—specifically the idea of a legislative ratification. In the United States, it is the Senate that must “advise and consent” to the President’s nominations to the Supreme Court. Because the Canadian Senate lacks the credibility and the federal and democratic credentials that would fit it for such a role, the suggestions are more commonly for ratification by the Commons, or by a House of Commons committee such as the Justice Committee.



There are of course difficulties in translating the American Congressional example into Canadian parliamentary form. The first is the presence of the strongly disciplined political parties of the Canadian form; members rarely vote against party instructions, and would presumably be even less likely to do so in the context of such a dramatic and significant action. The second is the weakness of the Canadian committee system, which displays none of the independence and cohesiveness of Congressional committees and is subject in a number of ways to the control of party leadership, especially of the governing party. Only in the context of a minority government (such as Canada now has) would there be any element of unpredictability, but minority governments are an unusual outcome of a Canadian election, and even then the action would be shaped by strong parties and weak committees. Under normal circumstances, the government of the day would dominate both the Commons and the committee, able to guarantee any result within any time frame that it wished. Parliamentary review might make an important symbolic statement about the relationship between the branches of government, but it would usually be a totally predictable formality rather than a genuine opportunity for political leverage.<sup>62</sup>

Although the American example is obvious, it is not particularly attractive to Canadian lawyers or academics. The drama of the Bork and Thomas confirmation hearings, although not typical of such procedures, has been taken as a warning of what an open process of legislature review could become. It carries the obvious double dangers: Good candidates would be reluctant to expose themselves to a partisan attack masquerading as theoretical discussion, and even nominees who survive the process might be damaged in reputation and diminished in influence. And the reluctance of legal professionals in Canada to see (or at least to admit) a partisan and ideological dimension in the selection of judges constitutes a further hurdle; parliamentary review seems to admit, and thereby to promote,

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62. It bears noting in this discussion that the "advise and consent" function of the United States Senate has become deadlocked of late, due to the combination of, on the one hand, the competitive balance between the two major parties and, on the other hand, super-majoritarian rules in the Senate that allow a party to exercise major leverage even if it falls short of a majority of the seats.

just such an awareness. Ratushny, one of the architects of the current process, subscribes to a view that is in this respect representative of the profession: Legislative review is a bad idea that is not working well in the United States, and it would work even less well in Canada.<sup>63</sup>

#### *D. The “European Model”: A Partisan Court*

Some commentators, such as Morton, would look elsewhere for a useful model.<sup>64</sup> The constitutional courts (sometimes “constitutional councils”) of Europe are deliberately constituted as reasonably large, sometimes multi-panel, structures having members serving definite terms, and multiple appointing authorities interacting in such a way as consciously and deliberately to reflect the major political and regional divisions of the country in appropriate proportions. Shifting political fortunes and alliances will, over time, in an open and predictable way, be reflected in the membership of these courts.

The normal Canadian response to such a suggestion is that it would politicize both the appointment process and the Court. But the counter-argument would point out that to some extent it is judicial power itself that has made the Court an important political actor whose decisions regularly impact the lives of many citizens, and that changing the process would not so much politicize the system as simply bring the politics out in the open. But the further problem is that specific judges on the court would be identified with particular political parties or groupings; they would have to be so connected, as otherwise it would be impossible to ascertain which group was entitled to the representation share created by a vacancy on the Court. Under the present system, the partisan dimension has not been a good predictor of voting blocs on the Court—there were no recurrent confrontations between “Mulroney’s judges” and “Chrétien’s judges” over the last decade—but expectations, and in the long

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63. See Edward J. Ratushny, *Confirmation Hearings for Supreme Court of Canada Appointments: NOT a Good Idea!* in *Essays in Honour of Gérald-A. Beaudoin: The Challenge of Constitutionalism* ch. 18 (Pierre Thibault, Benoît Pelletier & Louis Perret, eds., Editions Y. Blais 2002).

64. Morton, *supra* n. 40.

run performance, might be changed by an openly partisan appointment process.

There are, of course, other problems. The European constitutional courts are formally separate from the regular court system, and they often function less as final appellate courts exercising concrete review than as before-the-fact advisory bodies exercising abstract review, sometimes described as a “third legislative chamber” rather than an Anglo-American style supreme court.<sup>65</sup> The multi-functionality of the national high court in a modern common-law system makes the overtly partisan politicization assumed in this model more problematic in a nation like Canada.

### *E. An Independent Nomination Process: A Nation’s Court*

It seems to me that the most appropriate point at which to deal with the various dimensions I have described is not a ratification process (whether or not it contains the right of rejection), but rather a nomination process. I have elsewhere proposed the establishment of a judicial nomination commission, whose membership would consist of three elements.<sup>66</sup> The first would be five members of the Canadian Judicial Council,<sup>67</sup> chosen by and from the members; the second would be five members of the Council of the Federation (as the premier’s conference is now styling itself)<sup>68</sup> chosen by and from the members; and the third would be five members of the Commons Justice Committee, chosen by and from the

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65. See Alex Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford U. Press 2000).

66. Peter McCormick, Presentation to Standing Comm. on Justice, Human Rights, Pub. Safety & Emerg. Preparedness (Apr. 1, 2004) (available at <http://www.parl.gc.ca/infocom/doc/37/3/JUST/Meetings/Evidence/JUSTEV09-E.HTM#Int-874267>) (accessed Feb. 21, 2005; copy on file with Journal of Appellate Practice and Process).

67. The Canadian Judicial Council, established in 1971, includes the chief justices and associate chief justices of all the courts whose members are appointed by the federal government, currently amounting to a membership of thirty-nine judges chaired by the Chief Justice of Canada. See <http://www.cjc-ccm.gc.ca> (accessed Feb. 26, 2005; copy on file with Journal of Appellate Practice and Process).

68. The Council of the Federation was established by the premiers on December 5, 2003, and consists of the ten provincial and three territorial premiers, with a small secretariat in Ottawa. See <http://www.councilofthefederation.ca> (accessed Feb. 26, 2005; copy on file with Journal of Appellate Practice and Process).

committee in such a way as appropriately to represent the various political parties.<sup>69</sup> Struck upon the occasion of an actual or anticipated vacancy on the Supreme Court,<sup>70</sup> the committee would have the responsibility of arriving by super-majority vote at a list of (say) five appropriately qualified nominees for appointment to the Supreme Court, with the Prime Minister making the final selection from this list.

I am consciously emulating that aspect of the current British reform proposals that aims at a “double displacement” of the judicial nominating function, by which I mean that this proposal specifies a set of people who will choose a second set of people who will make the nominations, which has the functional advantage of containing the potential for intentional manipulation of the process. Each of the three bodies indicated has an established existence in the Canadian political structure, and a set of functions to which the “name the nominators” function would be an important but (in terms of the demand upon time and energy) a relatively minor addition. Each is diverse in its membership: The Canadian Judicial Council includes thirty-nine judges from trial and appeal courts in every part of the country; the Council of the Federation includes thirteen first ministers who are drawn from a variety of political parties (or, in the case of the territorial governments, who enjoy nonpartisan support);<sup>71</sup> and the Commons Justice Committee includes members from all the political parties in the House of Commons, in proportion to their representation in the Commons. On the one hand, this independent existence and diversity should make it impossible to “stack” the commission; on the other hand, the research on super-majority voting requirements suggests not only that agreement can still arise from the

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69. The House of Commons Committee on Justice, Human Rights, Public Safety and Emergency Preparedness is one of seventeen standing committees of the House of Commons whose members are appointed under Standing Orders for the life of a parliament. In the 37th Parliament it consisted of a chair, a vice-chair, and sixteen members.

70. Unlike their American counterparts, judges of the Supreme Court of Canada are not appointed for life, but must retire on or before their seventy-fifth birthdays. Of the last six vacancies, three (Cory, L'Heureux-Dubé, and Gonthier) were caused by the retirement age and three (Lamer, Arbour, and Iacobucci) by decisions to resign.

71. It should be noted that in Canada, political parties, even when they share the same name, are usually not at all integrated between different provinces or between the provincial and national levels.

diversity, but that the obvious need for negotiation and compromise can create lists that go beyond the bland and the obvious.<sup>72</sup>

Some might prefer a longer list of organizations contributing members to the nominating commission. The Canadian Bar Association has played a significant role in establishing the current process, but I see no need to represent the organized legal profession when senior judges already make up their share of the group. Hutchinson of Osgoode Hall Law School, for example, has argued for some lay members, in the name of democratic participation and openness,<sup>73</sup> but I am concerned that there is no “clean” method for designating these individuals that would be comparable to the method of choosing “by and from” the members of an autonomous pre-existing group. Others might want to see certain groups (the Assembly of First Nations, or the National Action Committee on the Status of Women, for example) naming commission members; I would prefer to limit it to a small number of pre-existing autonomous organizations where a diversity of membership precludes a narrowly focused choice. But these are details; the principle that I am advancing is that a broadly representative group whose members are designated autonomously should do the bulk of the work in filling a Supreme Court vacancy, limiting the political executive to at most a final selection from a short list.

The phrase “at most” points to a possible further logical development. The core anomaly in the current appointing procedure is that the members of a highly independent national high court receive their position by virtue of a lightly constrained discretionary choice by an elected political leader, an element of inherent politicization that simply cannot be wished away or ignored. There is an emerging argument that this politicization undermines the independence of the judiciary by subordinating it to the political priorities of partisan officials. As the British consider major changes to their judiciary, it has

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72. See e.g. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 *Tex. L. Rev.* 1671 (2004).

73. Allan Hutchinson, Presentation to Standing Comm. on Justice, Human Rights, Pub. Safety & Emerg. Preparedness (Apr. 1, 2004) (available at <http://www.parl.gc.ca/infocom/doc/37/3/JUST/Meetings/Evidence/JUSTEV09-E.HTM#Int-874267>) (accessed Feb. 21, 2005; copy on file with Journal of Appellate Practice and Process).

been argued that “the Prime Minister should end his involvement in judicial appointments.”<sup>74</sup> The procedure that I am suggesting constrains the Prime Minister’s choice instead, limiting it to picking one from a list of five names. But the model could easily be adapted to fit this imperative as well, requiring the nomination commission to come up with a single name.

#### *F. The Liberal Reform Proposal: A Government’s Court*

In April 2005, the Minister of Justice released a proposal to reform the appointment procedures for the Supreme Court, a culmination of the process initiated by the legislative committee hearings in the spring of 2004.<sup>75</sup> This proposal focused on the twin responsibilities of the Supreme Court—the “powers process” dealing with the federal/provincial distribution of governmental power, and the “rights process” limiting the exercise of governmental power in the protection of human rights—and on the Canadian Supreme Court as the “exemplar of excellence.” The overarching principles informing a revised appointment process were identified as merit, the constitutional responsibility of the federal executive branch, judicial independence and the integrity of the courts, transparency, parliamentary input, and provincial input.

The core of the revised appointment process would be an advisory committee, established as each vacancy arises. The composition of this committee would be:

- One member nominated by each political party recognized in the House of Commons (under current rules, every party with at least twelve elected members), yielding, in the current Parliament, four members;

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74. Thomas Legg, *Judges for the New Century*, 2001 Pub. L. 62, 74.

75. Minister of Justice—Canada, *Proposal to Reform the Supreme Court of Canada Appointments Process* (April 2005) (available at <http://www.canada.justice.gc.ca/en/dept/pub/scc/>) (accessed April 19, 2005; copy on file with Journal of Appellate Practice and Process).

- One retired judge, nominated by the Canadian Judicial Council;
- One member nominated by the attorney general of the province (or jointly by the attorneys general of the provinces within the region) for which the appointment is to be made;
- One member nominated by the law society of the province (or jointly by the law societies of the provinces within the region) for which the appointment is to be made; and
- Two lay members (neither judges nor lawyers) nominated by the Minister of Justice.

This advisory committee, which would select a chair from its own members, would be part of a four-stage process. The first stage would involve the drawing up of a list of prospective appointees by the federal Department of Justice, through the current consultation process, which generates a pool of names and solicits opinions on those names. Under the proposal, the Minister would use this process to create a list of eight names for the consideration of the advisory committee.

The second stage would centre on the advisory committee, which is charged with conducting a “full, balanced and objective assessment” of the eight judicial candidates, within the terms of a “mandate letter” submitted by the Minister that would specify the criteria to be applied, the persons to be consulted, the requirement of written confidentiality undertakings, and several procedural guidelines, including an absolute ban on in-person interviews of the candidates. The Minister would attend the first meeting of the advisory committee, and the committee would report to the Minister on a regular basis. At the end of this stage, the committee would present an unranked list of three candidates, accompanied by a written commentary assessing the strengths and weaknesses of each candidate.

The third stage would involve the Prime Minister, who would make the selection from the three names submitted,

although he would retain the discretionary capacity to appoint from outside the short list should he deem it necessary.

Finally, as soon as possible after the appointment of the new member of the Supreme Court, the Minister of Justice would appear before the Justice Committee to explain the identification and evaluative processes by which the appointee was selected.

At first glance, this would seem to be a fairly substantial move on the part of the government, one that has picked up on many of the concerns that I have identified above and has responded by constraining what is now a wide-open choice by the Prime Minister, but on closer investigation, much of this evaporates.

The most important consideration is that the advisory committee is given a very narrow responsibility—cutting a list of eight names proposed by the Minister of Justice to a list of three names from which the Prime Minister will (possibly but not necessarily) make his choice. The process of generating this eight-name short list is conducted in the same way as in the past, by the legal professionals of the federal Department of Justice acting under the instructions of the Minister of Justice, who is appointed by the Prime Minister. The committee has no capacity to consider additional names of its own choosing, only to comment on the eight names it has been supplied, and it is specifically prohibited from meeting the judicial candidates in person.

A second problem is that even this choice is largely toothless. Although the committee chooses its three names, draws up its evaluative commentary, and submits this to the Prime Minister, he is free to ignore it. The report suggests that this should not be done lightly, but at the same time insists that the Prime Minister must have the complete discretion to do this if he deems it necessary—indeed, that he *should* do so if there is the slightest hint that the advisory committee may have breached confidentiality in any way.

A third consideration is that the membership of the committee has been kept down in the interests of creating collegiality and quick response, but the result is it has been significantly skewed. There are four federal politicians, two laypersons appointed by federal politicians, one lawyer, one retired



judge, and one representative of the provincial attorney(s) general—even though it is accepted up front that one major axis of the Supreme Court’s responsibility is the policing of the jurisdictional limits of the two levels of government.

A fourth consideration is the intrusive role of the federal Minister of Justice, who appoints several of the members, drafts the mandate letter, sets strict limits for the procedures of the committee, generates the “long short list” of eight judicial candidates, attends the committee’s first meeting, receives regular reports and detailed minutes, and ensures that there have been no violations of confidentiality.

A fifth consideration is the constant reiteration of the constraints that are put on revisions to the appointment process by the federal cabinet’s “constitutional responsibility” for the appointment of Supreme Court justices. But the Supreme Court of Canada is not even entrenched in the constitution; the appointment process regarded as so sacrosanct is contained within an ordinary piece of federal legislation; and even if the assertion could be taken at face value, it is still not inconsistent with a formal process that delegates the actual narrowing of a list to a single name. After all, it is technically the Governor-General who does the appointing of Supreme Court justices, and nobody suggests that her office or the credibility of the Supreme Court is compromised by the fact that she has no choice but to accept the name submitted to her by the Prime Minister. As Ziegel has summed it up: “What is so striking about the federal government’s most recent proposals is the government’s neurotic obsession with perpetuating executive paternalism into the 21st century.”<sup>76</sup> The Minister of Justice offers the illusion but not the substance of reform; the contrast with the sweeping and substantive changes to the judicial system currently being considered by the United Kingdom is both striking and embarrassing.

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76. Jacob Ziegel, *Supreme Court Selection Process Needs More Thought*, Toronto Globe & Mail (Apr. 13, 2005) (available at <http://www.theglobeandmail.com/servlet/story/RTGAM.20050413.wwebcomment12/BNStory/National/?>) (accessed Apr. 19, 2005; copy on file with Journal of Appellate Practice and Process).

## VIII. CONCLUSION

Prime Minister Paul Martin surprised many when he spoke out about a democratic deficit and linked the idea to the way Supreme Court justices are appointed, but it would be a mistake to assume that this necessarily means that major changes are on the horizon, or that these reform measures will enjoy a high priority for an increasingly shaky minority government. The ad hoc process adopted for the appointment of two new judges in August 2004 involved minimal changes: a toothless panel of legislators allowed on one day's notice after the appointments had already been announced to spend a few hours throwing questions at a person who insisted that he had not made the decision.<sup>77</sup> The Minister of Justice's April 2005 proposals seem no better: a toothless advisory committee dominated by federal politicians and federal appointees that could (if the Prime Minister did not simply decide to ignore them) reduce the Minister of Justice's short list of eight to a shorter list of three. From a caricature of a U.S.-style legislative ratification, we have progressed to a caricature of a nomination commission. The pattern suggests that the federal government is satisfied with the basic logic of the current process, worried only about the superficial appearances. Months after the Prime Minister himself opened the issue, the initiative remains in the hands of the Prime Minister, who chooses according to his own priorities the judges who will shape Canadian law for decades, and who is answerable to no one for how he does so. There is no reason to think that the situation will be any different ten years from now.

To return to my opening comments: In Canada, who will appoint the judges? It is clear that the Prime Minister will continue to do so, within the most inoffensive of constraints. And who will guard this guardian? Canadians will just have to hope that he will guard himself.

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77. A newspaper columnist referred to the process, a legislative panel interviewing neither the judges nor the politician who had selected them, as the equivalent of sending your mother to your job interview. *A Feeble New System for Screening Judges*, Toronto Globe & Mail A16 (Aug. 25, 2004) (unsigned editorial).