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Editors' Note 2

Jacob S. Ziegel
Merit Selection and Democratization of
Appointments to the Supreme Court of Canada

Introduction 3

The Supreme Court's Adjudicative Roles 4

Existing System of Appointments to
the Supreme Court 5

Comparative Methods of Appointment to
the Highest Courts 6

Origins and Evolution of the Executive
Appointive System in Canada 8

Canadian Developments: The Case for a
Nominating System for Appointments
to the Supreme Court 9

Modus Operandi of Nominating
Committee 10

The Case for a Confirmation Procedure 13

A Supreme Court Nominating Committee
or a Confirmation Procedure, or Both? 17

Constitutional Position 18

Conclusion 19

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Selection
and
Democratization
of
Appointments
to the
Supreme Court
of
Canada

Editors' Note

Supreme Court appointment procedures have been coming under heavy scrutiny in recent months as a vacancy has opened up on the Court with Justice Peter Cory's decision to retire. A successor, Louise Arbour, has been duly appointed.

While this selection process involves the Justice Minister and other officials, the final decision about Supreme Court appointments lies with the Prime Minister. Given the prominent role played by the Supreme Court nowadays, however, there is considerable pressure building to find a new method of selection.

Jacob Ziegel of the University of Toronto Law School has been following this issue for many years and firmly believes change is in order. Drawing on a comparative analysis of the procedures in place in other jurisdictions, Professor Ziegel calls for parliamentary hearings to confirm potential appointees put forward by the Prime Minister. He also favours what is perhaps a more attainable reform, the establishment of a nominating committee. Such a committee, with representatives from the federal and provincial governments, the legal community and others, would present the Prime Minister with a short-list of recommended candidates for Supreme Court vacancies.

The results of a recent IRPP survey on Canada's courts, to be reported in a forthcoming *Choices* paper in the *Courts and Legislatures* series, suggest that Professor Ziegel's recommendations would find considerable favour among the Canadian public. The survey asked 600 Canadians what they thought of the Prime Ministerial method of appointment and found that only eight percent approve. What Canadians would like to see instead is a process involving parliamentary and/or provincial input.

Whether any of this will come to pass remains to

be seen. There is deep resistance in some quarters to tinkering with our institutions of governance, stemming perhaps from the acrimony and division stirred up by past constitutional reform efforts. But as Professor Ziegel points out, it is questionable whether the changes he proposes would require any constitutional amendment. With practical reform proposals on the table and public disenchantment seemingly on the rise, the onus is on the federal government to give serious consideration to alternative ways of selecting Canada's Supreme Court judges.

a n n o u n c e m e n t

Forthcoming *Choices* in the
Courts and Legislatures series:

- Janet Hiebert (Queen's University), *Wrestling with Rights: Judges, Parliament and the Making of Social Policy*, which examines how the Charter has affected the development of government policy and the evaluation of legislation.
- Joseph Fletcher (University of Toronto) and Paul Howe (IRPP), *Canadian Attitudes Toward the Charter and the Courts: Results of a Recent IRPP Survey in Comparative Perspective*, which reports initial results of a national survey commissioned by IRPP.
- Gregory Hein (McMaster University), *Interest Group Litigation in Canada, 1988-1998*, which seeks to explain why certain interest groups choose litigation as a means of advancing their interests and documents their success rates.

Introduction

The long simmering debate over the appropriate method of appointing judges to the Supreme Court of Canada in the Charter era has flared up again over the past year. It is safe to assume that the debate will continue to attract the attention of Supreme Court watchers until a more satisfactory method of appointment is adopted than the present.

The current resurgence of interest is illustrated, among others, by the following events. In Alberta and elsewhere in Canada, right wing politicians have long been critical of the activist role of the Supreme Court.¹ The criticism mounted last year with the Supreme Court's decision in the *Vriend* case² declaring Alberta's Human Rights Code to be in violation of the equality provision in the Charter because it discriminated against gays and lesbians.³ Critics urged the Klein government to use the override provision in the Charter to reverse the Supreme Court's judgement, although the province eventually decided against it. Then, much more recently, Justice McClung's unprecedented public outburst over Justice L'Heureux-Dubé's criticisms of his judgement in the *Ewanchuk* case⁴ sparked a vigorous media debate on gender issues in the Supreme Court and Justice L'Heureux-Dubé's gender philosophy.⁵

Not surprisingly, these events have encouraged editorialists and politicians to renew their calls for greater transparency in the appointment of Supreme Court judges.⁶ Members of the Supreme Court have also been drawn into the debate. Last September, shortly after announcing his retirement from the Court, Justice Gérard V. La Forest indicated his support for some sort of confirmation procedure for appointments of Supreme Court judges.⁷ On the other hand, in a similar but more recent interview following the announcement of his retirement, Justice Peter Cory expressed strong

opposition to any confirmation procedure that included questioning of nominees for appointment about issues likely to come before the Court.⁸ In a subsequent address to law students, Justice Frank Iacobucci also expressed his hostility to a public confirmation procedure.⁹

Meanwhile, reacting to common knowledge in the Toronto legal community that supporters of John Laskin and Rosie Abella, both members of the Ontario Court of Appeal, had actively lobbied for their favoured candidate to succeed Justice John Sopinka on the Supreme Court, Chief Justice Lamer publicly rebuked both factions for engaging in conduct that, in his view, was bound to tarnish the Court's good image in the public eye.¹⁰

Events of this genre are not peculiar to Canada. Similar debates about the role of the country's highest court and desirable changes in the method of appointments are taking place in Australia, England and New Zealand, and in the Council of Europe with respect to the European Court of Human Rights. At the same time, a vast literature has been spawned in the US about the confirmation procedure for appointments to the US Supreme Court following the Senate's rejection of Robert Bork's nomination in 1988 and the approval of Clarence Thomas by a narrow margin in 1991.

What is surprising about the Canadian scene is that since the rejection by Canadian voters of the Charlottetown Accord, both the Conservative and Liberal governments have evinced no interest in revising the selection method for appointments to the Supreme Court. In the case of the current administration, this may suggest either that Prime Minister Chrétien is quite happy with the existing system or that he feels that any changes must take place in the framework of generally agreed upon constitutional changes — changes, as he has often made clear, that are unlikely to take place in the foreseeable future. Another article, therefore, on appointments to the Supreme Court may seem futile. I do not share this pessimism and this article

proceeds from the premise that greater accountability and transparency in the appointments is much overdue although some constitutional hurdles may have to be overcome in order to bring about the necessary changes.¹¹

Two alternative or cumulative recommendations are presented below to address the shortcomings of the existing system of appointments:

- The establishment of a nominating committee that would present the Prime Minister with a short list of candidates to fill vacancies as they arise;
- The introduction of a parliamentary confirmation procedure for candidates presented by the Prime Minister for appointment to the Supreme Court.

Before describing these recommendations, I first consider the role of the Supreme Court, the existing appointment procedure, and the methods in place in other countries for appointments to the highest courts.

The Supreme Court's Adjudicative Roles

An appropriate starting point for the discussion is an appreciation of the overarching role played by the Supreme Court in Canada's legal firmament.¹² The Court's position as the final arbiter of the meaning and interpretation of the Charter of Rights and Freedoms is its most visible and intrusive role since 1982, but it is only one of several roles. Since the abolition of appeals to the Privy Council in 1949, the Court has also become the court of last resort in appeals concerning the division of powers between the federal and provincial governments and on all other constitutional questions arising under the Constitution Act, including being expected to advise the country on the meta-legal rules applying in a post-secessionist Canada!

Thirdly, unlike many other constitutional courts in the Western hemisphere, the Supreme Court discharges the very heavy burden of supervising Canada's criminal justice system and other public law areas, as well as having the last word on judicially crafted doctrines and principles in the private law area applicable at both the provincial and federal levels. It is common to speak of the Supreme Court's role in the non-constitutional arena as being interstitial in character since its decisions can be changed by legislation. This is true in theory but it does not reflect the actual practice since to a large extent the federal and provincial legislatures have been content to let the courts apply and develop private law principles with little interference, especially those applying outside Quebec. Significantly, the Supreme Court's value-laden Charter role has also encouraged it to adjudicate much more boldly on non-Charter issues than it did before 1982.¹³

Still, it is the Court's decisions on the Charter that have engendered the most debate and, it is safe to assume, will continue to do so in the future. It is easy to see why. In a couple of dozen sections the Charter entrenches those democratic, legal and egalitarian values regarded as fundamental in regulating relations in a modern liberal state between a government and its citizens. Unavoidably, since the values themselves are open-ended and relative, so are the Charter provisions. It is left to the nine members of the Court to give them meaning and content, and equally to determine when the rights-oriented norms can be departed from under section 1 of the Charter because of compelling societal needs. Apparently some Canadian judges still believe that this "interpretive" task is no different from the roles played by the Supreme Court before 1982,¹⁴ but clearly this is not so. In giving content to the Charter provisions, judges are bound to bring into play their own political philosophies and life experiences and thus to support or disappoint the various interests appearing before them.

This consequence of the entrenchment of a bill of rights is well understood in the US and accounts for the close scrutiny and sometimes fierce debates surrounding new appointments to the US Supreme Court. As Justice Felix Frankfurter wrote in 1930, "It is because the [US] Supreme Court wields the power that it wields, that appointment to the Court is a matter of general public concern and not merely a question for the profession. In truth, the Supreme Court *is* the Constitution."¹⁵ These words are equally apt in describing the role of the Canadian Supreme Court.¹⁶

Existing System of Appointments to the Supreme Court

Anomalously for a federal system and subject to what is said hereafter, the Supreme Court is not entrenched in the Canadian constitution. In fact, the Supreme Court was not mentioned by name before the adoption of the Constitution Act 1982. Rather, the Constitution Act 1867 merely *empowered* the federal Parliament to establish a general court of appeal for Canada¹⁷ and that power was only exercised eight years later with the establishment of the Supreme Court in 1875.¹⁸

This casual approach to the need for an indigenous final court of appeal for Canada was not accidental. On the contrary, it very much reflected the belief of the Fathers of Confederation that the Privy Council in London should remain the court of final resort on questions of Canadian law, not only on questions of constitutional law and in other public law areas but in matters of private law as well. Although sentiments began to change after the First World War, it was not until 1949 that appeals to the Privy Council were fully abolished¹⁹ and that the Supreme Court truly became master in its own home.

During the intervening 74 years the Supreme Court was not only eclipsed by the much greater prestige and senior position occupied by the Privy Council, but it suffered the further indignity that if the litigants so elected appeals from provincial appellate decisions could be taken direct to the Privy Council, and in practice often were.²⁰ Still worse, successive federal governments also treated the Supreme Court as a mere adjunct of the executive arm and not as a separate branch of government. Appointments to the Court were tarnished by patronage, just as they were at the provincial level in appointments to the provincial superior courts, and the Court's judgements were of indifferent quality. In Peter Russell's trenchant description, the Court was "a thoroughly second rate institution and treated as such by the federal government."²¹

Abolition of appeals to the Privy Council was one important step in the post-World War II transformation of the Supreme Court but others were equally important in improving the efficiency and quality of the Court's work and in elevating its constitutional status as Canada's pre-eminent court. These factors included the abolition as of right of appeals to the Court in civil cases (1974) and the abolition of oral hearings in leave applications except at the Court's option (1990). The most important event of course was the adoption of the Charter in 1982 because it dramatically changed the character of much of the Court's work and therefore also forced the federal government to take its appointive role much more seriously. To this list of transformative factors should be added the introduction of law clerks during Chief Justice Laskin's tenure of office. The law clerks (usually the top graduating students in their year) not only greatly assist the Supreme Court judges in handling their heavy case load but play an equally important role in keeping the judges abreast of legal scholarship in the various branches of the law and of current trends in legal and political philosophy,²² and thus in assisting the members of the Court in discharging their policy making functions.²³

Most observers would agree that the cumulative impact of these changes has been greatly to improve the quality of appointments to the Supreme Court and of the judgements rendered by the Court, certainly as compared with the prewar standards and probably also as compared with the period between 1949 and 1982. However, this is not meant to imply that the actual process of appointments has become any more transparent and that further changes are not needed to improve the quality of appointees still further.

The Supreme Court Act simply provides²⁴ that the nine members of the Court, including the Chief Justice, are to be appointed by the Governor in Council, that three of them must come from Quebec, and that an appointee must either be a judge of a superior provincial court or be a barrister or advocate of at least 10 years standing at the bar of a province. By convention, Ontario is also entitled to be represented by three judges, the Maritime provinces by one, and the Prairie provinces and British Columbia by two.²⁵ Everything else about the appointing process is left to the discretion of the appointing Cabinet, and it remains shrouded in vagueness, and unsubstantiated rumour and gossip. Obviously the Minister of Justice is involved and so, we are told, is the Prime Minister's Office, since by convention the Prime Minister makes the actual decision. If that is the case, does the Cabinet do more than simply rubber stamp the Prime Minister's choice? What role does the Chief Justice of Canada play? To what extent does the Minister of Justice confer with the attorney general or attorneys general of the province or region from which the candidate is to be appointed? What is the role of lobbyists for special interests or on behalf of specific candidates? In the Charter era, how much attention does the federal government pay to the constitutional philosophy of prospective appointees? There are no sure answers to any of these questions.

According to the Canadian Bar Association's *Report on the Appointment of Judges*,²⁶ federal Min-

isters of Justice follow the same selection procedure as they do in appointments to the Federal Court of Canada, the federal Tax Court, and provincial superior courts. This is not very reassuring because the process in respect of those courts is just as unstructured and lacking in transparency as it is at the Supreme Court level. Worse still, political patronage and personal friendships still play a prominent role in appointments to the lower courts.²⁷ In one respect, however, appointments to provincial superior courts offer better safeguards than appointments to the Supreme Court. This is because of the system of advisory committees established by the Mulroney administration in 1988 to screen applicants for provincial judicial appointments and continued by the Chrétien government. We also have a more or less firm commitment from the Chrétien government not to make an appointment unless the candidate has received at least the passing grade of "recommended" from the Committee.²⁸ Admittedly, as discussed further below, the threshold of acceptability is low and the screening system is a poor substitute for one in which the advisory committees actually present the appointing authority with a short list of the best qualified candidates. However, it is at least a beginning on the journey to a more accountable and transparent system of appointments. This and other alternatives to achieving this goal are considered in the following sections of this article.

Comparative Methods of Appointment to the Highest Courts

Broadly speaking, there are three methods in use today in Western Europe, North America and other common law jurisdictions for the selection of members of the highest constitutional court. These are selection by the Executive, selection by the legislature or a leg-

islative committee acting alone or in conjunction with other government agencies, and selection through a career judiciary. It needs to be emphasized that there is no rigid division between the three methods because of the many variations within each of the methods and the extent to which they borrow from one another. To obtain a complete taxonomy of the range of alternatives, one would have to add as a minimum the use of judicial nominating commissions²⁹ preceding the actual appointment of or voting on candidates, as well as the existence of confirmation procedures after the selecting agency has named its nominee for judicial office. Although only the executive appointive method has ever been used in Canada, it is still useful to reflect on the non-appointive methods of selection to act as a corrective to a sense of superior virtue one may have about the Canadian model.

The legislative model is used in some fashion in such countries as Germany, Austria, Switzerland and Italy. In Germany, for example, the members of the Federal Constitutional Court (*Bundesverfassungsgericht* (BVG)) are appointed by the members of the lower house (*Bundestag*) and upper house (*Bundesrat*) of the German Parliament, with each house voting for one of the two eight-judge senates into which the Constitutional Court is divided.³⁰ The *Bundesrat* is made up of representatives of the German states (*Länder*), thereby supplying the federal component in elections to the Constitutional Court. The *Bundesrat* also participates actively in the selection of judges for the five other specialized final courts of appeal with which Germany's federal structure is endowed.³¹ An important difference between the judges in the Constitutional Court and the other appeal courts is that only six of the judges of the Constitutional Court are required to be drawn from the career judiciary. Even more significant is the fact that the legislative role in the selection of judges for the Constitutional Court reflects a widespread sentiment in civil law systems that constitutional law is "political law" and that the

members of the Court should therefore be appointed by the elected representatives of the German people and representatives of the *Länder*.³²

An elective system also applies to the members of the International Court of Justice (ICJ), who are elected by combined majorities of the United Nations General Assembly and the Security Council, and to the members of the European Court of Human Rights (ECHR). The latter are elected by the member states of the General Assembly of the Council of Europe from short lists of candidates presented by the member countries.³³ However, it is not so much a democratic impulse that drives the elective method in the ICJ and ECHR as the fact that the United Nations and the Council of Europe are not governments and lack an effective executive authority.

A much more authentic Jacksonian spirit of democracy inspired the American states in the 19th century to adopt a populist system of election of judges. That system has now been heavily diluted in about half the states and in the District of Columbia through the use of judicial nominating boards, often, but misleadingly, referred to as the Missouri plan after the state which first introduced the system in 1940.³⁴ Under the Missouri plan, when a vacancy arises in a court the board presents the Governor with a list of three candidates from which he or she must choose one and appoint the candidate until the next general election for judges but not for less than one year. After this probationary period, the appointee must be approved by the electorate for a full 12 year term in the appellate court, or a lesser term in the trial court. The tradition is for the judge to run unopposed on a separate non-partisan judicial ballot at the time of the general election.³⁵

With rare exceptions, Canadian lawyers find any entanglement with an elective system repugnant, at least where the electorate is made up of ordinary voters. They find it demeaning to the candidate running for judicial office and likely only to attract

second rate talent. They also see it as basically incompatible with the concept of judicial independence if the candidate has to submit herself to re-election at various intervals. These are serious weaknesses to be sure. But a sceptic is entitled to ask whether the results are worse, or significantly worse, than the partisan system of federal judicial appointments that still obtains in some of the provincial superior courts and to some extent in the Federal Court of Canada. In any event, no Canadian scholar and no investigative committee has ever recommended adoption of a US style electoral system for Canadian judges.³⁶ It is true to say, however, that over the past twenty years Canadian discussions and organizational changes in judicial appointments have been much influenced by the use of judicial nominating boards of the type associated with the Missouri plan. The adoption of this model, as we shall see, has also been recommended in connection with appointments to the Supreme Court of Canada.

Origins and Evolution of the Executive Appointive System in Canada

The Canadian system of judicial appointments, at all levels, is derived from the English model and, so far as federal appointments to the Section 96 courts are concerned, is enshrined in the Canadian constitution. Historically, the system arose in England because the monarch was regarded as the fountain of justice. The courts were the King's courts and the judges were the King's judges. So it was natural that all the superior court judges should be appointed by the reigning monarch or his designate and that the appointive system should be retained even after the introduction of responsible government and universal suffrage. Patronage considerations undoubtedly influenced the appointment of judges

in earlier centuries but the problem was never as serious in England as it became in Canada after Confederation. This was (and largely remains so) because of the much smaller number of full-time judges in England and Wales and because of the rigid division until recently of the legal profession into barristers and solicitors.³⁷

Another difference between Canada and England is the unique role of the Lord Chancellor under the British constitution as head of the judiciary, presiding officer in the House of Lords, and a member of the Cabinet. In his judicial capacity, the Lord Chancellor is responsible for appointments to most of the superior courts and, since the last century, for appointments to most of the lower courts as well. Because of his unique position the Lord Chancellor was able to develop a high degree of independence from the other branches of government in making the appointments. He has been greatly aided in this task since the last part of the 19th century by the introduction of a permanent secretariat attached to the Lord Chancellor's Office.³⁸

Nevertheless, complaints about the lack of transparency in the Lord Chancellor's appointments, the predominance of white male upper class Oxbridge appointees and the under-representation of women and visible minorities at all levels of the judiciary have led to increasing demands for reform. Observers predict that the pressure for broader changes is bound to mount with the incorporation into British domestic law of the European Convention on Human Rights.³⁹ Some changes were introduced by the Conservatives during Margaret Thatcher's prime ministership. In a 1995 pre-election manifesto, the Labour party committed itself to introducing a system of advisory committees for appointments to the bench.⁴⁰ The system is not yet in place and it is not clear whether it will ever be applied to the House of Lords in its judicial capacity. Nevertheless, Lord Irvine, the new Lord Chancellor, has recently reaffirmed the Blair government's commitment to continue with the

reform of the appointive system, including the establishment of the advisory committees.

Canadian Developments: The Case for a Nominating System for Appointments to the Supreme Court

Canada has never had a Lord Chancellor's Office, we have many more judges, and federal ministers of justice are generally ambitious politicians. It is therefore not surprising that since Confederation federal governments of whatever political hue, and regardless of pre-election promises, have never been able to resist using judicial offices for rewarding party supporters, personal friends and professional associates.

The mounting criticisms of the abuses of the appointive power led postwar Canadian governments to make modest changes⁴¹ — first, through the use of the Canadian Bar Association's National Committee on the Judiciary to act as a screening device for prospective appointees, then, starting with Otto Lang in 1968, with the hiring of a special assistant to the Minister of Justice to compile dossiers on candidates for office, and, most recently, with the introduction of provincially-based but federally-sponsored advisory committees with no powers actually to nominate candidates for judicial office.

Those who have followed this evolution are near unanimous in their criticisms that the federal government has not gone far enough and that the advisory committee system introduced in 1988 is only a palliative which does not ensure appointment of the best qualified candidates. Moreover, the advisory committees do not play even a screening role with respect to the promotion of existing judges and there is no committee to advise the federal government on appointments to the Supreme Court.⁴² The

critics argue that the correct model for the federal government to follow is the merit-based system of nominations for appointments of provincial court judges in force in British Columbia, Manitoba, Ontario and Quebec,⁴³ and strongly endorsed in the 1985 reports of the committees on judicial appointments of the Canadian Association of Law Teachers (CALT) and the Canadian Bar Association (CBA).⁴⁴

Both the CBA and CALT reports recommended that the same system of committee nominations (although differently constituted) should be adopted for appointments to the Supreme Court as were recommended for appointments to the provincial superior trial and appellate courts.⁴⁵ More recently, Professor Martin Friedland has made the same recommendation in his important report to the Canadian Judicial Council.⁴⁶ During its term of office the Mulroney administration showed no disposition to surrender its valuable patronage power in deference to these recommendations and unhappily the Chrétien government seems as firmly committed to the status quo as its predecessors.⁴⁷ That being the case, it seems unrealistic to expect Prime Minister Chrétien to establish a nomination procedure for appointments to the Supreme Court of Canada.

In defence of the present government's position, it might be argued that since it is generally agreed that Supreme Court appointments are now substantially free of party biases the need for an independent nomination procedure has disappeared. It could also be urged that the present informal system of consultation in the filling of vacancies provides much greater flexibility than would be available in the conversion to a formalized nomination mechanism.

There may be some merit to the second argument, but there is little merit to the first. If major controversies have been avoided over the appointment of Supreme Court judges since the adoption of the Charter (still only a short 17 years ago), this is largely because successive Prime Ministers —

Trudeau, Mulroney, Chrétien — have shared similar constitutional philosophies and because the full impact of the Charter has not yet sunk in. If a Reform-type government were to be elected in the future, it is entirely predictable, based on recent US experience,⁴⁸ that without the restraining force of an independent nomination procedure or confirmation process appointments would become much more polarized, as the appointees would be selected on the basis of their conservative political and social philosophies. The same would be true, of course, if Canadians were to elect a government with a strong left wing agenda.

Another argument often put forward to avoid the establishment of an independent nomination procedure is that the federal government is responsible to Parliament for its actions and should only be held accountable in that forum for its judicial appointments. The reasoning, in my view, is specious. There appears to be a long-standing tradition in the British Parliament that specific judicial appointments should not be debated because it might impair the independence of the judiciary. The tradition may not be as well entrenched in Canada but even if questions were permitted in the House of Commons it would do little good. The opposition would always be faced with a *fait accompli*.

The excuse of parliamentary accountability would only be meaningful if there were an opportunity to debate appointments *before* they were made or, better still, if nominations had to be confirmed by Parliament before they could take effect, as is true of federal judicial appointments in the US. The desirability of such a confirmation procedure in Canada and whether it should be adopted in place of, or in addition to, an independent nomination procedure is discussed below. For the moment it is sufficient to say that since there are already strong precedents in Canada for the establishment of judicial nomination committees, this should be a first step in assuring Canadians of a more objectively-based, better structured and more transparent system for selecting Supreme Court

judges than exists at present.

If a Commonwealth precedent were needed to support a judicial nomination committee at the highest constitutional level, it will be found in the new South African constitution. This provides for the appointment of a Judicial Services Commission (JSC) of 23 members, whose mandate is to provide the South African President with a short list of nominees for appointment to the Constitutional Court, the Supreme Court of South Africa, and members of the South African High Court.⁴⁹ The Commission has now been in operation for five years and appears to be functioning well. One of the distinctive features of the JSC is that it conducts public interviews of prospective nominees before presenting its list to the President.

Modus Operandi of Nominating Committee

The 1985 recommendations of the CALT and CBA committees provide a useful starting point for defining the structure and operation procedures of a Supreme Court nominating committee. In commenting on these recommendations, Lorraine Weinrib of the University of Toronto Law School has justly complained that they are too meagre and contain very little information about the nominating committee's terms of reference and how the committee is expected to go about its work.⁵⁰ The following notes are designed to respond to her questions and to offer further non-exhaustive suggestions on the *modus operandi* of a nominating committee.

1. *Size of the Committee.* The CALT committee envisaged a nominating committee of seven members composed of the following:

- the Chief Justice of Canada
- a nominee of the Canadian Judicial Council
- a nominee of the Minister of Justice
- a nominee of the attorney general(s) of the province or provinces from

which the candidate is likely to be selected

- two members of the Bar
- a member of the public to be nominated by the other members of the committee.

The size of the committee, as well as its composition, should be reconsidered. Given the committee's important role and the range of constituencies it must accommodate, a larger size than seven is called for. The question is how much larger. The Ontario provincial advisory committee has 13 members, a majority of whom are non-lawyers. The South African Judicial Services Commission has 23 members, 10 of whom are drawn from the South African Parliament and the provincial legislatures. On the other hand, Professor Friedland recommends a body of nine,⁵¹ a suitable number because of the importance of balancing representativeness with the need for collegiality and effectiveness.⁵² In light of these considerations, the committee should be structured as follows, though my suggestions are not written in stone:

- one nominee of the federal Minister of Justice
- two nominees of provincial governments
- two nominees of the Canadian Bar Association and provincial law societies
- one nominee of the aboriginal communities
- two members of the public to be appointed by the Governor General
- one chair of the committee, also to be appointed by the Governor General.

2. Other Compositional Issues. The following issues also arise in determining the composition of the committee. The first is whether the Chief Justice of Canada should be directly represented. The office is included in the CALT list; judges are also strongly represented in the South African commission. On the other hand, the inclusion of judges is generally not favoured in American state nomi-

nation committees. I believe the American position is the right one. Undoubtedly, the incumbent Chief Justice of Canada should always be consulted but, in my view, it would be a mistake for him or her to be a member of the committee. If the Chief Justice were a member the others members might feel obliged to defer to his views. If they failed to do so the incumbent might feel slighted.

A second issue is whether members of Parliament should be included. The German and South African models strongly argue for their inclusion, particularly if there is to be no confirmation procedure for the nominee ultimately chosen by the federal government. If a confirmation procedure is put in place this seems to dispense with the need for parliamentary representation.

The role of provincial representation raises a separate set of issues. Finding the right formula for provincial input in the selection of members of the Supreme Court has been a dominant theme in constitutional discussions between the federal and provincial governments, starting with the Victoria Charter (1971) and ending with the Charlottetown Accord (1992). The trouble with all the proposals was that they focused on the provincial role in the selection of the judges to the exclusion of other democratic inputs, and were therefore seriously flawed.⁵³ If this is conceded there is no justification for giving the provincial representatives a majority voice on the committee.⁵⁴ This reasoning gains further strength from the fact that division of powers issues and other questions peculiarly of provincial concern now only occupy a modest part of the Supreme Court's agenda.

A related issue is whether the provincial representatives for a particular appointment should be selected by the province or provinces from which the judge is likely to be drawn. I have argued elsewhere that it is a mistake in the Charter era to attach so much importance to balanced regional representation to the exclusion of other factors. Nevertheless, given Canada's size, its dispersed popula-

tion and the strength of the tradition favouring regional representation, a compromise might be struck by giving one seat on the nomination committee to the province or provinces from which the new appointee is expected to be drawn and allowing the other provinces to select the second provincial representative. Quebec's status on the committee would also need to be considered. It is not clear whether Quebec's legislatively prescribed three seats on the Court is now constitutionally entrenched,⁵⁵ but, regardless, no one would question the province's entitlement to be represented on the committee when a Quebec vacancy arises on the Court. However, for the reasons I have given in respect of appointments from the other provinces, Quebec's role should not be to the exclusion of other provincial representation.

3. *Scope of the Committee's Jurisdiction and Appointment of the Chief Justice.* A question requiring some consideration is whether appointment of the Chief Justice should also fall within the committee's jurisdiction. If the position falls vacant and is to be filled by a person not already on the court then clearly the committee should be involved. However, the Canadian tradition is to appoint the Chief Justice from existing members of the Court.

Should this make a difference in determining the Committee's role? The US position is that the chief justiceship of the Supreme Court is a separate position requiring separate nomination and therefore confirmation by the Senate. Leaving aside the constitutional requirements, American scholars believe that the Chief Justice wields so much influence and power on the Court that his designation requires special consideration, even if legally he is only *primus inter pares*, first among equals. The current members of the Canadian Supreme Court seem to take a less exalted view of the Canadian chief justiceship and seem to treat it more as a prestigious administrative position than anything else.⁵⁶ Whatever be the correct assessment of the Canadian position, Professor Friedland reports a growing sentiment among Canadian judges at the

puisne and appellate levels that the selection of the Chief Justice should not be a unilateral decision by the Prime Minister and that the office should only be held for a limited term. He supports both these sentiments and also recommends a separate selection procedure for chief justices.⁵⁷ It would be anomalous if a separate selection procedure were to be adopted for provincial chief justices and not for the Chief Justice of Canada. It is surely also correct to say that most Canadians attach considerable symbolic significance to the office of Chief Justice of Canada and that they see the incumbent as being much more than a presiding administrator of the Supreme Court.

4. *Committee's modus operandi.* To address now some of Professor Weinrib's more specific concerns, she is right to stress the importance of compiling a full dossier on every candidate. This means that the committee must have adequate, skilled and sensitive support staff, including an executive director of appropriate seniority.⁵⁸ The committee should be required to solicit suggestions for nominations from all segments of the legal community and to advertise the vacancy. A personal interview with candidates appearing on a short list should be equally essential, although whether the interviews should be held in public is more debatable. As already mentioned, in South Africa the hearings are held in public. In my view, the Canadian position should turn on whether the candidate favoured by the federal government must also run the gauntlet of a parliamentary confirmation procedure. If a confirmation procedure is rejected as unnecessary (a critical issue that is addressed below), then public hearings by the nominating committee are indispensable to give its proceedings the needed transparency and to permit representations from interest groups and members of the public.

5. *Selection criteria among candidates.* Professor Weinrib seems strongly of the view that the committee needs to be armed with a statutorily prescribed list of criteria to assist it in its search for the ideal candidate. This is not self-evident, first,

because persons with the presumed sophistication required of members of the committee should not need instruction about the requisite attributes of a successful member of the Supreme Court and, second, because even Supreme Court judges differ in their ranking of the necessary qualities. There is surely also widespread agreement that Supreme Court judges should not be clones of each other but should have varied backgrounds and experiences, and should represent a spectrum of philosophical positions on the most pressing constitutional issues with which the appointees are likely to be faced in the course of their judicial careers.

Subject to these caveats, my wish list for the essential attributes of a Supreme Court judge would include the following: complete personal integrity; robust health; industriousness and good work habits; a sense of collegiality with other members of the Court to enable the court to discharge its very heavy work load efficiently and without unnecessary friction;⁵⁹ an excellent intellect and fine writing skills to match it; a deep understanding of the Canadian constitution and the Charter, and of the role of law in general in contemporary Canadian society; and not least, keen discernment in being able to project the consequences of a judgement on to a broader canvass.⁶⁰

Professor Weinrib has suggested that a candidate's strong track record in a career requiring demonstration of these virtues would greatly assist the nominating committee in its search, and apparently believes that prior appellate service would be a particularly valuable source of information. Not everyone would agree, certainly not Justice Frankfurter, who was no mean judge of what makes for a successful Supreme Court judge. In an oft cited passage, he wrote that "One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the Supreme Court is zero."⁶¹ In fairness to Professor Weinrib it needs to be explained, however, that she is not simply relying on the presence of prior judicial serv-

ice but on the *quality* of that service. This raises an entirely new dimension for consideration.

6. *Disposition of the Committee's recommendations.* Both the CALT and CBA reports envisaged the committee presenting the federal government with a short list of recommended candidates from which the federal government would be obliged to pick the appointee or give reasons for its refusal to do so. Professor Friedland has ingeniously suggested that the federal government should be free to go outside the list but would then have to justify its decision in some kind of confirmation procedure.⁶²

The Case for a Confirmation Procedure

Professor Friedland's bold suggestion brings us face to face with what is currently the most contentious issue in Canadian discussions of appropriate selection procedures for the Supreme Court. This is whether a confirmation procedure is needed and whether it is also required where a nominating committee system has been installed.

Neither the CBA nor the CALT committee recommended the introduction of confirmation procedures for appointments to the Supreme Court, or to any other court whose judges were appointed by the federal government. They did not feel it was needed given the existence of a credible nomination procedure. I was a member of the CALT committee and I concurred with my colleagues' views. I have changed my mind since then, at least so far as the Supreme Court is concerned.

The most important reason for my change of position is this. It is precisely because of the intensely political role (I use the word political in a positive and not pejorative sense) played by the Supreme Court judges in applying and interpreting the Charter as well as the rest of the constitution that it is critical to inject a democratic and

balancing note in the appointing process. Canadians should be able to learn about, see, and evaluate the candidate before his or her appointment becomes a *fait accompli*. If the federal government has chosen well, with or without the help of a nomination committee, it will have little to fear. The candidate is likely to earn quick approval from the confirming body.

If the candidate is controversial, underqualified or otherwise unacceptable to a significant constituency, all the more reason why his or her merits should be publicly debated while there is still time for it. If candidates for the office of Prime Minister are expected to expose themselves to close public scrutiny, why should we require less of a nominee for the Supreme Court, who is likely to remain in office long after the appointing Prime Minister has disappeared from the public scene and who, in many respects, wields as much power as the Prime Minister and with less accountability?

There is also another reason that justifies the introduction of a separate confirmation procedure. Assuming the confirming body is made up of parliamentarians, it will help to educate our elected representatives on the impact of the Charter on traditional concepts of responsible government and give them a better appreciation of where the line should be drawn between their role and the Charter's role. Members of Parliament and senators (and likewise their provincial counterparts) have been slow to react to the steady erosion of Parliament's authority, implicit though it may be in the very existence of the Charter. As noted at the beginning of this article, the mood of acquiescence is changing and Canadians are beginning to appreciate the important roles of personalities and judicial philosophies in the interpretation and application of the Charter norms. The "inconvenience" of a confirmation procedure will be readily forgiven if it provides a regular opportunity for reviewing the work of the Supreme Court and in raising our collective awareness of its norms propounding role.

The notion of a confirmation procedure is no longer radical. It appeared in the report of the Ontario Advisory Committee on the Constitution in 1978 and in Bill C-60 introduced by the federal government in the same year. Both provided for confirmation of Supreme Court nominees by a revised Upper Chamber. In the case of Bill C-60, Upper Chamber approval would have been necessary even though the nominee would have been selected by the co-operative efforts of the Attorney General of Canada and the attorney general of the appointee's province. The Charlottetown Accord saw a confirmation role for the revised Senate in the appointment of members of senior government agencies and boards. It would surely be anomalous if the public were given a greater opportunity to comment on the potential head of the CBC, the CRTC or the Canadian Transportation Agency than is available to them to assess the qualities and suitability of a future member of the Supreme Court or a candidate for the chief justiceship of Canada.

As we have seen, Justice La Forest accepted the legitimacy of confirmation hearings after he retired from the Supreme Court a year ago, whereas Justices Cory and Iacobucci have taken a very different position.⁶³ We know that other members of the Supreme Court share their misgivings, so they deserve closer analysis. The objections appear to fall under two main headings, though it may be that the second is only a subset of the first.

The first objection is that the existing system works well, so why knock it?⁶⁴ The defence of the status quo is coupled with a warning not to be beguiled by foreign models (more particularly the US confirmation procedure) which may work well in their own environment but are alien to Canadian soil. This reasoning is quite unpersuasive and ignores the historical reasons for the adoption of the confirmation procedure in the US constitution.

The American Founding Fathers were divided over which arm of government should have the power to appoint the members of the US Supreme

Court; some favoured the President, others the Senate. A compromise was reached by conferring the nomination power on the President but requiring the President's nominations to be confirmed by the Senate.⁶⁵ The delegates to the Constitutional Convention of 1789 appreciated that giving the President an untrammelled power of appointment would give rise to abuses or lead to an unrepresentative Court. History has amply confirmed their intuition. Between 1789 and 1992, the Senate refused to confirm 28 of the 142 Supreme Court nominees, or nearly one out of five nominees, whose names were submitted by the President.⁶⁶ We may be sure that an even larger number of prospective nominees were never forwarded to the Senate because the President and his advisors anticipated rejection of their choices.

In short, even allowing for political partisanship in the Senate, the US confirmation requirements have on the whole met the Founding Fathers expectations in eliminating clearly unqualified candidates and in ensuring that the nominees enjoyed broad political acceptance. If US confirmation hearings have erred, it is on the side of accommodating the President's choice even where the candidate was not of the first quality, an almost inevitable result where the President's party also dominates the Senate.

Had Canada had an equivalent screening device for appointments to the Supreme Court, the well documented abuses of the appointment power that occurred during the first 75 years of the Court's history⁶⁷ might well have been avoided. In what sense then, has Canada been well served by a paternalistic executive power of appointment not subject to public scrutiny? It is true that the quality of appointments has been much better over the past 20 years or so. Even so, there is little room for complacency. There have undoubtedly been weak appointments and a surprising number of Supreme Court judges have taken early retirement for reasons other than ill health.⁶⁸ We are also entitled to

ask how much *better* the appointments might have been if there had been an independent nominating procedure or if the government's selections had been subject to a confirmation requirement. The warning against the danger of importing foreign innovations must also be viewed with much scepticism, given the fact that Canada has borrowed many legal concepts from the US during its relatively short history, including, not unimportantly, the concept of an entrenched bill of rights!

But what about Justice Cory's complaint that prospective appointees to the Supreme Court should not have to run the gauntlet of public questioning by politicians? The concern is that parliamentarians may be more interested in embarrassing the candidate or in scoring political points than in engaging in serious debate on the meaning of the Charter or the role of Supreme Court judges as guardians of Charter values. Justice Cory has also argued that it is unfair to expect candidates to justify decisions they may have rendered many years earlier as lower court judges and highly improper to ask them to explain their positions on current legal controversies or to predict how they would decide those issues as members of the Supreme Court.

The horror stories the critics have in mind no doubt are the confirmation hearings of Robert H. Bork and Clarence Thomas before the US Senate. However, they overlook the fact that public questioning of candidates is a relatively recent innovation in proceedings by the Senate Judiciary Committee⁶⁹ and that there were exceptional features about the Bork and Thomas cases.⁷⁰ The more recent nominees that have appeared before the Judiciary Committee have been approved without difficulty and they have not complained about unfair treatment. The nominees have reserved the right not to answer questions concerning their position on future cases that could come before the Supreme Court, and that right is generally conceded.⁷¹ If it was deemed appropriate or necessary in the Canadian context, rules could also be

adopted to delimit the scope of a nominee's examination before the parliamentary committee.

We can also learn from overseas experience. The public hearings before the South African Judicial Service Commission show that they can be conducted with decorum and that the chair can be relied on to prevent improper questioning. According to a perceptive British observer, "The original fear that good candidates would not put themselves forward does not appear to have materialized."⁷² Again, to quote the reactions of the Deputy President of the Constitutional Court to his appearance before the JSC:

Speaking as a person who is sitting on this seat now, I must say I would have preferred not to have been interviewed at all, but I realize that the interviewing process is useful and I think it is essential and correct and I am fully in support of having open hearings.⁷³

Several other objections to a Canadian confirmation procedure involving the use of parliamentary committees also deserve to be noted. One is that the Senate cannot be expected to supply the federal component in confirmation hearings because its members do not speak for the provinces. Equally the Senate cannot remedy the democratic deficit in the appointment of Supreme Court judges since its members are unelected. Both these points seem to militate against the Senate playing a role in the appointive process of members of the Supreme Court. Nevertheless, the Senate is an integral part of Parliament and it may seem anomalous

that it should be denied any role in a confirmation procedure when it continues to play an active role in the enactment of legislation. A case can therefore be made for giving the Senate *some* representation on a confirmation committee, say up to one half the total membership of the committee, even before the long delayed reform of the Senate is finally agreed upon.

There are also difficulties in expecting a House of Commons confirmation committee to remain free of partisan bias. The members of the House of Commons are of course elected, but they are also expected to follow party discipline. In the case of a majority government, this means that the committee's approving vote would be a foregone conclusion⁷⁴ unless somehow the government could be persuaded to give its members a free vote. The same difficulty would arise if a full House of Commons vote were required to approve the committee's recommendation with respect to the government's nominee for the Supreme Court.

One solution to these obstacles would be to require supermajority voting in the committee and/or the full House of Commons.⁷⁵ Table 1, which is based on the results of recent parliamentary elections, shows that a two-thirds majority voting requirement would have given the opposition parties an effective voice in voting for confirmation in six of the seven parliamentary elections held between 1972 and 1997.

Nevertheless, the requirement of a supermajor-

Table 1: Federal Election Results 1972 – 1997

Election Year	Party Forming Government	Total Seats	Number of Government Seats	Seats Required for Two-Thirds Super Majority	Government Super-Majority?
1972	Liberal	264	109	176	No
1974	Liberal	264	141	176	No
1979	PC	282	136	188	No
1980	Liberal	282	146	188	No
1984	PC	282	211	188	Yes
1988	PC	295	169	197	No
1993	Liberal	295	177	197	No
1997	Liberal	301	155	197	No

ity vote runs very much against the grain of our parliamentary tradition and even if voluntarily adopted by the present administration would not be binding on future governments unless the requirement were constitutionally entrenched.

A Supreme Court Nominating Committee or a Confirmation Procedure, or Both?

If it is concluded that an independent parliamentary confirmation procedure cannot be secured without a constitutional amendment (an issue that is considered below), then the establishment of a separate nomination committee as previously described is the best alternative to ensure a broader input into the selection of future Supreme Court judges. The question that needs to be considered is whether such a nomination procedure is desirable *in addition* to a parliamentary confirmation process.

At first blush, the answer would seem to be no. Since the nominating council would represent a range of constituencies it would have little incentive, and little opportunity, to make clearly partisan nominations. One of the basic objectives of a confirmation procedure — to prevent abuse of the Executive's appointive powers — would therefore already be met. It is true the government would still select the actual candidate for appointment from the short list of candidates prepared by the nominating council, but the scope of that discretion would be heavily circumscribed. We are also entitled to assume that all the candidates on the short list will be highly qualified professionally and meet all the basic requirements for appointment to the Supreme Court.

However, there is another side to the coin. I have argued earlier that the involvement of Parliament in appointments to the Supreme Court should not be limited to curbing abuses by the Executive but

should serve a higher function in encouraging members of Parliament to take a closer interest in the work of the Court and in gaining a better appreciation of the interaction of the legislative and judicial roles under the Canadian constitution. It is also conceivable, though perhaps not very likely, that the parliamentary committee will conclude that the nominated candidate, while professionally very meritorious, will tilt the philosophical balance unacceptably on the Court.

It may be safely assumed that the federal government would strenuously resist the imposition of two layers of control over its appointive powers, and that if forced to choose between the establishment of a nomination council and a parliamentary confirmation procedure, it will opt for the latter. The government could be expected to argue that it is as capable of nominating very highly qualified candidates as is a nomination council and that, unlike the council, it is responsible for its actions to Canadian voters. The government would also protest that it is unacceptable in a democratic society that its role should be reduced to providing a courier service between the council and Parliament. One could question the soundness of several of these assertions but it is difficult to deny that historically and constitutionally the federal government has played a key role in the appointment of federal judges at all levels. The issue, therefore, is not whether the federal government should play a role but *how large* that role should be. Given my own preference for an open parliamentary confirmation requirement, if forced to choose between a confirmation procedure and an unelected nomination council, I would concede the government's prerogative to select the nominees whose names are to be brought before the parliamentary committee. A confirmation requirement is the more important reform, and is consistent with the approach adopted over the past 30 years or more in discussions dealing with the entrenchment of the Supreme Court.

Constitutional Position

I have assumed so far, as do most other observers discussing desirable changes in the appointment procedure for Supreme Court judges, that there are no constitutional obstacles. Unfortunately the position is not straightforward and it requires some discussion.

As previously discussed, the Supreme Court is not entrenched in the Constitution Act. Rather, the Court owes its existence to an ordinary Act of Parliament adopted pursuant to s.101 of the Constitution Act 1867 empowering the federal Parliament, from time to time, to provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada. The Supreme Court Act entrusts the appointive power in respect of members of the Court to the Governor General in Council but, since it is only an ordinary enactment, there would appear, at first sight, to be no hurdles to introducing new and more democratic methods for appointing the judges along the lines discussed in this article.⁷⁶

The difficulties arise because of the changes adopted in the Constitution Act 1982. Section 41 of that Act requires the unanimous consent of the federal Parliament and all the provincial legislatures for five classes of amendments, including, in 41(d), "the composition of the Supreme Court of Canada." In addition, Section 42 lists "the Supreme Court of Canada" as one of the six classes of amendment subject to a less stringent ratification procedure (the federal government and two-thirds of the provinces representing 50 percent of the population), but "subject to paragraph 41(d)." This raises an important question, so far as changes in the status of the Supreme Court are concerned, about the proper relationship between sections 42 and 41.

Scholars are divided in their views about the meaning of these provisions. Some scholars, such as Professor Cheffins and the late Professor Leder-

man,⁷⁷ believe some meaning must be given to the provisions in sections 41 and 42 and that they cannot be ignored. Other scholars, such as Peter Hogg and Peter Russell,⁷⁸ take the position that the provisions are ineffective for the following reason. Sections 41 and 42 only apply to amendments to "the Constitution of Canada." That term is defined in section 52(2) of the Constitution Act 1982, and the list of instruments enumerated there does not include the Supreme Court of Canada. Whatever their individual views, the scholars are agreed that the references to the Supreme Court of Canada in sections 41 and 42 have created "an intolerably confusing situation."⁷⁹ While a reference to the Supreme Court would ordinarily be desirable to clarify the meaning of these provisions, the difficulty in this case is that the judgement of the members of the Court may appear to be clouded by views they have previously expressed for or against the need for changes in the existing system of appointments to the court.

There is no reason, however, why the federal government cannot proceed with at least one of the changes recommended in this article — the creation of a Supreme Court appointments nominating committee — without waiting for the results of such a reference. As previously noted, advisory committees already exist to screen applicants for appointments to the other federal courts and the superior provincial courts. It has not been suggested that this violates the federal government's responsibility under Section 96 of the Constitution Act, 1867 to appoint the judges to these courts. What remains unsettled is whether the federal government could agree constitutionally to appoint only a person whose name appears on a short list prepared by a nominating committee — as recommended here — because that would encroach substantially on the federal government's appointive responsibilities.

In sum, while a confirmation procedure before Parliament is the more desirable reform, the estab-

lishment of an advisory committee may be a more practical and attainable measure in light of the constitutional uncertainties involving changes to the Supreme Court.

Conclusion

In addressing future appointments to the Supreme Court of Canada, there are two key questions. The first is whether we are satisfied with the existing system of appointments which vests complete and unaccountable discretion in the Executive even though the judges of the Supreme Court are the ultimate arbiters of the Canadian constitution and collectively exercise a power as great as that of the federal Cabinet. If this question is answered no, the second question is what changes we deem desirable to bring transparency and accountability to the selection procedure and to ensure that only the best qualified candidates are appointed.

There may be honest differences of opinion about the answer to the second question, but there should be little doubt about the answer to the first. Over the past 15 years there has been a near unanimous chorus of opinion among scholars reinforced by many publicly-sponsored reports that the existing system of appointments is incompatible with a modern federal democratic constitution governed by the rule of law and incorporating one of the most powerful bills of rights in the Western hemisphere. What ought to give cause for concern is that none of these reasoned arguments have had any apparent impact on successive federal governments whose spokespersons continue to insist that there is no need for change and that the federal government is and has been doing an impeccable job. One's best hope is that there will be a rising tide of opinion in favour of change within the major political parties⁸⁰ and that more members of the Supreme Court will join Justice La Forest⁸¹ in rec-

ognizing the anomaly of owing their appointments to the unrevealed and undebated preferences and partialities of one or more unaccountable members of the federal Cabinet.

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Notes

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- 1 For criticisms outside Alberta, see for example, *Bar and Bench Daily News Digest*, August 27, 1998, "Godzilla' Judges Overpowering Cabinets: Crosbie," referring to a "scathing critique" of recent Supreme Court of Canada judgements by former Justice Minister John Crosbie in an address to the annual meeting of the Canadian Bar Association in St. John's, Newfoundland. Justice Minister Anne McLellan replied vigorously to Crosbie's criticism at the same meeting.
 - 2 *Vriend v. Alberta* [1998] 1 S.C.R. 493.
 - 3 See Brian Laghi, "Debate on Gay Rights Polarizes Albertans," *Globe & Mail*, April 2, 1998, p. A5 (as quoted in *Bar and Bench Daily News Digest* VIII, Issue 64).
 - 4 *R. v. Ewanchuk* (1999) 169 D.L.R. (4th) 193 (S.C.C.).
 - 5 See *National Post*, February 27, 1999, p. A2 (text of JA McClung's letter), and Barbara Amiel, "Feminists, Fascists, and Other Radicals," *National Post*, March 6, 1999, p. B7. To her great credit, in an address to Ottawa University law students Justice Beverley McLachlin strongly encouraged debate about the role and rulings of Canadian courts as a "healthy process" while warning against the debate slipping into personal attacks against the judiciary. See Erin Anderssen, "Debates on Courts Healthy: Judge," *Globe & Mail*, March 27, 1999, p. A5.
 - 6 See, for example, Editorial, *Globe & Mail*, March 5, 1999, p. A14. The Reform Party has also adopted a policy statement requiring all federally appointed judges, including appointments to the Supreme Court, to be nominated by the provincial governments and to be ratified by a Triple-E Senate. See <http://www.reform.ca/bluebook/justice.html>. See also: Preston Manning, "Parliament, not Judges, Must Make the Laws of the Land," *Globe & Mail*, June 16, 1998, p. A23; Editorial, "A Supreme Challenge for Reformers," *Globe & Mail*, June 17, 1998, p. A24; Peter H. Russell, "Reform's Judicial Agenda," *Policy Options*, Vol. 20, no. 3 (April 1999); and E. Preston Manning, "A 'B' for Prof. Russell," *Policy Options*, Vol. 20, no. 3 (April 1999), p. 15.
 - 7 *Hill Times*, September 2, 1998.
 - 8 Kirk Makin, "Top-Court Judge Defends Bench," *Globe & Mail*, March 3, 1999, p. A5.
 - 9 Erin Anderssen, "Top-Court Judge Rejects Proposal to Quiz Nominees," *Globe & Mail*, March 25, 1999, p. A8.
 - 10 Kirk Makin, "Lamer Blasts Unseemly Lobbying for Positions on Supreme Court," *Globe & Mail*, February 5, 1999, p. A2.
 - 11 On the constitutional issues, see p. 18.
 - 12 Compare A. Wayne MacKay and Richard W. Bauman, "The Supreme Court of Canada: Reform Implications for an Emerging National Institution," in Clare F. Beckton and A. Wayne MacKay (eds.), *The Courts and the Charter*, Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), Vol. 58, p. 37.
 - 13 Examples of the Supreme Court's willingness to rewrite important private law doctrines include:
 - adoption of the constructive trust as a discretionary remedial device;
 - expansion of the scope of fiduciary duties and remedies for breach thereof;
 - admissibility of punitive damages for breach of contract;
 - repudiation of long standing precedents in the conflict of laws area in favour of more "modern" rules, including the finding of an implicit "full faith and credit" doctrine in the Canadian constitution requiring the recognition and enforcement of judgements by the courts of sister provinces.
 - 14 See, for example, Justice Cory, note 9.
 - 15 Paul A. Freund, "Appointment of Justices: Some Historical Perspectives," *Harvard Law Review*, Vol. 101, no. 6 (April 1988), pp. 1146, 1153.
 - 16 And indeed, Justice Cory's disclaimer notwithstanding, this is almost universally accepted in Canada, and recognized by the Supreme Court's own law clerks. See Lorne Sossin, "The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada," *University of British Columbia Law Review*, Vol. 30, no. 2 (1996), pp. 279-82, 307. Sossin claims that the largest impact of the law clerks has been on the institutional culture of the Supreme Court as a policy making institution.
 - 17 Section 101 of the Constitution Act, 1867.
 - 18 See now Supreme Court Act, R.S.C. 1985, c. S-26, as amended.
 - 19 Appeals in criminal matters had previously been abolished in 1933.
 - 20 In the constitutional area, 77 out of 159 appeals to the Privy Council from Canada were taken direct to the Privy Council. P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), p. 336.
 - 21 Russell, *The Judiciary in Canada*, p. 337.
 - 22 On the law clerks various roles, see Sossin, "The Sounds of Silence."
 - 23 There is no doubt that law clerks assist the judges in the writing of judgements (Sossin, "The Sounds of Silence," pp. 296-98), but in my experience, based on discussion with former law clerks, there is disagreement about the importance of that role. Mr. Sossin argues that Supreme Court policy decisions are typically the result of a process in which many different actors invariably have a role, and he insists that "*no clerk ever considered the decision to be his or her own*" (Sossin, "The Sounds of Silence," pp. 297-98; italics in original). Far more reaching claims have been made about the influence of law clerks in the preparation of judgements in the US Supreme Court. See Tony Mauro, "The Hidden Power Behind the Supreme Court, Justices Give Pivotal Role to Novice Lawyers," *USA Today*, March 13, 1998 (reviewing Edward Lazarus, *Closed Chambers* (1998)).
 - 24 Supreme Court Act, sections 4-6.
 - 25 Some observers believe that there is now an implicit understanding that British Columbia is entitled to its own representative. I express no view one way or the other.

- 26 *Report of the Canadian Bar Association on The Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985), p. 11.
- 27 Peter H. Russell and Jacob S. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees," *University of Toronto Law Journal*, Vol. 41, no. 1 (Winter 1991), p. 4.
- 28 While he was Minister of Justice, Allan Rock committed himself, except in the case of affirmative action appointments, not to appoint a candidate unless he or she was rated "highly recommended." Under the original scheme, the advisory committees were required to report whether a candidate was qualified or not qualified. These categories were changed in 1991 to recommended, highly recommended, or not recommended.
- 29 In this paper, I use the terms judicial nomination committees, judicial appointment committees, judicial appointments advisory committees and similar expressions interchangeably and in a non-technical sense.
- 30 See Henry J. Abraham, *The Judicial Process*, 6th ed. (Oxford: Oxford University Press, 1993), pp. 294-95. The lower house makes its selection through a special committee of 12 electors established on the basis of proportional representation in the *Bundestag*. A two-thirds majority is required for the election of the judges by each house.
- 31 Carl Baar, "Comparative Perspectives on Judicial Selection Processes," in *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991), pp. 143, 152.
- 32 Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham, NC: Duke University Press, 1997), esp. pp. 3-4.
- 33 See H.C. Kruger, "Selecting Judges for the New European Court of Human Rights," *Human Rights Law Journal*, Vol. 17, nos. 11-12 (December 1996), p. 401.
- 34 See Abraham, *The Judicial Process*, pp. 35-38. The designation is misleading because there are two major types of plans, the other, introduced in 1934, being the California plan. There are also great variations among the plans adopted in the several states.
- 35 The judges are usually re-elected but re-election cannot be taken for granted if the electorate becomes aroused because of controversial judicial policies. In 1986, Chief Justice Bird and two of her colleagues on the California Supreme Court were "decisively" rejected by the voters in a retention election for just this reason. Abraham, *The Judicial Process*, p. 36.
- 36 However, at least one Canadian scholar greatly admires the German system for the selection of members of the German Constitutional Court and regards it as combining the best elements of a merit-based and democratically accountable system of appointment. See David M. Beatty, *Talking Heads and the Supremes* (Toronto: Carswell, 1990), pp.10, 265-66.
- 37 It is less so now because of the changes introduced by former Lord Chancellor, Lord Mackay, during Margaret Thatcher's last term of office, permitting solicitors specializing in litigation to appear in the High Court under carefully controlled conditions and also permitting solicitors to be appointed to lower courts.
- 38 Robert Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (Oxford: Clarendon Press, 1992).
- 39 The Blair government has committed itself to giving the British courts a limited power to find British legislation and executive acts incompatible with the Convention but the power to act on such findings would be left up to a special committee of Parliament.
- 40 Kate Malleson, "Assessing the Strengths and Weaknesses of a Judicial Appointments Commission," *Amicus Curia* (May 1998), p. 13.
- 41 For the details, see Russell and Ziegel, "Federal Judicial Appointments," pp. 26-33.
- 42 Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada, A Report for the Judicial Council of Canada* (Ottawa: Canadian Judicial Council, 1995), pp. 255-58.
- 43 An Alberta committee also recommended the establishment of an Ontario style nominating committee in May 1988. See Alberta, *Judicial Selection Process Review Committee, Report and Recommendations* (Edmonton: Alberta Justice Communications, May 1998).
- 44 The committees reported within a few months of each other in the late spring and summer of 1985. Although their recommendations were strikingly similar, the committees were differently structured and worked quite independently of each other. The writer was a founding member of the CALT committee and later its chair.
- 45 For the details see Christopher Kendall, "Criticism and Reform: A Survey of Canadian Literature on the Appointment of Judges in Ontario Law Reform Commission," in *Appointing Judges: Philosophy, Politics and Practice*, p. 211.
- 46 Friedland, *A Place Apart*, pp. 256-57.
- 47 When Professor Russell and this author discussed the matter by telephone in 1995 with Allan Rock, then Minister of Justice, he made it clear that a change in the system of judicial appointments was "not in the cards." See also Friedland, *A Place Apart*, p. 241.
- 48 Presidents Nixon, Reagan and Bush were all committed to a right-wing political agenda and to appointing US Supreme Court and lower federal court judges who shared their political philosophy and could be relied on to roll back the legacy of the Warren Court of the 1960s and 1970s. It was this attitude that prompted President Nixon to nominate Clement F. Haynsworth, Jr. and G. Harold Carswell to the Supreme Court, President Reagan to nominate Robert Bork, and President Bush to nominate Clarence Thomas.
- As is well known, the first three candidates were rejected by the Senate and the fourth, Clarence Thomas, was only confirmed by a narrow majority after long and painful public hearings. See Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 3rd ed. (Oxford: Oxford University Press 1992), pp. 14-18, 356-59. It is important to note, however, that partisan nominations reflecting the political philosophy and personal predilections of the incumbent president are not confined to right-wing Presidents but have come to be accepted as part of a US president's prerogative. For example, President Roosevelt was just as committed to appointing, and did appoint, judges supporting his *New Deal* Reforms. Subsequent Democratic Presidents followed the same pattern (Abraham, chaps. 9 and 13). In the US, the objection is not to Presidents nominating candidates whose political phi-

losophy is compatible with the President's, but to Presidents using the nominating power to appoint unqualified or underqualified candidates or candidates whose constitutional philosophy offends the dominant ethos. In Canada, this aspect of the federal government's appointing powers has so far attracted little attention.

- 49 See Constitution of the Republic of South Africa, 1996, sections 173-76, the *South African Judicial Services Commission Act 1994*, and Kate Malleson, "Assessing the Performance of the Judicial Service Commission," *South African Law Journal*, Vol. 116, no. 1 (March 1999), p. 36. (I am very grateful to Dr. Malleson for providing me with a copy of her article as well as other much valuable information).
- 50 Lorraine E. Weinrib, "Appointing Judges to the Supreme Court of Canada in the Charter Era: A Study in Institutional Function and Design," in *Appointing Judges: Philosophy, Politics and Practice*, pp. 136-37.
- 51 Friedland, *A Place Apart*, p. 256.
- 52 On the other hand, Professors Bauman and MacKay prefer a nominating committee of 13 ("The Supreme Court of Canada," p. 80).
- 53 Ziegel, "Appointments to the Supreme Court of Canada," p. 12.
- 54 There is even less justification, in my view, for the Reform Party's suggestion (see note 6), that only the provinces should be entitled to nominate candidates for the Supreme Court. I share Professor Russell's position that the proposal has little to commend it. The Reform party's terse policy statement on the issue does not explain how the ten provinces (and territorial governments?) would go about exercising their powers, which would likely present a logistical nightmare. Arguably, the provinces and territorial governments could delegate their powers to a standing committee on nominations to the Supreme Court but it is unlikely that the provinces would agree to this. Further difficulties arise because of Quebec's statutory entitlement to three judges and the well-established convention that Ontario should be represented by three judges and the other regions by one each.

Substantively, a still more serious objection to the Reform party's proposal is that it suffers from a democratic deficit unless somehow each province is expected to strike a sub-provincial nominating committee representing diverse constituencies, which would create new problems of its own. Apparently, the Reform Party proposal envisages a Triple-E Senate providing the democratic input through the confirmation requirement included in the proposal. This feature is also troubling, first, because there is no prospect of the Canadian constitution being amended in the foreseeable future to accommodate an elected Senate and, second, because if the change did take place there would be no justification for a purely provincially-based nominating committee. A reformed Senate would be expected to reflect provincial attitudes and interests.

On balance, therefore, I believe the judicial nominating procedure envisaged in the CALT and CBA recommendations is greatly to be preferred to the Reform Party's proposal.

Professors MacKay and Bauman, "The Supreme Court of Canada," p. 81, recommend that all members of the nominating committee must be approved by the federal government and by at least four provinces. While not as objectionable as the Reform party proposal, this requirement could unduly complicate filling the slots on the committee

and lead to potential gridlock if the two levels of government could not agree.

- 55 See the discussion, pp. 18-19.
- 56 Ian Greene, Carl Baar, Peter McCormick, George Szablowski, and Martin Thomas, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998), p. 103. Four of the Supreme Court judges who responded to the question saw the Chief Justice primarily as an administrator who attended to the scheduling of cases, composition of panels, and budgetary issues. Two of the judges saw the ceremonial aspects of the job as important features. Only one saw him as the Court's intellectual leader; another saw him as chief spokesperson for all Canadian judges.
- 57 Friedland, *A Place Apart*, pp. 229-31.
- 58 The Commissioner for Judicial Affairs, who holds the status of a deputy minister, would seem a logical person to fill this position.
- 59 It goes without saying that a sense of collegiality as described in the text does not mean intellectual conformity. However, a strong and independent personality is not incompatible with courtesy to and cooperation with other members of the court.
- 60 In the Greene *et al.* study, *Final Appeal*, none of the Supreme Court of Canada respondents felt they could comment on what factors currently play a role in Supreme Court appointments. In their opinion, however, the factors that ought to be considered are a sense of fairness and good judgement (2 respondents), demonstrated legal ability (2), being representative of Canadian society in general (2), good interpersonal skills (1), and good work habits (1).
The attributes listed in the text and mentioned by the Supreme Court respondents differ in important respects from the preferred attributes of a distinguished US Supreme Court watcher. His *de minimis* qualifications are: "One, demonstrated judicial temperament. Two, professional expertise and competence. Three, absolute personal as well as professional integrity. Four, an able, agile, lucid mind. Five, appropriate professional background or training. Six, the ability to communicate clearly, both orally and in writing, especially the latter." Abraham, *Justices and Presidents*, p. 4.
- 61 Frankfurter, "The Supreme Court in the Mirror of Justice," *University of Pennsylvania Law Review*, Vol. 105, no. 6 (1957), p. 781, cited in Abraham, *Justice and Presidents*.
- 62 Friedland, *A Place Apart*.
- 63 *Hill Times*, September 2, 1998; Makin, "Top-Court Judge Defends Bench"; Andersen, "Top-Court Judge Rejects Proposal to Quiz Nominees."
- 64 This is the gist of Justice Iacobucci's position (see Andersen, "Top Court Judge Rejects Proposal to Quiz Nominees"). It is also echoed in spades in a subsequent quote attributed to Justice Minister Anne McLellan: "I think the way we appoint Supreme Court judges in this country has served this country very well. I am very satisfied." Janice Tibbets, "PM Shows Little Interest in New Supreme Court Process," *National Post*, May 3, 1999, p. A7.
- 65 Charles L. Black, "A Note on Senatorial Consideration of Supreme Court Nominees," *Yale Law Journal*, Vol. 79 (1970), p. 657; Henry J. Abraham, *Justices and Presidents*, pp. 24-25.

- 66 Abraham, *Justices and Presidents*, p. 39.
- 67 Russell, *The Judiciary in Canada*, p. 337: "prime ministers and justice ministers in making appointments were highly susceptible to pressure from their federal and provincial political friends."
- 68 I am not of course suggesting that there is anything wrong with a judge electing to retire 10 or 15 years after the judge's appointment and before the mandatory retirement age of 75. There is cause for concern, however, where a Supreme Court judge decides to retire before having served for at least 10 years or before reaching 65. This paper does not deal with the important question of whether all Supreme Court appointments should be for a limited chronological term, as is true for example of appointments to the German Constitutional Court and various international tribunals. In any event, this would require an amendment to the Canadian constitution, even assuming a strong consensus exists in favour of such a change.
- 69 Questioning of nominees was only introduced in 1939 with the confirmation hearings on Felix Frankfurter. See Freund, "Appointment of Justices: Some Historical Perspectives," p. 1153.
- 70 For two contrasting views on the Bork nomination see Nina Totenberg, "The Confirmation Process and the Public: To Know or Not to Know," *Harvard Law Review*, Vol. 101, no. 6 (April 1988), p. 1227; and Patrick B. McGuigan and Dawn M. Weyrich, *Ninth Justice: the Fight for Bork* (Durham, MD: Free Congress Research and Education Foundation, 1990). For Bork's own account, see Robert Bork, *The Tempting of America: The Political Seduction of the Law* (London: Collier Macmillan, 1990). According to Professor Ross, "The more unsavoury aspects of recent confirmation struggles, particularly the distortions of Robert Bork's record, were the fault of individuals and organizations rather than the confirmation process itself. What is needed is self restraint rather than a more closed process, and perhaps, a re-examination of the proper role of a Supreme Court that is so powerful that appointments to it inspire such widespread concern." William G. Ross, "The Supreme Court Appointment Process: A Search for a Synthesis," *Albany Law Review*, Vol. 57 (Summer 1994), pp. 993, 998-99.
- It is fair to note that not all American observers are enthusiastic about recent developments in US Senate confirmation proceedings. In particular, the Twentieth Century Task Force expressed its concern in 1988 on the politicization of confirmation hearings and a majority of its members favoured non-public examination of nominees for appointment. See *Judicial Roulette: Report of The Twentieth Century Fund Task Force on Judicial Selection* (New York: Priority Press Publications, 1988), pp. 8, 10. However, there were strong dissents on both recommendations and current public opinion seems strongly to support the continuance of public confirmation hearings and public examination of nominees. See Ross, "The Supreme Court Appointment Process."
- 71 For example, at her confirmation hearing before the Senate Judiciary Committee, Justice Bader Ginsburg included the following reservation in her opening statement: "I come to this proceeding to be judged as a judge, not as an advocate. Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide." Ross, "The Supreme Court Appointment Process," note 56.
- 72 Malleon, "Assessing the Performance of the Judicial Service Commission," p. 42.
- 73 Malleon, "Assessing the Performance of the Judicial Service Commission," p. 42.
- 74 The same would be true of a joint Senate-House of Commons confirmation committee where the government also enjoys majority representation in the Senate. However, in recent years majority representation in the Senate has not been common in the early years of a new government and some years may elapse before the incoming government can appoint enough new senators to achieve a majority.
- 75 I am indebted to my colleague David Beatty for making this suggestion.
- 76 The position is therefore very different from the constitutionally entrenched provision in section 96 of the Constitution Act, 1867 entitling only the Governor General to appoint the judges of the Superior, District and County Courts in each province except for the judges of the Probate Courts in Nova Scotia and New Brunswick. There is a great deal of jurisprudence interpreting section 96 but none, to the best of my knowledge, discussing whether and to what extent the federal government can delegate or dilute its appointive powers by establishing advisory or nominating committees or providing for a parliamentary confirmation role. There has been some discussion of the issues in the Australian context because of the Commonwealth government's exclusive grant of constitutional powers in section 72(i) of the Commonwealth Act to appoint the members of the High Court of Australia. See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 2nd ed. (Sydney: The Federation Press, 1998), pp. 465-69, and J.A. Thompson, "Appointing Australian High Court Justices: Some Constitutional Conundrums," in HP Lee and G. Winterton (eds.), *Australian Constitutional Perspectives* (Sydney: Law Book Co., 1992), pp. 251, 266-69.
- 77 R.I. Cheffins, "The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications," *Supreme Court Law Review*, Vol. 4 (1982), p. 42; W.R. Lederman, "Constitutional Procedure and the Reform of the Supreme Court of Canada," *Cahiers de droit*, Vol. 26, no. 1 (March 1985), p. 195.
- 78 Russell, *The Judiciary in Canada*, pp. 67-68. See also MacKay and Bauman, "The Supreme Court of Canada," pp. 49-50, who however, express no views about the proper resolution of the conflict.
- 79 Canadian Bar Association, Committee on the Supreme Court of Canada, *Report of the Canadian Bar Association Committee On The Supreme Court of Canada* (Ottawa: The Association, 1987), p. 14.
- 80 As there already is within the Reform Party. See note 6 and accompanying text.
- 81 See note 7 and accompanying text.

Summary

Merit Selection and Democratization of Appointments to the Supreme Court of Canada

Jacob S. Ziegel

This article explains why the existing system of appointments to the Supreme Court of Canada is badly in need of reform and analyses two alternative methods for making the appointment system much more transparent and democratic in order to ensure that the most meritorious candidates are appointed to the Court.

Under the existing system, all appointments to the Supreme Court are made by the federal Cabinet (but actually by the Prime Minister) without the need to consult anyone. This unaccountable power was anachronistic before the adoption of the Canadian Charter of Rights and Freedoms in 1982 and it led to many abuses; in the eyes of many observers, it has become completely unacceptable since the adoption of the Charter, given the fact that the Supreme Court has become one of the most powerful courts in the Western world and that its decisions affect every aspect of Canadian life.

Accordingly, this article explores alternative methods of appointment. The first is to establish a Supreme Court nominating commission whenever a vacancy arises on the Court. This nine-member body, representing a variety of constituencies, would present the Prime Minister with a short list of candidates from which the federal government would have to pick one.

The other method of appointment would require all appointments to the Court (whether or not preceded by a nomination procedure) to be confirmed

by a committee of the House of Commons or a joint committee of the House of Commons and the Senate. A confirmation procedure for appointments to the US Supreme Court is mandated in the US Constitution. The adoption of a similar requirement for appointments to the Supreme Court of Canada has won the support of many official reports studying the entrenchment of the Supreme Court in the Canadian constitution.

A parliamentary confirmation requirement undoubtedly provides the greatest degree of transparency and accountability, but it has encountered much opposition in government circles and among members of the Supreme Court itself. This is because it is perceived as leading to the politicization of the appointment process and because the critics fear that it may compromise the independence of the Court. This article contends that these concerns are greatly exaggerated, though there may be constitutional difficulties in giving statutory form to a confirmation requirement and political hurdles in making it work effectively because of the party voting system in the Canadian Parliament. On the other hand, no such difficulties would hinder the establishment of a Supreme Court nominating commission.

The article concludes that Canadians cannot afford to sit back and ignore this issue any longer and that they should press for the adoption of one of these alternative methods of selection.