The Appointment Process for the Supreme Court of Canada:

Assessing the Goals and Performance of the Supreme Court Selection Panel

by

Gayle Leith

A Thesis submitted to the Faculty of Graduate Studies of

The University of Manitoba

in partial fulfilment of the requirements of the degree of

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Table of Contents

1. Introduction

In 2006, the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada ("AHC") became to the first committee to use public multi-party hearings to appoint a justice to Canada's highest Court. In the Prime Minister's words, the AHC was designed to "bring more openness and accountability to the process of appointing people to our nation's highest Court."[1] The reform was a striking departure: In Canada and other Commonwealth states such as Great Britain, Australia and New Zealand, judges have long been appointed outside of public view.[2] Though conceived of as an interim measure, the AHC has come to form the basis for future innovation of the judicial appointment process. The federal government has now presented what seems to be a new permanent Supreme Court selections process.[3] The establishment of the AHC and the concurrent creation of the Supreme Court Selection Panel (SCSP) warrant review to ground more clearly future directions following from these initial steps – which, though seemingly aggressive, remain under-examined in the literature.[4]

The AHC comprised twelve members: MP's numbering five Conservatives, four Liberals, two Bloc Quebecois, and one New Democrat.[5] The Prime Minister continued to remain pre-eminent in the process, nominating the candidate from a shortlist of three names produced by the previous government, and appointing the candidate after the conclusion of the hearings.[6] In introductory remarks, a limited set of judicial qualities on which the committee questioning was to focus was established by Peter Hogg.[7] Furthermore, the committee chamber was open to live broadcast media. After Hogg's remarks and more general comments by the Attorney General, vetting occurred over a three hour period. Generally, the committee members asked non-imposing questions and

appeared to be favourably disposed to the nominee.[8] Within the following two days, the Prime Minister directed the Governor General to appoint Rothstein J. to the Court.[9]

When appointing new judges, the elected branches of government enjoy rare moments of direct and formal power over courts. In turn, the interactions of those responsible for judicial selection and those who are selected raise concerns for judicial legitimacy. This paper addresses questions that have been raised as Canada moves towards stricter judicial appointments regulation, with still more changes promised for the future. I rely primarily on comparative international literature, emerging particularly in the last two decades, on the rise of advisory and nominating judicial appointment commissions and their implications for judicial independence and accountability. Canadian legal and political commentators have not, as yet, made extensive use of this resource.[10]

I begin in Part I by framing the problems addressed by the introduction of the AHC, using comparative literature, reports and reform proposals generated by various legal and academic groups, and other sources to stipulate the goals of selections reform. I begin from the premise that transparency and accountability should be a primary goal of a body such as the AHC,[11] and I offer further detail to support this assertion. Further, I attempt to clarify the issues surrounding judicial selection reform of which the AHC's architects have said little. What were the committee's goals, and what are the on-going goals of reform of the judicial appointments process? While it is understood that the Committee was designed broadly to "bring more openness and accountability to the process", it remains unclear what purposes these values serve in the context of selecting new

members to the Supreme Court. Further questions are then raised; what is ultimately gained when parliamentarians and the public assume a direct and watchful role in the selection process? And to whom and for what reason(s) should judicial selectors be accountable?

Part II draws from the literature on judicial selection reform as a matter of institutional concern. Here I trace the historical evolution of judicial selection reform and address the changing criticisms of executive control of the appointment process. In particular, this section focuses on the political role of the Supreme Court and its implications for the appointment mechanism. In order to understand the reasons surrounding the establishment of the AHC and the subsequent Supreme Court Selection Panel (SCSP), an analysis of the reasons underpinning the drive for reform is necessary. Here it is argued that the public policy-making role of the Court has been over-emphasized and should not be considered the primary variable directing selection reform. Instead, concerns of partisanship, independence, transparency and representation guide the process of appointment reform and it is these variables that the AHC and SCSP should strive to attain.

Part III examines the various models of judicial selection reform and their applicability in a parliamentary democracy. Here selection models that advance legalistic constraints on official discretion are analyzed. A conclusion to be stressed is that, despite their popularity as tools of institutional design, such formal constraints do not necessarily contribute to securing good decision-making by the Court. In fact, considerations of more importance are the norms of transparency and accountability that are associated with a

given decision-making body. For this reason, attention is turned to approaches of institutional design that encourage the development of accountability and transparency, most notably within the establishment of judicial nominating and advisory commissions. Further, issues of composition and evaluative criteria and their impact on judicial selection commissions are addressed. Here it is determined that membership of the commission and the criteria used to determine the suitability of potential candidates must be established and statutorily defined in order for the commission itself to fulfill the mutual goals of transparency, accountability and independence.

In Part IV, I assess the AHC and SCSP from the analysis presented in Part III. Here it is argued that the signature feature of the AHC and SCSP was the democratization of the judicial selection process. Furthermore, like many democratization recommendations,[12] it would seem that the overarching goal of the AHC and SCSP was the democratization of the selection process as an end in itself, or as a check on abuses of power. While this goal is relevant unto itself, it does not address accountability and transparency concerns behind the establishment and operation of the AHC and SCSP respectively. Thus this chapter attempts to address concerns of transparency and accountability in the selection model itself and identifies how these two committees might have been better structured to pursue these goals.

1. Executive Appointment and Selection Reform: Defining the Problem

(a) The Background

The Prime Minister's unfettered power to appoint Justices to the Supreme Court of Canada has long been a subject of controversy. Most recently, the problem was elevated to the status of national concern when former Prime Minister Paul Martin announced his support for reforming the appointment process as part of his strategy to effectively resolve Canada's encroaching 'democratic deficit', a buzz-word that has come to properly express a feeling of frustration that full representation of views and public participation in Canada's political and legal institutions are limited. In December 2003, Martin announced that the government of Canada would consult the Standing Committee on Justice and Human Rights on how best to implement prior review of appointments of Supreme Court judges. Martin's call for reform was later echoed by all parties of the House of Commons when in October of 2003 the House voted unanimously to support a private member's motion to authorize the Standing Committee on Justice to 'study the process whereby judges are appointed to courts of appeal and to the Supreme Court of Canada.'[13] The task of the Committee was subsequently complicated by the announcement by two sitting justices (Arbour and Iacobucci) that they planned to leave the Supreme Court by the end of the year (June 2004). The Chief justice quickly indicated that she wanted a complete Coram of nine judges to hear the federal government's reference on same-sex marriage scheduled to begin in the fall of 2004. The Standing Committee's mandate was thus expanded to include interim recommendations to deal with these appointments in addition to long term proposals for reform.

The committee held public hearings in March and April of 2004, and released its report in May. The report, written by a Liberal Party majority, rejected submissions calling for U.S. style parliamentary hearings for nominees as well as the South African model of public interviews which requires all candidates being considered for a position on the South African Constitutional Court to undergo an intensive interview process wherein the candidates are asked questions pertaining but not limited to shortcomings in their past judicial performance including their handling of the law and in the discharge of their administrative duties as a judge as well as questions that focus on the quality and significance of their past judgments. The Standing Committee also rejected reforms that emulate a model found in some European countries which limits the terms (for example, nine to twelve years) of high court judges and government sharing the appointment power with opposition parties in proportion to the strength of the latter in Parliament. Instead, the committee proposed several minor changes. For the two pending appointments, the committee recommended only that the Justice Minister appear before the committee after the appointments to 'explain' the process by which the current vacancies on the Supreme Court were filled and the qualifications of the two appointees.[14] For the longer term, the committee recommended the creation of an advisory committee that would send a list of three to five candidates to the Prime Minister, who would continue to have the final choice of who to select. The advisory committee would include representatives from each of the political parties in the House of Commons, the relevant provincial governments, the judiciary and the legal profession, as well as lay members. Once an appointment is made, the committee then recommended that either the Justice Minister or the Chair of the committee appear before a House of

Commons committee to explain publicly the process and reasons for the appointment.[15] Dissenting reports were quickly filed by the opposition parties. The Conservatives embraced a process of parliamentary review and ratification of appointments. The Bloc Quebecois called for nominations to be made by provincial governments. The New Democrats accepted the proposal for an advisory committee but demanded that the Justice Minister appear before the Justice committee to explain his choice before the appointment is made, not after. [16] Most significantly, Prime Minister Martin responded to the committee's report by suggesting that it was too timid and indicated that he favoured greater input into the selection process from Parliament. However, he did not elaborate on the form that input might take. The following May, 2004, Canada entered a federal election which saw a partisan debate over judicial selection to a degree unprecedented in Canadian history. As the Liberals slipped behind the Conservative party in the early weeks of the campaign, Paul Martin went on the offensive declaring that a Conservative government would use the Notwithstanding power to undermine the Charter of Rights.[17] This argument played itself out against the backdrop of the same-sex marriage reference to be heard by the Supreme Court that autumn. Martin adamantly declared that the Liberal government would abide by a Supreme Court ruling declaring the traditional definition of marriage as unconstitutional, as it would be a denial of equality rights as per section 15 of the Charter. Stephen Harper, then leader of the opposition Conservative party countered that the issue should be decided by parliament not the courts.[18] In the mean time, the debate over the same-sex marriage reference spilled over into the corollary issue of judicial appointments. Liberal newspaper columnists wrote about the 'the Tories plans for the Supreme Court'[19] while conservative columnists responded to

the claims by arguing that "courts not legislatures limit freedoms under the Charter."[20] In turn, legal academics maintained that the Tory platform was a 'legal minefield' and that the Harper government would use the judicial appointments process to engage in American style 'court-packing'.[21]

While the Liberal party won a second minority government in the House of Commons in June 2004, the partisan debate over judicial appointment was far from being denounced as pre-election semantics. Within a month of forming government Paul Martin announced the nominations of Rosalie Abella and Louise Charron to fill the two Supreme Court vacancies from Ontario. As judges serving on the Ontario Court of Appeal, both nominees had written controversial judgments extending spousal rights to same-sex couples. Then Justice Minister, Irwin Cotler, adamantly denied that the nominees views on same-sex rights were a factor in their selection, but conservative opinion leaders immediately denounced the Liberals for doing precisely what they had accused the Tories of planning to do during the election – stacking the court with ideologically driven judges.[22] In response to the growing debate among critics and academics, Justice Minister Cotler agreed to appear before a House of Commons committee to answer questions about the government's choice of Abella and Charron. The parliamentary committee would include a member of the judiciary as well as a member of the Canadian Bar Association. This innovation was intended to honour Paul Martin's campaign pledge to give Parliament a role in reviewing Supreme Court appointments. This move, however, did not satisfy the Conservative members of the committee who argued that the process was merely a 'rubberstamping' exercise as they were only given one days notice to prepare for the hearing which only lasted three hours. Most importantly, they protested

that the committee was not allowed to question the nominees directly. In the end, however, the committee's report endorsed the two nominees as 'eminently qualified'.[23]

The Report from the Standing Committee that was introduced in 2004 was quickly followed in 2005 with the 'Proposal for Reform to the Supreme Court Appointments Process' by the Government of Canada. While the report was quick to acknowledge the strength of the existing practices of Supreme Court appointments in terms of appointing judges of highest professional qualification and personal capacity to the Supreme Court, it indicated a current need to build on the strengths of the process by enhancing the transparency and credibility of the manner in which the identification and selection of candidates were made. The proposal identified a four-stage process of appointment that would begin with the Minister of Justice who would consult by way of discussion with the Chief Justice of Canada, the provincial attorneys general in the region of the vacancy, the local law societies and the Canadian Bar Association which would develop a list of candidates that would be between five to eight names depending on the size of the region in question. The list would then be submitted to an advisory committee that would be established as a vacancy arises. This committee would assess on a confidential basis, the merit of the candidates provided to it by the Minister. The committee would then provide an unranked shortlist of three candidates with an assessment of their merit and a full record of the consultations conducted. Upon receipt of the list from the committee, the Minister of Justice would complete further consultations as considered necessary and provide his advice to the Prime Minister. The Prime Minister would make his recommendation to Cabinet and in all but the most exceptional circumstances the appointment would be made from the shortlist. Finally, the

Minister would appear before the Justice Committee after the appointment to explain the process whereby the candidate was chosen and the professional and personal qualities of the appointee.[24] The reform proposal also developed fully the composition and functions of the advisory committee including membership, diversity, the committee assessment process, the committee consultations and the committee report and shortlist. Justice Minister Cotler expressed satisfaction that the new process outlined by the proposal for reform represented a delicate and careful reconciliation of the issues and concerns of those involved in the appointment procedure and that the government was prepared to move forward with the new process.[25] The Standing Committee on Justice, however, expressed disappointment with the process outlined by the government and requested that the government return to the Standing Committee with a revised process by the end of June 2005. The Minister advised the Standing Committee that he was prepared to entertain modifications arrived at by the Standing Committee as a whole but that an alternative reform proposal would need to be presented to the government by the end of May given the anticipated retirement of Justice John Major and the goal of ensuring that the Court continues to sit with a full Coram of nine justices.[26] The Standing Committee failed to deliver an alternative proposal and the government's reform proposals remained in their current form. On 2 August 2005 the Justice Minister was advised of the resignation of Mr. Justice Major to be effective 25 December 2005. In 2006, the government in conjunction with the new advisory committee system or Ad Hoc Committee (AHC), appointed Justice Marshall Rothstein to replace the retired Justice Major. This was the first time an appointment was made with the new advisory committee system in place. Moreover, Justice Rothstein was the first Supreme Court

Justice to answer publicly questions related to his professional qualifications and personal capabilities.

While the process of judicial selection procedure reform may at first glance seem exhaustive, there remain a number of important issues relating to judicial appointment that have not been addressed by the architects of the AHC. For example, what are the committee's interim goals, and what are the on-going goals of reform of the judicial appointments process more generally? The government has made clear that the Committee was designed broadly to "bring more openness and accountability to the process", but what is the underlying purpose of these values in the context of selecting new members to the Court? More importantly, what is gained when parliamentarians and the public assume a more pertinent role in the selections process?

(b) The Purpose of Reform

After taking office in December 2003, Liberal Prime Minister Paul Martin spoke of the need to address a 'democratic deficit,' with the appointment of Supreme Court judges being one element of this larger problem. Martin's concern was to make the process of judicial appointment more transparent and accountable, and charged the Commons Justice Committee with conducting public hearings in order to develop a set of recommendations or alternatives. The hearings resulted in an established set of principles or goals that the government believed should inform selection procedure reforms. These were: (1) judicial merit and diversity of perspectives; (2) the constitutional framework providing a role for the executive branch of government in administering the Supreme Court of Canada; (3) judicial independence, and related principles of judicial integrity

and impartiality, and the rule of law; (4) transparency, promoting public engagement and public confidence; (5) Parliamentary input; and (6) provincial input.[27] While the set of goals for reform was surprisingly comprehensive, it failed to produce a sense of clarity of purpose since a common rationale for these changes went unstated. For example, although the details proposing change have been formally established in government policy documents, the rationale underlying the need to reform the judicial selection procedure continues to remain blurred. In fact, only upon close examination of the Minister's report can one determine that each goal is directed toward or closely related to one or more of three concerns: the democratization of the appointment process, the constitutional framework which serves to guide the process of executive appointment, and concerns of accountability and transparency within the process itself.[28] Thus, it seems that reforming the appointments process is meant to bring a measure of democracy to the judicial branch through public and parliamentary involvement, although within the confines of the constitutional framework that outlines the role of the executive and the provinces and the ever important need to maintain the independence of the judiciary. In turn, a democratic culture, which relies on public and parliamentary involvement as a means to maintain and strengthen the democratic system surrounding judicial appointment is considered by the government to be a pre-requisite for an effective rule of law and independent judiciary.

Having established the goals of reform of the process of appointment for Supreme Court judges, it remains to be determined if the reformed process for appointment will be able to achieve these goals. The following analysis will lay the basis for discussion of the implications of judicial appointment reform for the appointing power. When one can

fully understand and appreciate the actual reasons underpinning reform, he or she may then be able to develop a better understanding of processes that can assist in achieving fundamental change in appointments to the Supreme Court of Canada.

2. Appointing Judges to the Supreme Court of Canada A Brief History

The appointment process for the Supreme Court of Canada derives from the British system. Unfortunately, in its transplantation to Canada the procedure has appeared to have lost many of its institutional strengths.[29] Historical analysis of the appointment procedure in Canada would suggest that the partisan exercise of the appointment power is a direct result of the manner in which the Court and Canada's legal system has developed. For example, until 1949, Canada retained a higher Court in the form of the Judicial Committee of the Privy Council, a court-like body whose membership partially overlapped the House of Lords, and which had ultimate judicial authority over the off-island parts of the British Empire.[30] As a result, the Supreme Court operated under the shadow of the Judicial Committee which diminished the possibility of appeal to the Supreme Court and treated the Court with a casual indifference with relation to the Court's deliberations. [31] Furthermore, it has been suggested that the role of the Judicial Committee, in functioning as the highest appellate court for Canadian litigation until 1949, dispelled the need for those appointing members of the Canadian bench to act upon long-term concern for the outcome of Canadian cases and the growth of the Canadian legal system,[32] which has resulted in, among other things, the continuation of the partisan exercise of the appointing power in Canada. The following brief outline of the changing practices in the exercise of the appointing power to the Supreme Court of Canada, against

the background of the critical literature and recent reform proposals, is indicative of the growing national realization that past practice was inappropriate to the stature and role of the Court in Canadian society.[33]

(a) Legal Structure of the Appointing Power

The Supreme Court is a statutory court, founded by the Parliament of Canada, pursuant to section 101 of the Constitution Act 1867, as a general court of appeal. The Supreme Court Act makes these appointments the prerogative of the Governor in Council, or the federal Cabinet. When the court was created in 1875, there was some expectation that it would assume the role of final appellate court. This change, however, did not take place until 1949.[34]

The appointing power for Supreme Court judges is similar to the constitutional provision for appointments of Superior court judges, which replicates the practice of executive appointment used in Britain.[35] In this model, the executive holds unfettered power of appointment. Section 4.2 of the Supreme Court Act provides that judges of the Supreme Court of Canada "shall be appointed by the Governor in Council by letters patent under the Great Seal." In Canadian practice, however, the phrase "Governor in Council" does not actually mean the Governor General, but rather the federal cabinet (Prime Minister) giving the Governor General advice that by convention is generally never refused. Interestingly, the executive system of appointments in Britain has seemed to escape the hold of partisan considerations that are found in the Canadian system and, accordingly, does not attract the kind of criticism levied at its Canadian counterpart.[36] This contrast between the two countries would suggest that the British system of judicial appointment reflects certain attitudes towards law and adjudication that are not inherent

in the Canadian system of appointments.[37] Furthermore, these value differences would suggest that the appointment procedure has a direct correlation to the political culture of the country and that it is the political culture of the country that will determine the values with which the appointment procedure will operate. For example, there are a number of features in the English appointing system which has enabled the system to escape the grip of partisan political considerations. For instance, the Lord Chancellor, who is appointed at the recommendation of the Prime Minister, makes recommendations for Superior Court appointments and is often influential in bringing forth names for the positions of Law Lord, Lord Chief Justice, and the Master of the Rolls. He does not consult with cabinet colleagues but works from his own familiarity with the members of the bar, confers with senior members of the judiciary, and relies upon the work of a small but important office in the permanent civil service. High Court appointments are, by statute, awarded to barristers of at least ten years' standing; in practice this has generally meant that senior members of the bar would secure appointment only after sitting as deputy judges for a temporary period. High Court judges have recently made up the pool for appointment to appellate positions.[38] This system differs from its Canadian counterpart to the extent that there is no permanent office within government to assist the Prime Minister with the decision to appoint a candidate to the bench. In the Canadian case, the Minister of Justice consults members of the legal community to identify and assess outstanding candidates. More importantly, the Minister of Justice has acknowledged that consultations between the Minister and members of the legal community are quite often infrequent resulting in a process that is not always followed according to any specific standards of protocol.[39]

Like Canada, the British system of judicial appointment offers no checks and balances either before or after appointment. Candidates are considered and appointed with no criteria for selection, other than the obvious experience at the bar. The power of appointment is vested in a member of the executive and only constrained by the Lord Chancellor's role. Nevertheless, the appointment procedure was considered to be free of the partisan and political concerns that tend to occupy those who hold executive office.[40] It seemed that the conventional constraints that kept this system of selection oriented toward quality appointments rested in the traditions of impartiality and integrity that were attached to the office of the Lord Chancellor and to the exercise of the appointing power itself. Furthermore, there are other significant factors that work to support the system as well, such as the small size of the eligible pool of nominees that results from a divided bar split into barristers and solicitors, and the developed system of evaluating excellence among the barristers. As a result, the British system of executive appointment has functioned on a merit basis that, unlike its Canadian counterpart, has faced little criticism within academic, legal and political circles. This contrast would suggest that while power can be exercised through the appointment process, the process itself does not determine the values by which the power is exercised.[41]

The features of the British system of judicial appointment as well as its operation reflect certain attitudes towards law and adjudication and many of these values have permeated the Canadian legal system although they are not honoured as they might be in the context of appointing judges.[42] For example, the life tenure granted to judges' signals a commitment to the impartiality of judges and is attributable to the freedom that judges

have to make decisions without temptation of promises or rewards. This feature of the legal system represents the evolution of the independence of the judiciary from the executive and legislative branches in British legal history. Furthermore, it reflects the value that law should not only operate differently from politics but is best when insulated from the political sphere of influence.[43] Other features of the Canadian legal system also signal a commitment to the rule of law. The appellate system with the Supreme Court at its pinnacle reflects the determination that the law enjoys a consistent application and interpretation throughout the country. The jurisdiction of Superior Courts in constitutional cases assures the availability of law-based dispute resolution between individuals and between individuals and the state. Unfortunately, the values that underpin the rule of law which are evident in the structure and functioning of Canada's legal system are not to be found in the exercise of the appointing power at the highest level in Canada as accusations of partisan appointments have flourished and evidence would suggest that individual merit has not always been the decisive factor in all appointments to the Supreme Court. Indeed, there are clear examples at different periods in Canadian history of candidates from different religious persuasions that were not Protestant or Catholic being passed over for consideration, of a deliberate policy of appointing those of British or French origin, and appointments made in the face of opposition from the Bar and Bench.[44]

The values derivative from the rule of law that are so evident in the structure and function of the Canadian legal system have not, as the following section of this paper demonstrates, informed the exercise of the appointing power at the highest level in Canada. The evolution of a non-partisan appointment practice in the British system

suggests that the design of the mechanism of appointment is not the prime variable for creating a non-political judicial appointments system.[45] After briefly reviewing the Canadian practice and the critical literature on the judicial appointment procedure to the Supreme Court, I will discuss how the failure of commentators to fully understand the role of the Supreme Court and its Charter responsibilities, has produced recommendations for reform that will not work to improve the system in the most meaningful ways.

(b) Patterns in Supreme Court Appointments: The Early Years

Reforming the judicial appointment process is surprisingly not a new idea, but one with a significant historical pedigree. Throughout the decades there have been a number of proposals that have justified the need for reform of the judicial appointments process. While very few of these reform proposals have been implemented, there have occurred small modifications to the original system of executive appointment with the addition of advisory committees and the reduction of absolute executive discretion in Canada's federal court and in various provincial courts. While these changes have occurred within the lower courts, the essential features of the appointment process to Canada's Supreme Court have remained unchanged. This is true even in spite of some specific reform proposals, including some changes to the process for appointing judges, as early as the Victoria Charter round on constitutional reform;[46] the flurry of writing and reform proposals prior to the 1982 amendments to the constitution in the form of the Constitution Act 1982;[47] and the failed rounds of the constitutional amendments in the form of the 1987 Meech Lake Accord and the 1992 Charlottetown Accord.[48] In outlining how the debate over Supreme Court of Canada appointments has changed throughout the

years there is revealed an underlying change in how Canadians have come to understand the most important tasks that the Court performs as final adjudicator of Canada's Constitution. If one is to design and implement an effective appointments process, one must be conscious of conflicting interests that have come to inform this debate over the years.

The Supreme Court of Canada has not always been a respected and prestigious institution. In the early years, potential appointees preferred provincial court appointments as it was generally perceived as having a higher stature to that of the Supreme Court. Because Canada's highest court of appeal remained the Privy Council in Britain, the Supreme Court lacked the strength and power to be taken seriously. Anecdotal evidence from this period suggests that agreements were made on the part of litigants to appeal to the Privy Council regardless of the outcome of their case in the Supreme Court.[49] In 1922, a Canadian Bar Association report advocated for the retention of the Privy Council as the final appellate court because of the "greater learning, more varied experience and wider vision" of the body as well as its relative freedom from "political, racial or religious bias from local prepossessions." The report continued:

> The majority observes with regret that the vicious system of making judicial nominations rather as rewards for political services than for professional qualifications of candidates shows no sign of disappearing from our customs…[50]

In this sense, it could be suggested that the quality of candidates to the Supreme Court may have been compromised not only by the policies involved in making the selection but also by the limited nature of the willing pool.

While the Supreme Court remained undervalued and limited by the scope of its jurisdiction, the policies of appointment only served to enhance the negative perception

of the institution. In the period before the abolition of appeals to the Privy Council, political experience and ties were a strong factor in appointment to the Court. Between 1875 and 1949, the year of abolition of appeals to the Privy Council, of the forty judges appointed to the Supreme Court, twenty-two had held electoral office in a legislature and thirteen had been ministers. Eight of these appointees were active politicians at the time of their appointment. Moreover, a significant number of those appointed had been unsuccessful politicians.[51] This data demonstrates that appointments to the Supreme Court during this time appear to have been a reward for successful federal politicians since other federal appointments do not display such a high incidence of political experience.

When the Supreme Court became Canada's final appellate court in 1949 there emerges a different pattern in the manner of appointments and the criteria used to determine qualified individuals. On an examination of jobs held before appointment there is a notable difference between those appointed before 1949 and those appointed after. Judges composed 57.5 percent of the pre-abolition appointments and 14 percent thereafter. Politicians fell from 17.5 percent to 4.5 percent while practitioners rose from 20 to 31.8 percent. Deputy Ministers went from 5 percent to nil.[52] While this information is rather limited because it does not reveal political experience or ties amongst the appointees other than in terms of the job held at the time of appointment, the contrast would suggest that with the abolition of appeals to the Privy Council there was a definite change in the career path of Supreme Court appointees.

Aside from career background, other factors also appear to have influenced appointment decisions after the abolition of appeals to the Privy Council. Only Justice

Bora Laskin in the period up to 1987 came from a background other than English, Scottish, Irish or French. While ethnic origin may determine religious affiliation, the pattern in Supreme Court appointments has been rigid enough to suggest that religious background also played an important role in determining who was suited to sit on the Bench. From the creation of the Court until 1909, appointment of a seat vacated by a Catholic went to a Catholic and appointment to a seat vacated by a Protestant went to a Protestant. The 1909 appointment of Justice Anglin, an Irish Catholic from Ontario, appeared to hinge to some extent on his religion. The pattern reappeared thereafter with Justice Hughes, an Irish Catholic, replacing Justice Anglin in 1909 and Justice Kerwin, also an Irish Catholic, replacing Justice Hughes in 1962. In 1924, Justice Abbott became the first Protestant appointed from Quebec. The pattern of religious continuity on the Court, however, seems to disappear after this time.[53] While it remains that during this period the most important qualification for appointment appears to have been related to participation in elective politics, other factors such as ethnicity and religion clearly influenced the final selection process.

The composition of the Court during this period was also influenced by the federal composition of the country. Since the Court's inception Quebec has been allocated three seats on the Bench. The other seats were originally accorded to Ontario and the Atlantic provinces. In 1905, the first western judge was appointed from Manitoba. The current distribution of the nine seats rests on various bases. While Quebec is the only province to have its three seats guaranteed by statute, the other seats are distributed by tradition with two to three from Ontario, one from the Atlantic Provinces and one to two from the western provinces, with British Columbia having an untested

claim to one. The role of federalism, ethnicity and diversity as it relates to the current appointment procedure to the Supreme Court will be explored in further detail throughout this thesis. The above analysis is meant only to provide a brief history of the forces shaping the appointment system over time.

(c) The Introduction of Constraints on the Discretionary use of the Power of Appointment in the Pre-Charter Period

Amid criticism of the unfettered nature of the appointment power, two major changes occurred that, while not binding on the executive, reflected a concern for the quality of judicial appointments that were made. In 1967, Pierre Trudeau, as Minister of Justice, approved the establishment of a committee of the Canadian Bar Association to advise on the qualifications for appointment of persons referred to the committee by the government for possible appointment to the Federal Court. The evaluation would take the form of a rating of well qualified, qualified, or not qualified. However, the committee did not have the authority to review names for Supreme Court nominees. The committee, which consisted of twenty-four lawyers from leading law firms across the country, did not meet to confer on candidates. Instead, members would pass on their views about particular candidates to the Chair of the committee who would then pass on a consensus opinion to the Minister of Justice. The time frame for a response from the committee was usually quite short, sometimes no longer than forty-eight hours, and the information was secured by telephone contacts. The committee did not have the capability to handle the number of names referred to it and some had difficulty evaluating the persons whom the members had never met or whose practice with which they were unfamiliar.[54]

In 1974, then Justice Minister Lang appointed a special advisor whose task it would be to look for names of potential candidates as well as determine the qualifications for each possible candidate. The process was not to be directed at individual appointments but at creating a list of the best candidates for the job that would then be presented to the Minister of Justice. The approach was considered to be reminiscent of that used by the Lord Chancellor's civil servant support staff that assists the Lord Chancellor in developing a list of potential nominees to present to the Prime Minister. This advisory function was not to be binding on the Minister or on the Cabinet. The advisor would consider such qualities as "sympathy, generosity, charity, even-temperament, integrity, an ability to listen, and an impeccable personal life as well as legal ability and experience, religious and ethnic origin, specialized abilities, public service, age and sex,"[55] in determining whether the candidate was suitable for consideration for appointment.

The Supreme Court of Canada has not been directly affected by these efforts at enlarging the pool of candidates and improving the qualifications of its members. However, some analysts have suggested the possibility of an indirect effect from changes to superior court appointments on the quality of appointments made to the Supreme Court. This is because it is thought that if an efficient and effective system of appointments to the superior courts was created, then the improved quality of judges that would result from the new system would eventually be felt in the Supreme Court of Canada as part of a trickle up approach since many of the Supreme Court judges are chosen from the bench of superior courts.[56] It should be noted, however, that there is no empirical data to suggest that the quality of Supreme Court judges had improved as a result of changes to the appointment process of superior court justices. Much of the

opinion concerning the ability of those appointed to the Bench stems from the common belief that elevation from court to court occurs only if one has demonstrated ability in one's previous position. As a result, this may explain why, until recently, there had been little discussion about the mechanisms used by the appointing power to select judges for the Supreme Court.

(d) The Historical Evolution of the Appointing Power since the Charter: Federalism and the Charter

The extensive literature on the appointment of judges in Canada has devoted little attention to the Supreme Court of Canada. Often ignored in its evaluation is the role of the Supreme Court as the final court of appeal and as the ultimate interpreter of the constitution. There have been a number of explanations suggested over the years as to why the Supreme Court has not experienced similar reform proposals as other branches of the judiciary. It could be held that because the Supreme Court acquires the best legal talent in the system, largely as a result of advancement to the Bench from the Federal Courts, that it has escaped the problem of an appointment process that offers no consistent assurance of quality. Another way to explain the absence of criticism around the appointing process is to understand the repeated, broad-ranging complaints about the practice of appointing judges in Canada as pervasive, extending to all levels of court, so that the Supreme Court has attracted no special attention.[57]

While the appointing procedure to the Supreme Court has not experienced the calls for reform that have occurred at the provincial court level, it should be noted that extensive comments have been made relating to the Court as an institution deliberating

upon questions of federalism. In the post-war period, criticism of the Federal executive's monopoly of Supreme Court and Superior Court appointments has been based largely, although not exclusively, on arguments about the requirements of federalism. In his study of the Supreme Court as a bilingual and bicultural institution, Peter Russell wrote that much of the debate on the Court flowed from concerns about federalism, bilingualism and biculturalism.[58] The classical legal theory of federalism with its focus on balance and equity between the two levels of government as well as of security of jurisdiction has formed the basis of the federal critique of judicial appointment.[59] This analysis was central in the Report of the Tremblay Commission which argued that common sense as well as federal theory would suggest the need for a tribunal entirely independent of the governments, whose constitutional disputes it settles. The Commission goes on to state: "And if this requirement proves either too difficult to meet or contrary to national susceptibilities, at least appointments to the Supreme Court must not be the exclusive appanage of one of the two orders of government."[60] This sentiment has continued to form the basis of the argument that it is inappropriate for only one level of government to appoint the judges to such an important federal institution. Similarly, commentators have expressed the need for regional representation on the Court to ensure familiarity with the distinctive features of each region. For example, the argument to maintain a certain coram of judges from Quebec asserts that there remains a need for civil law training and experience as well as background in the practice of law in the French language in order to deal with civil law issues and cases that may be argued in French.[61] The French-English dualism of the Canadian political tradition has also manifested itself in the tradition of alternating the appointment of the Chief justiceship between an Anglophone and

Francophone.[62] Such traditions reflected the need to support and respect the general tenets of classic federalism especially as they related to Supreme Court appointments.

The expectation for regional balance on the Supreme Court that has been so pervasive in the criticism of the judicial appointment procedure is reflective of the deep regional cleavages that have, over the years, shaped Canadian politics. Beginning with the Victoria Charter of 1971, a majority of the provinces have lobbied for increased provincial participation in the appointment process and constitutional entrenchment of the convention of regional representation.[63] Over the years, the provincial governments had suspected the Court of harbouring centralist biases and this suspicion had resulted in the provinces advancing different mechanisms for provincial government participation in the appointment procedure. These mechanisms ranged from proposing the implementation of the American practice of ratification of federal appointments to proposals of the creation of an Upper House composed of provincial government appointees that would be charged with ratifying federal government nominations in camera.[64] A year later the Pepin-Roberts Task Force on Canadian unity recommended a similar procedure, but without the committee acting in camera and the British Columbia Constitutional Proposal of 1978 also contemplated an upper house of provincial government delegation possessed of the ratification power.[65] The appeal of these proposals to the provinces seemed to rest on the idea of a second legislative chamber composed of provincial delegates. For the provinces, this would assure an effective check on Supreme Court appointments in a ratification process.

While the provinces have long maintained that regional representation in the appointment process would guarantee a more 'representative' court, the critics have protested that a provincial veto over Supreme Court appointments would amount to the rejection of the "basic principle of the judicial process: that judges are judges of the issue, not partisans of parties to the issue."[66] However, in 1987, Prime Minister Brian Mulroney embraced the reforms articulated by the provinces arguing that they would increase the legitimacy and the authority of the Supreme Court, thereby making it a more effective vehicle of 'intra-state federalism' or the representation of regional interests within the institutions of the national government. The 1987 Meech Lake Accord proposed that the Federal government be required to appoint Supreme Court judges from lists submitted by the provinces. It was generally understood by the provinces that provincial nominees, especially those proposed by the government of Quebec, would be more de-centralist in their federalism rulings and more reluctant to use the newly entrenched Charter of Rights to impose uniform national standards on provincial policies.[67] The proposal for provincial nomination of Supreme Court appointments as outlined in the Meech Lake Accord was strongly opposed by various rights advocacy groups who argued that the proposed change would allow provincial governments to determine the political orientation of the Court in a way that would undermine and impact the Supreme Court's approach to interpreting and enforcing the Charter. On the other hand, defenders of the proposal argued that it was consistent with the spirit of equality between the two levels of government in Canadian federalism and that provincially nominated judges were likely to be as ideologically diverse on Charter issues as federal nominees.[68]

While the Meech Lake Accord would go on to be defeated over concerns to the absence of Senate reform and the conferring of a 'special' status to Quebec, it would remain indicative of the long line of responses to the problems of the Court's legitimacy in the eyes of the provinces, as expressed in the language of federalism. Interestingly, the rejection of Meech would also signify a shift in the debate over the system for appointing Supreme Court justices. In addition to the problem of legitimacy from the standpoint of provincial governments, there was now a growing problem of the Court's legitimacy in the eyes of the public and this has been linked to the entrenchment of the Charter of Rights and Freedoms in 1982.[69]

(e) Federalism, Partisanship and Ideology

Throughout the years the provinces have maintained a traditional federalist argument justifying the need for reform of the appointing procedure as demonstrated in the proposals of the Meech Lake Accord. It would seem, however, that such a model for reform would not be able to survive the changing nature of the role of the Court. Such change has become evident in the work of scholars who have long advocated for reform of the system. For example, in his defense of the Meech Lake proposal, Peter Russell declined to use the traditional federalist argument justifying reform. Instead, he emphasized the importance of a tribunal that would decide disputes about the rights of citizens as well as the powers of governments, and condemned the status quo by pointing out that there existed no check to prevent the federal executive from making poor judicial appointments. Moreover, Russell argued that political cronyism and ideological differences would manifest in Supreme Court justices, not centralist biases. As a result,

Russell suggested the need to establish an institution that would act as a check on the federal executive's power, and provincial governments would be a good choice to act as this check, not because of the federalist nature of the Canadian political system, but because the provinces would be likely to take positions on Charter issues contrary to those of the federal government. Furthermore, Russell argued that provincial participation in the selection of judges would promote different candidates, thereby encouraging the prospects for ideological pluralism on the Court. For Russell, diversification of the Bench is a solution to the threat of ideological homogeneity, especially during the periods of one party dominance characteristic of Canadian politics at both the federal and provincial levels of government.[70]

Other post-Charter proposals on judicial appointment have reflected the shift away from the traditional federalist theme. A notable example is the 1985 Report of the Canadian Bar Association's Committee on the Appointment of Judges. The 1985 Report stresses an overriding concern that judicial appointments generally be "based on merit and legal excellence alone," with a small caveat on the continuing need for regional and Quebec representation on the Court. Such a concern reflects a significant shift from the association's committee on the Constitution 1978 which placed importance on disputes between the provinces and the federal government. According to the Report: "In disputes between the federal and provincial governments, justice should be seen to be done...it is essential that the provinces have a role in the appointment of the judges of the Supreme Court of Canada."[71] Thus, it would seem that the 1985 committee of the Canadian Bar Association was content to leave the appointment power in the hands of the federal executive and simply suggested that the federal executive pursue a "meaningful

consultation" with the provincial attorneys-general when making an appointment. At the heart of the 1985 committee's proposal is a system of advisory committees made up of lawyers and judges. The implication of this proposal is that Canadians should be able to rely on the profession to help determine appointments which would of course be based on merit and legal excellence alone.

The Canadian Bar Association's 1985 committee on appointment was wary of the subject of ideology. Instead, in its report there is discussion of the patronage practices that flow from party politics, and it is this issue that the committee considered to be the major, albeit not the only, obstacle to consistently good judicial appointments.[72] It conceived of the system of advisory committees as a way of offsetting or diminishing partisan considerations in the appointment process. The empirical findings cited in the report indicate a correlation between the use of advisory committees or judicial councils at the provincial level and a decline in such considerations in relation to provincially appointed judges.[73] The committee also determined that without such bodies, partisanship would remain a leading factor when choosing candidates for the bench. It should be noted that throughout the report the committee was keen to acknowledge that while unfettered ministerial appointments are almost always partisan in nature this did not necessarily preclude that all appointments are bad. In fact, the committee repeatedly stated that past appointments to the Supreme Court have demonstrated a commitment to legal excellence and sound decision-making, yet the committee continued to advance the argument that partisan appointments were generally bad for the system.[74] The committee identified three leading problems associated with partisan considerations in the appointment process. The first is that the partisan qualification diminished the pool of perspective

candidates, which meant that many qualified and able individuals were being passed over for consideration. The second concerned the public's perception of the system. The committee held that a partisan system often resulted in a cynical public since it is perceived that judges are chosen mostly on the basis of party affiliation rather than merit and the general ability to do the job well. This problem then has larger implications for the judicial system as the public doubts the ability of the Court to decide cases impartially and this creates concerns about the Courts' independence, particularly in cases which pit the individual against the state.[75] Finally, the committee advanced concerns about the competence of the judges and judging in a partisan judicial system. The committee labeled this problem "uneven competence" and linked it directly to the problem of patronage. The committee went on to state that partisanship adversely affects judicial appointments because it diminishes the importance of prime qualities in judges such as high moral character, legal experience and intellectual abilities.

What is most interesting about the committee's report is the lack of attention and concern given to the issue of judicial ideology. In fact, the committee stated that it did not consider judicial competence to be an issue related to ideology: "we have seen no evidence to suggest a judge with previous political affiliation carries those views to the bench."[76] For the committee of the Canadian Bar Association, the clear and most pressing problem surrounding the judicial appointments process to Canada's highest Court was the potential for partisan considerations in the appointing system and it is in this context that the committee would press for an appointment procedure that would provide the "best qualified" people who display "legal excellence".

The committee's insistence that patronage posed the most significant problem to the process of judicial appointments to the Supreme Court is analytically interesting in a post-Charter environment. This is because the entrenchment of the Charter of Rights and Freedoms in 1982 is largely considered to have created a new role and function for Canada's Supreme Court. The introduction of the Charter changed the Court's docket and necessitated different modes of analysis to deal with the new phase of judicial review of constitutionalized rights and freedoms. Yet, in focusing on the partisan nature of judicial appointments, the report of the 1985 committee of the Canadian Bar Association failed to address the new demands the Charter had placed on the role of judges. As a result, there was no discussion on the implications for judicial appointment procedures of the Supreme Court of Canada's new Charter role. Indeed, the Meech Lake proposals which were outlined only two years after the publication of the committee's report, continued to avoid the issue of institutional changes to the Court which occurred as a result of the new public policy or political role of the Court on Charter cases. Instead, Meech continued to debate the legitimacy of the appointment process mainly in the language of federalism. All of this was to change, however, with the Supreme Court's 1988 decision in *Morgentaler v. The Queen.*[77]

At issue in *Morgentaler* was whether section 251 of the Criminal Code which prohibited abortions unless they were carried out by a qualified doctor in an approved hospital with approval from the hospital's abortion committee, violated the Charter's guarantee of security of the person in section 7. The Supreme Court ruled 5-2 that section 251 violated the Charter, but the judges in the majority gave three different sets of reasons. The two dissenting judges considered the abortion issue to be so political that the

Court ought to leave its regulation entirely up to Parliament. The decision by the Court to strike down Canada's abortion law came under immense criticism and alerted the public to the new power judges were now able to exercise under the Charter. Peter Russell noted at the time that, "Filling Supreme Court vacancies…has always been a little bit political in a subterranean way and now it will be right at the surface [with] the political interest groups lobbying and pressing the appointing authorities to put people on the Court of their persuasion."[78] Russell's prediction would be filled almost immediately when Angela Costigan acting as counsel for Choose Life Canada suggested that in the future her organization would try to influence the appointment of judges who shared the group's opinion. James Jepson, a Tory backbencher at the time also lobbied to put justices on the bench that would reflect a "more conservative point of view."[79] As a result of the Court's ideological stance on matters of important public policy, the critical response to the Morgentaler decision marked the beginning of a growing demand for greater transparency and public participation in Supreme Court appointments. More specifically, the response to the Court's *Morgentaler* decision marked a shift in the debate over the legitimacy of the appointing process from issues of federalism to a specific focus on the ideological standpoint of Supreme Court justices and the implication of ideology in the use of judicial review by the Court.

The 1988 *Morgentaler* decision was quickly followed by another controversial decision in 1989 in the case of *Andrews v. Law Society of British Columbia*[80] in which the Supreme Court's groundbreaking interpretation of the meaning of equality would set the course for increasingly controversial Charter decisions. The decision in *Andrews* raised questions about the appropriate limits on the Courts' freedom to override

legislative decisions in the name of protecting individual rights and the degree of deference the judiciary should show to the legislative process in democratic societies. The decisions rendered by the Court in such cases as *Morgentaler* and *Andrews* resulted in the recognition by the Ontario Law Reform Commission (OLRC) of the growing importance of conflicts between individual rights decisions and government actions, and thus between the courts and legislatures, in setting the terms of Canadian political discourse. As a result, the O.L.R.C determined that the current process for judicial appointment was inadequate for selecting judges to the Supreme Court who would be rendering decisions contrary to existing Canadian social and economic policy. Thus, the Commission asked the Dean of the Faculty of Law at Queen's University, John D. Whyte, to direct a research project to define a process and set of criteria that could assist the Government of Ontario in exercising the role that it was to have in Supreme Court of Canada appointments. The report of this project, *Appointing Judges: Philosophy, Politics and Practice*[81], noted that the Charter was probably the greatest impetus for the increase in attention that the public was now paying to the judiciary and its membership, and that the public's interest was "not only in the judicial function, but in the qualifications of the people who execute the office."[82] It went on to note that "respect for judicial independence has been enhanced, as it should be, but so has the demand that the process of selection itself enjoy independence from the vagaries of politics."[83] Thus, the papers in the report reflected not only on the Supreme Court of Canada's role in issues of federalism, but also on the Court's role in disputes over Charter issues, and considered the implications of these issues for the legitimacy of the processes by which people are appointed to all courts in Canada.

While the report of the OLRC attempted to reconcile the new power of the judiciary with the method of appointing Supreme Court of Canada judges, its impetus for reform was to eventually fade. In 1992, the Charlottetown Accord largely reproduced the federalism-focused process contained in the Meech Lake Accord. This Accord too was to be defeated in October of 1992 bringing with it a fading of the debate for reform of the process for the appointment of Supreme Court justices. Surprisingly, this general silence has continued despite the Courts' perceived 'activist' jurisprudence on Charter related issues. While the Canadian legal literature abounds with articles on the Charter, and on the role of the Supreme Court and the Charter, there has been relatively little analysis about the implications for judicial appointment procedures of the Supreme Court of Canada and its Charter role. Indeed, one finds a limited discussion of the institutional costs associated with a new phase of judicial review of constitutional rights and freedoms. While Peter Russell has called for "an ideological balance" on the Court and also suggested that the Charter will displace federalism as the 'significant' component of the Court's work, and the Canadian Bar Association sees the Charter as increasing the need for independence of the Supreme Court as well as the desire for the best possible appointees, there has been little analysis undertaken about the role of the Court vis-à-vis the Charter and its impact on the judicial selection process. The following chapter will identify how Charter adjudication has altered the role of the Supreme Court and the implications this has had for the appointment process.

3. The Appointing Power in the Age of Judicial Review: Judges as Legislators?

The relationship between democracy and judicial review has been a central issue in Canada since the passage of the Charter of Rights and Freedoms in 1982 and it has been this relationship that has formed the current basis of critical argument for change to the appointing power for the Supreme Court. This debate has been highly polarized, producing enthusiastic supporters of the Charter and the activist jurisprudence of the Supreme Court, and staunch critics who view the activist jurisprudence of the Court as responsible for the rise of a 'judicial state.'[84] While the supporters and critics disagree as to the outcome of constitutional interpretation of rights by the Supreme Court, their analyses occurs within the same judicial centered rationale which emphasizes the judiciary as the agent responsible for fundamental political and social change. As a result of this perceived shift in power from the legislature to the Court, both groups have identified change to the executive appointing power as necessary to address the democratic inconsistencies that are produced by a powerful judiciary acting on issues of national social and economic policy, albeit with strong disagreements as to the extent and type of change that is necessary.

In this chapter, the legitimacy debate that has dominated legal and academic analyses of the Charter and formed the foundation for calls of change to the executive system of judicial appointments will be examined. The current legitimacy debate is divided between the supporters of judicial activism, who view both the protection and determination of rights to be in the domain of the Court, and judicial critics, who question whether the Court, as an unrepresentative and unaccountable institution, can actually advance democracy beyond its concern for the rule of law. In turn, this debate has come to have a

significant impact on judicial selection procedures since Supreme Court judges have been singled out as contributing to the 'democratic deficit' through judicial review.[85] It is my contention that reforming the appointment procedure as a means to address accountability concerns associated with the use of judicial review by the Court is a misguided approach as it perpetuates the notion that the primary impact on Canadian democracy has been the rise of the judiciary as a policy actor. Moreover, the central focus on the policy-making ability of the Court has meant that other links between the Court and democracy have been overlooked. While the impact of judicial review on Canadian democracy is clearly salient, it is not the only or most important variable in assessing the democratic impact of the Court. Any reform proposal should consider not only the impact of judicial review by the Court, but also the extent to which the Court reflects other indicators of Canadian democracy such as whether the Court is reflective of the current ethnic and demographic make-up of Canadian society and how the Court as an institution facilitates public confidence in the system.[86]

(a) Democracy and the Charter: A Left-Wing Perspective

Much of the debate surrounding the rise of judicial power and the use of Charter review by the Supreme Court considers the extent to which judicial interpretation of legislation has advanced Canadian democracy or hindered its development. This debate has laid the foundation for much of the analyses on the role of the Supreme Court and emerged as the primary variable determining change to the judicial appointment process. While the effects of judicial review have been debated in Canada since the Charter's introduction, it was not until the publication in 1994 of Torbjorn Vallinder's, *The Judicialization of Politics – A Worldwide Phenomenon*, that the analysis was presented

on a global scale. Vallinder identified two related phenomena associated with the global expansion of judicial power: judicialization from without and judicialization from within.[87] The first dimension of judicial power existed in political systems where judicial review is an established practice and the courts can require democratic actors to honour constitutional protections. The second dimension, judicialization from within, occurred when judicial values and processes became internalized within the decision-making structure of the legislative arena. The importance of Vallinder's analysis is that it identified not only the rise of judicial power but also determined the extent to which judicial power was able to grow within different political systems. This analysis was to have a significant impact on the work of legal and political academics in Canada, who would use the basis of Vallinder's approach to advance their own opinions on the use of judicial review by Canada's top Court. For instance, left-wing critics of the Charter such as Lorraine Weinrib, have argued that an activist court is necessary in order to best protect the rights of all Canadians. According to Weinrib, the Supreme Court has been instrumental in moving Canada away from the minimalist view of democracy as simply adherence to majoritarianism, and toward a more mature democracy that demonstrates its respect for the rule of law by entrenching constitutional supremacy and protecting the rights of citizens through judicial review of government action.[88] This critical position reveals a fundamental assumption that rights are only fully protected in the constitutional state under judicial supervision. The defense of judicial activism, therefore, comes to rest on the claim that the Supreme Court is a more "capable" and more "principled" institution than Parliament to act as the guardian of the constitution.[89]

Judicial activism by the Court has also been defended by other left-wing critics of the Charter through the development of the 'dialogue metaphor'. The originators of this approach, Peter Hogg and Allison Bushell, developed this metaphor in a 1997 article in Osgoode Hall Law Journal, and it has quickly become the dominant analysis for understanding the complex institutional relationship between courts and legislatures that result from Charter review.[90] The dialogue theorists challenged the view on the rise of judicial supremacy by contending that judicial invalidation of a statute begins a dialogue between courts and legislatures that "causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision."[91] For the dialogue theorists, judicial invalidation is not a problematic occurrence because it allows legislatures to respond to the invalidation: "the legislative body is in a position to devise a response that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded."[92] Further to this point, Charter dialogue is said to have had occurred if it results in a democratic decision that responds to a judicial invalidation by reversing, avoiding, or modifying a constitutionally suspect statute. In the 1997 study, Hogg and Bushell analyzed sixty-five cases in which the Court invalidated statutes and suggested that Charter dialogue had occurred in two-thirds of the cases because the responsible legislative body introduced legislative sequels to the judicial invalidations. More importantly, Hogg and Bushell contend that in "most cases, relatively minor amendments were all that was required in order to respect the Charter, without compromising the objective of the original legislation."[93]

Another supporter of the dialogue theory is Kent Roach, who views the "Charter not so much as a revolution, but as a continuation and enrichment of the ability of courts and legislatures to engage in a dialogue under the common law."[94] Using a similar argument to Hogg and Bushell, Roach contends that judicial activism advances Charter dialogue because the Supreme Court never prevents the competent legislature from introducing a legislative response to reverse a decision of the Court. Instead, Roach asserts that judicial activism is not problematic because the Canadian combination of strong courts and equally strong legislatures prevents judicial supremacy under the Charter.[95] Additionally, Roach contends that this dialogue is innately democratic since it occurs as a result of legislatures' retaining the ability to decide how to respond to judicial invalidation of legislation as an unreasonable limitation on a Charter right. Furthermore, the responsibility for judicial policy-making remains with Parliament because "when the Court has the last word, it is because the legislature and the people have let it have the last word."[96]

Unlike the approach advanced by Hogg and Bushell which views any legislative response as evidence of Charter dialogue, irrespective of the judicial remedy used by the Court and whether this remedy would allow for a response by Cabinet[97], Roach advances a theory that respects the individual roles performed by the Supreme Court and cabinet and understands Charter review by the Court not as judicial empowerment but as a democracy enhancing exercise. This understanding is reflected in his analysis of judicial remedies during the second decade of Charter review. Roach believes that the complexity of judicial remedies, in which the Supreme Court is employing more suspended decisions when it considers legislation to be a violation of the Charter, provides the cabinet with

greater discretion in deciding how to respond to the judicial invalidation of legislation.[98] While Hogg, Bushell and Roach may differ in opinion on the extent to which the dialogue metaphor empowers Canada's legal institutions, they are all in agreement that judicial activism is necessary to initiate the institutional dialogue between the Supreme Court and the cabinet, and then to assure that Charter values attain prominence in legislative sequels that would be absent without activism.[99] Moreover, all agree that Charter dialogue is not initiated by the Court, but is the result of political attempts to protect rights when legislation is being developed.

Supporters of judicial activism are united in their skepticism about political power and the effectiveness of parliamentary institutions. This skepticism, however, comes at the expense of understanding that the Supreme Court is a political actor when it decides Charter issues and should therefore be subject to the same institutional limits as the Cabinet or Parliament. This limitation is further enhanced by other supporters of the left-wing perspective. The Critical Legal Studies (CLS) position is the pre-dominant branch in the left-wing perspective and includes such academics as Michael Mandel, Joel Bakan, Judy Fudge and Allan Hutchinson. These commentators suggest that there are inherent limitations on Charter review that act as impediments to social equality and democratic participation.[100] In particular, those who hold this critical position conclude that Charter review simply reinforces the limitations of liberalism because the Charter is fundamentally a liberal document that advances a negative conception of freedom.[101] More importantly, these critics suggest that the progressive nature of the Charter is limited by the conservative character of the judiciary, which fails to address the power imbalances in Canadian society through an activist approach to the Charter. In essence,

the CLS position claims the Charter has not facilitated a more representative democracy by empowering marginalized groups in society, but instead has developed a 'legalized politics', which only serves to reduce the progressive nature of the Canadian state because of the conservative nature of legal liberalism.[102]

Advocates of the Critical Legal Studies position argue that the deficiencies of liberalism are so entrenched in the Charter that judicial interpretation is counter-productive to the overall goal of societal reform and substantive equality. In fact, Allan Hutchinson has argued that there is no sense in waiting for the Charter to transform Canada into a just and progressive society, and instead to replace "liberal individualism and engendering a more open ended form of social democracy."[103] In fact, those who hold the CLS position argue that the legalization of politics creates a policy environment where the corporate sphere is provided with the means to undermine the welfare state and organized labour. Andrew Petter has echoed this sentiment by suggesting that the Charter is no more than "a 19th century document let loose on a 20th century welfare state. The rights of the Charter are founded on the belief that the main enemies of freedom are not disparities in wealth nor concentrations of private power, but the state."[104]

Judy Fudge sees the liberal distinction between the private and public sphere, and the focus on negative liberties and individualism, as serious constraints on the reformist potential of the Charter: "Together they constitute a block on the development by the judiciary of the social and collective rights necessary for redistributive policies."[105]

Rather than being a critical evaluation of the Supreme Court and its interpretation of the Charter, the left-wing position seems more a critique of the overall failings of liberal democracy. Like Charter critics, Critical Legal theorists do not deny that the Supreme

Court has been activist, they simply reject the direction of this activism, which in their view has only further legitimized liberalism and the public/private distinction which is considered by CLS theorists to be at the root of inequality in Canadian society. Michael Mandel is particularly critical of the democratic thesis surrounding the Charter, claiming that the Charter does not substitute a new form of democracy for the one that it replaces.[106] Mandel's solution to the 'legalization' of politics under the Charter is to abolish the legalization of politics altogether.[107] Thus, the Charter is undemocratic for left-wing critics including Mandel because it has not advanced their desired form of democracy. Interestingly, if judicial activism had facilitated the emergence of social democracy, than the left-wing critique of the unrepresentative and unaccountable nature of judicial review would lessen, and the democratic virtues of judicial review would be acknowledged by those who hold this position.

(b) Conservative Judicial Critics: A Perspective

Similar to the left-wing perspective, conservative critics of judicial review reject the idea that the Charter has strengthened Canadian democracy. Further, these critics suggest that the emergence of an activist, non-interpretivist Charter jurisprudence has weakened both representative democracy and constitutional supremacy. However, this is where the similarities between the two positions end. Unlike CLS theorists, the conservative position on judicial review has taken its queue largely from American theories of judicial review particularly the distinction between interpretivism, where the judiciary is simply a legal actor that interprets the constitution consistent with the clear meaning of the text, and non-interpretivism, where the judiciary acts as a political actor

that potentially changes the constitution's meaning by exceeding and defying the original intention of the text.[108] Moreover, judicial critics such as Ted Morton, Ranier Knopff and Christopher Manfredi account for the undemocratic nature of Charter politics not by focusing on the Charter as a legal and political document but rather by focusing on the groups of actors who have used the Charter as a vehicle to advance their particular agendas.[109] In particular, Morton, Knopff and Manfredi are critical of the Supreme Court's activist approach to the Charter, which they suggest encourages interest groups to engage in the politics of rights and to abandon the parliamentary arena for judicial politics.[110]

In his book *Judicial Power and the Charter*, Manfredi contends that the legalization of politics has fundamentally altered citizen's perception of the policy process because judicial activism encourages the use of litigation strategies by interest groups and thus undermines the parliamentary arena as the centre of public policy.[111] Further to this point, Morton and Knopff express concern that the Court has extended the 'living tree doctrine' of federalism to its Charter jurisprudence, a development considered serious by conservative judicial critics because the expansion of rights limits the policy capacity of the legislature and allows the judiciary to substitute legislative policy preferences for judicial preferences.[112] Such a phenomenon erodes the Charter's compatibility with liberal democracy because it reduces the importance of majoritarian politics in Canada. According to Morton, rather than accommodating legislative problem-solving, judges are encouraged to find better solutions. The constitutional judge is encouraged to read new meaning into the constitutional text in order to correct legislative errors. Courts are given the authority to dictate to the legislature what it may not do or

even must do. The political roles are reversed. The constitutional judge decides policy, and the legislator implements judicial choice."[113] The right wing is extremely critical of this development because it is thought to transform the judiciary into a policy actor that rivals Parliament and the provincial legislatures and, at times, dominates parliamentary actors in policy areas where the judiciary lacks legitimacy and institutional capacity.[114]

This argument is furthered by Manfredi who suggests that the Charter complicates the proper functioning of constitutional supremacy because the court's activist jurisprudence undermines public debate in representative and accountable forums, where policy solutions are suggested to be the result of deliberation and compromise. Manfredi notes that the Court's approach to the Charter raises an important normative issue, as "the legislatures pose a special dilemma for democratic theory, especially one that recognizes the doctrine of parliamentary supremacy."[115]

The general conclusion by conservative critics that judicial review of legislation has been the primary institutional outcome of the entrenchment of the Charter has been rebuffed by a number of academics both in the legal and political realm. The most significant limitation of the conservative critique as noted by these scholars is the weakness of the majoritarian critique against judicial review. This limitation has been highlighted in the work of Patrick Monaghan, Peter Russell and James Kelly who suggest that the focus of conservative critics on the judicial invalidation of statutes and the negative relationship characterization of the Supreme Court's Charter jurisprudence is misguided, since empirical studies would suggest that statutes represent only a minority of the Courts' Charter cases.[116] For example, between 1982 and 2003, the majority of cases that have been subjected to Charter review have been on the conduct of public

officials such as the police with 52 percent of Charter cases involving such challenges. As a result, it is argued that the conservative critique of judicial review as anti-majoritarian is based on a minority of Charter cases since more than 50 percent of judicial reviews see the Supreme Court challenge the conduct of police officers and not the policy choices of the cabinet.[117] Further to this point, James Kelly has demonstrated that the rate of activism between 1982 and 2003 has been 33 percent, as rights claimants have not been overly successful in challenging the constitutionality of government acts or the conduct of police officers.[118] The extent to which judicial decisions impact upon Canadian democracy will be further examined in the next chapter. What is to be made clear here is that empirical evidence suggests that Charter activism has been far less pronounced than conservative critics would contend.

While the scholarship from both the left and the right may not be in agreement on the effects of judicial review on the Canadian political system, there is consensus on the transformation of the Court's role with the introduction of the Charter and both groups have acknowledged the growing role of the Court as a dominant policy actor. The awareness amongst critics of the ever expanding political role of the judiciary has had the subsequent effect of impacting the judicial selection procedure, especially with regard to the Supreme Court of Canada. Currently, the judicial appointment debate follows that a judiciary that is invested with the power of review must be considered a branch of government that is equal to that of the political executive and legislature. Furthermore, such a powerful branch of the political system should be subject to constraints properly available to all institutions. Since the judicial review power acts as a check on the executive and the legislature, then it follows that there should be an effective check on

the judiciary. In Canada, the appointment process of Supreme Court justices is considered one of three main counters available, the others being formal constitutional amendment and the override clause in the Charter of Rights and Freedoms. In recent years, it has been the appointment procedure that has generated considerable interest among critics since it is generally held that judicial review can only be regarded as legitimate, and therefore democratic, in the long run if the principles of transparency, difference and democratic accountability govern the selection process of judges. This argument was at the heart of the Martin government reforms in 2004 and has formed the foundation of the scholarship calling for changes to the executive dominated appointment process. But is it acceptable to suggest that Canada's democratic deficit is really the result of unelected, unaccountable judges engaging in judicial review of legislation and that Canadian democracy can be improved by changing the method in which judges are appointed? Recent empirical and normative research indicates not.

(c) The Dominant Role of Judicial Review Reconsidered: Legislative Responses to Judicial Power

The limitations of the contemporary debate on judicial appointment are reflective of differences in the debate surrounding the global expansion of judicial power. For instance, evidence would suggest that parliamentary systems of government have addressed the rise in judicial power in distinctively different ways than the American presidential system or those systems that are based on popular sovereignty, yet the present Canadian debate makes no differentiation. Neither supporters nor critics of judicial activism have considered the institutional responses to the Charter by the cabinet and bureaucratic actors.[119] Both supporters and critics consider the implications for

democracy to be dependent on the approach of the judiciary, but they discount the role of political institutions in advancing democratic governance with the introduction of the Charter.[120] This lack of attention to the parliamentary arena has recently been addressed in the works by Janet Hiebert and James Kelly. Hiebert has demonstrated the ability of Parliament to advance an interpretation of the Charter that is an alternative to that of the Supreme Court.[121] However, Hiebert distances her relational approach to constitutional interpretation from the dialogue theorists because she contends that the dialogue theory allows a judicial-centred approach to constitutional interpretation to dominate. Hiebert's primary concern is that Charter dialogue simply allows the court's approach to the Charter to structure the legislative remedy that Parliament introduces in response to judicial invalidation and thus perpetuates the assumption that the protection of rights is solely a judicial responsibility.[122]

Like Mary Dawson, Hiebert asserts the importance of focusing on parliamentary actors because of the growing significance of legislative activism and the emergence of a rights culture within government.[123] Many of the claims made by the critics of judicial activism have been based on an incomplete assessment of the Charter's impact on Parliament. Indeed, the claim that judicial activism is essential in order for Charter values to be respected in the legislative process assumes that the cabinet, the bureaucracy and Parliament ignore the Charter during the development of legislation and that the judiciary must then fill this Charter void in the policy process. Instead, Hiebert suggests that rather than viewing judicial activism either as essential to democracy or a process that results in a loss of authority for the cabinet, it should be thought of as part of a mutually reinforcing activist approach to rights that originates with the cabinet and the bureaucratic arena that

supports its legislative agenda. Further, Hiebert contends that the debate has overlooked parliament's role in significant institutional and cultural reform to advance the values of the Charter and this role limits judicial activism as the primary force behind Charter values in public policy.[124] Furthermore, James Kelly suggests that judicial invalidation of legislation is a result of the institutional failure of legislative activism to fully ensure that Charter values are addressed in the design of legislation then it is an indication of judicial supremacy.[125] Like Hiebert, Kelly maintains that while legislative activism can function as a check on judicial activism and allow cabinet to remain at the centre of public policy, he acknowledges that the full benefit of legislative activism has been limited by the underdevelopment of parliamentary scrutiny of legislation from a rights perspective. Indeed, Kelly states that parliamentary activism is underdeveloped in comparison to bureaucratic activism because of what he perceives to be an executive dominated parliamentary process. Further, Kelly argues that the advanced development of bureaucratic activism allows the cabinet to dominate the legislative process during Charter review, since the bureaucratic apparatus is at the disposal of the cabinet in the legislative process and not of parliament and its standing committees.[126]

Unlike Hiebert, who focuses primarily on the role of Parliament in determining the meaning of Charter values in legislation, much of Kelly's research addresses the question of the role of an executive dominated Parliament in sharing responsibility for the Charter and the determination of its meaning. Kelly asserts that Parliament does not have an effective role to play in interpreting the Charter and is not as efficient as it could be in comparison to what he terms 'functional' parliamentary systems such as those found in Britain, Australia and New Zealand.[127] Parliamentary activism in Canada constitutes the

Minister of Justice or the provincial Attorneys-General certifying, first to cabinet and then to Parliament that legislation conforms to the Charter. In this sense, the approach to rights activism has not changed since the introduction of the Canadian Bill of Rights and the requirement under section three that the Minister of Justice examines all bills for their relationship to the Bill of Rights and reports any inconsistencies to the House of Commons.[128] Current legislative activism in Canada is generally equated with the review process conducted by the Minister of Justice and government lawyers directly answerable to Parliament. However, this process has proved to be problematic for certain members of the Senate Standing Committee on Legal and Constitutional Affairs for the 37th Parliament as well as members on the Standing Committee on Human Rights, Public Safety and Emergency Preparedness who claimed that there exists an alternative form of judicial activism in that a cabinet-centred parliament gets the policy outcomes it deserves when legislation is invalidated by the judiciary because parliamentary actors outside the executive are constrained in their ability to thoroughly assess the Charter implications of legislation.[129] In essence, politicians are aware of the lack of parliamentary insight in the design of legislation and as a result are looking for a role outside of the cabinet to ensure that the legislative process is able to reach principled decisions on Charter values.

Cabinet dominance of legislative activism is furthered when bureaucratic activism is considered. Bureaucratic activism has been identified by Kelly as a process whereby the development of policy within the administrative state has been restructured to incorporate an extensive Charter review of policy proposals, resulting in the continuation of control of the policy agenda by the political executive.[130] Furthermore, bureaucratic activism has been under the direction of the Department of Justice who has come to

monopolize Charter advice within the federal bureaucracy. This important institutional reform has been implemented to ensure that legislation is subjected to an extensive Charter scrutiny process, resulting in the strengthening of cabinet in the policy arena. For Kelly, the development of a rights culture within government has not challenged executive control but has strengthened it because bureaucratic activism can ensure that the policy choices of the cabinet survive Charter scrutiny by the courts.[131] More importantly, bureaucratic activism occurs outside the parliamentary arena, and the Charter certification of legislation by the Minister of Justice to the cabinet is based on the scrutiny performed by the Department of Justice. This formalized review process has no equivalent review within parliament, as neither the House of Commons nor the Senate have established a standing committee with formal responsibility for Charter scrutiny of legislation.[132] This is not to say that calls for the implantation of a standing committee have not previously been made. In 1969, Peter Russell urged the House of Commons to establish a committee saying that it "would provide Canadian citizens with a more reliable and accessible device for examining the libertarian aspects of public policy than would the opportunity to appeal to a judicial system, which not only might fail to take the libertarian's concerns seriously, but will charge him thousands of dollars and make him wait several years to find out."[133] This committee, however, has yet to be established in Parliament or any provincial legislative assembly.

The legislative activism that has developed within the 'machinery' of government suggests that a new relationship has occurred between the process of legislation development and scrutiny by the DOJ and the decline of judicial invalidation of legislation as inconsistent with Charter protections. In 1990 under the leadership of John

Tait, then deputy justice minister, the Human Rights Law Section within the Department of Justice changed direction, from reviewing existing legislation for Charter consistency to setting guidelines and parameters to be followed by line departments in new policy exercises. The Human Rights Law Section created a Charter checklist to provide Legal Service Units within the DOJ with a tool to identify potential Charter conflicts in the policy proposals of line departments. This checklist is a comprehensive manual updated by the Human Rights Law Section every six months, and it allows Legal Service Units to provide consistent Charter advice to all operating departments, ensuring that a department's policy objective can be structured in a way that minimizes the risk of judicial nullification. Furthermore, at the insistence of the deputy minister of justice, the clerk of the Privy Council wrote to all deputy ministers in 1991 stressing that a proactive Charter exercise must begin at the earliest stages of policy development. Thus, the deputy minister was instrumental in securing changes to the Memorandum to Cabinet to incorporate a Charter analysis, and line departments were required to consult with Justice to review the Charter implications of policy proposals.[134] These changes within the DOJ suggest that government officials were aware of the need for an effective check on the rise of judicial power. Indeed, former Chief Justice Brian Dickson stressed the importance of legislative activism as an effective check on judicial power: "The fact of the matter is that the scope of judicial power under the Charter is very much dependent on the extent to which the government takes the Charter seriously. The more government works constructively in ensuring Charter values are taken into account in drafting and implementing legislation, the less the courts will end up second guessing the legislature's decisions."[135]

Kelly contends that the decline of judicial activism is not necessarily an indication that the commitment to rights has decreased in Canada, but that the cabinet has increased its commitment to principled policy decisions through a reformed policy process that attempts to reconcile policy objectives with Charter values.[136] This argument is further supported by empirical evidence that demonstrates that the procedural changes within the development of public policy at the federal level have succeeded in limiting the risk of judicial nullification of federal statutes. This is illustrated by the fact that there have been a limited number of Charter challenges involving federal statutes enacted after the Charter was introduced and, perhaps more importantly, by the fact that no federal statute has been nullified that was created as a result of the new policy process under the direction of the Department of Justice.[137] Kelly's analysis demonstrates that 67% of the federal statutes nullified by the Supreme Court between 1982 and 1998 were enacted or amended before the Charter was introduced in 1982. For Kelly this is a significant characteristic of federal nullifications, as a large amount of statutes nullified were enacted in a policy environment with less rigorous standards for the protection of rights and freedoms. Thus for Kelly, it is not surprising that statutes enacted in the period before 1982 have a higher rate of nullification than statutes enacted after the Charter was introduced, given that a rigorous screening process by the Department of Justice was not in place during the period when the Canadian Bill of Rights was the principle statement on rights and freedoms. Further, 90% of the federal statutes nullified that were introduced after the Charter was entrenched in 1982 were enacted in 1985 and 1986, which is the period before the Department of Justice implemented its proactive Charter review process for public policy.[138] Such data suggests that the Department of Justice has been

successful in constructing a Charter review process that limits the risk of judicial nullification and that this bureaucratic activism on the part of the DOJ has checked judicial activism in statutes and regulations, thus preventing the transfer of public policy decision-making authority to the judiciary. Thus, in policy contests between the judiciary and the political executive, the political executive is now increasingly more successful in having its policy agendas stand up against judicial review on Charter grounds.

The rise of bureaucratic activism within the Department of Justice directly challenges the dialogue theorists' position that Charter values only attain prominence once the courts invalidate legislation as a violation of the Charter. Although Kelly does note that the rise of bureaucratic activism has succeeded primarily within the cabinet and not parliament, he continues to assert that the mere existence of a developed legislative scrutiny of Charter values in legislation suggests that there has not been a transfer of decision-making authority to the judiciary.[139] More importantly, this activist approach to rights has witnessed the emergence of legislative decisions that indicate the presence of an important dialogue on rights at the cabinet level, which is then implemented at the bureaucratic level by the Department of Justice. As a result, the invalidation of legislation by the judiciary should not be seen as evidence of a shift of power to the Court but rather as judiciary acting within the confines of a rights-protected culture.

(d) Conclusion: Judicial Review and the Appointing Power

The introduction of the Charter has resulted in an intense debate surrounding the implications of judicial review for Canadian democracy. In turn, this debate has formed the central premise in the argument for the need of reform of the executive dominated judicial appointment process. The objective of this chapter has been to demonstrate that

judicial review of legislation has had a more nuanced effect on Canadian democracy than critics would contend and as a result this has direct implications for any analysis of the change in the appointing method of Supreme Court justices. Kelly and Hiebert have demonstrated that the evolution of Canadian democracy is the result of more than the judiciary's approach to rights and freedoms. Indeed, it has been suggested that the Charter's introduction has resulted in multiple forms of activism, which have assured that Canada has evolved into a system based on constitutional supremacy and that public policy makers reach decisions based on the principles of the Charter. While scholars of the Charter have made important theoretical assessments of the Charter's impact on the judiciary, this approach has until recently only presented an incomplete analysis of the relationship between judicial review and Canadian democracy. In fact, the maturing of Canadian democracy has not been "monopolized by any one actor, but has been the institutional outcome of the Supreme Court, the cabinet, and the bureaucracy through the DOJ attempting to govern in a newly entrenched rights culture".[140] Moreover, Kelly and Hiebert's analysis has demonstrated that there exists important political checks on judicial power within the policy process outside of the notwithstanding clause. The growth of a rights-culture has seen the creation of important Charter review functions within the bureaucratic arena in support of the cabinet's agenda.[141] As a result, the focus of judicial critics on the Charter's notwithstanding clause, and their criticism of the Supreme Court, have occurred without a critical evaluation of the decision-making processes that result in public policies eventually being subjected to judicial review. Moreover, the lack of critical evaluation of the legislative process by cabinet and the bureaucracy casts doubt on the merits of the critique of judicial review and its

institutional implications for the Supreme Court. In turn, this raises fundamental questions with regard to the argument for change to the appointment process since the cabinet-centered approach to rights scrutiny suggests that the constitutionality of a statute remains the primary responsibility of the cabinet and the relative bureaucracy and not the Supreme Court. To alter the appointing method of Supreme Court justices as a means to address the democratic inconsistencies that result from an unelected and unaccountable judiciary making decisions of significant policy considerations seems incompatible with research that suggests that the Supreme Court is not necessarily the final authority on matters of Canadian public policy. In fact, such reform considerations do not take into account the role of government actors in the legislative process (outside of the use of the notwithstanding clause) which have been proven to possess authority over constitutional matters that exceeds that of the Supreme Court. Indeed, the constant focus on judicial review and the power of the Court has ignored the role of other players operating within the policy process which has resulted in a set of reforms that ignores the greater challenge to Canadian democracy, namely the concentration of power within the cabinet.[142]

Further to this argument, the focus of academia and the media on the actions of the Court has resulted in other actors in the policy process being overlooked. While the Court continues to have an important role in scrutinizing legislation for its consistency with Charter rights, it does not always have the final word in the design of legislation. Instead, this power continues to reside with the legislature, specifically the executive, where rights scrutiny of legislation occurs before statutes are enacted into law. It should not be denied that a judiciary that is invested with the power of judicial review holds political power, but the extent to which this power has actively censored and directed legislators is

debatable. As a result, the argument that Supreme Court judges have single handedly contributed to Canada's democratic deficit through Charter review of legislation seems inaccurate in light of the recent scholarship that has highlighted the role of other political actors, namely the cabinet and bureaucracy, in the development and implementation of legislation. Such analysis has identified a far more nuanced role for the Supreme Court that casts doubt on the extent to which the decisions of the Court impact upon and create public policy. While the current rationale for change to the appointment process of Supreme Court judges is suspect, other indicators of the appropriate democratic role of the Court and their impact on the appointment process should not be discounted. The reasons for change of the executive dominated appointment system should extend beyond considerations of the power of judicial decisions and instead should reflect institutional concerns surrounding the Court such as guaranteeing the independence of the system from inappropriate politicization and promoting diversity in the composition of the judiciary so that it better reflects the changing nature of Canadian society.

4. Changing Critiques: Contemporary Concerns about the Appointment of Judges to the Supreme Court of Canada

Peter Russell has described Canada as "the only constitutional democracy in the world in which the leader of government has unfettered discretion to decide who will sit on the country's highest court."[143] For Russell, this statement simply implies an observation about constitutional design; it is not a critique of the specific actions of those who do the appointing or a condemnation of the capacities of those they appoint. Taken at face value, Russell's statement reflects the essential core of the problem of executive appointment: Canada has never really worked through the implications of a developed

"American style interventionist Court with an unreformed British style of appointments."[144] For the critics of the process this is simply bad institutional design.[145] While the impetus of the move to reform the Court appointment process has emanated from the perceived rise in judicial power and the changing nature of the Court to a political actor, it should remain that such concern should not be the only nor the primary variable for determining the extent to which reform of the system is necessary. The deficiency of the current procedure extends beyond concerns of the implications of federalism and judicial review to include issues of politicization, merit through professional capacity, personal characteristics and diversity in the composition of the bench, as well as concerns surrounding accountability and transparency in the formal mechanisms of appointment and its implications for the independence of the Court. It is these variables that will ultimately determine the extent to which reform of the appointment system is necessary as well as assist in the analysis of the sort of reforms that will benefit or hinder the judicial appointments system.

The partisan use of the appointing power in Canada has generated extensive comment on the damage to the public perception of impartiality on the bench and aroused concerns regarding the mixed quality of appointments. It has also in recent years opened the door to actual or perceived cronyism, political or "reward" appointments, concerns of gender and ethnic bias and a lack of transparency that has resulted from the fact that the formal procedure for appointment is unclear even among members of the legal community. Such uncertainty endangers the Court's legitimacy and breeds a lack of confidence in the process that could have far reaching implications for the functioning of the Court acting as Canada's final legal authority. In addition to these problems, the

closed and discretionary system of high court appointments undertaken by the Prime Minister creates a problem of perception that top court appointments could be politicized. While there is very little evidence to suggest that past appointments to the Supreme Court have been purely partisan or political, with no formal constraints on the process of appointment, there is a legitimate concern that judicial independence might be at risk if the Prime Minister appoints only those he determines to be in agreement with his/her government and its policies. For these reasons, there has been strong support for reforming the current process in order to ensure the integrity of the Court by safeguarding the principles of judicial independence and impartiality.[146]

(a) The Politicization of the Judicial Appointment Process

The selection of judges on the basis of merit rather than political patronage has long been considered a defining feature of a good judicial appointments process. Unfortunately, in Canada, patronage has had a long history as a defining factor in consideration of appointment from lower courts to high courts. In 1932, Prime Minister R.B. Bennett remarked that "the test of whether a man is entitled to a seat on the Bench has seemed to be whether he has run an election and lost it."[147] While the number of judicial appointees who had contested elections started to drop around the second World War, surveys of leading lawyers in the 1950's and 1960's demonstrated that most appointees in all provinces and the federal court were supporters of the party in power at the time.[148] In the late 1960's modifications to the appointment process began to occur as a result of the use of blatant patronage in the appointments system when then Justice Minister, Pierre Trudeau, set up a system of consultation with a committee of the

Canadian Bar Association which would screen the names of judicial candidates forwarded by the Minister and rate them as to whether they were 'qualified' for appointment. At the same time, the Minister of Justice began to use special advisors to accumulate information about prospective candidates from judges, members of the law profession, and provincial attorneys-general. Although these were improvements to the system, the likelihood that they would reduce patronage in the system was mitigated by the fact that the special advisors reported directly to the Minister of Justice and that regional ministers had a strong influence over judicial appointments.[149]

In the early 1980's, conflict between the Conservative government of Saskatchewan and the federal liberal government over the appointment of Liberal party supporters to section 96 courts in Saskatchewan demonstrated the weakness of the executive controlled appointments system. Moreover, a string of patronage appointments at the end of the Trudeau/Turner years generated outrage among the provinces and the public and subsequently brought the appointments process under greater scrutiny.[150] In response to the rise in patronage appointments, the Canadian Bar Association established the McElvey Committee in 1985 to investigate judicial appointments in Canada. Based on interviews with federal and provincial officials, judges and lawyers, the Committee concluded that partisan considerations played a large factor in section 96 appointments in the Atlantic Provinces and Saskatchewan and were significant in Alberta and Manitoba. In British Columbia, Ontario and Quebec the role of patronage was less significant in appointments although the importance of party affiliation varied depending on the federal Minister of Justice.[151] At the Federal Court level, patronage was also found to have been a 'dominant' consideration for appointment with many appointees having been "active

supporters of the party in power."[152] As a result of their findings, the McElvey Committee recommended significant changes to the appointment process. At the same time, the Canadian Association of Law Teachers also argued for changes to the system of appointing federal court judges. Although the details of the CBA and CALT recommendations differed, both groups identified the need for the establishment of nominating committees in each province which would consist of various representatives that would recruit and screen candidates for judicial office.

In the late 1980's extensive reforms were made to the Ontario provincial judges appointment system by then Attorney-General Ian Scott. Scott created a commission composed of nearly equal numbers of lawyers and laymen that was tasked with the responsibility of actively recruiting potential candidates for appointment, rather than simply reacting to names submitted to them by the government. In turn, the committee had the authority to interview and rank candidates based on their qualifications and then would submit their list of ranked candidates to the Attorney-General who would then appoint the candidates recommended by the committee.[153] These improvements at the provincial level encouraged the federal government at the time to enhance the system for federal judicial appointments. The Mulroney government replaced the system of consultation with the committee of the Canadian Bar Association with provincially based screening committees, and the responsibility for creating the list of potential candidates was transferred from the Justice Minister's office to the commissioner for federal judicial affairs. The committees, however, were not given responsibility for recruiting candidates instead they were tasked with the role of screening out unqualified candidates presented to them by the commissioner.[154]

The reforms to the judicial appointment process that occurred at both the provincial and federal court levels in the 1980's were not replicated on the Supreme Court. While attempts were made during the Trudeau period to take political partisanship out of the appointment process and to appoint persons to the Supreme Court who were generally considered to be the best potential judges in the country, decisions about appointments to the Supreme Court continued to remain with the Prime Minister in consultation with the Minister of Justice. The lack of reform initiative at the High court level reflects the general feeling that the majority of appointments to the Supreme Court have been of high quality, however, concerns have continued to plague the process with occasional complaints suggesting that partisan considerations were factors in appointments made by both Prime Minister Mulroney in the 1980's and Prime Minister Chretien in the 1990's.[155] Unfortunately, there has been no empirical research undertaken that would assist in determining the extent to which partisan political considerations have dominated the appointment process to the Supreme Court.[156] The same is not true however, for appointments to Canada's lower courts where extensive studies have conceded that patronage has been 'pervasive' in the federal and provincial judicial appointments process.[157] While there remains a lack of detailed information regarding the actual extent to which patronage is a dominating factor in judicial appointments to the Supreme Court, some experts maintain that there continues to be a problem of perception of danger that the Court appointments could be politicized when the Prime Minister has ultimate authority to determine appointments with little in the way of formal constraints upon his choice.[158]

While no one has openly criticized past appointments as being purely partisan or political, at least at the Supreme Court of Canada level, it remains that with no formal constraints on the process, there continues to exist a legitimate concern that judicial independence might be at risk if the Prime Minister appoints only those he sees as a supporter to his government and his policies. Such concerns have been addressed in the research of other academic commentators in the field of judicial reform. Indeed, University of London Professor, Kate Malleson, has argued that while the British judicial system has a significant historical pedigree in removing partisan politics from the judicial appointment system, there continues to remain good reasons for anticipating future political manipulation of the process.[159] Malleson contends that the expanding role of the British judiciary under the Human Rights Act 1998 suggests the possibility that the new secretary of state for constitutional affairs may feel justified in scrutinizing the ideological views of prospective appointees to the senior judiciary with greater intensity than was the case under the old Lord Chancellor. Given the lack of transparency in the current appointment system to Britain's High Court, Malleson argues that political patronage could become apart of the system with very little public awareness or scrutiny. Moreover, Malleson asserts that the fact that the current arrangements in Britain are dependent on the self-control of politicians and lack of any structural checks on potential abuse serves to undermine confidence in the system, despite the strong record of non-politicized appointments in recent years.[160] As a result of the potential for politicization of the appointment process in Britain, Malleson suggests the need to establish a robust appointments system that can withstand any future political pressure.

Concern over patronage in judicial appointments in Canada has most recently been expressed in testimony by government officials obtained during the Gomery Inquiry. Here accusations of judgeships being given out as a reward to party faithful were made by one witness (Benoit Corbeil) who testified that a number of Quebec lawyers who had campaigned for the federal Liberal party in the 2000 election were subsequently appointed to the bench.[161] The suggestions of blatant patronage made during the Gomery Inquiry were enough to provoke the House of Commons to establish a Subcommittee on the Process of Appointment to the Federal Judiciary in 2005. Here the government determined that the process whereby judges were appointed to the federal government was largely unknown and, therefore, subject to the opinion that it may be open for misuse primarily in relation to fostering political appointments. The subcommittee was asked by the House of Commons to address the issue of the role of political orientation or partisanship in the federal judicial appointment process. During the proceedings, Constance Glube, former Chief of Nova Scotia's Court of Appeal, testified that judicial appointments in Nova Scotia were based not on merit, but rather on political considerations.[162] While this subcommittee did not have time to issue a final report prior to the federal election in January 2006, it did agree that change to the federal judicial appointment process was necessary, including the need to reduce the wide discretion exercised by the federal Minister of Justice when making judicial appointments. The committee also suggested that some changes could occur in the future, especially with the election of a new Conservative government that has been vocal in its criticism of judicial power and the selection process.[163]

In addition to the perceived threat of political manipulation to the appointment process, there has in recent years been allegations made by some of Canada's top level politicians that appointments to Canada's courts including the Supreme Court have been politically motivated. For example, in September of 2003, Stephen Harper alleged that the Liberal government and the courts had conspired via appointments of judges friendly to rendering judgments to laws prohibiting same-sex marriages as unconstitutional so that the Liberal government could sidestep the political controversy permitting courts to decide the question:

> I think it's a typical hidden agenda of the Liberal party...They had the courts do it for them, they put the judges in they wanted, then they failed to appeal, failed to fight the case in court...I think the federal government deliberately lost this case in court and got the change to the law done through the back door.[164]

This allegation was fully criticized in the media for a number of reasons including the fact that Roy McMurty, the Chief Justice of the Ontario Court of Appeal and one of three judges who ruled unanimously striking down the common law restriction of marriage to heterosexual couples in *Helpern v. Canada (Attorney-General)*[165] was appointed by Mulroney's Progressive Conservative Party of Canada and had previously been an Attorney-General of Ontario in Bill Davis' Conservative government.

While Harper may have simply been playing politics with the debate about judicial appointments, his comments demonstrate that, however much past court appointments have been non-politicized, there continues to remain important political players who have the potential to be more motivated to take into account purely political concerns when appointing judges to the Court. Moreover, there currently exist no formal constraints or procedural safeguards in Canada's current appointment system to prevent this type of partisan political consideration from happening. Indeed, such is the concern over the

possibility of such pervasive politicization of the appointment system that it has generated calls for reform to the judicial appointment process from a number of organizations including the Canadian Bar Association (CBA), the Canadian Association of Law Teachers (CALT) and the British Columbia Civil Liberties Association (BCCLA). Both the CBA and CALT have recommended a procedure of nomination by a committee which would "interject accountability, transparency, and representativeness into the system,"[166] while the BCCLA has called for reform to the appointment process on the grounds that the process lacks adequate transparency and legitimacy and may threaten judicial independence and impartiality because it could be subjected to purely political manipulation.[167] The perceived problem of partisanship as a factor in judicial appointments is acknowledged by a host of academics, commentators, judges and lawyers irrespective of ideologies, political values and opinions. The expressed concern over the potential politicization of the appointment system suggests that confidence in the appointments process may be lacking. If the way judges are chosen is seen to be prone to political involvement, then the legitimacy of the judiciary inevitably suffers. The judiciary will only be considered legitimate if the public expresses confidence in the appointments process.

(b) Diversity and Merit

Reforms of the appointment process to the judiciary are intended to provide sound structural protection against improper political control and are considered to aid in the promotion of the long-term health of the appointments system. A more immediate and pressing rationale for change is the need to tackle the lack of diversity in the composition

of the judiciary. The narrow background from which the judiciary is drawn, particularly at the level of the Supreme Court, poses a significant problem for the legitimacy of the Court. This is because the judiciary has come to be accepted as the link between Parliament and the people and as such the judiciary must be seen to reflect the diversity of society if it is to have the confidence of that society as a whole and in particular those who use the Court.[168] Thus, there is a growing sense amongst Canadians that Canada's courts and particularly the Supreme Court would enhance their legitimacy by better reflecting the diversity of Canadian society. Such concerns were recognized by the Government of Canada in its proposal to reform the Supreme Court appointments process wherein the government acknowledged that to the extent possible, the Supreme Court bench should reflect the diversity of Canadian society so that 'plural perspectives' could be expressed in the resolution of disputes.[169] Moreover, diversity is now one of the official norms used by the Justice Minister in making appointments.[170] This norm is not only entrenched in Canada's judicial selection process, it also enjoys widespread international support among political elites in other western democracies.[171] While the increased diversity of the Court has often been assumed, there have been opponents of the diversity push who suggest that too much focus on proportional representation of the Bench could detract from the vital appointment criteria of merit. But are the values of merit and diversity irreconcilable? And to what extent does Canada's Supreme Court under-represent traditional minority groups?

While there have been numerous research projects undertaken that have sought to evaluate the impact of judicial review on Canadian democracy, there has been little if any research that explores the extent to which Canadian society is adequately represented in

Canada's courts including the Supreme Court. In 2006, as part of the Canadian Democratic Audit series undertaken by the Centre for Canadian Studies at Mount Alison University, Professor Ian Greene analyzed the extent to which those who work in the legal system reflect the major demographic groups in Canadian society. Greene acknowledged that there has been little research conducted on the background of judges in a historical sense, however, what little evidence that exists does suggest that prior to the movement to reform the judicial appointment process in the 1970's, the Canadian judiciary significantly over-represented men of British and French origin and under-represented women, new Canadians, aboriginals and visible minorities.[172] Upon the introduction of reforms to the judicial appointment process at both the provincial and federal level, Greene asserts that there has been a radical shift in the proportion of women in the judiciary, as well as of visible minority judges especially in Ontario and of Aboriginal judges in the western provinces.[173] Unfortunately, there is currently no statistical analysis to determine the extent to which the Supreme Court is representative of Canadian society in its current context, although subsequent appointments since the 1970's of a number of women and a number of men from different cultural backgrounds suggests that the executive is taking seriously the issue of diversity on the bench of the Supreme Court.[174] In fact, the assessment of merit of the potential candidates highlights diversity as an essential factor for consideration of any judicial nominee. In this sense, the current procedure for judicial appointment must take into consideration the extent to which the composition of the Court appropriately reflects the diversity of Canadian society.[175]

Although the diversity factor has generated significant political support, it has faced mounting concerns that have weakened its appeal overtime. The largest concern has emanated from the proponents of the individual merit/liberty theory which suggests that proactive measures for diversification can result in an appointments process that prioritizes a person based on his or her group identity, ignoring other professional and personal characteristics that could determine the best candidate for the job.[176] Essentially, the merit/liberty theoretical argument suggests that the interaction between micro level selection criteria, in this case, the criteria of individual merit and macro level desiderata such as diversity have the potential to compete. For example, diversity is most often considered in the judicial appointment process, reflecting the post-liberal belief that the judiciary as a whole should mirror the diversity of society.[177] The paradox is that strictly meritocratic selection of individuals may result in an undesired macro level composition of the bench. For example, it is generally held that meritocratic principles can result in a gender imbalance on the bench due to the high proportion of women who tend to score, on average, higher grades on exams and psychological tests than their male counterparts.[178] In this sense, it is argued that a meritocratic system could lend itself to developing an overwhelming female majority on the bench.

The merit/diversity paradox has, however, been ill-sustained in recent years as the argument for greater representation on the bench has continued to guide considerations for reform of the appointment system. For example, the report of the Canadian Association of Law Teachers Panel on Supreme Court Appointments stresses that greater diversity on the bench "can and would enhance merit (broadly defined) and not replace it as a vital criteria for appointment."[179] While the report of the CALT team does not go

into detail about how diversity can enhance merit, the argument is explored at length in Richard Devlin, A. Wayne MacKay, and Natasha Kim's 2000 article, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary or Towards a "Triple P" Judiciary."[180] Devlin et al. propose a number of counter arguments to the suggestion that claims for increased diversity on the bench will hinder the assessment of candidates based on criteria of merit. First, Devlin et al. maintain that historically Canada has never been committed to a system of pure merit for judicial appointments. The authors suggest that at the federal level and particularly the Supreme Court level, territorial and linguistic identities have always been considered legitimate concerns.[181] Moreover, at times religion and diversity of legal experience have also been considered a legitimate factor in assessing candidates for judicial appointment.[182] While, the combination of factors that have been considered legitimate in assessing the candidacy for Supreme Court appointments such as territory and linguistic ability are important political considerations, Devlin et al. make the argument that in contemporary Canada, other political identities are perhaps even more important than territory, especially gender, disability, race and class.[183] In addition to solving the merit/diversity paradox in terms of a historical analysis of the role of merit in judicial appointments to Canada's high court, Devlin et al. suggest that the parameters for what constitutes merit often remain unspecified. For example, how does one determine criteria such as patience, good knowledge of the law, honesty and being compassionate and polite? More specifically, these conditions for employment once recognized, do not necessarily determine that a candidate will demonstrate quality performance functioning in the judicial role. As

Devlin et al. suggest there is no connection between the skills connected with successful legal practice and those required for desirable judicial performance.[184]

The considerations of merit and how they may affect the potential diversification of the bench have also been considered in recent Charter jurisprudence.[185] In a 1999 Supreme Court of Canada decision of *British Columbia (Public Service Employee Relations Committee) v. BCGSEU,*[186] the Court acknowledged that the qualifications for many jobs including those with the public service are set out in a way that reflects a majority white male norm, rather than the actual minimum requirements for the job. As a result, many employment qualifications are not considered to be objective standards to be used in assessing whether a candidate can effectively complete the tasks and duties that the job may require. In *BCGSEU,* the Court determined that the standard aerobic fitness test for firefighters had an adverse impact on women and was not demonstrably justifiable for the job of firefighting.[187] While there are no exact equivalents to aerobic fitness tests for judges, the principles enunciated in *BCGSEU* are relevant in helping to address the concerns created by the merit/diversity paradox. Speaking on behalf of the Court, Justice Beverley McLachlin makes a number of statements about the need to remedy systemic discrimination and the hidden prejudices in otherwise neutral criteria for employment:

> Although the practical result of the conventional (equality) analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself...
>
> ...Although the government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the "mainstream" can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination

receives the laws approval. This cannot be right.[188]

The significance of *BCGSEU* is that the Court firmly rejected the notion of formal equality and affirms that different treatment is often required in order that society can achieve substantive equality. Furthermore, "neutral" job qualifications that have become institutionalized are no longer beyond the reach and scope of the law.

Further to this argument, Justice McLachlin draws upon another Supreme Court ruling *Charter in Law v. Canada (Minister of Employment)*[189] to clarify the meaning of equality. Here McLachlin suggests that any notion of equality is to be treated according to one's own "merit capabilities and circumstances."[190] Moreover, McLachlin notes that for true equality to exist, differences must be accommodated.[191] Such considerations are clearly relevant for the problems of diversity in the Canadian judiciary as they suggest the need to examine closely the qualifications established by the Government that determine a candidate's full ability to excel at the job. As Devlin et al. maintain, professional ability to do one's job may be one criterion in appointments, but it should never be determinative.[192]

While the Court's ruling in *BCGSEU* has established that standardized employment qualifications have the potential to systemically discriminate against traditionally vulnerable groups thereby hindering chances to adequately diversify places of employment such as the courts, it does not suggest that merit qualifications do not have a place in the hiring process. For the Court the debate is not one of meritorious versus unmeritorious candidates, but rather how merit is defined. For example, do the professional and personal qualifications used to assess candidates for the job reflect the overarching needs of the organization hiring? In the opinion of Devlin et al. the qualifications listed by the Minister of Justice to determine whether a candidate is

suitable for holding a position on the Court are not necessarily valued by the Government itself nor do they promote a level of diversity on the Court that appropriately reflects the diversity of Canadian society, as can be witnessed by the current Coram of the Court which reflects more of a concern with regional representation than with appropriate demographic representation. [193]

F.L. Morton has argued that one of the strongest forces that will compete to shape the judicial appointments process in the future are identity politics advocates, who maintain that the composition of the bench should reflect the demographic characteristics of Canadian society.[194] For Morton, this new post-liberal definition of equality as group parity in representation in public institutions and the workforce is a direct result of the effective lobbying of feminists and multiculturalists who have become successful in influencing judicial selection in both the lower and high Court.[195] Such efforts on the part of advocacy groups to increase the level of diversity in the Court system remain problematic for Morton who contends that the merit/diversity claim suffers from several liabilities that have the potential to weaken the diversity appeal overtime. Similar to the merit/diversity paradox outlined above, Morton suggests that there is evidence that the practice of merit is too often sacrificed in appointments that are driven by concerns of diversity, although he offers no concrete evidence to suggest that this has come to be the case for appointments to Canada's top Court. Interestingly, while critics of the diversity consideration for high Court appointments have identified a number of potential limitations, they have failed to acknowledge that the reason Canada has come to achieve greater success in diversifying its judiciaries, in comparison with other western democracies, is a result of the thorough consideration of both the cause and effect of

diversification through the conscientious widening of the definition of merit beyond the profile of existing members of the judiciary.[196] In this sense, the diversity norm has become entrenched in Canada's judicial selection process so that it is a recognized condition of merit that is considered by the executive upon deliberation of potential appointments. This effort to include diversity in the appointments procedure is recognized internationally as a legitimate and reasoned way to address concerns relating to the traditional definition of merit which can at times be limited due to its failure to incorporate all of the potential candidates who would generally make good judges. As a result, other countries looking to improve upon the level of diversity in their judiciaries have looked to Canada for ideas and suggestions for improvement.[197]

While Canada has come out ahead of other countries looking to modernize their judiciaries in terms of representation, the general consensus amongst commentators and critics is that there is still much that should be done to increase the level of diversity on the bench so that it accurately reflects the current composition of Canadian society. This is not to suggest that identity should become a paramount consideration for criteria for judicial office, but its significance should not be distorted if the judiciary is to be properly subjected to democratic norms, including especially the norms of representation and diversity. One of the fundamental arguments for increasing the diversity of the judiciary is that it will enhance the democratic legitimacy of the bench. As has been observed in Britain, "In a democratic society, in which we are all equal citizens, it is wrong in principle for [judicial] authority to be wielded by such a very unrepresentative section of the population:...not only mainly male, overwhelmingly white, but also largely the product of a limited range of educational institutions and social backgrounds."[198] More

specifically, the judiciary has come to be viewed as the link between Parliament and the people, which suggests that the judiciary "must be seen to reflect the diversity of our society if it is to have the confidence of society as a whole and in particular those who use the courts."[199] The democratic legitimacy argument is further supported by such commentators as Kate Malleson who argues that "in all liberal democracies it is regarded as an inherent good that different social groups should have the opportunity to participate in public life..."[200] Furthermore, Malleson suggests that the judiciary, being an institution that exercises official power over individuals' lives, is inevitably a political body, therefore, Malleson argues that greater diversity in the make-up of the bench will increase accountability and thus public confidence in the work of the Court: "Since the judiciary cannot comply with the democratic requirements of electoral accountability, this method of social accountability amounts to an essential form of legitimacy."[201] The democratic legitimacy argument as it relates to the level of diversity on the bench is now part of the modern discourse on judicial selection procedural reform. However, if proportional representation is to become the norm for the Court, then an improved judicial selection procedure is required.

(c) Judicial Accountability and the Independence Doctrine: The Emerging Debate

Any analysis of judicial appointment systems has two fundamental dimensions that must be satisfied. First, the process should satisfy all procedural norms and second, the system should ultimately produce a good judiciary. While these dimensions are obviously intertwined, analysts and reformers will argue that a particular appointment process is likely or unlikely to produce the best kind of judiciary.[202] Modern discourse on the judicial appointment process suggests that there are a number of normative qualities

that have the capacity for producing a 'good' process for selecting and appointing judges. The most frequently articulated normative concern about the judicial appointment process is striking the right balance between independence and accountability. Most analysts of the judicial appointments debate would agree with the statement that "judicial appointment procedures have to be independent of undue political influence and democratically accountable."[203] As outlined above, the kind of political influence on the appointment of judges that is not only undue, but even 'due' or desirable, is a focal point of much of the discussion about reforming the process. However, the desire for a process that is 'democratically accountable' poses a number of limitations for an independent judiciary in that it requires that the process for selecting judges be subject to the influence of the democratic citizenry – even the more so when the judiciary appears to be weighing into important issues of public policy.[204] The democratic accountability norm requires that those who do selecting and appointing of Supreme Court justices be answerable to the people and their elected representatives for what they do and how they do it. In Canada, accountability in appointing the judiciary is provided by vesting the appointing power and responsibility in senior elected members of the executive – typically a minister of justice and a prime minister. The problem with such executive appointment of the judiciary is that no institutional checks and balances have been built into this system of executive control over the selection and promotion of judicial personnel. Concerns about independence were met by downplaying the political significance of the judiciary's work, by selecting judges from the top echelons of an independent legal profession, and by guaranteeing judges security of tenure after appointment. However, with the advent of the age of 'judicial power', new concerns have emerged about continuing to vest power of

government control over appointment to and advancement within judiciaries that are supposed to be rendering impartial justice in disputes to which the government itself is very often a party, and which deal with, however minimally, controversial issues of public policy. Moreover, the traditional defense of the judiciary– that it is merely finding the law rather than making it and that the scope of their discretion is closely confined by statute – looks increasingly difficult to sustain in an era in which some of the more forthright members of the judiciary have openly accepted that they can alter the law.[205] To observers who accept this line of thinking, developing accountability mechanisms for the judiciary is a significant constitutional problem given that many accountability mechanisms contain a potential threat to the independence of the decision-makers. As a result, attention has now turned to appointment mechanisms as a source of legitimacy and 'before the event' accountability.[206]

(d) The Judiciary and the Accountability Revolution

Throughout the years, accountability has become an amorphous concept.[207] Until recently, accountability was understood primarily as a command and control relationship. In this sense, the person called upon to give account for his actions or omissions was in a subordinate position and was subject to sanction if it was determined that an error had occurred. In the context of the democratic state (like Canada), the key accountability relationships are those between the citizens and the holders of public office and, within the ranks of office holders, between elected politicians and bureaucrats. Core accountability has thus commonly covered issues such as how voters can make elected representatives answer for their policies and accept electoral retribution, how legislators can scrutinize the actions of public servants and make them answerable for their

mistakes, and how members of the public can seek redress from government agencies and officials.[208] More recently, however, accountability has increasingly been extended beyond these central concerns. For instance, accountability now commonly refers to the sense of individual responsibility and concern for the public interest expected from public servants (this has come to be known as 'professional' and 'personal' accountability). Secondly, accountability is also now a feature of the various institutional checks and balances by which democracies seek to control the actions of the governments (accountability as control).[209] In this sense, accountability has expanded so that its practice is demanded in relation to more and different public decision-makers than in the past. In recent years, the Canadian judiciary has come under intense scrutiny for a lack of accountability mechanisms that would ensure that the members of the judiciary individually as well as the Court as an institution can be held responsible for its decisions and actions. Much of this criticism has emanated from academics and media who are largely of a right-wing political orientation.[210] These critics argue that judges need to be subject to 'more' and 'new' forms of accountability since judges, especially those sitting on the bench of the Supreme Court, now have the ability to influence and in some cases determine the nature of public policy agendas.[211] Such critics suggest that judicial independence should not be regarded as an unqualified constitutional principle, but one that ought to be balanced against others, principally that of accountability. Furthermore, critics believe that courts may be subject to accountability mechanisms with no real loss to their independence.

Most of the focus of these critics has been on developing new methods of judicial appointment. Accountability can be improved, it is argued, by developing an institution

whereby appointments can be made by a council independent of government and buttressed by a parliamentary confirmation procedure. In 1991, a Law Society of England and Wales publication argued:

> There appears to be a move internationally away from the position that the merit of judicial independence is beyond evaluation or review. Calls for judicial accountability have largely been responsible for the rather defensive approach adopted by those supporting judicial independence. Proponents of accountability point out that the judiciary is an arm of both government and administration and as such must be subject to checks, balances and review. Those defending the principle of judicial independence argue that political scrutiny of judges thrusts the judiciary into the partisan world of politics and threatens' judges right and duty to act in an impartial and non-partisan manner.[212]

While the proponents for enhanced judicial accountability suggest that there is no indication that mechanisms for judicial accountability can hinder the independence of the judiciary, the opponents of such increased accountability mechanisms argue that accountability and independence cannot be reconciled and that the notion of an 'accountable judge' is simply an oxymoron. The view that guarding the independence of courts rules out innovations in accountability is well represented by Lord Cooke of Thorndon, a senior New Zealand judge. He wrote:

> In what sense are they [judges] or should they be accountable for their decisions? So far as appellate tiers extend there is accountability within the judicial system; but a fashionable line of argument might suggest that somehow there should be more...Judicial accountability has to be mainly a matter of self-policing; otherwise, the very purpose of entrusting some decisions to judges is jeopardized. The old question quis custodiet ipsos custodies [sic] remains as unanswerable as ever.[213]

In Canada, the opposition to increased accountability mechanisms has not been as hostile. Organizations such as the Canadian Bar Association and the Canadian Association of Law Teachers have argued that the values of independence and accountability can be reconciled and effectively concede that courts have long had accountability practices inherent in the system.[214] For example, in Canada courts sit in public; they offer reasoned

written judgments; often judgments can be appealed to a higher judicial body; and much of the work of the judiciary is scrutinized by a reasonable informed news media and in the scholarly work of academics. The reported comments of Justice Tan Sri Dato' Seri Mohamed Dzaiddan bin Haj Addullah, Chief Justice of Malaysia, addressing the Commonwealth Lawyer's Association 'Judicial Accountability Workshop' in April 2002, captures this stance well:

> He pointed out that judges of all Commonwealth countries were already accountable. They sat in open court. They delivered their reasons which were published. Those reasons were subject to appellate scrutiny as well as to scrutiny in the media and in the community generally. The Chief Justice accepted that with judicial power went the obligation of accountability to the citizens from whom, ultimately, power derived. He reminded participants of the words of Chief Justice Taft of the Supreme Court of the United States, that the scrutiny of intelligent citizens was a valuable support for the work of judges.[215]

The comments of the Malaysian Chief Justice lead the association to the conclusion that "the CLA should consider appropriate ways to heighten public scrutiny of the work of judges. Such scrutiny should be performed in an intelligent and informed way. The CLA should consider the means of reinforcing examination of the work of the judiciary which would inform citizens about its true character, difficulties and importance."[216] In this sense, accountability can be enhanced without making any changes to the form and function of the judiciary as a whole.

The concerns about arguments for a more representative and accountable bench are the implications which any proposals may have for the independence of the judiciary. While critics of enhanced accountability are correct in their identification of accountability mechanisms within current legal practices, it remains that these practices are limited in terms of their scope and effectiveness especially if one agrees with the argument that the Charter has altered the role of the Supreme Court so that it now has the

ability to develop and alter public policy. Thus it remains that judges who engage in the formulation of policy should be held to similar standards as other government members. As K.D. Ewing has argued; "Judges should be representative of, and ultimately accountable to, the people, not to the government of the day."[217] Ewing also suggests that accountability procedures for the Court would not undermine the independence of the Court but would serve only to promote and protect it.[218] This is because judicial independence has been firmly secured so that any introduction of accountability mechanisms would do little to encroach upon and/or affect the independence of the Court. For example, judicial independence is maintained through such qualifiers as 'no one should be a judge in his/her own case, meaning that a judge can be disqualified from hearing a case through a social, economic, or political relationship with one of the parties in the dispute. Another way judicial independence is secured is that judges are expected to relinquish any formal links to a political party especially the governing party. Furthermore, judges have security of tenure which prevents them from being dismissed for their performance in any particular case. As a result, Ewing argues that there is no reason to believe that measures designed to promote a more accountable judiciary would undermine the independence of the judiciary.[219]

(e) Judicial Independence and Democracy

The concept of an independent judiciary implies a judicial power that is separate and distinct from the legislative and executive powers. However, Peter Hogg contends that the Constitution Act, 1867 is not based on a theory of separate powers because it does not separate executive, legislative and judicial functions and instruct each branch to exercise only those powers to be consistent with its function.[220] In support of this contention, he

observes that the conventions of responsible government, according to which members of the executive or cabinet are also legislators, are inconsistent with the separation of powers doctrine.[221] In addition, Hogg notes Parliament may confer non-judicial functions on the courts and, conversely, confer judicial functions on bodies that are not courts.[222] While Hogg's view is based on a close reading of the 1867 Act, the committee of the Canadian Bar Association examining the independence of the judiciary takes a broader view of the matter, arguing that there is a judicial power "co-equal with and distinct from the legislative and executive powers."[223] The separation of powers theory is further supported in the opinions of the *McEvoy* decision: "Under the Canadian constitution the superior courts are independent of both levels of government…The judicature sections of the Constitution Act, 1982 guarantee the independence of the superior courts; they apply to Parliament as well as to the provincial legislatures."[224] As well, the committee refers to the views of two British constitutional authorities who argue that the British parliamentary system is based on a separation of powers to the extent that it features an independent judiciary exercising a power as separate and autonomous as those of the executive and the legislature.[225] While the separation of powers doctrine may hold true at least in theory, the report of the CBA asks whether the separate powers doctrine retains any applicability to modern Western governments, particularly parliamentary ones. As the CBA report makes clear, the three form system of government – making the law, executing the law, and applying the law – has been rendered antiquated.[226] Vast bureaucracies make and interpret rules, the executive possesses important discretionary powers, and the judiciary makes as well as applies the rules. Further to this argument, the report of the CBA asks whether judicial power is separate and distinct or whether it is

part of the executive power. Like civil servants, judges do interpret and apply the law, although the manner in which the law is applied is quite different from that of civil servants since judges have a level of authority in their judicial pronouncements that is not available to civil servants.[227] Moreover, the interpretation of law by officials is subject to review unlike those of the judiciary. These two distinguishing features of judicial law application, the special procedures followed and the authoritative nature of the result, supply the argument for an independent judiciary:

> The reason for the independence of the judiciary, therefore, and incidentally of juries, is not that they perform a judicial function, an expression to which is very difficult to give a precise meaning. The argument for the independence of the judge is that in performing his function of rule-interpretation he should not be subject to pressure that would cause him to vary the meaning of the rule to suit the views of the persons affected by them, and that in ascertaining the rule he will not be influenced by considerations of expediency. It is essentially an element in the maintenance of that stability and predictability of the rules which is the core of constitutionalism.[228]

While the report of the CBA is accurate to suggest that the functions of the three powers are not generally tied to the specific branches of government, teachers and students of government have continued to associate each function with a particular branch of government. Thus, they continue to assign to the legislature the dominant role in law-making, while continuing to be aware that the bureaucracy and the judiciary also play a role here too. There is, however, empirical evidence for maintaining this approach. The CBA emphasizes the normative reason:

> The whole history of the doctrine of the separation of powers and its relative constitutional theories is indicative of the fact that neither a complete separation nor a complete fusion of the functions of government, nor of the procedures which are used to implement these functions, is acceptable to men who wish to see an effective yet controlled use of the power of governments.[229]

The CBA committee on the independence of the judiciary recommends that the constitution be amended to include an explicit statement of the principle of judicial independence. The committee argues that a comprehensive statement would clarify and

strengthen the particular guarantees of independence that the constitution now supplies, namely, the security of tenure of judges and the independence and impartiality of criminal courts. Peter Russell, on the other hand, takes a more cautious view of this issue and points out that while the formal constitution does not establish the judiciary as a separate branch of government, in practice it is separate. The active principles governing the relationship of the judiciary with the executive and legislature, Russell argues, are the independence of the judiciary and the separation of powers. These principles are part of the informal constitution, upheld by custom, constitutional convention and ordinary statutes.[230]

Still much scholarship is restive on this point. In the report of the Chief Justice of Quebec's Superior Court, Jules Deschenes details a variety of ways in which the executive controls the administration of the courts, and, in the name of judicial independence, recommends that the judiciary, itself, assume administrative responsibility.[231] As Russell has observed, such a development would place judges in a position of determining the boundaries of their own power since they are, after all, the ultimate arbiters of the constitution.[232] Moreover, many judges thought that increased involvement in administration would compromise their independence by bringing them too close to executive and legislative functions of government.[233]

Much of the analysis concerning the judicial independence principle exists in the realm of the judicial power/activism debate, which as noted above, has been the primary variable guiding Court appointment reform. Judicial independence has been analyzed both in terms of its relationship to the federal state and in terms of the Courts' use of independence decisions to advance a hegemonic stance over the other branches of

government. Indeed, most literature informing the judicial independence debate is an assessment of the degree to which the Court has emerged as a strategic policy actor in determining the parameters of judicial independence.[234] For example, the independence doctrine has been reaffirmed by the Court on a number of occasions. Indeed, the decisions rendered by the Court on the issue of judicial independence have had far reaching implications for the role of the Court in determining the extent to which protection of section 11 (d), the independence of the judiciary, in the Charter of Rights and Freedoms should occur. In the *Judicial Independence Reference* of 1997, the Supreme Court ruled that the attempt by three provinces to address their budgetary deficits by reducing the salaries of provincial court judges violated judicial independence and was not a reasonable limitation on section 11 (d).[235] In the *Reference Re Provincial Court Judges*, Chief Justice Lamer ruled that provincial governments can change the salaries of judges, but only after seeking the recommendations of an independent judicial compensation committee charged with submitting non-binding reports to each provincial legislature. In effect, the Court determined both the process for establishing judicial salaries and the institutional structure that the judicial compensation committees must take to satisfy section 11 (d). For instance, the members of the compensation committee must have security of tenure, and serve for fixed terms to prevent political interference by the legislative branch.[236] The significance of this ruling is that the Court expanded both the content and meaning of judicial independence beyond the scope of the three core characteristics, namely security of tenure, financial security and administrative independence – three characteristics that were established in *R. v. Valente*.[237] More importantly, in terms of the judicial activism debate, the decision rendered in reference

Re Provincial Court established a clear confrontational stance by the Court with the provincial cabinets suggesting the use of judicial hegemony over section 11 (d).[238] Further to the significance of the Courts' decision, Chief Justice Lamer also developed a more institutional view of judicial independence. For example, in determining the extent of the relationship between the executive, legislature and the judiciary, Lamer insisted that it was necessary that the "relationship between the judiciary and the other branches of government be depoliticized."[239] For the Court in *Re Remuneration of Judges*, the separation of powers between the legislative, executive, and judicial branches of government is critical for ensuring judicial independence and insulating the judiciary from political influence:

> "What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is that the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate and which do not relate to the proper administration of justice."[240]

The trend since *Valente,* therefore, has been the growing judicial control over the determination of section 11(d) and the emergence of the Court as a policy actor in determining the parameters of judicial independence. Interestingly, the Court's independence rulings are evidence that the Court has at times become a strategic policy actor; however, this result has been downplayed in recent scholarship. For instance, James Kelly argues that much of the legislation found to violate the Charter suffers from both vagueness in the activities it seeks to regulate and from over breadth by attempting to regulate vaguely defined activities in an excessive manner.[241] Thus, it is these inherent

flaws in the legislation that account for judicial invalidation, resulting in a lack of proportionality[242], that is the primary cause of judicial invalidation and not the discretionary decision of judicial actors.[243] For Kelly, this type of judicial activism can be interpreted as a signal to the parliamentary arena, to draft legislation in a more precise manner in order to reconcile statutes with the Charter.[244] Furthermore, Kelly argues that "a few activist decisions" by the Court do not demonstrate a general pattern of judicial power as the critics have argued.[245] For Kelly, the concern is not with the increased power of the Court as demonstrated in such decisions as *Reference re: Provincial Court Judges,* but with how the Court works with the other branches of government in balancing competing interests of public policy.

While the extent to which the rulings on judicial independence by the Court have determined a role for the Court as a policy actor are important in the analysis of the implications of judicial review of legislation, they are also indicative of a larger normative concern about the process of judicial appointment; since maintaining the independence of the judiciary is considered by judges to be crucial in any appointment system. In this sense, the judges of the Supreme Court of Canada have established clear criteria of independence which must be upheld both by the sitting judge as well as in the process whereby a judge would be selected to sit on the bench. For example, at the constitutional level, it seems that the distinction between the appointment process and the appointment itself does not hold. In *Re Therrien*, the Supreme Court asserted that facts existing prior to the appointment of a judge were relevant to the assessment and protection of judicial independence.[246] Indeed, it is impossible to claim that the principle of judicial independence is maintained if appearances indicate that the appointment

process is tainted by any interference be it political, economic or social. Such concern is only further enhanced when one considers the implications of a judiciary equipped with a policy development role and an executive appointment system that continues to vest unfettered power of government control over appointment to and advancement within judiciaries that are supposed to be rendering impartial justice in disputes to which the government itself is very often a party, and which deals with controversial issues of public policy. As a result, the need to establish clear and effective checks and balances in the selection process has become necessary in order to protect and promote the independence of the judiciary. But is the doctrine of the separation of powers, considered primarily in relation to the independence of the judiciary, consistent with the executive's retention of the appointment power?

Before one can consider whether the executive's appointment power can be considered a check on the judicial branch, there must be an argument made that demonstrates the need for such a check. For most analysts the primary concern is the concentration of power. While the judiciary, through the nature of its function, requires the need to be distanced from democracy, it cannot be entirely divorced from it. Furthermore, while justice often finds itself at odds with the democratic will, it cannot prevail independently from it.[247] As such, the people who represent democracy, the elected members of Parliament, can be held accountable for their actions by the citizens whose votes granted them the job of politician. Through the act of voting, a citizen can hold a government accountable for its appointments to the bench; however, he cannot hold members of independent organizations such as the Canadian Bar Association accountable because there is no public office from which he can seek to remove its

members. Further to this point, and as argued by Jennifer Smith, the presence of any democratic element in the appointment system implies substantive as well as procedural considerations since democratic will implies the use of opinion.[248] In turn, Smith argues that opinion is not immune to certain considerations which have the possibility of manifesting in the appointments they make to the Court which violates the principle of judicial independence thereby subverting the judicial function. Furthermore, Smith maintains that since the arrival of the Charter, it has become clear that the Supreme Court deals with broad, philosophical issues of which background ideological convictions can be expected to surface.[249] While Russell's idea of ideological pluralism on the Court has the idea of offering fairness in the context of liberal democracy and the range of political opinion it exhibits, Smith argues that it is nevertheless a dangerous idea because under the existing executive appointment system it is impossible to guarantee the pluralism element, but not the ideological element. This becomes even more problematic for Smith when she acknowledges that under the executive appointment process, there is no institutional check in place to offset such an event as there is in the American system, where the Senate is possessed of the ratifying power which can moderate the executive's will. For Smith, ideological pluralism is a poor standard for appointment to Canada's highest Court since "pluralism is not a sufficient antidote to ideology."[250] As noted by Smith, Russell suggests that ideology indicates that judges have strong positions on the major philosophical and jurisprudential issues facing the Court, or that they possess values and perspectives that can make a difference. However, members of the judiciary are supposed to be at arms length from their inherent prejudices so that they can administer the impartiality that is integral to their independence. While it would be

impossible to expect that members of the bench have no opinions, Smith argues that there is no need to implement the "unavoidable" into a sort of standard, which is what would happen if ideological pluralism became a criteria for appointment.[251] For Smith, if pluralism is thought to be the best that can be done about the problem of ideology, then the appropriate appointment process should be more open and transparent than it is under executive control.

However, the argument for an ideological plural Court as espoused by Peter Russell seems necessary when one considers the potential deficit that could occur when a political party dominates government for a considerable period of time and exercises its control over appointments in a partisan or ideological manner. This concern is not without merit as the dominance of the Liberal party throughout the late 20th and early 21st century would suggest. Furthermore, the ability of a long governing party to make a number of appointments to the bench puts the Court at serious risk of becoming politically unbalanced in their opinions and viewpoints. Therefore, a Court that contains a mixture of political persuasions, including differing views on the proper approach to adjudication, is considered desirable and even necessary. Moreover, for those critics who suggest that ideological pluralism subverts judicial independence, Russell argues that in an age of judicial power and with judges playing such a prominent role in governance, full independence from a country's politics is neither possible nor desirable.[252] For Russell, the solution is to create an appointment procedure that has a level of political pluralism although he acknowledges that this is no guarantee of an open appointing process that meets the norms of a liberal democracy.[253]

A further solution to the standard of ideological pluralism has been advanced by such academics as Jennifer Smith who argues that the traditional idea of the detachment of the judge is a useful consideration in the appointment process. While Smith acknowledges that such an idea has been derided by proponents of judicial activism, and by those who consider it naïve, even a self-serving concept, Smith maintains that it is a useful standard for assessing candidates for the bench. This is because unlike ideological conviction, it is consistent with the procedures that distinguish judicial application of the law from administrative application of it – for example, in the procedures governing the determination of matters of fact. These procedures are the empirical underpinnings of the doctrine of the separation of powers and the related principle of judicial independence. Although Smith acknowledges that many critics object that detachment is an unrealistic standard, she suggests that it is better to err on the "high side" rather than setting standards that are low and considered to be problematic.[254] The idea of implementing detachment as a standard for judicial appointment raises a number of procedural questions such as how the executive can determine that individuals are detached or reliably impartial? Smith suggests that because earlier studies have shown that, unchecked, political executives in Canada are likely to appoint otherwise acceptable partisans and that the prestige of the bench in the eyes of the public depends in part on the ability of appointees to shrug off old habits of partisan thought upon assuming office, there should be no considerable problems for the executive to find and appoint those judges that possess a large degree of detachment. While this standard for appointment seems better able to address the issue of judicial independence, it is hard to disagree with Russell's analysis that full independence from a country's politics is simply not possible.

Instead, creating a proper set of checks and balances into the system of appointment seems the most logical solution to addressing concerns of independence. In fact, the approach most widely favoured by liberal democracies looking to improve upon their judicial appointment procedures, is placing the responsibility for identifying the best candidates for judicial office in the hands of a commission or committee on which the government is represented but which is not controlled by the executive. This has been the model advanced in the proposal to reform the Supreme Court of Canada appointments process and to which this paper now turns its focus.

V. Towards a Solution: Competing Models of Change

(a) Introduction

Reforming the judicial appointment process to Canada's courts is not a novel idea, but one with significant history. In Appendix I, one is presented with a bibliography of prior reform proposals which, while not exhaustive, gives a sense of the continuing interest in judicial appointments and reform of the process.[255] An analysis of the prior reform proposals suggests that very few of the reforms considered have come to be implemented. While the original system of executive appointment at the provincial court level has been modified by the addition of advisory committees and the reduction of absolute executive discretion, the essential features of the appointment process for judges has remained unchanged; this is especially true for the Supreme Court. Interestingly, court appointment reform has been discussed and debated as early as the Victoria Charter round of constitutional reform; given much consideration prior to the 1982 amendments to the constitution in the form of the Constitution Act, 1982; made up a large part of the failed rounds of constitutional amendments in the form of the 1987 Meech Lake Accord

and the 1992 Charlottetown Accord; and was considered a vital component in Prime Minister Paul Martin's democratic deficit reduction strategy. Most recently, reform has emerged in the form of an Ad Hoc Advisory committee that was used to appoint Justice Marshall Rothstein, and the creation of a Supreme Court Selection Panel to assist the Prime Minister in selecting suitable candidates for the bench.

Many of the past reform proposals did not, until recently, even consider the issues associated with the appointment process such as representation and transparency. In fact, these issues have only become a focus of reform proposals since the early 1990s, after the arrival of the Charter and a growing awareness of the politics of identity at all levels of public life. Furthermore, many of the reform proposals did not move beyond academic writings and thus were not a part of policy considerations in government. In addition to identity diversification concerns, there has been a growing awareness of the need for a more open and accountable judicial appointment process and mounting concern about leaving judicial appointments to the unfettered discretion of the executive level of governments. In fact, it was in response to the growing demand for a more open and consultative process that the federal government and the provinces embarked upon a process of establishing advisory committees that would be responsible for screening and recommending appointments to the executive,[256] and while the final decision continues to remain with the executive, in practice, the recommendations of these advisory committees has come to have increasing influence.

Although most of the earlier reform proposals were not concerned with issues of representation and accountability, there is evidence to suggest that some academics expressed concern about the definition of specific qualifications and criteria of

appointment[257], but generally it was held that despite the structural flaws of the process, it did produce a well-qualified judiciary. Issues of openness and accountability had more to do with appearances and legitimacy, than with the production of a more highly qualified bench. Even reformers concede that Canada was generally well-served by the results of the existing appointment processes for judges.

As highlighted above, the major issues of concern for judicial appointment have been and continue to be; a proper French/English balance in the federally appointed courts and on the Supreme Court; regional representation in federally appointed courts and the Supreme Court; a proper provincial role in federal appointments and appointments to the Supreme Court; and the problem of judicial appointments based upon political patronage. In fact, it was this last issue of patronage that led to the reduction of unfettered discretion of the executive in making judicial appointments at the provincial and federal court levels.[258]

While the argument surrounding issues of patronage in court appointments is integral to understanding appointment selection reform, it is not possible to entirely separate politics from the judicial appointments process. In fact, the one clear conclusion that was reached in Kate Malleson's and Peter Russell's collection of essays on judicial appointment reform throughout the world is that no matter how the process is constructed it always has a political dimension.[259] While Russell asserts that the desire to insulate the appointment of judges from politics is an understandable human aspiration since the defining function of the judiciary is to adjudicate disputes about citizens' and governments' rights and duties, it is not possible for humans to achieve the apolitical action that is necessary in operating their institutions of governance. Therefore, the

choice is between a "process of appointment in which the politics is open, acknowledged and possesses some degree of balance or a system in which political power and influence is masked, unacknowledged and unilateral."[260] Therefore, the challenge for judicial selection reform is twofold; first, any discussion of judicial appointment reform must take place in the context of understanding that politics cannot be fully separated from the process, and second, developing a system of appointment whereby the political element of appointment is minimized thereby allowing for greater focus to develop a system that is more inclusive of the population and more accountable to the electorate.

There is a tendency in most reform proposals to assume that "one size fits all". However, it is necessary to suggest that reform proposals should be context-specific. This is because there are different types of courts, both institutionally and constitutionally and the power and procedures of these courts vary depending upon the implications of the decisions rendered by the court. As a result, any assessment of the various options for reform will be reflective of the fact that the primary focus of this paper is on appointment considerations and procedures to the Supreme Court of Canada. Further to this point, any analysis of the various options for change must take place in the context of striking the right balance between the objectives of the Court in maintaining its impartiality and independence, and creating a more open, transparent and representative system of appointment.

(b) The Constitutional Framework

As noted above, any changes to the process of judicial appointments in Canada must either operate within the existing constitutional framework or be accompanied by the necessary constitutional amendments. As has been demonstrated by the failed efforts at

constitutional amendment in 1987 (The Meech Lake Accord) and 1992 (The Charlottetown Accord), it is difficult to change the Constitution under the amending formula introduced as part of the Constitution Act, 1982. Most reforms require the approval of the federal government and seven provinces, representing at least 50 percent of the population. This is further complicated by the fact that changes to the composition (which probably does not read to include the process of appointment) of the Supreme Court of Canada require the unanimous consent of the federal government and the provinces. The difficulties of constitutional amendment to the appointment process for the Supreme Court are accentuated by the view that this Court is implicitly entrenched in the constitutional structure, and any changes to it may have constitutional dimensions.[261] Finally, the practice of putting proposed constitutional amendments to both federal and provincial reference adds a further complication for constitutional change.

While the formal procedures for change to the appointment process of Supreme Court justices propose severe limitations for the possibility of change, it remains that as long as the formal appointment is left with the Governor-in-Council, a constitutional amendment would not likely be needed to move the appointment power to a different source. The current modification of the executive appointment process through the implementation of an advisory committee (now Supreme Court Selection Panel) has been instituted without any constitutional amendment. Thus, reforms such as public hearings or even an appointing commission may be instituted without constitutional amendment, so long as the formal act of appointment remains with the Governor-in-Council. Support for this analysis is provided by the move to making judges accountable for misconduct to the Canadian Judicial Council, created under the Judges Act, while leaving the formal

mechanism for removal as a Joint Address of the Senate and House of Commons in accordance with section 99 of the Constitution Act, 1867. As a result, change in the power for disciplining federal judges was brought about without any constitutional amendment.[262]

Because the Constitution is silent with respect to federal appointments under section 101 of the Constitution Act, 1867 and provincial appointments under section 92(14), the processes for these appointments are left to the relevant federal and provincial statutes. These statutory structures have also adopted a system of executive appointments recently modified by advisory committees. Thus, any changes to these appointment processes can be brought about by regular statutory change, rather than by constitutional amendment. Only the section 96 appointments to superior courts, and possibly the Supreme Court appointments, raise constitutional issues. Thus, proposals for reform of the appointment process must be considered in its proper context and adapted to different political processes.

(c) Options

There is a broad continuum of judicial appointment models from which reforms can be drawn. Charted from the least to the most open process, systems can range from complete executive discretion in appointments to direct popular elections of judges – and any variation or combination of those in between. Having a clear understanding of the different modes of appointment is necessary in order to evaluate their appropriateness for the Canadian judiciary, and their effectiveness in pursuit of the goals of proportional representation and a more open and responsive appointments process.

While there are a number of reform proposals that would change the manner in which justices are appointed to the Supreme Court, it is the intent of this paper to focus on reform proposals that fully consider the constitutional and political conditions of Canada and therefore have the potential to be implemented. While not taking every reform option into consideration restricts analysis to traditional modes of change, it is important to understand that there is a clear set of assumptions about what constitutes a legitimate judicial appointments process and it is within the confines of these assumptions that analysis of the reform proposals for the Supreme Court of Canada appointment process should occur.

1. Modified Executive Appointment

This system is used for the Canadian Supreme Court, where the government has broad discretion in appointment. Although currently aided by advisory bodies, the other federal and provincial appointments remain subject to executive discretion to varying degrees.

Canada inherited its executive appointment system from Great Britain, which has always entrusted the executive branch of government with the power of appointment. However, like most jurisdictions, Britain has not escaped the call to reform the appointment process. Like Canada, the past appointees to Britain's High Court have generally been highly qualified and well-suited for their position on the Court. Indeed, the tradition of appointing barristers rather than solicitors – a division not present in Canada – often ensured candidates were chosen from the professional and highly esteemed ranks of the Queen's Counsel. However, this exclusionary practice, the closed process, and unrepresentative bench have faced mounting criticism. Such criticism has

resulted in recent changes in the Lord Chancellor's office, which has moved towards greater openness in the appointment process and increasing diversity in those selected to sit on the bench. For example, solicitors can now apply for consideration for appointment, vacancies are advertised, candidates are interviewed, and the process and criteria for appointment are now published. Moreover, in 2003 the government of Great Britain took the unprecedented step and created a new judicial appointments commission which significantly reduced the role of the executive in the selection process. While the incorporation of the European Convention on Human Rights into domestic law was largely attributed to the changes made to the appointment procedure in Britain, judicial reform is also part of a larger process of modernization.[263] Part of this modernization process was an unmasking of the power of the judicial elite to recreate itself and alter the social exclusiveness of those appointed to the court. Furthermore, it seemed that vesting the highest judicial authority in Law Lords and an officer of state who is both a member of the cabinet and speaker of a parliamentary chamber simply could not survive Britain's transition from a parliamentary democracy to a constitutional state. In turn, the British process of judicial appointment was un-amenable to the new desire for greater representation and openness.

If an executive dominated judicial appointment process is ill-fitted to good, quality judicial appointments in Britain's new constitutional state, then it would suggest that it is also ill-fitted to the political and territorial realities of Canada. Historically, the major objective to executive discretion in Canada has been the exclusion of the participation of the provincial governments from the appointments to both section 96 courts and the Supreme Court and it is this concern has continued to inform the development of the

government's proposal for a revised process of appointments such that provincial input into the appointments procedure has become a defining feature of the most recent proposal to reform the Supreme Court of Canada appointments process. In the *Proposal to Reform the Supreme Court of Canada's Appointment Process* issued by the Department of Justice, the government acknowledged the importance of provincial input through consultation with the appropriate provincial Chief Justices, Attorneys-General, provincial bar leaders and other interested provincial bodies that may wish to make recommendations.[264] In fact, further provincial participation in the appointments system is one of the defining objectives of the federal government's reform proposals and will be discussed in further detail later in this paper.

In addition to concerns of federalism in the appointment process, there have emerged democratic considerations that many judicial appointment reformers, including the government of Canada, believe should inform the judicial appointment process in Canada. These include calls for greater openness and transparency in the method used to appoint Supreme Court justices.

As a matter of reform, the question is whether the modifications to executive appointment (in the form of advisory committees and the setting of criteria for appointment) can be further extended to achieve the stated goals of the government's reform agenda, namely to achieve greater representation and a more open and accountable process of judicial appointments. It is true that the changes to the structure have advanced both objectives to some extent as witnessed at the federal and provincial court levels, but for many they have not gone far enough. While the diversity of the bench has grown, it continues to depend on the political will and commitment of the

particular government in power,[265] and ultimately the advances in gender representation have far outdistanced those on race or disability. For Devlin et al., these facts can be explained in terms of the qualified pools as well as to the greater numbers of women and their past successes in pursuit of equality rights. As a result, Devlin et al. maintain that such advances suggests the need for greater distance from the executive process as well as suggestive of the need for more significant changes to the process of appointments.[266]

While advisory committees do make the judicial appointment process more open and accountable, there are still a number of limitations as to their scope and applicability. For example, the composition of these committees is still quite limited. Their membership is drawn largely from the professional ranks of lawyers and judges, and there is only limited input from the lay public. The representation of women, visible minorities, and the disabled within this lay membership is also severely limited. Thus, the accountability is still to a fairly select group. Furthermore, the process is still one which is veiled in secrecy and the existence and composition of these advisory committees is not readily available to the general public. As long as the ultimate decision rests with the executive, it is unlikely that the process of recommendation and advice will be open. To summarize, there is little evidence to suggest that tinkering with current, albeit improved, executive appointment process will achieve a more diverse, open and transparent system. As will be argued later, what is required is an independent body that is responsible for selecting candidates for the Supreme Court.

2. Elections

The premise of the election model is to allow the populace a voice in choosing its judges, especially once the political role of the judiciary is recognized. The primary

justification for an elective model is that the current executive appointment system is highly partisan, secretive and unaccountable.[267] Seen as its opposite, elections are perceived as making judges accountable to the electorate, either through the voters directly (partisan or non-partisan popular election) or through the public's political representatives (legislative election of judges). However, each has its own strengths and weaknesses.

The best examples of legislative judicial elections are found in Germany and Switzerland, although a handful of American states also employ this method. For the German Constitutional Court, the Bundestag, which consists of elected political representatives, and the Bundesrat, the house which represents the member states, each selects eight judges to the court by a two-thirds majority.[268] The judges of the Swiss Federal Supreme Court are elected in a meeting of joint session by the House of Representatives and the House of States. Each has institutional mechanisms for ensuring that satisfactory candidates are selected. For example, in Germany, splitting the selection power between the Houses and the two-thirds, rather than the simple majority, encourages the selection of judges satisfactory to all parties. Similarly, the constitution of Switzerland mandates that the court is representative of all three official languages of the country.[269] The legislators also participate in the recruitment and nomination of candidates, rather than merely approving or rejecting a candidate through a vote. Interestingly, both countries share the same flaw: the judicial seats on the Court are usually distributed proportionately to the relative strength of the major parties in power in Parliament.[270] As a result, the institutionalized role of political parties in selecting the members of the Court demonstrates that politics still play an important role in selecting

judicial officers. In addition, the control of judicial appointments by party notables may result in a process that is as closed and unaccountable as when judicial elites control appointments.[271]

Popular elections are most often associated with various states in the United States. Due to its obvious democratic nature, the election process has some significant advantages. Judges are made accountable for their policy-choices; voters are informed about the candidates, especially with the use of party-labels; the voter turnout for judicial elections is fairly large when they are coordinated with other political contests; and finally, poor judges are voted out instead of sitting on the bench until retirement due to security of tenure.[272] As a result of the politicized conception of judging that has been attributed to the Court and its justices, the American model of judicial elections often informs the discussion of reforms to the judicial appointment procedure – specifically the idea of legislative ratification which will be discussed in further detail later. The election model for judicial appointment is, however, problematic in the context of a parliamentary system of governance. For example, it is often argued that parliamentary democracy should not and cannot be reduced to a simple model of majoritarianism. Democracy is a complex phenomenon and includes other principles such as the advancement of the participatory rights of historically marginalized groups. In fact, the expanded definition of democracy being more than majoritarianism was clearly articulated by the Supreme Court of Canada in *Reference re: Secession of Quebec*. In *re: Secession of Quebec,* the judges wrote that "Democracy means more than simple majority rule…Constitutional jurisprudence [shows that] democracy exists in the larger context of other constitutional values",[273] such as "respect for the inherent dignity of the human person". The Court

added that "a functioning democracy requires a continuous process of discussion ...compromise, negotiation, and deliberation. Inevitably there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices."[274] As a result, the decision engages in the consideration of the democratic norms of participation (discussion, negotiation, compromise and elections) and inclusiveness (the protection of minority rights and the promotion of the inherent dignity of all citizens of Canada and Quebec).[275] Further, it is suggested that majoritarianism in the form of elections can be a threat to democracy.[276] As indicated by Devlin et al. studies from the United States indicate that, from the promotion of minority rights, electoral processes are more reactionary than bureaucratic processes. Election on a basis of majority vote by definition excludes the interest of the minority population in judicial election districts, and legislative election is often seen as giving the power of appointment to a small group of political elites.[277]

In addition to concerns of majoritarianism and its impact on the diversification of the Court, judicial elections pose a significant problem for the principle of judicial independence which lies at the heart of the Canadian judiciary. The idea that judges will attempt to reach decisions as independently of external forces as possible is compromised when judges have to face (re)election since they will be excessively influenced by considerations of popular support.[278] This is compounded by concerns about the impact of financing for judicial campaigns and a lack of public knowledge about the judicial system, judicial practices and the qualifications of individual judges beyond their party affiliation.[279] Furthermore, Devlin et al. argue that election systems tend to undercut the legitimacy of the judicial system and as a result are becoming less popular in the United

States.[280] Judicial independence is often compromised, either at the will of popular opinion or because of political pressures. Moreover, desirable judicial candidates may be discouraged from running and subjecting themselves to a potentially 'demeaning experience'.[281] It is believed that the election of judges "would be incompatible with their role as bulwark against majoritarian excesses, concerned more with protecting individual interests than with pursuing communal goals."[282]

Finally, the idea of judicial elections has generated very little interest or support in Canada. In fact, nearly all of the reform proposals generated by academics, lawyers and politicians argue against the need for establishing a procedure of judicial elections and instead maintain a strong argument for the implementation of a nomination committee system which will be further explored later in this paper. Suffice it to say for now that the evidence presented suggests that judicial elections are both inappropriate and unlikely to occur in the Canadian political context.

3. Confirmation Procedures

While judicial elections have generally been rejected outright, the idea of American style confirmation hearings have been supported by the likes of Jacob Ziegel and retired Supreme Court Justice Gerard La Forest,[283] at least with regard to the Supreme Court. For Ziegel and others, the allure of confirmation hearings is that it is able to provide greater transparency and provincial participation in the selection of Supreme Court justices. Confirmation hearings by the Senate – as representatives of the provinces – opens the process to the people, provides a check on executive power, and allows the provinces a voice in judicial appointments to the court that adjudicates intergovernmental disputes. Ziegel maintains no reason(s) why justices should not be made to sit in front of a select

panel of Senators and explain their ideological positions on a range of issues that are of concern to Canadians.[284] However, confirmation hearings have not been winning favour with everyone. In fact, much like the election model, there are a number of drawbacks to a confirmation or ratification model of appointments.

Although the need to check the power of the executive in relation to judicial appointments is advocated by many scholars and commentators, there is much evidence to suggest that partisan politics is too often the result of the confirmation model of judicial selection.[285] This is because it is thought that if the same political party holds most of the seats in the Upper and Lower Houses, then patronage has the potential to be a strong factor in appointments. Moreover, this remains true even if different parties are in control of one of the Houses since the Senate may react to public opinion and the media about the appointee rather than fully considering his or her qualifications.[286] Further, 'ideological partisanship' may also occur; if it is thought that the nominee would unacceptably "shift the philosophical balance"[287] on the Court, than one's personal philosophy becomes a condition of appointment. This concern has been further demonstrated by Michael Tolley who has argued that the process of confirmation hearings can break down when partisanship, fuelled by ideological absolutism, is so fierce that there is a lack of respect on both sides of politics for the political conventions that moderate the political contest over the appointment of judges.[288] What is even more problematic for the American system is that it is unlikely that the process can be restructured to produce limited partisan influence since the process is enshrined in their constitutional history. For Tolley, the only way in which America can avoid a judicial crisis is if their political leadership recovers the capacity for the modicum of moderation

which is essential for the operation of their system.[289] As a result, no matter how much reformers may aspire to a more open and democratic system of appointing judges, they seem unlikely to suggest a model associated with the raw politics of the American system.

In addition to concerns over partisanship, the use of 'approved' or 'reject' by the Senate committee is largely considered to be an ineffective 'merit-control' method. It is argued that ratification only provides for the "avoidance of down-right poor nominations; it does not provide for positively seeking out the best available nominees in the first place."[290] To this extent, such democratic factors as diversifying the bench become the ultimate responsibility of the nominator. For example, in the United States, the President is responsible for nominating an appointee, and there are great differences in the demographics of appointments with the last four presidents. President Carter was firmly committed to redressing the under-representation of women and minorities on the bench, and nearly one/half of his nominees were female, black and/or Hispanic during his administration. In contrast, the affirmative action policies were abandoned by Regan and thus the numbers of women and visible minorities dropped drastically. The same pattern holds true for the Clinton and Bush administrations. Where Clinton renewed Carter's commitment resulting in about 64 percent of nominees being women or minorities,[291] the Bush administration was not as dedicated. In addition to concerns over partisanship, ideological, and personal commitment of a single body which nominates, such debacles as the Thomas and Bork affairs have lead Canadian observers to reject a role for parliament in general or the Senate in particular in naming members of the Supreme Court of Canada. Indeed, it has often been argued that the intense questioning of Thomas

and Bork by the U.S. Senate has the potential to be duplicated in Canada. Further, it has been suggested that such scrutiny of judicial candidates may result in some candidates choosing not to be considered for judicial appointment for fear that they may have to confront potentially embarrassing questions about their past behaviour both in their personal and professional lives. Moreover, it is believed that such questioning may lead to a rejection of the candidate by the committee, as happened in 1987 when the nomination of Robert Bork to the Supreme Court of the United States was rejected by a predominately Democratic Senate.[292] Although the rejection of confirmation procedures may seem valid, Carl Barr has argued that it may be more instinctive than reasoned.[293] Barr argues that the rejection of confirmation hearings as an alternative method of judicial selection often ignores the adoption and use of legislative constraints – and even legislative elections – in other countries. In fact, Barr suggests that the Canadian response focuses not so much on the legislative role in voting on a nominee, but on the role of U.S. Senatorial Committees in holding confirmation hearings which subject a nominee to a whole range of legal and personal questions.[294] The fear for many Canadian observers has been the possibility of a Bork or Thomas fiasco in which irresponsible questioning or reporting has the potential to destroy the credibility and reputation of candidates, possibly discouraging many from even considering judicial office.[295] However, Barr argues that no nominee for the United States Supreme Court appeared before a legislative committee until 1939, when Harvard Law Professor Felix Frankfurter went before the Senate Judiciary Committee and defended his political and legal views intensely and effectively.[296] Barr notes that for 150 years before this hearing, no nominee was ever required to defend his views during a confirmation hearing – despite the many rejected

nominees, and even in such controversial appointments as that of Louis Brandeis of Massachusetts. Thus, Barr argues that the interrogation of nominees for the Supreme Court, including those already sitting as judges on other courts, did not become a regular practice until the period when the Senate was generally unwilling and unable to reject a presidential nominee on the basis of his/her personal views.[297] In this sense, legislative ratification has often had less impact on the process of judicial selection than many Canadians may realize.

Further to partisanship, ideology and diversification concerns, there remain a number of difficulties in translating the American Congressional example into the Canadian parliamentary system. For example, political parties in Canada are disciplined; members rarely vote against party instructions, and would presumably be even les likely to do so in the context of such a dramatic and significant action. Furthermore, the weakness of the Canadian committee system,[298] which displays none of the independence and cohesiveness of Congressional committees and is subject in a number of ways to the control of party leadership, especially of the governing party, is problematic for the confirmation model of appointments.[299] Only in the context of a minority government would there be any element of unpredictability, but minority governments are generally an unusual outcome in Canadian elections, and even then the action would be shaped by strong parties and weak committees.[300] Under normal circumstances, the government of the day would dominate both the Commons and the committee, and thus, able to guarantee any result within any timeframe that it wished. Parliamentary review might make a symbolic statement about the relationship between the branches of government,

but it would usually be a totally predictable formality rather than a genuine opportunity for political leverage.[301]

Finally, concerns have been raised about the possibility of confirmation hearings violating the distinguishing characteristics of the judiciary as outlined in *Re: Valente.*[302] This is because a candidate is often asked to indicate how she or he would decide on a specific issue. This is problematic for a number of reasons not least of which is the perception of bias that is demonstrated to the public. Such notions of bias clearly reduce the applicability of judicial impartiality and raise concerns for the fundamental norm of judicial independence. It is for this reason that former Justice of the Supreme Court of Canada, Bertha Wilson, is opposed to confirmation hearings, drawing on the American experience of Sandra Day O'Connor, who was interrogated at great length about her views on abortion in the United States.[303] Retired Justice Peter Cory has expressed the same concerns and misgivings.[304] Clearly, legislative ratification of judicial nominees, as exemplified in the American model, poses a number of limitations that make it unsuitable to be adapted in Canada. However, it remains that the Canadian public should know both details about how justices appointed to the bench are chosen and the background and possible ideological convictions of the nominees. Thus, a balance must be struck between the government secrecy surrounding executive appointment and the media frenzy that is so often the result of confirmation hearings. Many observers believe that this balance can be achieved through the introduction of transparent and responsible appointment commissions.

4. Judicial Appointment Commissions

The most popular new institutional constraint on government authority to appoint judges has been the use of judicial nominating and/or advisory commissions. In fact, much of the analysis presented on judicial appointment reform has focused on the establishment of judicial appointment commissions, primarily commissions which have the power to nominate a shortlist of candidates for judicial selection and advisory commissions which are responsible for screening names which are submitted to the executive for consideration. For many reformers, the creation of an independent judicial appointments commission would interject accountability, transparency, and representativeness into the system of executive appointment, and is often considered a far better alternative to that of confirmation hearings or legislative ratification of judicial nominees.

The origins of judicial appointment commissions are generally traced back to the 'Missouri plan.' This is the name of the committee process in the United States where appointments are made by committee members based upon criteria of merit and professionalism, rather than political or ideological partisanship. While research has demonstrated that politics continues to play a role in nominating commissions, it is, however, less of a role than in systems which use executive discretion. Furthermore, it is argued that nominating and advisory commissions are a better process for judicial appointment since their adaptability allows them to be shaped to meet the particular requirements of a country's political system of governance.[305] In addition to the benefits of adaptability, research indicates that candidates appointed using a committee system are generally ensured to be as well-qualified for appointment as those nominees chosen in an

executive system of appointment.[306] Thus, the move to nominating and advisory committee systems for judicial selection is increasingly being explored as a solution to the difficult problem of democratizing judicial selection.

The use of nominating and/or advisory commissions has been linked to an overall decrease in partisan appointments. Evidence suggests that the nomination and/or advisory committee process places considerable value on merit selection since appointments tend to be based on merit and professionalism, rather than political or ideological partisanship. While politics most certainly continues to play a role in the appointment process, studies have shown that it is less pervasive than in the model of full executive discretion.[307] For judicial appointment reformers, the prevalence of traditional partisanship is generally decreased by granting appointment power to a commission. Moreover, a commission is more likely to further restrict the discretion of the executive appointing body.[308]

While judicial commissions for the selection of judges have become an increasingly popular proposal for reform, there has been, to date, very little analysis of the forms, functions and effectiveness of these commissions. Most of the written material on the subject suggests to the dilution of the executive's prerogative to appoint justices, but only by way of formalizing a procedure for wider participation in the process of seeking and evaluating candidates. What reformers have failed to acknowledge is that an appointing power vested in politicians will be exercised on partisan political grounds unless political constraints dictate otherwise. The change in the nature of appointments to the Supreme Court, when appeals to the Privy Council were abolished, is a case in point. It demonstrates the growth of a political convention displacing partisan concerns in favour of appointment of persons who had other claims to experience, expertise and skills when

the importance and prestige of the Court grew.[309] However, while the appointees have of late possessed much better credentials, many still have had professional, governmental and personal ties to leading figures in government.[310]

The proposals by the Canadian Bar Association, the Canadian Association of Law Teachers and other academics[311] call for nominating committees to solicit names and to evaluate potential nominees in order to broaden participation in the creation of the list of nominees for the executive's exercise of the appointing power. The proposals tend to be similar in that they are generally concerned with membership and the qualifications of those who are chosen to sit on the committee. In this respect, broadening the qualifications of those who participate in the review of potential nominees are intended to neutralize at least the early effects on the process of partisan influence. They do not, however, adequately respond to the many criticisms of the existing system and for that reason might not, in actual operation, offer much improvement. Moreover, for the ideals of transparency, accountability and representation to be embedded in the process, the details of every element of the committee system must be refined. This is because a broad determination of these priorities will only hinder any advancement that a move to a committee system might make such that the same problems that plague the model of executive appointment will find their way into the new committee system. In the following paragraphs I canvass some of the shortcomings of the proposed committees in order to prepare the way for discussing the need to delineate the selection process in a way other than setting down qualifications for membership in nominating committees. I will later suggest that there must be wider membership on these bodies and that the

process and criteria of selection must be finely detailed and made available to the Canadian public.

a. **Membership**

The nomination committee model presupposes that professional peer evaluation will produce a better pool of candidates for appointment by the executive. For example, the Canadian Association of Law Teachers suggests that two members of the bar in addition to a member of the public partly constitute the committee for Supreme Court appointments.[312] In addition to the CALT report, Richard Devlin and his team also suggest a representative from the Canadian Bar Association and a number of lay persons to assist in the composition of a nominating committee.[313] The assumption, however, does not appear to have much merit since professions do not necessarily produce criteria of their own excellence[314] and leaders of the legal profession may not necessarily have the experience or expertise in appellate advocacy and adjudication so as to be the best arbiters of the kind of excellence that is required of the Supreme Court. In terms of nominations to the Supreme Court, the bar association input may be less helpful since so few lawyers – and thus so few members of the bar association – engage in appellate advocacy and still fewer in cases that reach the Supreme Court.[315] For Lorraine Weinrib, the real expertise in the quality of those working in the appellate courts, especially in the specialized areas of law like the Charter, is academics trained in law and fields close to law, not the practicing bar. Further to this argument, Peter McCormick suggests that there is really no need to have representation from the organized legal profession. This is because McCormick argues for the need to have a small number of representatives from the Canadian Judicial Council (5) to sit on the nomination committee. Because the

Canadian Judicial Council is comprised of chief justices and associate chief justices of all the courts whose members are appointed by the federal government, McCormick sees no need to have members of the bar be present on the committee when senior judges already make up their share of the group.[316]

While Richard Devlin et al. argue that the importance of expertise and credibility amongst one's peers indicates a pressing need to have representation from the judiciary and the bar they do not indicate why membership from the bar is necessary, other than by stating that it is an accepted part of the current system.[317] Thus, it remains that there is no clear indication that a committee consisting of members of the legal community contribute to a better process for selecting justices to Canada's top court.

In addition to the issue of legal membership, the lack of political influence that a nominating committee model promises may essentially be illusory; "nominating committees may merely engender a different form of politics, at the bar association, rather than the partisan level, but again at the expense of qualified persons."[318] For Weinrib, elements of conservativism and elite values can be found in the bar association committee system put in place in 1968. Indeed, Jacob Ziegel is also critical of the practices of the Canadian Bar Association arguing that secrecy, oral discussions with no dossier, reliance on second and third hand information that may be unreliable and out-of-date and the tendency to favour those who practice in big cities and elite practices are the general norms of the organization. In fact, Ziegel concludes that the "system…is positively hostile to selecting candidates exclusively on the basis of merit."[319] According to Weinrib, one can also see the same tendency in the Canadian Bar Association's own writing on the subject of impartiality appropriate to judicial appointees.[320] According to

the CBA Report on the Independence of the Judiciary, the organization rejects civil servants and in-house counsel as inappropriate candidates for judicial appointment. The former, according to the Report, would be incapable of deciding a case impartially if their former government employer appeared as a litigant.[321] As Weinrib asserts, there is no reference to the tradition of the independence of the judiciary or the civil service in Canada or advantages of the exceptional public law training that government lawyers' receive, which few lawyers in private practice possess. In-house counsel is considered ineligible on similar grounds.[322]

While the necessity of considering members of the bar for a position on the nominating committee remains debatable, additional concerns have been raised with regard to suggestions that there must also include a seat for a dean of law or his or her designate. In responding to concerns that having representatives from the bench and bar would simply be "self-selecting oligarchy,"[323] reformers of the judicial selection process argue that a dean of law can play an important watchdog function over the appointment procedure as well as ensure that the commission is informed of current research on appointment matters.[324] Here again the concern is one of substance over form. While the appointment of a law school dean to the committee endeavors to address concerns of accountability, issues concerning the workability of a committee with such a divergent membership have been raised. Specifically, it has been suggested that judicial representatives, who presumably have more direct routes of communication with members of the federal executive generally and the Minister of Justice in particular, may choose to communicate their preferences for appointment privately rather than at a

committee meeting.[325] If the committee is unable to function properly, then one may wonder why a committee structure is necessary at all.[326]

Finally, the presence of both political and lay members is likely to be a debated issue. The idea of an independent commission seems at odds with allowing political representatives a voice on the commission. However, to ensure balanced membership and increased accountability, there must be some legislative representation. While the move to a nominating commission model removes the discretionary power of the executive, it remains that the judicial office is a form of political office and, consequently, there must be some representation from democratically constituted bodies. Again, the concern here is one of partisanship. Studies of European appointments commissions suggest that legislative representation may increase the connection between political parties and judges.[327] The concern here is that legislative representation has been given too prominent a role. Therefore, to prevent control of the commission from traditional political parties, it is argued that legislative representation should be limited to a select few candidates.[328] In this sense, government and opposition representatives are granted equal seats on the commission to allow for an adequate range of partisan political views. While legislative representation from the political parties often results in problems with arguments along party lines, as illustrated by the German and Swiss experiences where an understanding exists that appointees will be chosen in proportional numbers to legislative political representation, reformers suggest that this problem can be easily resolved by limiting the number of seats and to ensure that the other voices are heard on the commission.[329] Further to this argument, Peter McCormick has suggested that a 'good' nominating committee would consist of five members of the Council of the Federation[330]

which would be chosen by and from the members. Furthermore, McCormick suggests that the committee rounds itself out by including five members of the House of Commons Justice Committee. Again, these members would be chosen by and from the committee in such a way as appropriately to represent the various political parties.[331] Here too the focus is on limited legislative representation.

Lorraine Weinrib has also speculated about the role of provincial attorneys-general on a nominating committee. Weinrib argues that because the attorney-general sits as a member of the provincial executive, he or she is often involved in the kind of partisan politics that a proposal for an appointing commission is intended to dilute or eliminate. Because of this role, there are concerns that the functions of the attorney-general in the committee may distract from consideration of substantive grounds of quality.[332]

Lay membership on the nominating committee is often considered a significant move in improving the degree of public participation in the appointments process.[333] As Alan Hutchinson has argued, representation of lay members on the committee is essential for democratic participation and openness.[334] There are, however, a number of concerns with regard to lay membership in the nomination committee model. First, it is argued that there is no "clean" method for designating these individuals that would be comparable to the method of choosing "by and from" the members of an autonomous pre-existing group.[335] In this sense, it is preferable that lay members are chosen from a particular pre-existing group than from 'off the street'. This is because it is contended that no one person can "represent the public," only his or her own views or that of the government if appointed by it.[336] However, all existing Canadian judicial appointment committees have

demonstrated that this counter-argument is problematic. For example, the establishment of appointing committees at both the provincial and federal levels suggests that these committees have become institutionalized, and lay participation in these committees in order to represent the public interest has become accepted as a given in the democratic context.[337] Reformers have also attempted to further separate a nominating committee proposal from the objections raised by providing a relatively non-partisan method of appointment for lay members. For example, each lay member would be appointed by an all-party committee of the relevant federal and/or provincial government and appointed by an order-in-council. It is argued that this procedure would allow for a move away from partisan appointments to the commission, yet at the same time allowing adequate screening of the abilities of the individual being considered.[338] Moreover, reformers maintain that the process of an all-party committee is more transparent than arrangements currently used by appointing commissions and may provide for a better mechanism to achieve diverse representation on the commission.

The issue of diverse representation in the nominating committee model is also significant in light of the fact that increasing the diversity of the judiciary has been a prominent reason driving reform of the appointment process. In order to ensure adequate diversification of the bench, it is argued that the appointing authorities should also ensure that the commission itself adequately reflects the gender, ethnic and racial diversity of the jurisdiction occupied by the court.[339] In the case of the Canadian Supreme Court this should also include express recognition of the need to include First Nations. Devlin et al. argue that diversity in the membership of the commission can be most easily achieved through lay member appointments however they are quick to suggest that it is important

that these concerns are also considered by nominators of legal and political representatives. For Devlin et al., identity representation should not be confined to a "quota mentality," but should inform the entire process of judicial selection.[340] More significantly, recognizing a wider ethnic and gender variety in the composition of the committee is reflective of the federal executive's desire to value the diversity of the Canadian population. Accordingly and for the Supreme Court arguably more importantly, the process whereby one chooses judges to make up the court of final resort on Charter issues should be reflective of the Charter's egalitarian values.

b. Qualifications

Concern over the membership of the appointing commission model has been paramount in any analysis of committee systems. Here one can see a clear interest in broadening participation however there has been little manifestation of concern as to the quality of candidate or the qualifications desired. In past reform proposals issued by the likes of the Canadian Bar Association and the Canadian Association of Law Teachers, the only reference to procedure is the recommendation that the committee recommend a short-list of names of members of the bar and/or a judge from a provincial or federal court. For the most part, the reports of the organizations indicate that a short-list of three names would be optimal. Furthermore, in its only reference to criteria, the reports note that while previous judicial experience is an "advantage", the "work and role" of the Supreme Court differs significantly from that of other courts so that it should not be made a prerequisite for nomination.[341] Further, recent scholarship on reforming the appointment process has also failed to offer ideas for a substantive process for appointing

committees. In fact, only research by Richard Devlin et al. offers detailed information pertaining to process and criteria for use by appointing commissions.

A major criticism of a judicial appointment commission is that the power of appointments is removed from elected representatives and becomes the responsibility of appointed members. Thus, it is argued that the problem of accountability is simply relocated rather than resolved.[342] In fact, F.L. Morton asserts that in any nominating commission the balance of power will continue to rest with the government and its "strategically selected" allies from the Canadian bench and bar. Morton suggests that "while there will be a great deal of self-congratulation about insulating the 'Guardians of the Constitution' from political influence, all this reform will do is drive such influence underground."[343] For Morton, the committee model does not eliminate or even address political considerations; rather these considerations are merely hidden from view. Thus, under a nominating committee system, accountability for the judicial exercise of political power remains blurred.[344]

In contrast to Morton's assertions, Devlin et al. maintain that greater accountability can indeed be established through the creation of a responsible selection process conducted by commission members who represent a broad cross-section of society, government and the legal profession. This is because Devlin et al. openly acknowledge that any appointment system will retain a political element. However, by removing the appointing power from the hands of the executive and inserting it into a committee system that is representative of the Canadian public, the process becomes more open and transparent and less partisan. In order for this to occur, Devlin et al. argue that an established process for judicial selection must be implemented and strictly

adhered to. First, vacancies for judicial office must be advertised. More importantly, a proactive recruitment campaign towards under-represented groups should be pursued.[345] Evidence from the Ontario provincial court suggests that such proactive steps are central to increasing appointments from diverse groups.[346] The second procedural recommendation from Devlin et al. is that the presentation/interview of judicial candidates should be partially open to the public.[347] This is because candidates' abilities and individuality should be transparent to the public due to the enormous responsibility shouldered by judges. Additionally, bureaucracies are not beyond politics; in many instances the bureaucracy may be motivated by controversial political assumptions and as a result should be held publicly accountable.[348] While the suggestion of Devlin et al. may on the surface appear to be an endorsement of a type of confirmation hearing, they are quick to assert that there are considerable differences that should be emphasized. For example, confirmation hearings function either to confirm or reject a candidate after the candidate is subjected to intense public scrutiny in the legislative arena. In contrast, public interviews are only one part of a larger independent nomination appointing process. Several candidates are interviewed for one position, and those that are not selected do not face the same stigma, since the elimination of candidates is a natural part of the selection process. Further, guidelines for questions may be established to ensure all candidates are treated fairly.[349] Using the South African model as an example, Devlin et al. argue that the public interview process is now an accepted part of the appointment process and the Deputy President of the Constitutional Court, who was selected through this process, described it as "useful and...essential and correct."[350]

In addition, the stated functions of the interviews in South Africa are primarily to identify positive characteristics of the candidate, rather than to emphasize negative ones.[351] Any allegations received by the commission which may affect "reputation or dignity or ...privacy" of the candidate are referred to the Chairperson and the candidate is notified and then has the option of responding in a closed session.[352] As Devlin et al. argue the usual counter-argument to open interviews – that impressive candidates will not want to run the risk of public scrutiny – is unpersuasive both normatively and empirically. For example, in South Africa, the dire predictions that only second-rate candidates will apply for positions on the court, have not transpired.[353]

Finally, Devlin et al. insist that greater transparency would increase accountability by virtue of the quality of the appointments made.[354] Moreover, the public and commentators could continuously assess the performance of the commission in diversifying the bench as they are being informed about the potential appointees before the appointment is formalized. Currently, so little is known about the appointment process that it would be a rare occurrence for the electorate to hold the executive accountable for its appointments to the bench. In contrast, opening up the process would allow for greater vigilance and participation by the public and greater accountability for appointments made by the commission.[355]

c. Criteria

In addition to a lack of clear procedural norms, another clear disadvantage of reform proposals suggesting an appointing committee model is the lack of criteria for evaluation of potential nominees. In fact, it has only been recently that there has even been an effort to articulate criteria for being a judge beyond that of being a member of a

bar for a minimum number of years. For many years it was argued that setting a clear set of criteria was no guarantee of better results in terms of either the quality of the judges selected or their diversity. Moreover, critics maintained that because the literature was so vague, and the persons on the committee likely to hold such varying perspectives on questions of merit, integrity and judicial ability, a common mode of collaboration could be difficult to develop.[356] Furthermore, observers argue that setting appropriate job qualifications for potential judicial appointees raises a number of concerns including determining whether the job qualifications are indeed vital to the performance of the job and are objective, rather than a means to exclude certain groups (intentional or otherwise).[357] Concerns have also been raised with regard to embedded biases in what would appear to be seemingly neutral criteria.[358] For example, Devlin et al. suggest that a possible adverse impact of bias is provided by the work of the Ontario Judicial Appointments Advisory Committee, which emphasizes professional achievement, community awareness and personality as job criteria. Devlin et al. argue that while community awareness and involvement appears to be neutral criteria, it might have an adverse impact on women who may have less time than men to be involved in community organizations because of the time-consuming demands of home and family.[359] While the Advisory Committee did acknowledge the potential problem by stating:

> With regard to community involvement and awareness, the committee recognizes that it would be unreasonable to insist on a high level of participation in community organizations for every candidate who is to be highly recommended. Often there are personal circumstances – for instance, major family responsibilities – which leave little time for volunteer work in the community.[360]

For many observers including the National Association of Women and the Law (NAWL), the statement did not go far enough. In fact, NAWL made the following, more explicit

recommendation for acknowledging the different situations of men and women in Canadian society:

> Recommendation #3: The evaluation criteria for the selection of judges should specify that childrearing, family activities, and household management are to be considered under "community awareness."[361]

Devlin et al. also acknowledge the importance in recognizing different experiences of a historically marginalized group as an additional qualification for the job of judging.[362] In fact, Devlin et al. suggest that the existing criteria needs to be both revised and expanded in order to produce a more diverse and pluralistic judiciary, although they offer no suggestions for developing a thorough and comprehensive set of evaluative criteria. Instead, the authors suggest that the problems and potential solutions relating to gender and racial bias in the selection process can be discussed in the annual reports of the commissions,[363] thereby leaving the work of establishing suitable criteria to the members of the nominating/advisory committees.

The issue of values and criteria in the selection procedure is also addressed by Lorraine Weinrib who argues that the committee system should not become too concerned with issues of membership and procedure but should focus on the values and criteria that will drive the nomination and selection process.[364]Moreover, Weinrib suggests that only intense focus on job qualifications can assure the legal excellence that is required for the proper functioning of the Supreme Court. For Weinrib, any evaluative criteria should fully consider the nature of the work that is to be undertaken. Because the Charter work of the Court requires focused thinking in the history and variety of the legal system, comparison with other legal systems, and reference to theoretical writing, the system to evaluate potential candidates should consist of criteria that help in creating a

wider body of knowledge and experience. Further, Weinrib suggests that the literature on judicial appointment displays an over-emphasis on professional values and a general disdain for academic accomplishment. Weinrib suggests that any evaluative criteria should include academic considerations since early academic excellence is often relied upon to mark potential in situations where experience and achievement are still lacking. Moreover, this is the basis on which the career system of judges works in civil law countries.[365] Weinrib argues that once the system can produce a knowledgeable and experienced panel, the better the Court's judgments will become.[366] Further, Weinrib suggests that nominations and appointments should reflect a view of the overall needs of the Court in order to produce a "mix" of talents and experience that promote the best insight and analysis of the problems that come before it.[367] Like Devlin et al., Weinrib offers no suggestions for the type of evaluative criteria that can assist the committee in determining candidates with the intellectual breadth and legal experience to successfully operate as justices on the Supreme Court.

While evaluative criteria is an essential tool to assist a committee in determining the most suitable candidate for the job, there is also statutory criteria which must be taken into consideration by the committee. Devlin et al. suggest that there are a number of statutory criteria that may be problematic for a committee that aims to provide a more diverse judiciary. For example, statutes that set the minimum years of experience at the bar as being five to ten years or transfer from another judicial post seem on the surface to be a sensible restriction if one prioritizes narrow professional experience over all other qualities, however, it does make the pool of non-traditional candidates, such as Aboriginals and other visible minorities, smaller, since they have generally graduated

from law school more recently.[368] Moreover, Devlin et al. are skeptical that ten years of job experience is a necessary qualification given that it tends to exclude non-traditional candidates from the pool, however, they leave it to the commissions to assess this statutory requirement and report their findings accordingly.[369]

A further statutory requirement at the federal level is the guarantee of Quebec representatives on the Supreme Court.[370] This provision is a clear recognition of the relevance of identity (regional/linguistic/cultural) to the role of judging. Moreover, the guaranteed representation from Quebec is an acknowledgement of the fact it has a civil rather than a common law system. However, it is suggested that the guarantee of representation from Quebec currently has little relevance since the role of the Supreme Court as final arbiter of cases arising in the Quebec courts on questions of civil law has diminished in recent years and thus presses less urgently in the Court's restructuring.[371] There has also been marked improvement in the ability of judges appointed from provinces other than Quebec to listen to cases in French. Indeed, the Court has recently included two judges who were eligible for nomination from Quebec as well as from other provinces.[372] However, the identification with the Court as Quebecers' final court of appeal continues to remain important in terms of its traditional representation and has continued to extend to the qualifications for appointment generally. Interestingly, this analysis of representation from Quebec would suggest that a good case could be made for a statutorily entrenched Aboriginal representation as a matter of cultural or regional identity, and as representatives of an alternative system of law.[373] However, only the recent report of the Canadian Association of Law Teachers comments on the need to set a statutory criterion for Aboriginal representation on the bench of the Supreme Court.[374]

For many observers however, the regional component of appointment decisions does not suggest representation.[375] This is because a judge is not expected to forward the concerns or interests of his or her province of origin, for example when it appeared as a party in private litigation or a constitutional case involving division of powers or the Charter. On the contrary, the wide flung origins of the judges are primarily symbolic of the national stature of the institution with reference to its independence from the centrism often apparent in other federal institutions and its power to overrule the determinations of the highest appellate provincial courts.[376] Accordingly, regional representation is considered to be simply recognition of the desire to have judges bring to the bench their familiarity with the values, history and sensitivities of the people of their respective region. As well, the criterion of regionalism demonstrates a desire on the part of the federal executive to be seen to respect the powers of the Court and the judges that sit on its bench. As a result, regional criterion becomes a political consideration, although not a partisan consideration, and simply provides a beneficial egalitarian symbolism for the profession and the public at large.[377]

The importance of demographics and other identity factors at the statutory level have also been established in policies and practices at the federal and provincial court levels. Under the heading "Social Awareness," the federal policy in respect to s.101 and s.96 courts under the *Constitution Act,* includes a qualification of "sensitivity to gender and racial equality" and under "Professional Competence," requires "mainstream legal experience." These criteria do not necessarily require a candidate to be a member of a historically marginalized group, but lawyers from such communities would likely be

especially appropriate candidates on the basis of such criteria. The policy in British Columbia has a similar criterion – "appreciation for cultural diversity."[378]

Further, under the heading "Demographics," Nova Scotia, Ontario, and Alberta expressly address at the policy criteria level, the importance of considering diversity as a factor in making judicial appointments. This section states:

> The provincial judiciary should be reasonably representative of the population it serves. This requires overcoming the serious under-representation in the judicial complement of women, visible, cultural and racial minorities, and persons with a disability.[379]

The detailed criterion for judicial appointments at the provincial and federal court levels suggests that there is an emerging awareness of the value of diversity on the bench. However, the pattern across the country is still uneven, and the majority of the provinces and territories still make no reference to diversity as a positive job qualification. The policy in the Yukon Territory goes the greatest distance to recognizing links to a particular community as important and valid criteria for judicial appointments. It includes the following criteria:

- Respect in the community;
- Familiarity with Yukon First Nations issues;
- Experience in northern communities;
- The need to have a bench that is demographically representative of the community.[380]

While a clear statement of criteria for appointment of judges is often considered an important step towards escaping the old pattern of patronage appointments, there continues the need for much thought to be given to revising and adding to these qualifications in order to take account of the potential policy-making role of judges and the need for a more representative judiciary. Devlin et al. suggest that a more diverse judiciary can be sought by creating a more open process for developing criteria for

judicial appointments, that is also open to a wider range of consultation with groups and individuals that may have suggestions. For Devlin et al. the development of evaluative criterion can be accomplished within the judicial appointments commission as the individuals of the commission can work together and with other groups to compile a list of adequate evaluative criteria.[381] Devlin et al. argue that it is vital that evaluative criteria move away from strictly professional qualifications and the experience of candidates to include representativeness as an integral part of judicial qualification. Further, Devlin et al. argue that evaluative criteria including that of representation should be statutorily entrenched. The authors suggest that this could easily be achieved since the concepts have been entrenched in other judicial appointment commissions including that of South Africa where the commission interprets the constitutional provision of diversity as:

> Diversity…is not an independent requirement, superimposed upon the constitutional requirement of competence; properly understood, it is a component of competence – the Court will not be competent to do justice unless, as a collegiate whole, it can relate fully to the experience of all who seek its protection.[382]

Finally, once the evaluative criteria have been determined it is necessary for the criteria to be published in government statutes. This would allow for a more open process of evaluation and contribute to a transparent system of appointments.

d. Statutory Status

In order for a Judicial Appointments Commission to achieve the accountability and transparency that is lacking in the process of executive appointment, it is necessary for the appointment process to be published in government statutes – or at a minimum, in regulations – rather than in policies or guidelines. These elements include:

- Creation of the Judicial Appointments Commission;
- Composition of the commission;
- Appointment process;
- Criteria for judicial appointment, including a commitment to the need for diversity;
- Obligation to maintain statistics;
- Obligation to publish an annual report.[383]

For many observers statutory codification of the appointments commission not only enhances the openness and certainty of the process; it also symbolizes the significance of the commitment to the democratic process, which was at the heart of Martin's democratic reform agenda.

Currently, no jurisdiction in Canada contains a comprehensive account of the process in statutory enactments. While certain provinces include the composition of the committee and the provision of an annual report, and some provinces describe the process and criteria for selection, the majority of the procedures and processes in place merely operate as a policy and are not legally enforceable. Devlin et al. argue that this checkerboard approach to the committee system presents many difficulties for the realization of independence, transparency, accountability, and representation.[384]

While a constitutionalized process would appear to be the ideal means of providing independence for an appointing commission, the practical problems associated with constitutional reform in the past, is likely to make this proposal unrealistic. Moreover, it is suggested that constitutionalization is undesired because it has the potential to freeze the process when demands and needs change over time.[385] Therefore, judicial appointing commissions should be granted a statutory status similar to that of other independent administrative agencies such as the Canadian Human Rights Commission. Furthermore,

such a statutory status would allow for the independence of the appointing commission to be better assured.

Further, it is argued that the barriers to information on the appointments process which exist in jurisdictions result in inevitable problems with transparency and accountability.[386] Because published statutes are required to pass through appropriate democratic stages and are more easily accessible to the public than policy guidelines, they are generally far more transparent and provide the necessary accountability that is desired for the appointments process.

The lack of transparency in the current process of executive appointment to the Supreme Court is illustrated in the fact that the process was never made openly available to the public until Justice Minister Irwin Cotler announced the process in 2004. Moreover, Cotler could not guarantee that the process he provided had even been followed in the past.[387] At the federal and provincial court levels the lack of transparency is demonstrated in the difficulty in gaining access to the information of the appointees. This is because in many jurisdictions the government does not maintain, or at least does not release, statistics on members appointed to the bench. The expressed justification is individual privacy; however, there are at least four counter-arguments to this justification. First, there is a coherence objection; because statistics on gender are often made readily available it is argued that other statistics such as race, ethnicity, disability and marital status should also be made available. Second, the purpose of providing these statistics is generally positive since they assist in evaluating whether any progress on creating a more representative bench has been made. The question is raised as to how the federal government is supposed to know if it is achieving its stated "commitment to appoint more

women and representatives of Canada's ethnic and cultural minorities to the bench"[388] if it refuses to maintain statistics? Third, other elements of government have to maintain such statistics (for example under the federal contractors programme). Thus, there is no reason why the judiciary should be exempt. Fourth, other jurisdictions that are known to take privacy seriously, such as the United States, South Africa, and the United Kingdom, maintain and circulate comprehensive statistics.[389] Therefore, by including a strong statutory commitment to maintain statistics and to pursue appointments that are representative of Canadian society and with the publication of an annual report to track the commission's progress, the government can be held accountable through democratic processes.[390]

Devlin et al. suggest that the publication of annual reports would ensure detailed accounts of the commission's achievements and the explicit identification of demographic information. It is also argued that it would provide a public forum for commissions to suggest further reforms based upon their experiences.[391] Interestingly, while Devlin et al. have outlined in extensive detail the need to statutorily entrench the forms, procedures and criteria of the judicial appointing commissions in order to fully reach the level of transparency and accountability sought by both the public and government (and which this paper fully agrees), there exists very little research which suggests this requirement. Indeed, the reports of the Canadian Bar Association, the British Columbia Civil Liberties Association, the Canadian Association of Law Teachers and other public policy proposals do not mention the need to codify the form, function and procedures of the committee systems in which they propose. Instead, only passing reference to the need of the commission to provide a full annual account of the process

used for selecting and/or nominating candidates for judicial office is mentioned.[392] This is a serious limitation for any proposal for reform since the lack of statutory requirement by the commission to publish details of the appointment process makes it difficult for analysts to scrutinize any change in approach and to determine whether the process remains free of improper political considerations.

6. The Ad Hoc Committee and the Supreme Court Selection Panel

Having identified and analyzed the reasons supporting judicial selection reform as well as the various modes of appointment reform, this paper can now turn to examination of the AHC and subsequent SCSP using the framework established thus far. As described in Part I, the signature feature of the AHC was its focus on the democratization of the appointments process. This innovation was generally geared toward judicial democratization as an end in itself, or as a check on political and judicial abuses. In addition to democratic concerns, the goals of the AHC and SCSP are to strengthen judicial independence; maintain and enhance the quality of appointments so that all appointees are assessed on merit and to the extent possible reflect the diversity of Canadian society; provide a transparent system of appointments that enhances public knowledge and understanding of the process and ensure public confidence that appointments are made for legitimate reasons and do not involve political considerations of any extent; and ensure meaningful Parliamentary and provincial participation into the selection process.[393] It remains to be determined, however, whether the particular powers, procedures, and membership of the AHC and the SCSP are likely to achieve these aims.

(a) Membership

The composition of the AHC and the SCSP was established in the government's Proposal to Reform the Supreme Court of Canada Appointments Process. Here the government determined that committee members should be drawn from a range of constituencies so that the committee is able to have a complete and balanced perspective and expertise. While all committee members would be expected to bring their diverse experience to contribute in an objective and impartial manner, they would not be participating in order to 'represent' particular interests or constituencies.[394] Committee members would consist of one representative from each political party recognized by the House of Commons, a representative from the provinces in the region in which the Justice is to be chosen, a member of the legal profession such as the provincial law societies or the Canadian Bar Association, and two lay members who are neither judges nor lawyers. The framework presented above suggests that to assess the merits of the judicial selection process one needs to consult a range of conditions in order to ensure that the mutual considerations of accountability and transparency are met. In this sense, the analysis must consider the breadth in the decision-making sources and the responsibilities assigned to each of these sources. Thus, this section will analyze the involvement of members of the political parties, provincial representatives, members of the legal community and laypersons.

i. Political Parties

The inclusion of members of political parties on judicial nominating and/or advisory committees has been controversial. For example, the judicial nominating commission that was established in Britain in 2006 generated very little support for including members of Parliament to sit on the commission.[395] Here the British government argued that the inclusion on the commission for England and Wales of one MP from each of the three main parties would potentially give rise to the danger of politicization.[396] In the Canadian context, this view has been corroborated by Ron Levy who argues that importing the party political system into judicial selections does little to enhance the accountability and transparency of the appointments system.[397] Levy argues that the abysmal rates of trust in elected politicians suggests that politicians are not necessarily the right people to provide an adequate hearing for the potential nominees since members generally follow the party line and are polemical and self-interested.[398] In contrast to levy's argument, many supporters of judicial appointment reform argue that the participation of MPs increases democratic accountability and enhances the legitimacy of the appointments process while posing less of a threat to judicial independence.[399] For example, the use of MPs on judicial nominating/advisory commissions in South Africa and the judicial appointments commission in Israel have demonstrated that including members of the legislature on the commission can enhance the democratic legitimacy of the system.[400] In the case of Israel, politicians on the commission were the ones who pushed for a more representative Court, including the appointment of Arab judges to the Supreme Court.[401] For South Africa, the evidence that involvement of elected representatives

on the judicial selection committee contributed to building a more accountable and diverse judiciary is overwhelming. According to Francois Du Bois, electoral accountability via the involvement of political office holders in the appointment process makes a difference. Du Bois suggests that when demographic transformation of public institutions enjoys strong political priority and public support, as it has in South Africa, then a process that places the ultimate decisions in the hands of politicians tends to favour and accelerate representation.[402] This has further been demonstrated in the remarkable transformation of the judiciary's demographic profile since the establishment of the Judicial Selection Committee in 1994. Statistics suggest that while there was only three black male and two white female judges in the higher courts among 166 judges in early 1994, by September 2003 34 per cent were black and 12 per cent female.[403] In other words, between 1994 and late 2003 the percentage of white judges in the higher courts was reduced from 98 per cent to 64 per cent, although white males continue to predominate in the 2003 figures.[404] While Du Bois acknowledges the changing demographic profile of the judiciary since the introduction of the Judicial Selection Commission, he also observes that even with membership within the commission that has been specifically designed to represent the interests of different groups, and follows a transparent procedure, it has not eliminated controversy and suspicions that professional accomplishment has been downplayed to political considerations.[405] Du Bois argues that since all four nominees to the Constitutional Court were vetted, assessed and judged suitable for appointment by the JSC, this should have reassured the public that each nominee was qualified for appointment to the Constitutional Court, thus making it a matter of indifference from

the point of view of merit, who was ultimately selected by the President. However, a public debate continued to rage over the suitability of the selected candidates suggesting that a commission can only provide limited insulation against political controversy.[406] Indeed, this has been confirmed by other events in South Africa including the deliberate targeting of individual judges and the judiciary as a whole with criticisms implicitly tied to race as a result of suspicions arising from the role and selection of judges before the advent of the JSC.[407] Although problems have emerged with respect to the JSC, the general consensus remains that the commission has succeeded especially with respect to diversifying the judiciary. Moreover, the use of elected politicians on the Commission has been credited with this success.

While the involvement of elected representatives on judicial selection commissions is generally favoured by judicial reformers, there remains concern that a selection commission cannot be independent if political representatives are allowed a voice. This concern, however, has been dismissed by Richard Devlin who argues that legislative representation is vital in order to ensure balanced membership and increased accountability on the commission.[408] Furthermore, Devlin argues that because judicial office is a form of political office, there must be some representation from democratically constituted bodies. While Devlin acknowledges that studies of European appointments commissions suggest that legislative representation may increase the connection between political factions and judges, he suggests that this is merely because legislative representation is given to dominate a role. Devlin argues that in order to prevent 'hostage-taking' of the commission along party lines, one will need to expand the definition of representation beyond traditional party lines, and that political

representation should be limited.[409] Further, Devlin suggests government and opposition representatives should be granted equal seats on the commission in order to generate an adequate range of partisan political views. Interestingly, this suggestion has been implemented in the government's proposal to reform the judicial appointments process and was used in the AHCs' selection of Justice Marshall Rothstein.

ii. Provincial Participation on the AHC and the SCSP

A further controversial composition requirement established by the government's proposal to reform the judicial appointments process has been the establishment of formal mechanisms for provincial participation in the selection process of Supreme Court Justices. Here the government has explicitly stated that it would consult with the Attorney(s) General of the region in question to develop and identify a list of candidates to be assessed by the advisory committee. Further, the provincial attorney(s) general from the region would be responsible for nominating a member of the advisory committee. In cases where more than one province is included in the region in question, the report proposes that the provincial attorney(s) general of the region collectively nominate a single member. This would assist in keeping the overall balance of the committee composition and keep the size of the commission in check. The selected member would then participate in the consultation and evaluative process of the initial list of candidates, and assist in determining a short-list of three candidates.[410] The focus by the federal government of provincial participation on the advisory commission is interesting in light of the fact that provincial roles in judicial selection to Canada's high Court has all but vanished from current discussions on judicial appointments reform. While provincial participation in judicial appointments

received considerable attention in the failed Constitutional rounds of the Meech Lake and Charlottetown Accords; in the reports presented to the Commons Justice Committee on judicial appointments reform, only two of approximately a dozen interveners brought the matter of provincial representation up at all.[411] Furthermore, not a single premier addressed the issue of provincial participation in the judicial selections process.

The lack of consideration given to the role of provinces in the judicial selection process to Canada's high Court by the commentators and the provinces presents a legitimate concern, especially since the opportunities for the Court to shape the law have the potential to put the provinces at a decided disadvantage. In fact, even recently provincial premiers have suspected the Court of harbouring centralist biases.[412] Thus, it is interesting that such little attention was given to the Proposal to Reform the Supreme Court Appointments Process by the provinces. This is especially significant in light of the numerous proposals for reform that were generated by the provinces and the federal government throughout the late 1970s and 1980s. For example, in 1978, the Canadian Bar Association's committee on the constitution proposed that an upper house composed of provincial government appointees be charged with ratifying federal government nominations, although it would manage the process by specifying that the House ratify by way of judiciary committee acting in camera.[413] This proposal was followed a year later by Pepin-Roberts Task Force on Canadian Unity who recommended a similar procedure, absent the in-camera suggestion. British Columbia's *Constitutional Proposal* of 1978 also contemplated an upper house of provincial government delegates possessed of the ratification power.[414] The appeal of these proposals to the provinces was that it would

ensure the effective provincial government check on Supreme Court appointments through a ratification process. Interestingly, this reform procedure is now considered highly inappropriate since it is argued that it has the potential to openly politicize the appointments process and gives the provinces too much power and influence over the appointments process.

In addition to the provincial ratification proposal issued in the late 1970s, Canada continued to witness a host of different reform considerations including the establishment of a consultative process between federal and provincial ministers,[415] the establishment of a constitutional court separate from the Supreme Court,[416] and the establishment of the inter-governmental consultative model where the provinces would nominate a potential appointee who would then be confirmed by the federal government.[417] Clearly, this list of reform proposals is indicative of the problem of the Court's legitimacy in the eyes of the provinces, as expressed in the language of federalism.

The debate was, however, to shift dramatically with the introduction of the Charter. Here, the legitimacy of the Court shifted from concerns of federalism to issues of a Court that decides disputes about the rights of citizens as well as the powers of governments. As a result, the appointments status quo was assailed on the grounds that there was nothing to prevent the federal executive from making bad appointments. Thus, Peter Russell argued that an institutional check was required that would balance the federal executive's power. Here, Russell suggested the use of provincial governments as an effective check since the provinces would ultimately take positions on Charter issues contrary to those of the federal government.[418] Russell argued that when vacancies occur, the provinces will promote different candidates, thereby encouraging the prospect of ideological pluralism

on the Court. Although this has been noted above, it is important to re-emphasize here that Russell's solution to the problem of ideology on the Court was to create an element of diversification that would serve to combat the threat of ideological homogeneity, especially during the period of one party dominance characteristic of Canadian politics.[419] For Russell, the solution has been provincial input into the selection process as a solution to the criticisms of the appointing process.

It is easy to see why in the 1970s and 1980s much of the focus on appointment reform concentrated around provincial input. Debates over division of powers and the status of Quebec dominated the political agenda; and recognition of provincial roles in the selection of Supreme Court judges formed a logical part of this agenda. For Jacob Ziegel, however, the importance attached to the role of the provinces in the selection of Supreme Court judges has been over-emphasized. Ziegel argues that the provincialism in the selection process has the potential to lead to the 'arbitrary' type-casting of judges.[420] Here, Ziegel suggests that it is exceedingly difficult to find an individual that would be suitable for office and that holds loyalty to the province from which he/she was selected. Furthermore, Ziegel argues that the federal government should not be tied to rigid constitutional conventions in the selection of judges, and that most Canadians are willing to give the federal government leeway with regard to individual circumstances and the range of available candidates.[421] Moreover, direct provincial input has greatly diminished since the number of division of powers cases coming before the Supreme Court is quite modest. It is now Charter cases and criminal cases that compose the Court's docket, not cases involving constitutional issues.[422] This could explain why provincial representation

on the AHC was not a primary issue for the provinces, the academics and political commentators that were consulted during the judicial committee's hearings.

Further to concerns of a provincial role in judicial selection, Carl Barr's comparative research on state/provincial participation in judicial selection suggests that the experiences in other federal systems should not compel Canada to the kind of provincial role in the selection of Supreme Court justices that has been suggested in the provisions of the Meech and Charlottetown Accords.[423] Here, Barr argues that the Accord's provisions authorized a substantial provincial role, both in its constitutional status and in the range of activities it involved, than is characteristic of any of the world's other federal systems.[424] Moreover, state participation in the selection of judges to federal appellate courts occurs only in Germany; federal systems more typically give no role to state or provincial governments in the selection process.[425] Thus, there is no substantial evidence to suggest that provincial membership on judicial appointment bodies provides for a more democratic selection process.

iii. Judicial Membership

In the case of judicial membership on the advisory committee, the government recognized the importance of having a sitting judge occupy a position on the committee since it is thought that a judge can bring an intimate knowledge of the courts and the legal system. In fact, one witness argued that judges are well placed to help the advisory committee understand and assess the desirable attributes for judicial candidates and suggested that this was one of the main reasons why judicial members sit on the judicial selection bodies in other jurisdictions such as Ontario and South Africa.[426] However, the government was especially weary of allowing a sitting judge a spot on the commission.

The government argued that a sitting judge would be in a sensitive position in assessing the merit of judicial colleagues. Therefore, the government proposed that the advisory committee include one member who is a retired judge, and that this member would be nominated by the Canadian Judicial Council.[427]

A judicial role in the selection of judges is often endorsed as a step that reinforces the independence of the judiciary. In the case of India, this has been a particularly important argument, and has also been reflected in the support for the Lord Chancellor's role in Britain (as both a cabinet minister and a judge), and for the consultative role of judges in European countries where governments choose judges from among the career judiciary rather than the bar.[428] However, the involvement of the judiciary in the selection of judges is not considered a prerequisite for judicial independence in all countries. For example, in the United States, judicial involvement in the selection of judges is not only criticized but labeled "political interference". The notion that a prominent judge could be involved in the appointment of judges is very distasteful for Americans. This is because judges are generally considered to hold specific political views that are not always compatible with those of the general public and there is concern that judges will appoint other judges who hold similar view points.[429]

Carl Barr has demonstrated in his comparative work on judicial selection processes that practices outside of Canada largely suggest that judicial involvement in judicial selection is as likely to lead to political infighting as legislative involvement in the process.[430] Thus, Barr concludes that there is no evidence to suggest that judicial involvement in the selection of judges offers a positive contribution to the appointments process.

In Canada, the presence of a member of the judiciary on the advisory commission has been considerably debated. The panel of the Canadian Association of Law Teachers on Supreme Court appointments has argued that the importance of expertise and credibility amongst one's peers clearly suggests the need for representation from the judiciary and the Canadian bar.[431] On the other hand, academics such as Jacob Ziegel and Peter McCormick suggest that the presence of a judge on the committee could result in undue weight given to one individual's opinion.[432] However, the South African experience suggests that this fear is merely conjecture. For example, the nomination of judicial candidates by a diverse group has meant that in the South African experience the identification of potential judges is no longer solely in the realm of sitting judges. A considerable broader range of interested and knowledgeable persons is now involved in finding suitable candidates. They are not limited to official representatives of the legal profession including judges, but include groups dedicated to the transformation of South African law and the judiciary, such as the Black Lawyers Association and the National Democratic Lawyers Association. These associations have been very active in identifying and supporting candidates whose presence on the bench would serve the cause of transformation.[433] Thus, the South African experience has demonstrated that the involvement of other segments of society in the selection process have increasing weight over who is chosen to sit on the bench, and that the opinion of judicial representatives does not necessarily provide for the final choice.

The argument that judicial involvement can be problematic for judicial selection has been further eroded through evidence that suggests that there have been a number of instances where the ultimate selection has not been in accordance with the views of the

judge on the committee.[434] Indeed, the Chief Justice of the Constitutional Court of South Africa has stated:

> "While due weight has always been given in the selection process to the views of the "head of court" there is no belief amongst members that he has any "prerogative" in the matter, nor have members deferred unduly to his views. I can recall a number of instances where the ultimate selection has not been in accordance with the views of the "head of court".[435]

Furthermore, it has been argued that involving lower ranking judges in the appointments process may encourage an increase in the appointment of women, minorities and those individuals from non-traditional education backgrounds.[436] While the evidence suggests that the involvement of the judiciary in the selection process is not as problematic as some skeptics have argued, it remains that those who do advocate a judicial role on the commission suggest that judges should not constitute a majority of the members.[437] Similar to the government's proposal to reform the Supreme Court, commentators suggest the presence of one judicial member on the committee so that the commission has access to his/her expertise in assessing the professional components of merit, but does not run the risk of having the appointment process captured by judges.

iv. Legal Membership

Traditionally, legal organizations such as the provincial law societies or the Canadian Bar Association have been consulted by the Minister of Justice in relation to Supreme Court appointments. This involvement recognized the key role that lawyers play in the judicial system, their understanding of the attributes necessary for a 'good' judge, and their knowledge of lawyers in the region who may be considered as potential candidates. Furthermore, the expertise and perspective of the legal profession is considered by the government of Canada to be important to the work of the advisory

committee and thus proposed that one committee member should be a member of the legal profession.[438] This member is to be nominated by the law society of the region in question, and in regions of multiple provinces the law societies of those provinces would nominate a single member.[439]

Similar to judicial membership, involvement of legal organizations in judicial selection processes has also received criticism. For example, Peter McCormick has argued that while the Canadian Bar Association has played a considerable role in establishing the current advisory commission, they should not be represented on the committee since a senior judge (who no doubt will hold membership in either the CBA or his/her provincial law society), will be present on the committee.[440] In addition to concerns of representation duplication, the involvement of the legal community in judicial selection presupposes that professional peer evaluation will produce a better pool of candidates for appointment by the executive. The assumption, however, does not necessarily rest on firm ground. Professions do not necessarily produce criteria of their own excellence, and leaders of the legal profession may not have the experience or expertise in appellate adjudication so as to be the best arbiters of the kind of judicial excellence that is required of the Supreme Court.[441] In fact, it has been argued that in terms of nominations to the Supreme Court, the bar association input may be less helpful than for other courts since so few lawyers – and thus so few leaders of the bar associations – engage in appellate advocacy and fewer still in cases that reach the Supreme Court.[442] In contrast, however, many judicial selection reformers stress the need for legal representation given the importance of expertise and credibility amongst one's peers.[443] Further, it is argued that the Bar has a valid, professional interest in the

appointment of judges.[444] Moreover, it is suggested that the public, through the elected politicians, is entitled to the full benefit of its professional opinion on prospective candidates for appointment.[445] In addition to these arguments it has been suggested that because members of the legal community have been regularly consulted under the executive system of appointment, commentators argue that including a member of the CBA or relevant provincial law society poses no significant problems for the selection process since it is already an accepted part of the system.[446] Thus, including members of the organized legal profession on the advisory commission is necessary both for the legal background the member brings' to the commission and their expertise in assessing merit.

In addition to membership from the organized legal profession, many reformers have argued for the presence of a member from the legal academic community. In many cases this has meant giving a seat on the commission to a dean of law or his or her designate.[447] This recommendation is largely a result of endeavors to address concerns of accountability. Commentators have suggested that a dean of law can play an important watchdog function since he or she has significant ties to the legal community. Moreover, it is argued that because the dean is an academic, the representative can ensure that the committee is informed of current research on appointment matters.[448] Further to support for a dean of law on the advisory commission, Lorraine Eisenstat Weinrib has argued that academics trained in law and fields close to law are better suited to assess the merits of a candidate since they tend to have the experience working in the appellate courts, especially in specialized areas of law like the Charter.[449] In fact, for Weinrib the commission is better suited to have an academic presence instead of membership from the legal profession such as the Canadian Bar Association and the provincial law

societies. The proposal set forth by the government of Canada does not indicate the need to have a legal academic on the commission and subsequently it has not been given any consideration.

v. Lay Membership

In an attempt to address the dismal rate of public participation in the selection of judges in Canada, the government proposed the inclusion of two lay members on the judicial advisory committee. Generally, lay participation on selection committees in order to represent the public interest is seen as a given in the democratic context. However, public participation has historically been rather limited and it was not until judicial screening committees became institutionalized with regard to all court levels in the late twentieth century that lay participation in the selection of justices became accepted as a democratic norm.[450] The democratic nature of the involvement of members of the public in the selection of justices has, however, been a contested issue. Lorraine Weinrib has rejected outright the use of a public representative and has argued that a lay member can represent his or her own views or those views of the federal Minister of Justice who appointed the individual, but he or she simply cannot be presumed to represent the views of the public.[451] Moreover, Weinrib suggests that a lay member is an inappropriate candidate to offer his or her considered, professional opinion on the competence and relevant qualities of character of the potential appointee because he or she is simply not well enough informed to make this decision. Furthermore, Weinrib argues that lay people may generally be regarded by the committee as an outsider and his or her views may not be considered seriously.[452] As a result, Weinrib believes that lay people have little that is useful to contribute in deliberations on potential judicial candidates. While Wienrib's

arguments may seem extreme, she is not the only commentator to dismiss lay participation in the selection of justices. Jennifer Smith has also supported the claim that no one individual can represent the views of the public.[453] Smith argues that lay members are only capable of considering his or her own personal opinions or that of the government by which he or she is appointed.[454] Concern surrounding the perpetuation of government held views by members appointed directly by the political executive has also been raised by Peter McCormick who suggests that there is no "clean" method for designating such individuals.[455] For McCormick, there is no unbiased way for the federal executive to choose members of the public to sit on the committee.[456] Therefore, the solution is to choose members from an autonomous pre-existing group such as the Assembly of First Nations or the National Action Committee on the Status of Women where a diversity of membership precludes a narrowly focused choice.[457]

The counter-argument that lay membership is not appropriate for the task of advising the executive on potential appointees to the Supreme Court of Canada has been rejected by all existing Canadian judicial appointment committees as well as those commentators who argue for a more democratic process for appointing Supreme Court justices. Generally it is held that lay members are necessary for the selection commission because they bring experience of modern recruitment and selection processes from industry, as well as business experience, performance appraisal skills and interviewing skills. In addition, lay members are often considered to provide greater diversity and experience of the wider world than the judicial, legal and political members of the commission.[458] Furthermore, it has been suggested that citizen involvement in the selection of judges is an excellent alternative to the problems associated with the

involvement of political parties in the selection process.[459] This is because citizens can bring forward a broad and nuanced range of opinions and in contrast with political parties, public participation brings complex and marginal views before a selections committee and allows members directly to hear and see members of the public.[460]While the extent to which lay members are able to bring useful skill-sets to the commission is beneficial for the operation of the commission, the partisan nature of the selection of lay members to the commission cannot be understated. In response to this concern, Richard Devlin et al. have devised a solution to the potential problem of biased reasoning amongst lay members through the creation of a non-partisan method of appointment for lay members. Devlin et al. propose that each lay member is to be appointed by an all-party committee of the federal government and appointed through an order-in-council.[461] Devlin et al. maintain that this would allow for a move away from strict partisan appointment to the commission while at the same time allowing for adequate screening of the abilities of the individual. Furthermore, Devlin et al. argue that the process of an all-party committee is more transparent than informed arrangements currently used and may provide for a better mechanism to achieve diverse representation on the commission.[462]

In addition to concerns over the involvement of lay personnel on the advisory commission, there also exist strong differences in opinion over the amount of lay representation required on the commission. While the government of Canada has suggested that two lay people would be adequate for public representation on the commission, Richard Devlin et al. suggest that lay membership should constitute the majority membership on the commission.[463] This is because lay membership acknowledges the fact that there are considerations for appointment that extend beyond

professional ability that should be assessed, including personal characteristics and human qualities (although these qualities remain undefined). Furthermore, Devlin et al. argue that bench, bar and political representatives may be tempted to perpetuate elitist values that are incompatible with aspirations for a more democratic system.[464] Moreover, for Devlin et al. there is a pressing need to ensure that no one group has a monopoly over appointments. Thus, the commission should consist of enough members to give an effective voice to all the constituencies that hold a stake in the judicial appointments system.[465] In the case of the current advisory commission composition, political membership exceeds membership from all other sections. This is potentially problematic as it gives political representatives greater influence over who is the best candidate to be appointed to the bench and poses concerns for the politicization of the commission. Furthermore, the constituted majority of political representatives suggest that power can simply be shifted from the political executive to the political parties represented in Parliament.

vi. Diversity in the Composition of the Advisory Commission

The Canadian government reform proposal on the Supreme Court appointments process stresses the importance of developing a commission that is to the extent possible, reflective of the diversity of Canadian society.[466] Diversity in the composition of the committee is considered to be of fundamental importance as it will help to ensure that a wide range of insights and experiences will be reflected in the assessment process. As Devlin et al. suggest, identity representation should not only be required amongst the candidates for the bench but should inform the entire judicial appointments process, including membership on the commission itself.[467] Furthermore, it has been suggested

that the diversification of the composition of the committee will strengthen public confidence in the commission's impartiality and reduce the danger that the commission will be dominated by a single faction or interest group.[468] There is evidence to suggest that commissions that work well in other jurisdictions are generally those which form a strong collective identity and which the members do not see themselves as representatives of the professional and social groups from which they are drawn.[469] For example, the South African Judicial Service Commission is comprised of a large number of individuals – twenty-three in all – that are appointed in their capacities as judges, practicing lawyers, a teacher of law, and political representatives. Despite inevitable areas of disagreement amongst the members of the commission, it seems that the commission functions as a cohesive and coherent group.[470] While some members of the commission commented on the disadvantage of decision-making in such a large body, others emphasized that the size and diversity of the commission ensured that no one perspective dominated.[471] Thus, for a person to be appointed he or she must win the wide support from across the different groups in the commission.

Establishing the diversification of the advisory commission through the implementation of a specific policy that aims to create a 'mix' of members has the potential to be problematic since it can be difficult to develop appropriate criteria to assist in the inclusion of historically marginalized groups. For example, gender is a relatively straightforward term, generally meaning a fair balance between the sexes, but the criteria for other historically marginalized groups is more difficult to ascertain. In the case of Aboriginal representation on the commission, problems may arise as a result of the small minority of Aboriginals that will possess the necessary qualifications to participate in the

functioning of the commission. Furthermore, the proportionate representation for such a small group will mean that in reality there will be very few representatives, so that ultimately their participation will be merely symbolic rather than substantive.[472] Thus, Devlin et al. suggest that in order to remedy this problem numbers that are greater than the group's proportion to the population will be required so that the group may have an effective presence.[473] In order to achieve the necessary diversity in the composition of the commission, representation considerations will have to be made by the federal executive as well as the legal and judicial personnel that will be required to forward names to the Minister of Justice for consideration.[474] While it is difficult to disagree with the need to ensure that the principle of diversity informs the entire judicial appointments process, there remains the possibility that too great an emphasis can be placed on trying to achieve a proportionally representative judicial selection commission and judiciary. It will be important for those responsible for selecting members of the advisory commission to understand that seeking diversity in the composition of the commission remains for some the most controversial aspect of the appointments commission. Indeed, there are limits on the extent to which the commission can be both diverse in its own composition and achieve a more diverse judiciary, at least without first addressing the systematic biases in legal education and the legal profession.[475] Therefore, the need to establish a selection commission that is representative of Canadian society should not be paramount to the basic criterion of individual merit that should inform the selection of candidates to the commission. Instead of simply endorsing a broad statement identifying the need for representation on the commission, diversity should inform the conditions of merit with supplementary measures that expressly include demographics and the need for diversity

in the composition of the commission. This would ensure that diversity does not become a mere additive to other 'meritorious' considerations. An explicit policy statement recognizing the need to diversify the bench and to have it reflect the community which it serves is a necessary approach in order to integrate the goal of representation as part of legitimate assessment concerns, and avoid the risk of merely paying lip-service to the recognition of diversity.[476] The notion of including diversity within the concept of 'merit' has received official endorsement in the Ontario Judicial Appointments Advisory Committee where the committee is required by statute to recognize the desirability of 'reflecting the diversity of Ontario society' in their nominations of provincial judicial appointees. In South Africa the constitution requires that 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.[477] Thus, this statutory definition of diversity as an element of merit within the process to select judicial candidates should also inform the process used to select the candidates for the committee from which judicial selections will be made.

It is important to remember that members of the advisory commission should not be considered representatives of any group or constituency. Their duty is merely to advise the federal executive on the qualifications of potential appointees and inform the government of their preferred candidates. However, a commission that fails to reflect the make-up of the society from which it is drawn may not have the confidence of that society.[478] Indeed, it has been argued that when an institution is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution.[479] Therefore, a range of considerations support the argument that legal

institutions (including the judiciary and the commission that selects or advises on judicial candidates) should reflect the society of which it is part. These considerations include; the argument that diversity in the composition of the commission will enhance the democratic legitimacy of the selection commission. As Dame Brenda Hale has observed, "In a democratic society, in which we are all equal citizens, it is wrong in principle for authority to be wielded by a very unrepresentative section of the population...not only mainly male, overwhelmingly white, but also largely the product of a limited range of educational institutions and social backgrounds."[480] In the similar respect that greater diversity in the make-up of the bench will increase accountability of the judiciary and public confidence in their work, so to should accountability and confidence be enhanced in the selection commission if the committee reflects the diversity of the society in which they represent. Indeed, Kate Malleson has argued that diversity is an alternative form of accountability and legitimacy; "Since the judiciary cannot comply with the democratic requirements of electoral accountability, this method of social accountability amounts to an essential form of legitimacy."[481] Thus, if one applies this theory to judicial selection commissions, then the legitimacy of the commission can only be secured through direct efforts to maintain a commission that is representative of Canadian society. In addition to the democratic legitimacy argument, there is simply no room in the selection process to the commission for direct or indirect discrimination of candidates on unacceptable grounds.[482] It has been suggested that a system of selection that relies on soundings and a network of contacts in conjunction with an unarticulated concept of merit is open to [at least in perception] such discriminatory influences.[483] Therefore, it is paramount that any

process used to select committee members actively articulates the concept of diversity as a meritorious component of selection.

The diversity component of the selection commission as established in the Government of Canada proposal to reform the Supreme Court of Canada appointments process is simply a broad statement identifying the need for representation without including supplementary measures for what is needed to satisfy this requirement. Without including specifics, the government has not actually changed the disadvantageous structures and barriers imposed on under-represented groups seeking appointment to the advisory commission. In this sense, the government can applaud its commitment to diversity if an individual from a minority group is appointed and shirk responsibility if he or she is not chosen, because it has articulated a "commitment" to diversifying both the bench and the commission used to assist the executive in judicial appointments. Thus, if the government is serious about enhancing the democratic legitimacy of the judicial appointments process, then inclusion of specific arrangements outlining how diversification of both the bench and the advisory commission is to be achieved is necessary to fully establish a judiciary and commission that is representative of Canadian society.

vii. Summary

The current breakdown of the composition of the advisory commission is as follows:

- Four political representatives. This comprises one member from each recognized political party in the House of Commons;
- One retired judge to be nominated by the Canadian Judicial Council;
- One provincial representative from the region in question
- One member of the legal profession nominated by the law society of the region;
- Two lay-persons to be nominated by the Minister of Justice.

In addition to the above members, the government proposed that the Chair of the advisory committee be chosen from amongst its own members. Finally, the members of the commission are to be selected when a potential vacancy on the Court occurs. Thus, there is no fixed term limit and it is likely that each member will only serve on the committee once in his or her lifetime. While the government has acknowledged the need to include lay members on the commission, there is no established guideline to suggest how or if these individuals are to be remunerated for their work. Similar to the guidelines established by Richard Devlin et al. for selection to the commission, this paper proposes that each layperson be paid on a per diem basis for their service to the commission, with the amount to be determined by the commission itself.[484]

As noted above, the presence of political and lay members is likely to be a debated issue. Clearly, the idea of an independent commission seems at odds with allowing political representatives a voice on the commission. However, to ensure a balanced membership and increased accountability, there must be some legislative representation. Thus, this paper agrees with the government's mandate to give a role to elected political representatives on the advisory commission. However, there remains the need to be concerned that legislative representation has been given too prominent a role. While non-political members constitute the majority on the commission, political representatives do form the majority of a single group selected to sit on the commission. This has the potential to become problematic since studies of European appointments commissions suggest that legislative representation may increase the "connection between political factions and judges."[485] In order to prevent the potential 'hostage-

taking' of the committee and to expand the conception of representation beyond traditional party-driven definitions, the representation from the other groups involved in the committee process should be enhanced so that their total numbers significantly exceed those of elected political representatives.

Lay membership is often seen as a significant move in improving the degree of public participation in the appointments process.[486] Such participation is important since representation of the public interest has over the years become accepted as a given in the democratic context. Furthermore, the democratic legitimacy of the appointments process rests on the ability of members of the public to be actively engaged in the selection and appointment of justices. Thus, this paper agrees with the Government of Canada's inclusion of lay personnel on the advisory commission. However, there are a number of limitations with regard to the number of lay personnel and the selection procedures of the committee's lay members that need to be addressed. First, the involvement of the Minister of Justice in selecting lay members to the committee is problematic especially if one considers the argument that an appointee of the government will generally express the views of the government from which the appointment was made. Therefore, it is suggested that the Minister of Justice remove him or herself from the process of lay selection. Instead, lay selections should be made from an all-party committee of the House of Commons that is established solely to seek acceptable lay representation for the advisory committee. This would allow for a move away from strict partisan appointments to the commission, yet allow for adequate screening of the abilities of the individuals.[487] In addition to the problem of responsibility for selecting committee members, there is also concern over the number of lay members the government has suggested to be

beneficial for the functioning of the advisory commission. Here it is suggested that lay personnel constitute four of the ten positions on the commission. This would allow for greater public participation in the selection of Supreme Court justices as well as remove the balance of power on the committee from political representatives.

Just as important as political and lay representatives are bench and bar representatives. The involvement of members of the judiciary and legal profession on the committee is necessary due to their expertise in assessing the professional components of merit that will be used to determine the ability of potential appointees to carry out the duties and responsibilities associated with the process of adjudication. This paper agrees with the Government of Canada proposal to limit the involvement of judges to one member. This is because there is legitimate concern that the involvement of a large number of justices in the potential selection of Supreme Court judges would ensure that little would change from the status quo of executive appointment. As Baroness Hale has observed concerning the proposed English commission: "Depending on the composition of the commission, the [new] process might be even more under the control of the existing judiciary and the potential for 'cloning' could be just as strong."[488] This same argument holds true for members of the legal profession. Thus, this paper agrees with the Government of Canada position that only one member of the legal community be appointed to the advisory committee.

While members of the bench and bar have been given adequate representation on the committee, there is no indication that members of the legal academia are to be included on the advisory committee. The lack of academic representation should be considered quite unfortunate since senior legal academics possess a number of skills and

expertise that are not available to other members of the commission. In particular, legal academics are likely to have a long-term view of developments in Canadian constitutional and comparative law and judging; and to have an understanding of trends in legal scholarship and legal education not readily available to other members of the committee. Legal academics are also well versed in good legal writing and are therefore better able to assess the work of potential judicial appointees before they are selected to sit on the bench. Finally, legal academics are more likely than other candidates to have knowledge of the judicial appointments process and therefore more likely to have opinions on what constitutes an acceptable system of appointments. Therefore, this paper proposes that one position on the advisory committee be granted to a member of the Canadian legal academic community to be appointed by the same all-party committee of the House of Commons tasked with the job of finding the lay personnel to sit on the commission.

Finally, there have been a number of concerns expressed with regard to the practical implementation of the compositional structure of the advisory commission. The Government of Canada has expressed reservation with respect to creating a commission that is effectively too large to adequately assess and choose a candidate in the required time frame. However, it is useful to note that South Africa's Judicial Service Commission is composed of twenty-three members and has thus far encountered few problems; in fact, it is seen to have worked very well in the appointments process.[489] Furthermore, the judicial appointment committee in Ontario is composed of thirteen members and has thus far worked extremely well in appointing justices of high quality in a timely and efficient manner. Lastly, and most importantly, the significance of the commission's role should

not be undermined by potential administrative technicalities. The judicial office is vitally important to the functioning of Canadian society and measures must be implemented to ensure legitimacy and accountability in the appointments process. One such important measure is to provide adequate representation in the composition of the advisory commission and the suggestions outlined above are intended to achieve this goal.

(b) Committee Procedures

i. Introduction

In much of the literature on the various judicial appointment reform proposals there has been a clear concern to provide a balanced cross-section of the various constituencies with the greatest interest in appointments to the Supreme Court.[490] Here one can see an interest in broadening participation, but little manifestation of concern as to the quality of the candidates or the qualifications desired. Indeed, the only reference to procedure in past reform proposals has been the recommendation that the committee recommend a short-list of names of members of the bar and/or a judge from a provincial or federal court. The reports generally indicate that a list of three would be optimal and in its only reference to criteria, the reports note that while previous judicial experience is an advantage, the work and role of the Supreme Court differs significantly from that of other courts so that it should not be made a prerequisite for nomination.[491] The successful working of a committee that consists of such divergent membership, such as the AHC, is difficult to imagine. Without a stipulated mode of proceeding and without criteria for evaluation, it is difficult to determine how the committee would succeed in naming candidates with undisputed merit. Thus, it is essential that any proposal to reform the

Supreme Court of Canada appointments process consist of a detailed set of criteria for evaluation of potential nominees.

In the initial proposal to reform the Supreme Court of Canada appointments process it was decided that the mandate of the Supreme Court of Canada Appointment Advisory Committee would be to assess, on a strictly confidential basis, the merit of candidates provided to it by the Minister of Justice.[492] Furthermore, the work of the committee was to be based upon a written mandate from the Minister and established criteria. The committee was then to provide an unranked short list of three candidates with an assessment of their merit and a full record of the consultations conducted.[493] While the proposal acknowledged the importance of providing a clear mandate outlining the objectives of the process and the criteria to be applied in assessing merit, it did not provide any specific details or examples of what criteria would be useful for the appointing authorities. Indeed, the proposal suggests that it should remain the responsibility of the advisory committee to determine its own process, subject to guidelines established in the mandate letter provided to the advisory committee.[494]

Although the proposal to reform the Supreme Court appointments process does not provide a list of the qualities necessary to hold judicial office, it does suggest that the committee be responsible for undertaking an in-depth analysis of the candidates' curriculum vitae, judgments and academic articles. While such an analysis is clearly vital to the selection process, it will remain limited unless the committee is provided with a specific mandate that outlines the preferred qualities necessary for good judging. For example, Peter Hogg has determined six qualities that he considers to be essential in determining the ability of a judge to serve with distinction on Canada's highest Court,

these include; the ability to resolve difficult legal issues with technical legal skills, wisdom, fairness and compassion; demonstration of the ability to have energy and discipline to diligently study the materials filed in every appeal; be able to maintain an open mind on every appeal until he or she has read all the pertinent material and heard from counsel on both sides; demonstrate that he or she always treats counsel and the litigants who appear before the court with patience and courtesy; and finally, be able to work cooperatively with the other members of the court and help produce agreement on unanimous or majority decisions, and to do his or her share of the writing.[495] Thus, it is necessary that the advisory committee establish similar detailed guidelines to assist the committee in determining what personal and professional qualities a potential nominee must exhibit in order to be considered a good candidate to sit on the bench.

ii. The "New" Process of Appointment

The 2004 government proposal to reform the Supreme Court of Canada appointments process concluded that in-person interviews of candidates should not take place either in-camera or in public.[496] Here the government determined that public interviews of nominees would be unlikely to elicit any relevant information that is not otherwise available through consultations and documentary analysis. Moreover, the government argued that direct candidate interviews may result in questioning that may be inappropriate and embarrass the candidate thereby deterring potentially good candidates from allowing their names to be considered. The proposal stressed that the risks of in-person interviews far outweighed the minimal benefits that would be derived from the process of public hearings.[497] In 2005 with the announcement of the retirement of Justice John Major, then Minister of Justice Irwin Cotler introduced a new and elaborate process

that would be used to fill the Supreme Court vacancy. After the usual information consultations with the attorneys-general, chief justices, and leading members of the legal profession, the Minister would then submit a short-list of five to eight candidates to the advisory committee. The committee would then provide the Minister with a short-list of three names from which the appointment would be made. Further, this process would take place on a confidential basis which was considered to be of vital importance to the government who felt that the overall success and effectiveness of the committee process would rest on the confidence of all participants and observers in the confidentiality of every aspect of the committee's work. However, the final step to appointment to the Supreme Court of Canada would be public: it was proposed that the Minister of Justice (but not the appointee) would appear before the Standing Committee on Justice to explain the selection process and the qualifications of the person selected. Thus, in late 2005 an appointed advisory committee provided the Minister with a short-list of three names to be considered for appointment to the Supreme Court of Canada. Unfortunately, on 29 November 2005, before the final selection was made, the government was defeated in the House of Commons and Parliament was dissolved for the election that was to take place on 23 January 2006. One of the policies of the newly elected Conservative government was a public, parliamentary interview process for proposed appointees to the Supreme Court of Canada.

The new Conservative Minister of Justice, Vic Toews, decided to work from the short-list provided by the advisory committee appointed by the previous government. The Prime Minister, no doubt in consultation with the Minister of Justice, chose one candidate from that list. That candidate then had to submit to the new public interview process.

With the agreement of all the party leaders, the government established the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada. The Committee consisted of twelve MPs drawn from each party in proportion to their standings in the House of Commons. The Minister of Justice was the chair of the committee. The committee proceeded to hold a televised hearing on 27 February 2006. The hearing opened with a short introduction of the nominee and the process by the chair, it then continued with opening remarks by Peter Hogg and Justice Marshall Rothstein, the justice considered for appointment by the Prime Minister. The hearing then proceeded with questions from the members of the committee and concluded with a closing statement by both Peter Hogg and the chair of the committee Vic Toews. During the question period, Justice Rothstein was asked approximately sixty questions in two rounds of questioning.[498]

The committee did not prepare a written report and it was noted that the Prime Minister watched the proceedings on television and after the conclusion of the hearing had the Minister of Justice report directly to him. As well, at the conclusion of the hearing, the Minister invited the members of the committee to communicate directly to the Prime Minister. The result was a foregone conclusion in that the nominee's credentials, his statement to the committee and his answers to questions left no doubt as to his suitability for appointment, and the reaction of the committee members left no doubt that they would advise the Prime Minister to proceed with the appointment. Two days after the hearing, the Prime Minister announced in a written statement that he had selected the nominee and would recommend him for appointment by the governor in

council. Justice Rothstein was duly appointed, and was sworn in as justice of the Supreme Court of Canada on 6 March 2006.

iii. Parliamentary Scrutiny of Supreme Court Nominees

The questioning of Supreme Court nominee Justice Marshall Rothstein before an ad hoc parliamentary committee has been followed with great interest by those concerned with addressing the problem of executive judicial appointment. The primary concern in this debate is whether Supreme Court judges should be subjected to public scrutiny either before or after their appointment by the legislature. Such concern has been exacerbated by the experiences of the United States Senate Judiciary Committee confirmation hearings which have undermined the reputation of such hearings. The criticisms provoked by the questioning of Robert Bork and Clarence Thomas, in particular, have raised much doubt about whether confirmation hearings are a suitable mechanism for judicial selection. Thus, concerns about the U.S. precedent have loomed large in the Canadian debate on judicial appointments. Indeed, public confirmation hearings of judicial nominees has been subject to intense critical scrutiny in Canada with many observers arriving at the conclusion that public questioning can pose a large danger to judicial independence and threaten a candidates' right to privacy.

The argument that confirmation hearings are inherently bad for Canada and the judicial appointments process in particular is increasingly difficult to sustain. The fact that a small number of hearings in the United States have attracted criticism does not mean that the system itself is inherently flawed. In reality, most Senate confirmation hearings are relatively restrained affairs; indeed, they have sometimes been criticized for

verging on the bland.[499] However, the weaknesses of the confirmation process that currently occupy academics, judges and politicians in the United States are much less about the content of the hearings than the political manipulation of the procedure leading to excessive delays and leaving judicial posts unfilled.[500] Furthermore, there is no evidence to suggest that the degeneration of the hearings in the United States has been replicated elsewhere. Countries that have an established confirmation procedure such as South Africa and Israel have not faced the same problems as those experienced in the United States. Rather, both South Africa and Israel have attributed the success of their relatively new democracies to their legal institutions and judicial selection procedures in particular.[501]

A further criticism of public hearings for judicial candidates is that they undermine the quality of the judiciary by deterring first-rate candidates from coming forward and facing public scrutiny. While there is some anecdotal evidence to support this claim, the argument remains generally unpersuasive both normatively and empirically. In fact, where public hearings are used, the deterrent effect is not sufficient to affect the overall quality of the judiciary. In South Africa, for example, the introduction in 1996 of public interviews of constitutional court and high court judges by the Judicial Service Commission (a body which includes politicians) led to widespread fears that good candidates would not apply. This did not happen, and the quality of the Constitutional Court is widely regarded as being extremely high.[502] Moreover, South African judges are generally supportive of the system of public interviews, believing that it gives them the opportunity to strengthen public confidence in the Court. Similarly, U.S. judges have often gone on record in support of the process as a means of enhancing their legitimacy.

Public interviews also have the potential of offering less obvious advantages such as allowing judges to reveal certain information about themselves in a controlled environment. For example, in 1999, Justice Edwin Cameron, an openly gay member of the South African high court and a highly respected judge, informed the Judicial Service Commission that he was living with AIDS at his interview for a post on the Constitutional Court.[503] His subsequent appointment undoubtedly reinforced the commission's reputation for making non-discriminatory appointments.

While these examples are evidence that public nomination or confirmation hearings do not automatically undermine judicial independence, invade a candidates' privacy, or deter good candidates from applying, the risk of these outcomes cannot be dismissed altogether. In fact, many commentators in common law countries like Canada continue to conclude that such risks are not worth the benefit of increased openness and transparency.[504] However, in light of the more powerful role of the judiciary and the increasing demand by the citizenry for a more transparent and accountable system of appointments, it would seem that public hearings of potential Supreme Court nominees may be the only way forward. Citizens have the right to be properly informed about the people who sit on the bench of their highest court and determine controversial issues of great moral and political sensitivity and judges at this level cannot be expected to hide from such obligations. Indeed, it would seem that both the current government and the Canadian citizenry have accepted that a form of public questioning of Supreme Court candidates or appointees by elected representatives is necessary to provide a link between the democratic process and greater public engagement with the judicial appointments process, and that the legislature is the best forum for this process.

It is clear that in Canada the impetus for the introduction of hearings was as much driven by party considerations as by principle. For the Conservatives, scrutinizing judicial nominees holds out the promise of checking judicial activism. Conversely, questioning before a liberally minded parliamentary committee might be a means of checking the nomination of an extreme conservative. Further, it would be naïve to expect that party politics could be removed entirely from the equation, but it is clear that its presence does not undermine the sound principled reasons for change nor does it pose the danger of politicizing the judiciary and or embarrassing the nominee. Certainly, the hearing of Justice Rothstein has established that parliamentarians can conduct a civil hearing as well as limit the involvement of party politics in the hearing. In fact, it has been argued that unlike Senate confirmation hearings in the United States which are typically focused on controversial issues such as abortion and tend to take on a partisan and rancorous atmosphere, political parties in Canada do not define themselves primarily by reference to issues that have been decided by the highest court, such as abortion.[505] Nor is there any evidence to suggest that Canadian Prime Ministers, unlike American Presidents, have ever made any effort to pack the Court with their supporters.[506] Just as there is no evidence to suggest that confirmation hearings in other jurisdictions have resulted in disrepute, there is clearly no evidence that Canadian hearings will experience the same problems as American confirmation hearings.

Further, the argument that Canadian confirmation hearings will degenerate in the same manner as its American counterpart is also difficult to sustain in light of the fact that Canadian hearings are purely advisory in nature, since neither the *Supreme Court Act* nor the constitution provides any formal role for Parliament. This is significant since final

authority for appointment continues to lie with the executive. In the United States, by contrast, the constitution requires the appointment of a Supreme Court justice to be made by the President with the advice and consent of the Senate.[507] The Senate can block the appointment, and senators who do not belong to the President's party have a political incentive to strive hard to do so. Moreover, in the United States, unlike Canada, there does not seem to be an institutionalized process of consultation to ensure that appointments are always of high quality, so that in some cases there really is legitimate concern about the quality of a presidential nominee. When this occurs, senatorial opposition becomes more bipartisan, and this can lead to the defeat or (more usually) the withdrawal of the nomination.[508]

Much of the concern over the Parliamentary scrutiny of Justice Rothstein related to the type(s) of questions that would be asked of the nominee. Those observers that were less inclined to accept a model of public confirmation hearings of the nominee felt that an enforceable protocol that would limit the kinds of questions that the committee members could ask the nominee would be necessary to guide the hearings in an acceptable direction.[509] However, after much deliberation within government, it was decided that a binding protocol would not be conducive to providing the impression that the hearing was as open and transparent as possible. It was decided that any decision to impose a limit on questioning by members of the committee would have given the impression to the MPs and the public of a tightly controlled hearing. Indeed, the members of the committee were correct to acknowledge that interviews for the appointment of judges must strike a balance between the needs of political openness and the fair administration of justice. Questions, therefore, must be sufficiently full and testing to provide a

meaningful picture of the candidate, and yet they must not threaten the individual's future impartiality and his or her own personal privacy. Guidelines established by the commission in response to concerns that candidates would be exposed to improper questioning stress the importance of restraint. They state that the function of the interview is primarily to identify positive characteristics rather than negative ones, and no question should be asked which would require a candidate to demonstrate commitment as to how he or she would decide a particular issue should it come before the Court. While the questions asked by the members of the committee were sometimes searching, they were never intrusive, and the session seemed to achieve its aim of giving the public some sense of Justice Rothstein's views and values. Thus, the success of the first hearing bodes well, particularly since the committee sought to establish the parameters of acceptable questioning, taking evidence from a constitutional expert on the subject and making clear that judges should not be asked about issues which might come before them in the Court.[510] While there is no guarantee that MPs will stick to these rules in all subsequent hearings, this is not an inevitable cause for concern. The nature of the questions asked will differ according to the particular candidate, as Justice Rothstein himself noted when asked what sort of questions he thought should be put to nominees. Indeed, what is relevant must be determined on a case-by-case basis. In some cases, it may be appropriate to ask searching questions which may be uncomfortable for the candidate, and this should remain entirely within the realm of the advisory committee's mandate.

The prospect of public hearings continues to operate as a deterrent to a government that is considering making a partisan appointment of a poorly-qualified person. This, however, may not seem necessary in Canada where the diligence of the government of

Canada's routine informal process of consultation has yielded consistently strong appointments in the past, and will undoubtedly continue to yield strong nominations in the future. Therefore, it should not be problematic to assume that Canadian federal governments will continue to believe that it is good politics to make good appointments. In addition to a history of good judicial appointments, there is no evidence that Canadian politicians will want to stack the Court with judges that are amiable to their particular political views. Thus, having established that concern for holding hearings to interview Supreme Court nominees does not necessarily stem from concerns about the quality of the people nominated or the suspicion of court-packing motives on the part of the government, it remains to address why confirmation hearings are necessary at all. In the opinion of this paper, the basis for conducting public hearings is the democratic notion that important decisions should be transparent and those responsible for making these decisions be held accountable for their choices. Based on comments in the press and academia, it is clear that people are eager to receive real information about the work that Supreme Court judges do. People are genuinely interested in knowing about the way in which cases come before the Court, the materials used by the Justices to assist them in reaching their decisions, and the way in which judges try to reach decisions that are faithful to the law and the facts. The public interview of Justice Rothstein was a useful anecdote to the charges of judicial activism that occur after unpopular decisions are made by the Court. It was also beneficial for the public to hear directly from a judge the duties of his work and its implications for Canadian society; this was able to raise confidence in the public about the Court, the judges' ability to perform his duties adequately and the integrity with which these duties would be carried out.

Finally, it has been suggested that parliamentary scrutiny of an appointee of the executive branch of government is generally inconsistent with the Canadian parliamentary tradition. This line of argument suggests that because the executive branch has the authority to make appointments, it is by default, accountable to Parliament and the people for the quality of its appointments. As a result, parliamentary confirmation of candidates mischaracterizes the accountability relationship, by subjecting the appointee rather than the appointer, to Parliamentary scrutiny.[511] Such concern was also voiced by members of the Liberal party such that in the Liberal proposal to reform the Supreme Court of Canada appointment process, it was to be the Minister of Justice that would face a multi-party panel of parliamentarians to explain the reasons behind the appointment of the nominee and the process whereby the candidate was appointed.[512] Such a process has, however, come under intense scrutiny by members of other political parties in the House of Commons. The New Democratic Party suggested that the Minister should report to the committee before the final appointment is made. The rationale would be to allow the Committee to alert the Governor-in-Council where the Committee was of the view that the Minister had not followed due process or exercised due diligence.[513] This argument was dismissed by the Liberals who suggested that the mandate of the advisory committee in conjunction with the strength and stature of its membership would ensure the completeness and fairness of the process. Regardless of one's view on whether the Minister should appear before the committee to explain the executive's selection, the argument that parliamentary scrutiny of a Supreme Court appointee is inconsistent with parliamentary tradition remains unpersuasive. In truth, the notion of a confirmation procedure involving the judicial candidate has had a long and developed history in

Canada. 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. The Charlottetown Accord also saw a confirmation role for a revised Senate in the appointment of members of senior government agencies and boards. It would certainly be anomalous if the public had been given a greater opportunity to comment on the putative head of the CBC, the CRTC or the Canadian Transport Commission, than to assess the qualities and suitability of a future member of the Supreme Court. Furthermore, the use of the confirmation model for Supreme Court appointments has been consistently supported by members of the Conservative Party of Canada as well as leading academics and observers of the judicial appointment process.

The two step approach of an advisory committee combined with public confirmation hearings adopted by the Conservative government has not been without its critics. It has been argued that the hybrid approach endorsed by Prime Minister Stephen Harper is problematic for two reasons; first, because the powers of the advisory committee established by the Liberals were so circumscribed that they became more form than substance, and second, because of restrictions on the types of questions the parliamentary committee members were allowed to put to the nominee at the public hearing. Further, critics have suggested that the process should not be considered for use on a long-term basis because it is duplicative and wasteful.[514] Thus, it has been suggested that Canada should establish either one or the other approach to ensure high quality judicial appointments, but not both. While there is substance to these criticisms, there is no evidence to suggest that combining an advisory committee with public hearings will

produce a poor system of appointments. Although it may hold true that the public interview process by a parliamentary committee is sufficient to guarantee against a poorly qualified or partisan appointment, the assistance of the work of an advisory committee demonstrates institutional and procedural openness which is a fundamental indicator of democratic legitimacy. The requirement of openness in the judicial appointments process is particularly acute because a recurring criticism of the executive system of appointment was the high level of secrecy within which the selection process functioned. The extent to which an advisory commission operates transparent procedures is therefore a critical test of its legitimacy. To this extent the process by where a candidate is chosen (and consequently interviewed) should be as open as possible. Therefore, the work of the advisory committee is as important to the proper functioning of the appointments procedure as is the use of public interviews.

iv. Media Coverage of Legislative Hearings

However open and transparent the interview and selection process for Supreme Court justices is judged to be, if the process is known only to an elite few, than it does not fulfill the requirements of public accountability. One reason originally advanced for the use of open hearings was that they would promote a culture of human rights and educate the public about the role of the judiciary.[515] This function can only be served, however, if the general public has access to the interviews and the information produced by them. For this reason the government decided that the hearing of Justice Rothstein should be televised.

The decision to televise the public hearing of Justice Rothstein was, however, a controversial one. Indeed, observers of the judicial appointment process have been divided over the question of using the electronic media as a means to deliver the interview to the public. For many, the idea of televised public hearings is problematic since it has the potential to present a distorted view of the proceedings. For example, the Judicial Service Commission in South Africa has argued that television can give a false impression of a candidate and questions asked to the candidate have the potential to be taken out of context.[516] Furthermore, it has been suggested that thirty second news clips would be unfair to both the candidate and the Commission since it has the potential to distort a complex conversation between Commission members and the candidate.[517] Thus, the Commission argued that unless the hearing was aired in its entirety for all to see, it would ultimately be a fruitless endeavor to have the electronic media involved in the process. A minority view, however, has supported some form of electronic coverage, subject to the assurance which would guarantee the quality of the hearing. Here it is argued that full coverage of the proceeding would enhance awareness and comprehension of the judicial selection as well as make judicial selection much more accountable and participatory than it is in its current form.[518] Moreover, observers suggest that a televised public hearing has the potential to reach a much larger audience and can inform the public about the interview or even the existence of the advisory commission itself. Thus, it is concluded that televised hearings of a judicial nominee provides an educational element for the public that might not be attained through any other means.

The exclusion of radio and television from public hearings would inevitably greatly restrict the size of audience which is informed about the interview. Even interviews that

are open to the public are problematic since very few observers ever attend such proceedings in person. Furthermore, the public and media tend to lose interest in the appointments process over time, and as a result, press coverage becomes generally limited to the weekly newspapers, which serve only a small fraction of the general public.[519] Therefore, the effect of an arrangement whereby the media is not involved in the interview process is that the majority of citizens probably have no greater knowledge of the judge who is being appointed or the process by which that judge is chosen than they did under the old appointments process. Clearly, if the appointments process wants to maintain the confidence of the public in the openness of its work then coverage of the proceeding must be made available to all who are interested in the selection of Supreme Court justices.

v. Summary

The strongest claim to openness, accountability and transparency in the judicial selection process is the use of public interviews. Although by international standards this practice is unusual since most judicial appointments commissions conduct interviews in private. The government's decision to allow the public access to the appointed justice has been a highly controversial one. Supporters of the use of open interviews have long pressured the government to introduce public hearings on the grounds that they would promote legitimacy, competence and a more representative bench. Opponents of the proposal have pointed to the example of the United States Senate Judiciary Committee confirmation hearings as demonstrating the danger which public interviews can pose. In particular, the confirmation hearings of Clarence Thomas and Robert Bork were presented as evidence of the danger that such interviews would degenerate into

personalized attacks on the candidates and demonstrations of political correctness, and that far from increasing legitimacy, they would undermine public confidence in the judiciary. Indeed, the reports of the parties in the House of Commons have supported this view, arguing that leading members of the Bar would be discouraged from coming forward if interviews were made public.

The government of Canada, however, decided that it would be in the best interest of the appointment process to proceed with holding public interviews. While the system of parliamentary scrutiny of judicial candidates has only been used once, (with the appointment of Justice Rothstein) there is considerable evidence from other jurisdictions that use the confirmation model that the fears espoused by ratification critics have not materialized. In the case of the Judicial Service Commission in South Africa, the consensus among Commission members is that candidates seeking judicial office have not generally been deterred by the prospect of participating in a public interview. Indeed, during the early days of the interview process, wherein interviews were closed to the public, candidates that were asked if they would attend open interviews responded positively to the suggestion.[520] The success of the Commission in winning the support of the Bench and the Bar for public interviews has been important to ensuring that good candidates have continued to apply for judicial office in South Africa. Thus, there remains strong evidence to support the government's claim that parliamentary scrutiny of judicial candidates will not result in the loss of good candidates for the Bench.

The fact that judicial candidates generally approve of, or at least tolerate, the system of public interviews in other jurisdictions, however, is not a measure of the value of interviews in terms of the democratic legitimacy that it may bring to the Canadian system

of judicial appointments. As mentioned above, in order to fulfill the requirements of openness, the public interview process must demonstrate that it provides more and better information about the judicial candidates and that this information is made readily available to sufficiently wide audience. Together, these qualitative and quantitative measures provide a means of assessing the usefulness and impact of the process of public interviews. In the case of Canada, it may be too early to fully determine the extent to which the televised hearing of Justice Rothstein provided relevant information about the candidate and the appointments process in particular to the public. However, in other jurisdictions that have an established history of public interviews, the consensus amongst academics and observers has been that there is no doubt that the use of public interviews can significantly improve the extent and quality of information which is known about the justices appointed to the High Courts.[521]

Concerns that a parliamentary scrutiny committee may undermine the doctrine of judicial independence have also been disputed by the evidence presented in other jurisdictions. Indeed, accountability and independence are not necessarily at odds when interviews for the appointment of judges are able to strike a balance between the needs of political openness and the fair administration of justice. This can be achieved by establishing guidelines and protocols that allow for questions that are able to provide a meaningful picture of each candidate, and yet do not threaten the individual's future impartiality or his or her personal privacy. The guidelines established by Peter Hogg for the parliamentary scrutiny committee ensured the importance of restraint in questioning and made sure that the candidate would not be exposed to improper questions being fielded by members of the committee. Although these guidelines were not binding, the

committee demonstrated that it was able to proceed with respect and dignity for the candidate being interviewed. For those critics who are concerned that the same protocol may not be followed in future hearings, there are a number of improvements that the committee can make in order to ensure that the reputation and privacy of the candidate does not fall into disrepute. For example, formal guidelines can be established that make sure that the questions asked do not require a commitment as to how a judge would decide a particular issue should it come before the Court. Furthermore, the guidelines can state that all questions must be relevant to the selection criteria established by the advisory commission and any questions that affect the reputation, dignity and/or privacy of the candidate be referred to the Chairperson of the committee. These allegations could then be investigated in a closed session or if the candidate requests, in an open session. Such parameters in the questioning of judicial candidates would ensure that public hearings do not result in the humiliation or invasion of privacy of the proposed nominee.

The general consensus has been that the first Canadian parliamentary scrutiny of a judicial candidate was a success.[522] While the questions were sometimes searching, they were never intrusive, and the session achieved its aim of giving the public some sense of Justice Rothstein's views and values. Thus, the success of the hearing bodes well, particularly since the committee sought to establish the parameters of acceptable questioning, taking evidence from a constitutional expert on the subject and making clear that judges should not be asked about issues which may come before them in the future. While there is no guarantee that MPs will stick to these guidelines in the future, it is not necessarily an inevitable cause for concern. The nature of the questions asked will differ according to the candidate and in some instances it may indeed be appropriate to ask

searching questions which may be uncomfortable for the candidate. However, as evidence has suggested, being asked a few demanding questions by a parliamentary scrutiny committee does not necessarily discourage a judicial candidate from seeking a seat on the highest Court in the country.

7. Assessing the Impact of the New Advisory Commission and Parliamentary Scrutiny Committee on Supreme Court Appointments

The dominant rationale underlying the creation of the new advisory commission was the need to establish a more open appointments process. Thus, the need to provide greater transparency and accountability in the way justices are chosen to sit on the bench of Canada's highest Court has driven the reform process. However, in order to justify this change, the commission must demonstrate that it has indeed brought about fundamental improvements in the appointment system; in particular, the implementation of openness in the selection process and the promotion of greater diversity in the composition of the bench. In its current form, it is unclear whether the new advisory commission and subsequent parliamentary scrutiny committee can achieve the goals it has set for itself. It may be that further procedures and protocol within the committee process are necessary in order to ensure that the appointments process is viewed as democratically legitimate.

As mentioned above, an important feature of public accountability is institutional and procedural openness:

> What gives the members of this [Constitutional] Court the legitimacy to make decisions that will so substantially affect the inhabitants of the nation? It clearly possesses no electoral mandate. Its legitimacy must, therefore, flow from some other form of public support. We suggest that such support will most naturally arise from having a selection process which enables the public both to see and to participate in the appointment of judges.[523]

Thus, the extent to which a commission makes efforts to ensure that the process whereby candidates are selected, and subsequently interviewed, should be as open as possible. At first glance, the creation of an advisory committee would seem to be a fairly substantial move on the part of the government, one that addresses many of the concerns attributed to executive appointment and the secrecy that has surrounded judicial selection. Indeed, it would seem that the advisory committee has been able to constrain the powers of the executive while providing a more open and transparent selection process. However, upon closer analysis, much of this evaporates.

One of the leading criticisms of the advisory committee established by the Liberals was that the powers of the committee were so limited that they became more form than substance. Reducing a list of eight names proposed by the Minister of Justice to a list of three names from which the Prime Minister will (possibly but not necessarily) make his choice, is not much of a responsibility. Indeed, the committee has no capacity to consider additional names of its own choosing only to comment on the eight names that it has been supplied, and it is specifically prohibited from meeting the judicial candidates in person. These problems are further exacerbated by the fact that the Prime Minister is free to ignore the evaluative commentary and ultimate selection by the committee. While the report issued by the Liberal government did suggest that this should be done lightly, it continued to insist that the Prime Minister mush have complete discretion to do what he deems necessary – indeed that he should do so if there is the slightest hint that the advisory committee may have breached the confidentiality of the candidate in any way.

An additional criticism of the advisory committee is that the membership of the committee has been restricted in the interests of creating collegiality and a quick decision,

but the result is that the membership has been significantly skewed. There are four federal politicians, one lawyer, one retired judge, and one representative of the provincial attorney(s) general – even though it is excepted that one major element of the Supreme Court's responsibility is the policing of the jurisdictional limits of the two levels of government. Furthermore, the balance of the committee rests with elected politicians. This is significant since a commission's approach is inevitably influenced by the values and beliefs of its members and that its independence can be affected by the range of interests represented on the particular commission. The importance of the make-up of the advisory commission in determining the extent of its independence was fully recognized during the contested negotiations on its membership. Whilst the political parties supported a politically dominated composition, the legal profession and academia argued in favour of the creation of a body in which the legal contingent was in the majority. The experience of commissions, in particular those in the United States and at the provincial level in Canada, suggests that the most strongly independent commissions are those where the vested interests of different groups represented are subsumed under the collective interests of the body.[524] For this to happen, the commission must develop coherence and a common outlook which transcends the interest of each grouping or individual members. There is evidence which suggests that this can indeed occur over-time. In the case of South Africa, a member of the Judicial Service Commission has noted that groupings within the committee were not fixed in their decision-making and that some individuals or groups might agree on one appointment, but disagree on another. However, the group has always been able to reach a consensus on a judicial candidate. Additionally, critics have expressed concern that the dynamics of deliberation in a

diverse committee may eliminate candidates against whom some objection can be made.[525] Here the fear is that only the safest and least controversial candidates would achieve consensus in the committee, and while such persons are often excellent judges, they might not always be the best person for the Court. There is, however, no normative or empirical data that would suggest that committees with divergent membership often by-pass the best candidates for the job. Indeed, if the executive determines that the best candidate has been overlooked by the committee, the executive can decide not to choose the candidates from the list and instead select the candidate they feel is most suitable for the Court. Thus, it would seem that there is no evidence to support the claim that an advisory committee with divergent membership is not capable of making sound choices for the Supreme Court bench.

Concern has also been raised with respect to the role of the federal Minister of Justice in the operations of the advisory committee. It has been suggested that the responsibilities of the Minister, which include appointing several of the members of the committee, drafting the mandate letter, setting strict limits for the procedures of the committee, generating the list of eight judicial candidates for consideration by the committee, attending the committee's first meeting, receiving regular reports and detailed minutes of the meetings, and ensuring that there have been no violations of confidentiality, are too intrusive for the proper functioning of the advisory commission. Many critics of the advisory committee suggest that the Minister of Justice should have a limited role in the functioning of the advisory committee so that the executive is not able to influence the decisions of the committee members.

A final criticism of the advisory commission is the constant reiteration of the constraints that are put on revisions to the appointment process by the federal cabinet's "constitutional responsibility" for the appointment of Supreme Court justices. As highlighted above, the Supreme Court of Canada is not entrenched in the constitution. As a result, the appointment process that is regarded as so sacrosanct is contained within an ordinary piece of legislation and is therefore not inconsistent with a formal process that delegates the actual narrowing of a list to a single name. Indeed, it is actually the Governor General who does the appointing of Supreme Court justices, and it has never been suggested that her office or the credibility of the Supreme Court is compromised by the fact that she has no choice but to accept the name submitted to her by the Prime Minister. Thus, it would seem that the Minister of Justice is offering the illusion but not the substance of reform through the creation of an advisory commission.

The creation of the ad hoc advisory commission used for screening the nominations of Justices Rosalie Abella and Louise Charron was intended to be a temporary measure to ensure that there would be a full Coram of nine justices to hear the government's marriage reference in October 2004. It was expected that Parliament Hill would continue to press for a more transparent and formal role in the nomination screening process. Indeed, this is precisely what happened after the Conservative party won a minority government in 2005 and established parliamentary hearings as a forum to question the selection of Justice Marshall Rothstein for the Supreme Court. The process whereby Justice Rothstein was chosen to sit on the bench was viewed generally as positive since it was able to increase accountability in the selection process and seemed to strike the right balance between rigorous and informative questioning and respect for

personal privacy and judicial independence. The general feeling was that this process would continue and be improved through future judicial selections. However, this was not to be the case.

On 5 September 2008, Prime Minister Stephen Harper announced the nomination of Nova Scotia Court of Appeal Justice Thomas Cromwell to the Supreme Court of Canada. This nomination came under intense scrutiny as the Prime Minister chose to go ahead with the nomination without consulting the Supreme Court Selection Panel, subsequently suspending the panels' work to arrive at a short-list of recommended candidates. While the Prime Minister was quick to acknowledge that the appointment would not be made final until Justice Cromwell had the opportunity to answer questions from an ad hoc all-party committee of the House of Commons, his decision to by-pass the Supreme Court Selection Panel has raised a number of concerns regarding the possible politicization of the appointment process.

Problems became evident on the panel in August of 2008 when NDP Justice Critic Joe Comartin publicly announced that he disapproved of the membership on the selection panel. Unlike the membership plan devised under the Liberal party in 2004 in which the ad hoc advisory committee consisted of representatives from the legal community and MPs, the Conservative government decided that the advisory panel that would be used to assist the government with its decision to appoint a justice to the Supreme Court would consist only of MPs, two from the current government and one from each of the opposition parties. However, the Conservative MPs chosen to sit on the panel were cabinet ministers, and Comartin voiced his concern that the members chosen by the Conservative party would not provide independent advice but simply act as

mouthpieces for the Prime Minister's Office. In response to this accusation, the Justice Minister Rob Nicholson argued that the appointment of a Supreme Court justice remained a function of the executive and therefore it is not inconsistent with legislation that places Supreme Court appointments in the hands of the Prime Minister. This was a considerable departure for the Conservative Party who has consistently argued that the appointment of Supreme Court judges requires greater transparency, including the need to publicly review a short-list of the nominees before a parliamentary committee. The Conservatives have defended their decision to unilaterally nominate Justice Cromwell by suggesting that the selection panel was not able to reach a decision on a short-list of candidates because the opposition parties had objections to the composition of the committee and the panel was not able to accomplish its job in an expedient manner. There are a number of alarming problems that have been raised with respect to Prime Minister Harper's decision to nominate Justice Cromwell without the approval of the advisory committee in which he had established. First, the decision to select only MPs for membership on the advisory committee is not conducive to providing an accountable and transparent system of judicial appointments. Indeed, and as outlined above, a panel that consists of divergent membership is largely considered successful since diversity can strengthen public confidence in the committee's impartiality and reduce the danger that the commission will be dominated by a single faction or interest group. Moreover, commissions that work well in other jurisdictions are generally those which form a strong collective identity and in which the members do not see themselves as representatives of the professional or social groups from which they are drawn. There is also considerable evidence which suggests that where the majority of a commission's members are

politicians there is an increased risk of politicization of the appointments process and a greater likelihood of 'compromised' selections. Thus, there remains no considerable reason why the advisory committee for Supreme Court appointments should consist solely of Members of Parliament.

The second criticism levied at Prime Minister Harper's decision to by-pass the advisory committee is that in his haste to nominate Justice Cromwell, he has compromised the purpose of the selection panel itself. The selection panel was established in response to concerns over a lack of accountability and transparency in the appointments process and in his decision to side-step the committee, Harper has decided that swift decision-making is more important to political transparency. Indeed, Harper's decision to by-pass the committee has set a dangerous precedent. If the nomination process can be used to serve a political purpose, there is nothing to prevent a Prime Minister from using his power to appoint a partisan nominee in the future. While there is no indication that Justice Cromwell's nomination involved any act of partisanship on the part of the government, there is no evidence that in the future this will not be the case. The decision to unilaterally appoint Justice Cromwell leaves the impression that the Justice is the choice of the Conservatives rather than as a broad and non-partisan imprimatur that he might have received from the all-party parliamentary committee.

The decision to by-pass the advisory committee by the government was not the only flawed decision the Conservative government has made with respect to the judicial appointments process. In October 2008, the government argued that public accountability would remain a part of the appointments process, promising that if they were re-elected in October 2008 they would proceed with creating an all-party committee of the House of

Commons mandated to publicly interview Justice Cromwell. However, in January 2009, the government of Stephen Harper proceeded to rescind on this promise by abandoning the idea of a public hearing for Justice Cromwell. As a result of the Supreme Court sitting at a reduced number for the entirety of the Fall session and early Winter session, and because of Parliament's suspension in December, Prime Minister Harper indicated that there was no time left for parliamentarians to scrutinize his nomination of Justice Cromwell. He then proceeded with appointing the Justice on his own accord. The decision by Stephen Harper to choose practicality over principle may have long-term consequences for improving the judicial appointments process. Although Harper announced that he would reinstate the public process for the next appointment, this might not be until the next vacancy arises in 2012 and there is no established precedent that would bind a government into using the advisory commission and public hearing process.

If one accepts Harper's assurances that the use of ad hoc advisory commissions and parliamentary scrutiny procedures will be used by a Conservative government in future appointments to the Supreme Court, then it remains that a number of changes will have to be made to the process in order to ensure that the mutual goals of accountability and transparency in the appointments process are respected. First, the membership of the advisory commissions will need to be reworked so that the composition of the committee reflects the diversity of Canadian society. In addition, once membership of the committee is agreed upon by all parties of the House of Commons, it should be statutorily defined so that no one governing party will be able to alter the composition of the committee in the future. The problem with the ad hoc committee used to assess the nomination of Justice Cromwell was that it consisted solely of MPs, whose institutional role and self

understanding were presumably broadly similar. Indeed, role diversity on the ad hoc committee fell far short of what has been acknowledged as acceptable in an open and transparent system. Judicial appointment bodies should strive to feature members drawn from a broad selection of professional cultures – judges and academics alongside, for example, members of Parliament and a police officer.[526] The perspectives that emerge out of the combinations of these professional roles are thoroughly complex and unpredictable – thereby contributing to the effects of precluding strategic manipulation of decision-making by partisans, and reinforcing competent and good faith decision-making. In contrast, the lack of diversification on both the ad hoc advisory committee and the parliamentary scrutiny committee (in which Professor Peter Hogg was the only non-political advisor) suggests that any directives on substantive bounds and decorum, such as those set by Hogg for the parliamentary scrutiny committee, could have been readily and widely ignored, and indeed will be if committee members do not remain constrained in their ability to assess and consider candidates for appointment.[527]

Design for diversity in the judicial appointments process should therefore see committee members that are representative of the Canadian public. Judges and lay people should be present in numbers that are equivalent to or surpass those of elected politicians. However, decision-makers sitting on a body constituted of a variety of different members should include lay personal but they should dominate the body fully. Additionally, public consultation should broadly canvass individuals and civil society groups, so that the lay members on the committee are not considered direct representatives of the executive.

In terms of the substantive criteria used by the committee to evaluate potential judicial appointees, it is clear that Peter Hogg's criteria were relatively few, if far from

clear: (1) wisdom, fairness, compassion; (2) energy and discipline to study the materials; (3) an open mind; (4) patience and courtesy; (5) writing and reasoning opinions well; and (6) working well with others. More generally, as noted, authors on judicial appointments cite merit and competence as key qualities desired in judges. However, all of these criteria are open to multiple interpretations. As Lorraine Weinrib has noted, there is inevitable broad determinacy in what is looked for in selecting judges.[528] This is important because an ambiguous institutional design strategy can preclude partisanship without significantly interfering with legitimate decision-making criteria that are, in any event, inherently ambiguous.

Procedures of the ad hoc committee process were neither significantly complex nor ambiguous. The parliamentary scrutiny hearing began within two days of the Prime Minister's nomination, lasted three hours, and within two more days led to a formal appointment. However, because judicial vacancies can open without warning, selection must take place rapidly and a process whereby commissions are created on an ad hoc basis may pose problems for expediency in short-listing candidates and appointing justices to the bench. For example, the selection panel established in 2008 was mired in so many problems that the Prime Minister chose to by-pass the committee altogether and nominate the candidate of his preferred choice. In order to alleviate problems associated with the creation of ad hoc commissions, a permanent commission should be established in which it provides on an annual basis updated lists of names to fill potential vacancies on the Supreme Court. This would have the added benefit of permitting a consistent decision-making culture to develop within permanent appointments bodies. In addition to the creation of a permanent advisory commission, the commission's membership,

procedures and criteria should be statutorily entrenched so that future governments are not able to make arbitrary changes to the appointment process that reflect their political concerns and opinions.

8. Conclusion

Barely three years after the establishment of an ad hoc advisory and parliamentary scrutiny committee and with only one successful appointment, it would seem premature (especially in light of the government's failure to endorse the use of the committee process) to assess the success or otherwise of the enterprise. Nonetheless, even at this ambiguous stage in the process, it is possible to make a number of tentative and interim observations. The creation of the ad hoc committee system appears to be generally perceived by the media and government as a better approach to judicial appointments than the old model of executive selection. Moreover, there are indications from a number of quarters, including the appointee himself that the process was better able to inform the public about the role of Supreme Court justices and the manner in which justices are chosen to sit on the bench. In terms of transparency, both committees made their processes known through televised hearings and in print on the government's website. However, the committees did not produce an annual report detailing the commission's work. An obligation on the part of the committees to publish an annual report would have ensured that a detailed account of the commission's achievements and explicit identification of the processes and criteria used to assess and interview candidates were made available to the public. In terms of encouraging diversity both within the appointments made to the Court and the committee system itself, the picture is not appealing. It would seem that the advisory commission has not been able to tackle issues

of diversity associated with the tacit understandings of merit selection. The largest concern attached to the advisory and scrutiny committees has been problems associated with diversification in membership. The decision by the government to proceed with committees consisting solely of political representatives is not conducive to a legitimate system of judicial appointment.

Although the commissions were not statutory, they appeared to have enhanced the legitimacy of the process by its perceived commitment to objectivity and transparency. The creation of the commissions and the self-denying ordinance of the executive in restricting its primary role in the appointment process to a lesser influence can be considered to have enhanced judicial independence. Similarly, the transparency and objectivity of the commission's procedures can be considered to have enhanced judicial accountability. Based on this assessment, the verdict on the advisory and scrutiny commissions might be a good start - however, taking into consideration the actions of the Conservative government to by-pass the committee system in its entirety, it would be fair to determine that there remain incredible obstacles for reforming the appointments process to the Supreme Court of Canada.

While this paper has expressed concerns about the danger associated with an enhanced judicial policy-making role, it has not engaged in the interminable debate as to the relative merits of judges versus legislatures. For the purposes of this paper, it has been taken as a given that judges exercise, and will continue to exercise, significant social and political power. Thus, the concern of this paper has been about the current system of judicial appointments, in terms of both processes and results, and the on-going problems and gaps that have formed the basis of judicial appointments to the Supreme Court.

Consequently, the argument has been for democratic improvements at the institutional level including solutions for creating a more legitimate judicial advisory and scrutiny commission.

A Supreme Court judicial advisory and scrutiny committee should work from the premise that while the first and paramount function of the judicial appointments process is the selection of the best possible judges, that is not its only function. The judges it facilitates in appointing must also be chosen using processes that are independent, open, fair and inclusive. The challenge that any commission will face in guarding against future threats to its independence and reversing existing barriers to equal opportunities should not be underestimated. Indeed, the failure of the Conservative government to allow for the proper functioning of the commissions in the appointment of Justice Cromwell is evidence of this. However, the difficulties of this task can be mitigated by the fact that the judicial appointments commission has inherited a system in which the job of judging is highly valued and the quality of applicants is always high. If the quality of the process can be made to match that of the judges appointed, the commission in Canada should be able to rebuild public confidence in the judicial appointments process and provide a model for other systems looking to reform the way in which they select their judges. It is hoped that future governments will apply Stephen Harper's promise to implement the system of appointing commissions in all future appointments to Canada's Supreme Court.

[1] Prime Minister Stephen Harper, Press Release, "Supreme Court nominees to face questions from Parliamentarians" (20 February 2006), online: Office of the Prime Minister , <http://www.pm.gc.ca/emg/media.asp?id=0125>

[2] Kate Malleson, "The New Judicial Appointments Commission in England and Wales: New Wine in Old Bottles" (2006) in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World,* eds. Kate Malleson and Peter H. Russell, University of Toronto Press, 39-55. James Allan, "Judicial Appointments in New Zealand: If it were Done when tis' Done, then 'twere well it were Done Openly and Directly" (2006) in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World,* eds. Kate Malleson and Peter H. Russell, University of Toronto Press, 103-121. Elizabeth Handsley, "Judicial Whisper Goes Around: Appointment of Judicial Officers in Australia" (2006) in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World,* eds. Kate Malleson and Peter H. Russell, University of Toronto Press 122-144. In contrast, the United States example of public political hearings is well-developed, well-known, and, as I detail below, understood to be cautionary.

[3] Supra note 1.

[4] This has begun to change: See, Peter W. Hogg, "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada" (2006) 44 Osgoode Hall Law Journal. 527, F.L. Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition" (2006) in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World,* eds. Kate Malleson and Peter H. Russell, University of Toronto Press, 56-79.

[5] Prime Minister Stephen Harper, Press Release, "Historic Televised Hearing of Supreme Court Judge Nominee" (28 February 2006), online: Office of the Prime Minister <http://www.pm.gc.ca/eng/media.asp?category=5&id=1037>

[6] The Prime Minister by convention directs the Governor General, who holds nominal judicial appointment power under the *Constitution Act, 186.*

[7] Peter Hogg, "Judicial Interview Process" (Opening Remarks to Ad Hoc Committee on Supreme Court Appointment, 27 February 2006), online: Department of Justice Canada http://www.canadajustice.ca/en/dept/pub/scc/jud_interview.html [Hogg, "Opening Remarks"]. The qualities were: 1. Ability "to resolve difficult legal issues...with wisdom, fairness and compassion"; 2. "energy and discipline to diligently study the materials"; 3. ability to "maintain an open mind until [the judge] has read all the pertinent materials"; 4. "patience and courtesy"; 5. Ability "to write opinions that are well written and well reasoned"; 6. Ability "to work cooperatively with his eight colleagues".

[8] Rothstein faced only a few substantive questions, which he subsequently declined to answer. For example, Conservative MP Diane Ablonczy quizzed the nominee on the notwithstanding clause. The AHC, apparently satisfied with the Prime Minister's selection, voted for an early end to questioning. See, "Nominee Justice Marshall Rothstein Faces Ad-Hoc Committee", online: http://www.video.google.com/videoplay?docid=7460285392980005 6&q=rothstein.

[9] Terry Weber, "Rothstein Formally Tapped for Supreme Court" The Globe and Mail (1 March 2006) online: The Globe and Mail http://www.globeandmail.com/servlet/story/RTGAM.20060301.wjudge0301/BNstory/National/home>.

[10] Though reform of the judicial selection process to Canada's highest Court has been a topic of debate for years, only a handful of scholars have used comparative literature to assess selection criteria and procedures for the changing judicial role. See e.g. Lorraine Eisenstat 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: Papers* (Toronto: Ontario Law Reform Commission, 1991) 109. Carl Barr, "Comparative Perspectives on Judicial Selection Procedures" in *Appointing Judges: Philosophy, Politics and Practice: Papers* (Toronto: Ontario Law Reform Commission, 1991) 142.

[11] See, e.g. Ed Ratushny, "Confirmation Hearings for Supreme Court of Canada Appointments; Not a Good Idea!" (Paper presented to the Conference on Judicial Appointment in a Free and Democratic Society: The Supreme Court of Canada, 19 April 2004) at 2, online: University of Toronto, Faculty of Law http://www.law-lib.utoronto.ca/conferences/judiciary/readings/confhearings.doc. Ratushny alludes to selection techniques and judicial independence serving "one over-riding purpose. That purpose is to maintain public confidence" in judicial values such as judicial impartiality.

[12] See e.g. Peter Russell, "Reform's Judicial Agenda" (April 1999) 20 *Policy Options* 12 at 38; Jacob Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada" (June

1999) 5 *Choices* 51; Allan Hutchinson, "Lets Try Democracy when Choosing Top Judges" The Globe and Mail (3 March 2004) A19.
[13] This motion was introduced by Chuck Cadman, then an Independent Member of Parliament for British Columbia.
[14] "Improving the Supreme Court of Canada Appointment Process", Report of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 4-5.
[15] IBID. 5-6.
[16] The dissenting opinions of all three opposition parties are included in the committee's report.
[17] "Martin puts focus on Harper, but can't slow Harper's surge", Globe and Mail 16, June 2004. A1.
[18] For a detailed analysis of the same sex marriage reference as it played out during the 2004 campaign see McKay, "Confusion on the Hill", 29-40.
[19] Kirk Makin, Globe and Mail 16, June 2004, A6 "The Conservatives and the Judges" also the Globe and Mail 21, June 2004 A12, unsigned editorial.
[20] Lorne Gunter, Edmonton Journal, 20 June 2004 A12.
[21] "Tory Platform a Legal Minefield" Edmonton Journal, 21 June 2004, A1 and Lorne Sossin, "Don't Treat Judges Like Politicians", National Post, 11 June 2004, A18.
[22] For more on the debate see Claire Hoy, "Democratizing the Judiciary" National Post. 7 June 2004, A16. "New Judges Favour Same-Sex Rights," National Post, 25 August 2004, A1, Andrew Coyne, "A Purely Political Choice," National Post, 25 August 2004, A1, and Lorne Gunter, "Stacking the Court with Activists," National Post, 25 August 2004, A14.
[23] "Supreme Court Nominees Win Support", Calgary Herald, 28 August 2004, A9.
[24] "Proposal to Reform the Supreme Court of Canada Appointments Process," (2005-10-20). See http://www.justice.gc.ca/en/dept/pub/scc/1.html.
[25] News Backgrounder, "Reforms of the Supreme Court Appointments Process" (August 2005). See http://www.justice.gc.ca/en/news/nr/2005/doc_31588.html. 30.
[26] IBID. 30.
[27] Attorney General Irwin Cotler, "Proposal for the Reform of the Supreme Court of Canada Appointments Process" (Speech for the Honourable Irwin Cotler, Minister of Justice and Attorney General of Canada, 7 April 2005), online: Department of Justice Canada http://www.canada.justice.gc.ca/en/news/sp/2005/doc_31432.html
[28] Ron Levy, "Judicial Selection: Trust and Reform" (2008) U.B.C. Law Review 40:1, 200.
[29] Lorraine Eisenstat Wienrib, "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: Papers (Toronto: Ontario Law Reform Commission, 1991) at 112.
[30] For a complete description of the judicial committee, see Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* chapter 2. (Lorimer 2000).
[31] Peter McCormick, "Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada," The Journal of Appellate Practices and Process, 1 (2005). 7. McCormick notes that the treatment of the S.C.C by the Privy Council was best illustrated by the 19th century when the Chief Justice of Canada announced a decision but declared that the Court would not be delivering reasons because the losing party had already indicated their intention to appeal and he suggested that the Judicial Committee of the Privy Council rarely paid any attention to reasons.
[32] Wienrib, "Appointing Judges to the Supreme Court of Canada in the Charter Era: A Study in Institutional Function and Design," supra note 10 at 112.
[33] My purpose is not to present a definitive discussion of Canadian appointment of judges to the Supreme Court, but to set out the current understanding of this component of the general controversy about judicial appointment. For detailed discussions, see Angus, "Judicial Selection in Canada: The Historical Perspective," (1969) J. of Cdn. L.S. 220 and Peter Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969).
33 Peter Hogg, Constitutional Law of Canada, Student Edition 2005 (Scarborough: Thomson-Carswell, 2005), 6-7.
[35] IBID. 7
[36] Jacob Ziegel, "Federal Judicial Appointments in Canada: The Time is Ripe for Change," (1987) 37 University of Toronto Law Journal, 36. 4-5. Canadian Bar Association, "Report of the Canadian Bar Association on the Appointment of Judges in Canada, (Ottawa: Canadian Bar Foundation, 1985) at 17-20.

The report states that there are three reasons for the demise of political affiliation as a factor in the appointment of judges in Britain (in addition to the Lord Chancellor's unique position in sitting in the House of Lords and therefore immunized from the politics of the House of Commons): first, barristers who participate in politics do not reach the stature of the bar prerequisite to a political appointment; second, the profession, parliamentarians and the public have come to view partisan factors as inappropriate; and third, the leaders of the government exercised an act of political will to rise above partisan and political considerations. The report does not consider the extent to which such reasons could motivate change in Canada.

[37] That Canada has a British system, but operates it to different purposes, is often ignored. See, for example, the "Submission on Meech Lake Accord" prepared by the Special Committee on Judicial Appointments of the Canadian Association of Law Teachers to the Select Committee on Constitutional Reform, Ontario Legislative Assembly, March 1988, appendix C. Here the British system is considered as one of three alternative models for judicial appointment, but rejected because it is "not realistic or desirable to copy the British system in Canada". While this model is attractive because of the "independence and objectivity" of modern Lord Chancellors, it could not operate in Canada because "successive ministers of justice and provincial attorneys general have become too deeply identified with the faults of the existing system to make their latter day successors the focal point of reform."

[38] See Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976), and Douglas Schmeiser, "Appointment of Judges in Other Countries" in *Judicial Selection in Canada, Discussion Papers and Reports,* Canadian Association of Law Teachers Special Committee on the Appointment of Judges, (February 1987), 106-107.

[39] For a description of the current method for appointing Supreme Court justices see "A Proposal to reform the Supreme Court of Canada Appointments Process", Department of Justice Canada at http://www.justice.gc.ca/en/dept/pub/scc/1.htm and "Judicial Appointments to the Supreme Court of Canada", British Columbia Civil Liberties Association (June 2004) at 1-3. http://www.bccla.org/positions/dueprocess/04judicial1%20appointments.htm.

[40] It should be noted that recent literature on the process of judicial appointment to Britain's High Court has been critical of the manner in which justices are appointed. The introduction in 1998 of a codified Human Rights Act, which fundamentally altered the adjudicative process of the court, has lead many to challenge the manner in which justices are selected. Moreover, Britain has recently found itself in the midst of a program of modernization which has directly impacted the judiciary by creating a new Supreme Court and changing the manner in which justices to this court are appointed. See Kate Malleson, "The New Judicial Appointments Commission in England and Wales: New Wine in Old Bottles?" in Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World eds. Kate Malleson and Peter H. Russell, (2006) University of Toronto Press. 39-54.

[41] Weinrib, supra note 10 at 113.

[42] IBID. 115

[43] For the historical development and importance of the value of the independent judiciary see W.R. Lederman, "Judicial Independence and Court Reforms in Canada for the 1990's" (1987) 12, Queen's Law Journal, 385.

[44] See Angus, "Judicial Selection in Canada: The Historical Perspective," (1969) J. of Cdn. L.S. 220 and Peter Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969).

[45] Wienrib, supra note 31, at 114.

[46] "Victoria Charter" in Constitutional Conference, *The Constitutional Review* 1968-1971: Secretary's Report (Ottawa: Canadian Intergovernmental Conference Secretariat, 1974).

[47] While the amendments to the Constitution Act, 1982 included adding the Charter of Rights and Freedoms and thus changing the judicial role, no changes to the process whereby judges would be appointed to the Court were outlined in the Act.

[48] Both of these documents contained proposals increasing the provincial role in federal judicial appointments and appointments to the Supreme Court.

[49] Ian Bushnell, "A Historical Analysis of Appointments to the Supreme Court of Canada," in Judicial Selection in Canada: Discussion Papers and Reports, Canadian Association of Law Teachers Special Committee on the Appointment of Judges, (February 1987), 19-20.

[50] IBID, 20

[51] Peter Russell, supra note 5, at 337.
[52] IBID. 337
[53] Bushnell, supra note 19, at 11-13.
[54] Ziegle, supra note 35, at 12.
[55] IBID, 14
[56] Weinrib, supra note 10, at 118.
[57] While the Supreme Court has been the focus of much of the scholarly and media attention surrounding judicial appointment in recent years, it has largely been the provincial governments, especially those of Alberta and Ontario, that have been tuned into this debate for years, and as far as judicial selection is concerned, have been keen to make matters more open and transparent. For an exhaustive inventory and analysis of provincial initiatives and procedures, see Devlin, MacKay & Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary or Towards a Triple "P" Judiciary in Alberta Law Review, 38(3) 2000. 734-866.
[58] Peter Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, Documents of the Royal Commission on Bilingualism and Biculturalism (Ottawa: Queen's Printer, 1969) 43.
[59] K.C. Wheare, *Federal Government,* 4th edition, (London: Oxford University Press, 1963).
[60] *The Royal Commission of Inquiry on Constitutional Problems*, headed by Judge Thomas Tremblay, 1953.
[61] Hogg, supra note 33, at 33.
[62] Prime Minister's Trudeau appointment of Brian Dickson as Chief Justice in 1984 violated this tradition and appeared to signify an end to rotating Chief justiceship appointments. But Prime Minister Brian Mulroney continued to follow this tradition in his 1990 appointment of Antonio Lamer, a Quebec Francophone, to succeed Dickson as Chief Justice. This was confirmed again in 2000, when Prime Minister Chretien chose Beverley McLachlin, the senior Anglophone justice on the Court, to replace Lamer as the new Chief Justice.
[63] Peter Russell, *Constitutional Reform of the Judicial Branch*, Canadian Journal of Political Science, 17, 1984, at 224-252.
[64] Such recommendations were outlined in the 1978 report from the Canadian Bar Association Committee on the Constitution, *Towards a New Canada*, Study prepared for the Canadian Bar Foundation, 1978, at 38 and 55.
[65] This proposal was presented to First Minister's Conference on the Constitution, October 1978, at 38.
[66] Quoted in F.L. Morton, "Judicial Appointments in Post-Charter Canada" in Judicial Appointments in the Age of Judicial Power: Critical Perspectives from Around the World. Eds. Kate Malleson and Peter Russell, University of Toronto Press, 2006. 59.
[67] IBID. 59
[68] Peter Russell, *Constitutional Reform of the Judicial Branch*, Canadian Journal of Political Science, 17, 1984, at 99.
[69] See Alan Cairns, *The Charter versus Federalism: The Dilemmas of Constitutional Reform*: (Montreal-Kingston, McGill-Queen's University Press, 1992.)
[70] Russell, supra note 38, at 105.
[71] Canadian Bar Association Committee on the Constitution, Towards a New Canada, Study prepared for the Canadian Bar Foundation, 1978. 40.
[72] IBID. 35
[73] IBID. 36
[74] IBID. 36
[75] IBID. 35 and 54
[76] IBID. 58
[77] R. v. Morgentaler, [1988] 1 S.C.R. 30.
[78] Peter Russell, 'Public to Demand Say in Court Appointments', Lawyer's Weekly. 12, February 1988, 1. .
[79] Quoted in F.L. Morton, "Judicial Appointments in Post-Charter Canada" in Judicial Appointments in the Age of Judicial Power: Critical Perspectives from Around the World. Eds. Kate Malleson and Peter Russell, University of Toronto Press, 2006. 61.
[80] [1989] 1 S.C.R. 143.
[81] See Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991).

[82] IBID. 1
[83] IBID. 1
[84] Lorraine Eisenstat Weinrib, Canada's Constitutional Revolution: From Legislative to Constitutional State," Israel Law Review, 33. 1999. 37.
[85] In recent years, political and opinion leaders, government commissions, academics, citizen groups, and the press have all identified a democratic deficit and democratic malaise in Canada. These characterizations are often portrayed as a result of a substantial decline in Canadians' confidence in their democratic practices and institutions. For an account of the democratic deficit and its impact on the courts see Privy Council Office. Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform (2004), http://www.pco-bcp.gc.ca/default.asp?Languages=E&Page=Publications&doc=dr-rd/dr-rd_e.htm.
[86] Such indicators of democracy were outlined in the Canadian Democratic Audit series which identified a set of three benchmarks used to evaluate democratic practices and institutions. The benchmarks listed by the series include public participation, inclusiveness and responsiveness in the Canadian political system. Dr. Ian Greene of York University then used these benchmarks to assist him in his analyses of Canada's courts as the third branch of Canadian democracy. See, Ian Greene, *The Courts*. UBC Press (2006).
[87] Torbjorn Vallinder, "The Judicialization of Politics – A Worldwide phenomenon: Introduction," International Political Science Review 15 (1994): 93-94.
[88] Lorraine Weinrib, The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution," Canadian Bar Review 80 (2001): 704.
[89] James B. Kelly. "Governing with the Charter: Legislative and Judicial Activism and Framer's Intent," UBC Press (2006): 38-39.
[90] Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures," Osgoode Hall Law Journal (1997): 75-124.
[91] IBID. 79
[92] IBID. 79-80
[93] IBID. 81
[94] Kent Roach, "The Supreme Court on Trial: Judicial Activism or Democratic Dialogue," Irwin Law Inc., (2001): 12.
[95] IBID. 176
[96] IBID. 226
[97] Hogg and Bushell, supra note 59 at 82.
[98] Roach, supra note 63 at 218-221.
[99] Hogg and Bushell, supra note 59 at 89.
[100] Allan Hutchinson, "Mice Under a Chair: Democracy, the Courts and the Administrative State," University of Toronto Law Journal 40 (1990): 375-76.
[101] Allan Hutchinson, "Waiting for CORAF" Toronto: University of Toronto Press (1996): 37 and Joel Bakan, "Just Words," Toronto: University of Toronto Press (1997): 9-10.
[102] Michael Mandel, "The Charter of Rights and the Legalization of Politics in Canada," Toronto: Thompson Educational Publishings (1994): 38-40.
[103] Hutchinson, "Waiting for CORAF," 6-7 and 33-36.
[104] Andrew Petter, "Immaculate Conception: The Charters' Hidden Agenda." Advocate 45 (1987): 857.
[105] Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution and the Imperialism of the Courts," in Tom Campbell, K.D. Ewing and Adam Tomkins, eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001): 351.
[106] Mandel, "The Charter of Rights and the Legalization of Politics," at 71.
[107] IBID. 311
[108] Christopher P. Manfredi, "Judicial Power and the Charter 2nd edition." (Don Mills, ON, Oxford University Press, 2001): 25.
[109] The point should be stressed that Morton and Knopff are critical of Charter politics and not the Charter as a document. This clearly distinguishes the position of conservative judicial critics from the CLS position, which is critical of the Charter as a liberal document and the liberal state in general. F.L. Morton is clear on this point in "Judicial Politics Canadian Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992," where he is critical of Alan Cairns collapsing the Charter into the Supreme Court's interpretation of the Charter: "Cairns confuses the Supreme Court's interpretation of the Charter with the Charter itself and identifies the latter as the cause of the new constitutional expectations of Charter groups.

This is a mistake." In Curtis Cook, ed. Constitutional Predicament (Montreal and Kingston: McGill-Queen's University Press, 1994): 138.
[110] Christopher Manfredi, "Judicial Power and the Charter 2nd edition." 213 and 217.
[111] IBID. 3-5.
[112] Morton and Knopff, "The Charter Revolution and the Court Party," Osgoode Hall Law Journal 30 (1992): 627-28. And Manfredi, "Judicial Power and the Charter," at 11.
[113] Morton, "The Politics of Rights," at 77.
[114] Manfredi, "Judicial Power and the Charter," at 12.
[115] Christopher Manfredi, "Adjudication, Policy-Making and the Supreme Court of Canada: Lessons from the Experience of the United States," Canadian Journal of Political Science 22 (1989): 314-315.
[116] See James B. Kelly, "The Supreme Court of Canada's Charter of Rights Decisions 1982-1999: A Statistical Analysis," in F.L. Morton ed. Law, Politics and the Judicial Process in Canada 3rd ed. (Calgary: University of Calgary Press, 2002)
[117] IBID. 503-504
[118] IBID. 504
[119] James B. Kelly, "Governing with the Charter: Legislative and Judicial Activism and Framer's Intent," UBC Press (2006): 4.
[120] IBID. 38-39.
[121] See Janet Hiebert, "Charter Conflicts: What is Parliament's Role?" Montreal-Kingston, McGill-Queen's University Press, 2002.
[122] IBID. 50-51.
[123] Mary Dawson, "Governing in a Rights Culture," The Supreme Court Law Review 2nd series 14 (2001): 269. And Janet Hiebert, "Charter Conflicts." 51.
[124] IBID. 55-60
[125] Kelly, supra note 87 at 39.
[126] IBID. 40
[127] IBID. 40
[128] IBID. 40
[129] Sentiments expressed by author interviews in James Kelly, "Governing with the Charter," 40-41.
[130] James B. Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its Entry into the Centre of Government." *Canadian Public Administration*, vol, 42 no. 4. pp. 476-511.
[131] IBID. 17.
[132] IBID. 41
[133] Peter Russell, "A Democratic Approach to Civil Liberties," at 126. See also, Janet Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy," in Paul Howe and Peter Russell eds. Judicial Power and Canadian Democracy (Montreal-Kingston, McGill-Queen's University Press, 2001): 200-206, who has renewed calls for establishing a Charter committee.
[134] The Memorandum to Cabinet that required policy proposals to be reviewed for Charter consistency was known as the Tellier Memorandum and is important for a variety of reasons not least of which is that it legitimized a proactive Charter review at the departmental level, and because of the type of review it performed, saw Justice play a substantive role in the development of new proposals. See, James B. Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its Entry into the Centre of Government." *Canadian Public Administration,* Vol. 42 no. 4 pp. 476-511.
[135] Hon. Brian Dickson, "The Canadian Charter of Rights and Freedoms: Dawn of a New Era?" Review of Constitutional Studies 2 (1994): 11.
[136] Kelly, supra note 87 at 42.
[137] Kelly, supra note 134 at 504.
[138] IBID. 505-506.
[139] IBID. 43
[140] IBID. 44
[141] IBID. 44
[142] It is not the purpose of this paper to outline in extensive detail the use of coordinate constitutionalism and its impact on the judicial activism debate. This has already successfully been argued by James B. Kelly. Instead, this chapter seeks to demonstrate that the power of the Supreme Court is more nuanced than

critics would contend and that this has implications for changes to the appointing power. If one is to properly assess whether the new appointments system will work in Canada, it is important to understand why the process is being changed in the first place; and the argument that the enhanced policy-making function of the Court, as a result of the use of judicial review, has figured prominently in the judicial appointments debate.

[143] Peter Russell, *A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada* 1. Report to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (March 23, 2004).

[144] F.L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition* 1, Presentation to Standing Comm. On Justice, Human Rights, Public Safety and Emergency Preparedness (April 1, 2004).

[145] Morton, supra note 4. Peter McCormick, *Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada*, supra note 30 at 7. Journal of Appellate Practice and Process. And Jacob Ziegel, *Federal Judicial Appointments in Canada: The Time is Ripe for Change*, supra note 35 at 2.

[146] See *A Report on the Panel on Supreme Court Appointments*, The Canadian Association of Law Teachers, June 2005. *Judicial Appointments to the Supreme Court of* Canada, British Columbia Civil Liberties Association, June 2004. *Improving the Supreme Court of Canada's Appointments Process,* Report of the Standing Committee on Human Rights, Public Safety and Emergency Preparedness, May 2004. And, *Proposal to Reform the Supreme Court of Canada Appointments Process,* supra note 24.

[147] Quoted in Martin Friedland's "A Place Apart: Judicial Independence and Accountability in Canada," (Ottawa: Canadian Judicial Council, 1995) 236.

[148] Canadian Bar Association, "The Appointment of Judges in Canada," supra note 35 at 55-56.

[149] IBID. 57

[150] Taken with permission from Troy Riddell, Lori Hausegger and Matthew Hennigar's, "Judicial Selection in Canada: A Look at Patronage in federal Appointments since 1988," draft copy prepared for the Annual Meeting of the Canadian Political Science Association, York University, 2006. 6.

[151] Canadian Bar Association, "The Appointment of Judges in Canada," supra note 35 at 57.

[152] IBID. 57

[153] Ian Green, "The Courts," UBC Press, 2006. 15.

[154] IBID. 15

[155] IBID. 23

[156] It is not the purpose of this paper to outline in extensive detail the extent to which partisan political considerations have been factors in appointment to Canada's Supreme Court. Such analysis is well beyond the scope of this research project. It is only to be suggested here that concerns have been raised as to the extent that political patronage has dominated the appointment process to the Supreme Court. In turn, such concerns have had larger ramifications for the judicial system itself since a process of judicial appointments based on patronage raises concerns about whether the best possible candidates are being chosen for the job. Moreover, it also calls into question the fairness and integrity of the process and by extension potentially undermines the credibility of the judicial system as a whole. As a result, there have been calls for reform to the appointment process in order to reduce the level of patronage inherent in the system.

[157] See Peter Russell and Jacob Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees," (University of Toronto Law Journal, 41. 4-37). This study concluded that 48% of government appointees between the years 1984-1988 had a partisan political consideration. A more recent study by Troy Riddell, Lori Hausseger and Matthew Hennigar, "Judicial Selection in Canada: A Look at Patronage in Federal Appointments since 1988," follows up Russell and Ziegel's earlier analysis and determines that despite the move to a screening committee system in 1988, partisan ties between the appointing party and its appointees continues to exist.

[158] In particular, see the testimony of Professor Jacob Ziegel (Faculty of Law, University of Toronto) and Professor Peter Russell (Department of Political Science, University of Toronto) to the Justice Committee, March 23, 2004, online:
[http://www.parl.gc.ca/InfoCom/PubDocument.asp?DocumentID=1258204&Language=E]

[159] Malleson, supra note 2 at 41.

[160] IBID. 41-42

[161] Riddell, Hauseggar and Hennigar, supra note 152 at 3.

[162] IBID. 3.

[163] IBID. 3.

[164] News Hound, September 7, 2003 as cited in www.tranquileye.com/stockwell/harper.php
[165] Halpern v Canada (Attorney General) [2003] 1 S.C.R10314.
[166] For a detailed outline of the appointment recommendations see "Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada," supra note 35, and "Judicial Selection in Canada: Discussion Papers and Reports," (Ottawa: Canadian Association of Law Teachers, 1987). For an updated analysis of judicial reform recommendations see "Canadian Association of Law Teachers panel on Supreme Court Appointments," (Ottawa: Canadian Association of Law Teachers, June 2005)
[167] See "Judicial Appointments to the Supreme Court of Canada," (Vancouver: British Columbia Civil Liberties Association, June 2004)
[168] See, Alan Patterson, "The Scottish Judicial Appointments Board: New Wine in Old Bottles?" in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, eds. Kate Malleson and Peter H. Russell (Toronto: University of Toronto Press, 2006.)
[169] "Proposal to Reform the Supreme Court of Canada Appointments Process," (Ottawa: Department of Justice Canada, September 2006).
[170] Report of the Standing Committee on Justice, "Improving the Supreme Court of Canada's Appointments Process," 3.
[171] The principle of diversity has been recognized predominately in Great Britain see Kate Malleson, "The New Judicial Appointments Commission in England and Wales: New Wine in Old Bottles?" and Alan Patterson, "The Scottish Judicial Appointments Board: New Wine in Old Bottles?" in Peter Russell and Kate Malleson eds, "Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World," (University of Toronto Press, Toronto. 39-55 and 13-38.)
[172] Green, supra note 118 at 59.
[173] IBID. 59
[174] The Hon. Bora Laskin was the first Canadian of neither British nor French origin to be appointed to the Court in 1970. The first woman to be appointed to the Court was the Hon. Bertha Wilson in 1982. Since Wilson's appointment there have been five women appointed to the Bench.
[175] See *Proposal to Reform the Supreme Court of Canada Appointment Process*, Department of Justice Canada (2004) at http:///www.justice.gc.ca/en/dept/pub/scc/2.html.
[176] Devlin et al., supra note 55 at 798.
[177] Leny E. De Groot-Van Leeuwen, *Merit Selection and Diversity in the Dutch Judiciary* in Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World, eds. Kate Malleson and Peter Russell, University of Toronto Press, 2006. 145.
[178] IBID. 145
[179] *Report of the Canadian Association of Law Teachers Panel on Supreme Court Appointments* (June 2005) 7.
[180] Richard Devlin et al. Supra note 55 at 734-846.
[181] K.G. Banting, "Federalism and the Supreme Court of Canada: The Competing Bases of Legitimation" in *Appointing Judges: Philosophy, Politics and Practice,* (Toronto: Ontario Law Reform Commission, 1991) 217, 31 at 46.
[182] See Ian Bushnell, "The Appointment of Judges to the Supreme Court of Canada: Past, Present and Future," in *Judicial Selection in Canada: Discussion Papers and Reports* (Canadian Association of Law Teachers Special Committee on the Appointment of Judges, 1987) at 22.
[183] Devlin et al., supra note 55 at 799.
[184] IBID. 800
[185] Devlin et al, supra note 55 at 800.
[186] [1999] 3 S.C.R. 3[hereinafter BCGSEU].
[187] Devlin et al, supra note 55 at 801. Devlin et al. stress that the use of such standardized tests in both the physical and psychological domains, as a means of excluding non-traditional groups, is widespread and increasingly criticized. See W. MacKay & P. Rubin, *Study paper on Psychological Testing and Human Rights in Education and Employment* (Toronto: Ontario Law Reform Commission, 1996).
[188] [1999] 3 S.C.R. 3 as quoted in Devlin et al., supra note 55 at 801
[189] [1999] 1. S.C.R. 497 [hereinafter Law].
[190] Quoted in Devlin et al., supra note 55 at 802. 802.
[191] See *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R 143.
[192] Devlin et al, supra note 55 at 802.

[193] The current make up the Supreme Court consists of 4 women including the Chief Justice and two francophones. All are of a mixed European ancestry.
[194] Morton, supra note 4 at 72.
[195] Morton suggests that the increase in the number of women on the Supreme Court from zero to four in the last two decades alone is evidence that lobbying on behalf of feminist organizations has been successful. Furthermore, Morton suggests that 'diversity' has become one of the official norms used by the Justice Minister in making appointments to the Supreme Court. See Report of the Standing Committee on Justice, *Improving the Supreme Court of Canada Appointments Process,* 3.
[196] See Kate Malleson, *The New Judicial Appointments Commission in England: New Wine in Old Bottles,* Supra note 2, at 45. Also, see Beverley McLachlin, 'Promoting Gender Equality in the Judiciary'.
[197] Judicial appointment reform processes in Commonwealth countries such as Britain, Australia and New Zealand have considered the improvements at the diversification of the Canadian legal system for improvements within their countries. See James Allan, *Judicial Appointments in New Zealand,* and Elizabeth Handsley, *The Judicial Whisper goes Around: Appointment of Judicial Officers in Australia,* in Appointing Judges, at 103 and 122.
[198] Quoted in Alan Patterson, *The Scottish Judicial Appointments Board,* Appointing Judges in an Age of Judicial Review, supra note 132 at 28.
[199] IBID. 28
[200] Quoted in Patterson, *The Scottish Judicial Appointments Board,* Appointing Judges in an Age of Judicial Review, supra note 132 at 29.
[201] IBID. 29
[202] Peter Russell, "Independence and Accountability" in "Appointing Judges", supra note 11 at 426.
[203] Alan Patterson, "The Scottish Judicial Appointments Board" in Appointing Judges supra note, 132 at 13.
[204] See above section re: judicial review and its impact on the appointment procedure to the Supreme Court.
[205] See remarks by the former Chief Justice Antonio Lamer who commented that "...with the Charter, we are commanded to sometimes judge the laws themselves. It is a very different activity, especially when one has to look at section 1 of the Charter, which is asking us to make what is essentially what used to be a political call." In the Globe and Mail, 17 April 1992, A17.
[206] Alan Paterson, "The Scottish Judicial Appointments Board – New Wine in Old Bottles?" in "Appointing Judges in an Age of Judicial Power", eds. Kate Malleson and Peter H. Russell: University of Toronto Press (2006). 17.
[207] For discussion of this point, see Richard Mulgan ""Accountability": A Ever Expanding Concept?" (2000) 78 at 555.
[208] IBID. 556
[209] IBID. 556
[210] Many of the arguments for increased accountability within Canada's judiciary, primarily within the Supreme Court of Canada have emanated from a relatively small constituency of populist western based politicians such as the former Reform Party of Canada and the former Alliance Party of Canada. With the merger of the Alliance and the Progressive Conservative Party in 2004, a small number of members, mostly of the populist persuasion, have carried forth their views on judicial appointment and accountability.
[211] While the extent to which the Court actively engages in public policy creation is debatable, there is little doubt that the Charter has created a 'political role' for the Court especially with the development of the reference mechanism, by which the federal executive can refer any matter to the S.C.C. The new role of the Court in advising government on constitutional issues has plunged the S.C.C. into some of the major political issues of the day. See, for example, *Reference re: the Succession of Quebec, [1998] 2S.C.R.217, Reference re: Same Sex Marriage, [2004] 3 S.C.R, 698*
[212] Quoted in Andrew LeSeur, "Developing Mechanisms for Judicial Accountability in the UK" Public Administration, 2000 78, 3 at 75.
[213] IBID.75
[214] See "Panel on Supreme Court Appointments", Canadian Association of Law Teachers June 2005 and "Supreme Court of Canada Appointment Process" Canadian Bar Association, March 2004. Both organizations argue that the independence of the judiciary should remain paramount when considering the introduction of accountability mechanisms for the judiciary.
[215] Quote is available at www.commonwealthlawyers.com.
[216] IBID. 3

[217] K.D. Ewing, "A Theory of Democratic Adjudication: Toward a Representative, Accountable and Independent Judiciary" Alberta Law Review 38 (3), at 726.
[218] IBID. 726
[219] IBID. 729
[220] Peter W. Hogg, *Constitutional Law of Canada*, Student Edition (Toronto: The Carswell Co. Ltd., 2005), at 150.
[221] IBID. 203
[222] IBID. 388
[223] Report of the Canadian Bar Association on Judicial Independence.
[224] IBID. 8-9
[225] IBID. 10
[226] Further support of this argument is demonstrated in the above Chapter of this paper, Chapter 3: Judicial Review.
[227] IBID. 10
[228] IBID. 12
[229] IBID. 15
[230] Peter Russell, *"The Judiciary in Canada: The Third Branch of Government"* (Toronto: McGraw-Hill, Ryerson, 1987) at 98-99.
[231] Jules Deschenes with Carl Barr, Report to the Superior Court of Quebec, *"Maitres Chez Eux"* (1984).
[232] Peter Russell, *"The Judiciary in Canada,"* supra note 190 at 100.
[233] See, Ian Greene, The Courts, supra note 84 at 85.
[234] For further analysis of judicial independence and its relationship to the judicial activism debate see Jennifer Smith, "Executive Appointment of the Judiciary: A Reconsideration", The Report of the Canadian Bar Association on the Independence of the Judiciary, K.D. Ewing, "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary," supra note 205 and James B. Kelly, supra note 115.
[235] Reference re: Remuneration of the Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3. para.125 (hereinafter: "Reference re: Remuneration")
[236] Reference re: Remuneration of Judges of the Provincial Court (P.E.I) [1997] 3 S.C.R. 3.
[237] R. v. Valente [1985] 2 S.C.R. 673.
[238] James B. Kelly, supra note 115 at 150.
[239] Reference re: Remuneration of the Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3. para. 131.
[240] IBID. 140
[241] James B. Kelly, "Governing with the Charter", supra note 115 at 152.
[242] Proportionality is determined by the Court by using the *Oakes* test which determines whether a limitation (Section 1) on a right is reasonable and justifiable in a free and democratic society. See *R v. Oakes* [1986] 1 S.C.R. 103.
[243] IBID. 152
[244] IBID. 152
[245] IBID. 39
[246] Re Therrien [2001] 2 S.C.R. 3.57, 58 and 149.
[247] Jennifer Smith, "Executive Appointment of the Judiciary: A Reconsideration," supra note 222 at 205.
[248] Jennifer Smith, "Executive Appointment of the Judiciary: A Reconsideration," supra note 222 at 205.
[249] IBID. at 206
[250] IBID. 206
[251] IBID. 206
[252] Peter Russell, "Conclusion" Supra note 11 at 429.
[253] For further information see, Christine Landfried, "The Selection Process of Constitutional Court Judges in Germany," "Appointing Judges in an Age of Judicial Power" at 196.
[254] Jennifer Smith, "Executive Appointment of the Judiciary: A Reconsideration." Supra note 222 at 207.
[255] Due to the linguistic limitations of the author (unilingual English), this paper has not analyzed the significant writing in French from Quebec proposing judicial appointment reform at the provincial level.
[256] See for example, Department of Justice Canada, *A New Judicial Appointment Process* (Ottawa: Minister of Supply and Services. 1988).

[257] See CBA Committee Appointment, supra note 174 and Special Committee on the Appointment of Judges, Judicial Selection in Canada (Toronto: Canadian Association of Law Teachers, 1991).
[258] CBA Committee Appointment, supra note 174 and Special Committee on the Appointment of Judges, Judicial Selection in Canada (Toronto: Canadian Association of Law Teachers, 1988). These two reports along with other articles mentioned in the bibliography, referred to patronage as a major problem to be addressed in order to make the appointment process legitimate. For a current analysis of the patronage issue in federal court appointments since the implementation of the advisory committee system see Riddell, Haussegar and Hennigar, supra note 143.
[259] Kate Malleson and Peter Russell, supra note 2, at 420.
[260] IBID. 420
[261] W.R. Lederman, "Constitutional Procedure and the Reform of the Supreme Court of Canada" (1985) 26 C.D. 195.
[262] See, Devlin et Al. Supra note 55 at 815.
[263] Malleson, supra note 2 at 39.
[264] Proposal to Reform the Supreme Court of Canada Appointments Process, Department of Justice Canada, can be found at www.justice.gc.ca/en/dept/pub/scc/6.htm. Note that the extent of provincial input into the appointments process is an issue raised by the Conservative Party and the Bloc Quebecois in their dissenting reports to the proposal.
[265] For example, in Ontario, the profile of the provincially appointed judiciary became significantly more diversified under the Liberal and NDP administrations of the late 1980's and early 1990s. However, with the election of the Conservative government, there has been a significant decrease in the number of women and visible minorities selected. See, Devlin et Al. Supra note 55 for a further examination of the provincial statistics.
[266] Richard Devlin et al., "Reducing the Democratic Deficit" Supra note 55 at 822.
[267] Richard Devlin et al., "Reducing the Democratic Deficit" Supra note 55 at 822
[268] C. L'Heureux Dube, "Nomination of Supreme Court Judges: Some Issues for Canada" (1991) 20. Manitoba Law Journal at 615.
[269] See Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 823.
[270] See Christine Landfried, "The Selection Process of Constitutional Court Judges in Germany" Supra note 241 at 200.
[271] IBID. 422
[272] See Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 823.
[273] Reference re: Secession of Quebec, [1998] 2 S.C.R 217.
[274] IBID. At paragraph 149, 64 and 68.
[275] Ian Greene, The Courts, supra note 84 at 137-138.
[276] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 824.
[277] IBID. 824
[278] For a brief discussion of some of the American literature in this regard see J. Blume and T. Eisenberg, "Judicial Politics, Death Penalty Appeals, and Case Selection" (1999) 72 California Law Review 465 at 466. See also S.P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law", (1995) 62 University of Chicago Law Review 689 at 727-28.
[279] Richard Devlin et al. "Reducing the Democratic Deficit," Supra note 55 at 824.
[280] IBID. 824
[281] IBID. 824
[282] Quoted in Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 825. See, J. Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Honorable Mr. Justice Berger." (1984) 29 McGill Law Journal 369 at 379.
[283] J. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada" (1999) 5:2 *Choices* 1. See also Task Force on Canadian Unity, A Future Together: Observations and Recommendations (Quebec: Minister of Supply and Services Canada, 1979).
[284] IBID. 1
[285] Devlin et al. "Reducing the Democratic Deficit," Supra note 55 at 826.
[286] IBID. 826
[287] Ziegel, Supra Note 12 at 393.

[288] Michael Tolley, "Legal Controversies over the Federal Judicial Cycle in the United States: Breaking the Cycle of Obstruction and Retribution over Judicial Appointments," in "Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World" at 81.
[289] IBID. 84
[290] W.R. Lederman, "Current Proposals for the Reform of the Supreme Court of Canada," (1979) 57 Canadian Bar Review. 687 at 698.
[291] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 826.
[292] Carl Barr, "Comparative Perspectives on Judicial Selection Processes," Alberta Law Review Vol. 38(3), 2000, 148.
[293] IBID. 148.
[294] IBID. 148
[295] It should be noted that the drama of the Bork and Thomas confirmation hearings are not generally typical of such procedures. Moreover, Jacob Ziegel argues that critics have misinterpreted the significance of these events. Ziegel argues that Bork came under intense scrutiny because his constitutional philosophy was anathema to many segments of American society. Furthermore, Ziegel suggests that Clarence Thomas ran into fierce opposition because he was seriously under qualified to sit on the American Supreme Court. See, Jacob Ziegel, "Appointments to the Supreme Court of Canada," Constitutional Forum, March 1993, 10-15.
[296] Carl Barr, "Comparative Perspectives on Judicial Selection Processes," Alberta Law Review Vol 38(3), 2000, 148.
[297] IBID. 148
[298] The problems plaguing the Canadian committee system will be discussed in further length later in this paper.
[299] Peter McCormick, "Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada", supra note 30 at 33.
[300] IBID. 33
[301] Peter McCormick, "Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada", supra note 30 at 33
[302] Valente v the Queen [1985] 2 S.C.R. 673.
[303] Bertha Wilson, "Methods of Appointment", at 162.
[304] K. Makin, "Top Court Judge Defends Bench" The Globe and Mail (3 March 1999) A5.
[305] Kate Malleson, "Appointing Judges in an Age of Judicial Power," supra note 2 at 7.
[306] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 828.
[307] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 828.
[308] IBID. 828
[309] Lorraine Eisenstat Wienrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 133.
[310] For further information on this topic see Riddell, Haussegar and Hennigar, Supra note 143.
[311] See for example, Jennifer Smith, "Executive Appointment of the Judicial Branch", supra note 222, K.D. Ewing, "A Theory of Democratic Adjudication", supra note 205 and F.L. Morton, "Judicial Appointments in Post-Charter Canada", supra note 4 and Ian Greene, "The Courts", supra note 84.
[312] See Canadian Association of Law Teachers Special Committee on Judicial Appointments, "Recommendations" June 1, 1985.
[313] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 833.
[314] Lorraine Eisenstat Wienrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 134.
[315] IBID. 134
[316] Peter McCormick, "Selecting the Supremes" Supra note 30 at 37.
[317] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 833.
[318] Lorraine Eisenstat Wienrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 135.
[319] Jacob Ziegel, 'Federal Judicial Appointments in Canada: The Time is Ripe for Change", supra note 35 at 9 and 12.
[320] Lorraine Eisenstat Wienrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 134.
[321] CBA Report on the Independence of the Judiciary, supra note 183 at 31.
[322] Lorraine Eisenstat Wienrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 135.
[323] R. Stevens, "The Independence of the Judiciary: The Case of England," (1999) 72 Southern California Law Review 597 at 622.

[324] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 834.
[325] Lorraine Eisenstat Wienrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 136.
[326] Weinrib, supra note 10, at 136. While there is no actual supporting information to suggest that this is indeed a possibility, the idea here is simply to propose ways in which the nominating model could be subjected to unforeseen problems, if the details of membership and composition are not fully considered.
[327] Francois Du Bois, "Judicial Selection in Post-Apartheid South Africa," in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*, (Toronto: University of Toronto Press, 2006) at 290.
[328] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 834.
[329] IBID. 834
[330] The Council of the Federation was established by the premiers on December 5, 2003, and consists of the ten provincial and three territorial premiers, with a small secretariat in Ottawa. See, http://www.councilofthefederation.ca.
[331] Peter McCormick, "Appointment of Judges to the Supreme Court of Canada" supra note 29 at 35 and 36.
[332] Lorraine Eisenstat Wienrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 137.
[333] Ian Greene, The Courts, Supra note 84 at 20.
[334] Allan Hutchinson, Presentation to the Standing Committee on Justice, Human Rights and Emergency Preparedness (April 1, 2004) available at http://www.parl.gc.ca/infocomdoc/37/3/JUST/Meetings/Evidence/JUSTEV09-E.htm.
[335] Peter McCormick, "Appointment of Judges to the Supreme Court of Canada" supra note 29 at 35 and 37.
[336] Jennifer Smith, supra note 222 at 209.
[337] Ian Greene, The Courts, supra note 84 at 27.
[338] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 835.
[339] IBID. 835
[340] IBID. 836
[341] Lorraine Eisenstat Wienrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 136.
[342] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 837. This criticism, however, is somewhat dubious since it is very rare that a government would be voted out of office as a result of a poor appointment. In fact, the secrecy which currently surrounds the process actually tends to insulate the government from having to account for its appointments.
[343] F.L. Morton, "Judicial Appointments in Post-Charter Canada" supra note 4 at 75.
[344] IBID. 75
[345] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 839.
[346] Between 1989 and 1992, 35 of the appointments were women and 10 were persons of colour and/or Aboriginal, out of a total of 80 candidates. Devlin et al. "Reducing the Democratic Deficit" supra note 55 at 839.
[347] IBID., 839
[348] IBID., 839
[349] IBID., 839
[350] Francois Du Bois, "Judicial Selection in Post-Apartheid South Africa," supra note 327 at 291.
[351] IBID. 291
[352] IBID. 291
[353] IBID. 293
[354] Richard Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 840.
[355] IBID. 840
[356] Lorraine Eisenstat Wienrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 136.
[357] Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 841.
[358] IBID. 841
[359] IBID. 841
[360] Quoted in Devlin et al. "Reducing the Democratic Deficit," supra note 55 at 842.
[361] Quoted in Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 842
[362] IBID. 842
[363] IBID. 842

[364] Lorraine Weinrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 138.
[365] IBID. 139
[366] IBID. 138
[367] IBID. 138
[368] Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 842.
[369] Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 843.
[370] *Supreme Court Act*, R.S.C. 1985, c S-26, s. 6.
[371] Lorraine Weinrib, "Appointing Judges to the Supreme Court of Canada" Supra notes 10 at 139.
[372] IBID. 138
[373] Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 842.
[374] CALT acknowledges that the case for Aboriginal representation on the Supreme Court of Canada is part of the broader case for Aboriginal participation in Canada's governmental and public institutions. CALT has determined that Aboriginal representation on the Supreme Court is critical for a number of reasons including but not limited to their constitutional status as a 'nation' within Canada. In this sense, CALT makes the argument that, like provinces, Aboriginal peoples are constitutional entities and actors whose participation in national institutions matter for constitutional legitimacy. Moreover, CALT argues that Canada's constitutional commitment to political and legal pluralism demonstrates the need for a judicial role for Aboriginals especially in deciding cases intimately linked to the political and legal identity and rights of the Aboriginal peoples. See, Canadian Association of Law Teachers, *Panel on the Supreme Court Appointments*, June 2005 pp. 16-24.
[375] See Lorraine Eisenstat Weinrib, "Appointing Judges to the Supreme Court of Canada" Supra note 10 at 139, and Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 842.
[376] Lorraine Eisenstat Weinrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 139.
[377] Lorraine Eisenstat Weinrib, "Appointing Judges to the Supreme Court of Canada," supra note 10 at 139.
[378] Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 843.
[379] See Appendix I – Nova Scotia, Ontario, Alberta.
[380] See Appendix I.
[381] Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 844.
[382] Quoted in Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 845.
[383] IBID. 828
[384] IBID. 829
[385] IBID. 829
[386] IBID. 829
[387] *Improving the Supreme Court of Canada Appointments Process*, Report of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, May 2004.
[388] Devlin et al. "Reducing the Democratic Deficit" Supra note 55 at 830.
[389] IBID. 830
[390] IBID. 830
[391] IBID. 830
[392] See Kate Malleson, Supra note 2 at 47.
[393] "Improving the Supreme Court of Canada Appointment Process" Supra note 14 at 1-2.
[394] "Proposal to Reform the Supreme Court of Canada" Department of Justice Canada, Online: http://www.justice.gc.ca/en/dept/pub/scc/7.html at 1.
[395] Kate Malleson, Supra note 2 at 49.
[396] IBID. 49
[397] Ron Levy, "Judicial Selection: Trust and Reform" UBC Law Review 40, 1 (2007) at 239.
[398] IBID. 239-240
[399] See e.g. Kate Malleson, Supra note 2 at 49. Alan Patterson, Supra note 132 at 19. Jacob Ziegel, Supra note 35 at 339.
[400] Eli M. Salzburger, "Judicial Appointments and Promotions in Israel: Constitution, Law and Politics," (2006) in Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World, eds. Kate Malleson and Peter H. Russell, University of Toronto Press. 249. And Francois Du Bois, "Judicial Selection in Post-Apartheid South Africa" (2006) in Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World, eds. Kate Malleson and Peter H. Russell, University of Toronto Press. 288.

[401] E.M. Salzburger, supra note 400 at 249-250.
[402] Francois Du Bois, supra note 327 at 292.
[403] IBID. 287
[404] IBID. 287
[405] IBID. 292
[406] Francois Du Bois, supra note 327 at 292.
[407] IBID. 292
[408] Richard Devlin, Supra note 55 at 834.
[409] IBID. 834
[410] "Proposal to Reform the Supreme Court of Canada's Appointments Process" Supra note 24 at 2.
[411] Peter McCormick, Supra note 29 at 32.
[412] Jennifer Smith, Supra note 222 at 193.
[413] Canadian Bar Association Committee on the Constitution, *Towards a New Canada.* Supra note 62 at 38 and 55.
[414] Presented to the First Ministers' Conference on the Constitution, October 1978, at 38.
[415] Secretary's Report, Canadian Intergovernmental Conference Secretariat, *The Constitutional Review*, 1968-1971 (Ottawa: Information Canada, 1974) at 381-82.
[416] See, Jennifer Smith, Supra note 222 at 194.
[417] See, Meech Lake Reform Proposal, 1987, at 11.
[418] Peter Russell, Supra note 11 at 105.
[419] IBID. 105
[420] Jacob Ziegel, "Appointments to the Supreme Court of Canada" (1993) Constitutional Forum at 12.
[421] IBID. 13
[422] IBID. 13
[423] Carl Barr, Supra note 10 at 152-53.
[424] IBID. 153
[425] IBID. 152
[426] Proposal to Reform the Supreme Court of Canada Appointments Process, Supra note 24 at 2.
[427] IBID. 2
[428] Carl Barr, Supra note 10 at 149.
[429] IBID. 150
[430] IBID. 150
[431] Canadian Association of Law Teachers Panel on Supreme Court Appointments, Supra note 36 at 13.
[432] See, e.g. Jacob Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada" Supra note 242 at 11. And Peter McCormick, Supra note 12 at 37.
[433] Francois Du Bois, Supra note 284 at 288.
[434] Kate Malleson, "Assessing the Performance of the Judicial Service Commission" (1999) 116 South Africa Law Journal 36, at 38.
[435] Quoted in IBID. 38
[436] C. Thomas, "Judicial Appointments in Continental Europe" UK Lord Chancellor's Department, Research Series 6/97 (London: 1997), at 7.
[437] Simon Evans and John Williams, "Appointing Australian Judges: A New Model" Sydney Law Review 16 (2008), 19.
[438] Proposal to Reform the Supreme Court of Canada Appointments Process, Supra note 24 at 3.
[439] IBID. 3
[440] Peter McCormick, Supra note 29 at 37.
[441] Lorraine Eisenstat Weinrib, Supra note 10 at 134.
[442] IBID. 134
[443] Richard Devlin et al. Supra note 55 at 833.
[444] Lorraine Eisenstat Weinrib, Supra note 10 at 209.
[445] IBID. 209
[446] IBID. 834
[447] Richard Devlin et al. Supra note 55 at 834.
[448] IBID. 834
[449] Lorraine Eisenstat Weinrib, Supra note 10 at 134.

[450] Ian Greene, Supra note 84 at 27.
[451] Lorraine Eisenstat Weinrib, Supra note 10 at 209.
[452] IBID. 209
[453] Jennifer Smith, Supra note 222 at 209.
[454] IBID. 209
[455] Peter McCormick, Supra note 29 at 37.
[456] IBID. 37
[457] IBID. 37
[458] Alan Patterson, Supra note 132 at 29.
[459] Ron Levy, Supra note 28 at 240.
[460] IBID. 241
[461] Richard Devlin et al. Supra note 55 at 835.
[462] IBID. 835
[463] Richard Devlin et al. Supra note 55 at 831.
[464] IBID. 836
[465] IBID. 833
[466] Proposal to Reform the Appointment Process to the Supreme Court of Canada, Supra note 24 at 3.
[467] Richard Devlin et al. Supra note 55 at 836.
[468] Kate Malleson, Supra note 392 at 49.
[469] IBID. 49
[470] Kate Malleson, Supra note 392 at 39.
[471] IBID. 39
[472] Richard Devlin et al. Supra note 55 at 835.
[473] Richard Devlin et al. Supra note 55 at 835.
[474] IBID. 835
[475] It should be noted that the same problems of diversity inherent within the judiciary and the selection commissions are also reflected in law schools and informing the entire legal system. For an extended analysis of judicial diversity see Cheryl Thomas, The Commission for Judicial Appointments, "Judicial Diversity in the United Kingdom and other Jurisdictions: A Review of Research, Policy and Practices" (2005) at 57-60.
[476] Simon Evans and John Williams, "Appointing Australian Judges: A New Model", (2008) Sydney Law Review 16 at 12.
[477] Alan Patterson, Supra note 132 at 25.
[478] Richard Devlin et al. Supra note 55 at 736.
[479] Kate Malleson, Supra note 392 at 49.
[480] Quoted in Alan Patterson, Supra note 132 at 28-29.
[481] Kate Malleson, Supra note 392 at 49.
[482] Alan Patterson, Supra note 132 at 26.
[483] Simon Evans and John Williams, Supra note 434 at 5.
[484] Richard Devlin et al. Supra note 55 at 832.
[485] Quoted in Richard Devlin et al. Supra note 55 at 834.
[486] Ian Greene, Supra note 84 at 19.
[487] Richard Devlin et al. Supra note 55 at 835.
[488] Quoted in Alan Patterson, Supra note 132 at 20.
[489] Francois Du Bois. Supra note 284 at 291.
[490] See reports from the Canadian Association of Law Teachers, the Canadian Bar Association, supra note 36, and the British Columbia Civil Liberties Association. Supra note 38.
[491] IBID. 10
[492] Proposal to Reform the Supreme Court of Canada Appointments Process, Supra note 24 at 3-4.
[493] IBID. 4
[494] IBID. 4
[495] Peter Hogg, Judicial Interview Process, Notes for the Opening Remarks to the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada (2006) Osgoode Hall Law Journal 44, at 538.
[496] Proposal to Reform the Supreme Court of Canada Appointments Process, Supra note 24 at 5.
[497] IBID. 5-6

[498] Three questions were asked per member on the first round, and two per member on the second round. The committee elected not to continue for a third round.
[499] Kate Malleson, "Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom", (2006) Osgoode Hall Law Journal 44 at 558.
[500] See, Michael Tolley, Supra note 247.
[501] See Eli Salzburger, "Judicial Appointments and Procedures in Israel: Constitution, Law and Politics" and F. Du Bois, "Judicial Selection in Post-Apartheid South Africa" in Appointing Judges in K. Malleson and P. Russell, eds., *Appointing Judges in an Age of Judicial Power* (Toronto: University of Toronto Press, 2006.)
[502] Kate Malleson, "Assessing the Performance of the South African Judicial Service Commission" (1999) 116 S.A.L.J at 36.
[503] Kate Malleson, Supra note 457 at 559.
[504] See "Tory Platform a Legal Minefield" Edmonton Journal, 21 June 2004, A1.
[505] Peter Hogg, "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada", (2006) Osgoode Hall Law Journal 44 at 532.
[506] The original court-packing plan was devised by a Democrat, President Franklin D. Roosevelt, to overcome the destruction of his New Deal at the hands of an ultra-conservative Supreme Court, which believed that measures such as minimum wages or limitations on hours of work, let alone the New Deal programs to combat the depression of the 1930s, were contrary to the Bill of Rights. After the swing judge on the nine man Court changed his mind in 1937, the so called Lochner era ended without implementation of the expansion of the Court that had been proposed by the President. A period of judicial restraint ensued, but decisions in the 1960s and 1970s on issues such as abortion, contraception, pornography, desecration of the flag, and rights of criminal defendants raised the ire of conservatives, prompting a new round of hostility to the Court and open demands for the appointment of more conservative judges.
[507] U.S. Const. art. II, 2 (2).
[508] Peter Hogg, Supra note 4 at 533.
[509] See, Peter Hogg, Supra note 4 at 531.
[510] The Commissioner for Federal Judicial Affairs retained prominent constitutional law professor Peter Hogg to provide advice to the ad hoc committee as to its procedures. This included limiting the kinds of questions that committee members could ask the nominee.
[511] Ian Peach, "Legitimacy on Trial: A Process for Appointing Justices to the Supreme Court of Canada", Saskatchewan Institute of Public Policy. Paper No. 30 February 2005 at 17.
[512] See, "Reforming the Supreme Court of Canada Appointments Process", supra note 10.
[513] "Improving the Supreme Court of Canada Appointments Process", Report of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, New Democratic Party Dissenting Opinion on Reform of the Supreme Court of Canada Appointments Process, at 22.
[514] See, Jacob Ziegel, "A New Era in the Selection of Supreme Court Judges? (2006) Osgoode Hall Law Journal, 44 at 554.
[515] See Kate Malleson, Supra note 11 at 45.
[516] IBID. 45
[517] IBID. 45
[518] IBID. 45
[519] IBID. 45
[520] Kate Malleson, Supra note 392 at 42.
[521] See Jacob Ziegel, Supra note 500, and Kate Malleson Supra note 457.
[522] See Jacob Ziegel, Supra note 500, Kate Malleson. Supra note 457, Peter Hogg. Supra note 4 and Peter McCormick Supra note 29.
[523] Jonathan Klaaren and Stuart Woolman, "Public Hearings for Constitutional Court Judges" (1994) Working Paper 22, Centre for Applied Legal Studies, University of the Witwatersrand, Johannesburg, pp 6-7 as quoted in K. Malleson, Supra note 457 at 40.
[524] Kate Malleson, "The Use of Judicial Appointments Commissions: A Review of the US and Canadian Models (1997) Lord Chancellor's Department Research Paper No. 6.
[525] Peter Hogg, Supra note 4 at 535.

[526] *Federal Judicial Appointments Personal History Form,* reprinted in Andre Miller, "The 'New' Federal Judicial Appointments Process: The First Ten Years" (2000) 38 Alta. Law Rev. 616, App. IV [citing a need for legal and lay perspectives among judicial selectors].
[527] As noted above, a few questioners did ignore Hogg's advice to steer clear of substantive legal questioning.
[528] Weinrib, supra note 10 at 110.

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Appendix II – Chronology of Supreme Court Appointments Reform

12 December 2003 – "Democratic Reform" initiative started by Prime Minister Paul Martin. Martin announces: "the government will specifically consult the Standing Committee on Justice and Human Rights on how best to implement prior review of appointments of Supreme Court of Canada judges."

19 January 2004 – In a brainstorming session with law students from across Ontario, Minister of Justice Irwin Cotler identifies reforming the Supreme Court appointments process as a priority for the Martin government.

29 January 2004 – In a speech at Wilfrid Laurier University, Roger Gallaway, Parliamentary Secretary for Democratic Reform, announces a government proposal which would require Supreme Court nominees to answer questions in front of a parliamentary committee. Gallaway explains that courts are "the creation of Parliament and subject to it" and Parliament is "losing sight of the function and role of the courts and their place in our constitutional design." He warns those judges who oppose such a change to "remember their proper roles, one of which is to avoid comment on political or parliamentary affairs."

2 February 2004 – A University of Toronto study suggests that claims of judicial activism at the Supreme Court of Canada are exaggerated; from 1982 to 2002 governments won 62.4% of the time when an act of Parliament or the legislatures was at issue.

3 February 2004 – Despite earlier indications to the contrary, there is o mention of reforming the Supreme Court appointments in the Throne Speech.

4 February 2004 – Democratic Reform Minister Jacques Saada unveils the "Democratic Reform Action Plan," which expands on the democratic reform proposals announced in December 2003. Under the heading "Supreme Court Appointments" the plan reiterates the government's commitment to consult with the "appropriate Parliamentary committees on how best to implement prior review of appointments of Supreme Court of Canada judges."

20 February 2004 – Madam Justice Louise Arbour announces she will leave the Supreme Court in June 2004, in order to become the UN High Commissioner for Human Rights. At a press conference in Saskatoon, Prime Minister Martin says he will make the final decision on who will fill her seat, but says he will involve MPs in the selection process.

3 March 2004 – Senior government sources tell reporters that the Ministry of Justice has floated the idea of an interim appointments process to fill the seat vacated by Justice Arbour. MPs on the Standing Committee are divided over whether to proceed with a one-off procedure to deal with the Arbour vacancy, or to develop a permanent procedure before her departure.

15 March 2004 - The Standing Committee on Justice, Human Right, Public Safety and Emergency Preparedness announces it will undertake a study of the process by which judges are appointed to the Supreme Court of Canada.

17 March 2004 – In a speech to the Quebec Chamber of Commerce, Prime Minister Martin reiterates the need for a new process of Supreme Court appointments as part of the larger project of democratic reform.

22 March 2004 – Justice Frank Iacobucci announces he will retire from the Supreme Court in June 2004, opening up a second vacancy on the high court. In a statement praising Justice Iacubucci's service, Chief Justice Beverly McLachlin states: "I know that the Canadian government will now consider the appointment of two new justices of the Supreme Court with all the care and deliberation that is required under the present circumstances."

Following Justice Iacubucci's announcement, a government source tells reporters that the idea of an interim appointment process has been abandoned now that there are two seats to fill. Derek Lee, Liberal MP and chairman of the Standing Committee, tells reporters that he hopes a permanent appointments process can be agreed upon by the end of April.

10 May 2004 – The Standing Committee for Justice, Human Rights, Public Safety and Emergency Preparedness releases its report "Improving the Supreme Court of Canada Appointments Process" in which it recommends an interim procedure to fill the two vacancies of Arbour and Iacobucci. The committee recommends that the Minister of Justice appear before a House of Commons Standing Committee on Justice to explain the process by which the vacancies on the Supreme Court were filled and the qualifications of the two appointees. In addition, the committee recommended that the Government of Canada publish a document setting out the current process by which Supreme Court justices are appointed.

22 August 2004 – An Ad Hoc Committee was established to review the two nominations for the Iacubucci and Arbour vacancies. The Interim Ad Hoc Committee on the Appointment of Supreme Court Judges (the "Ad Hoc Committee") was composed of Members of Parliament, a representative of the Canadian Judicial Council and a representative of the Law Society of Upper Canada.

27 August 2004 – The Ad Hoc Committee releases its report. In addition to its comments on the two nominees, the committee also commented on its own process and requested that the Government respond to the Justice Committee's May 10 Report by the end of October 2004.

29 October 2004 – The Minister of Justice wrote the Justice Committee advising that the Government supports the principle recommendation of the Justice Committee that an advisory committee should be established as required for the purpose of filling vacancies on the Supreme Court of Canada as they arise. In the Government's view, such a process

would enhance the transparency of the appointments process, while maintaining the exceptional quality of nominees for positions on the Court.

30 November 2004 – In a letter, the Minister of Justice provided the Justice Committee with an outline of the "principles and overriding considerations that the Government considers central to the design of a revised process". This letter also set out "an early indication of our thinking in regard to some of the critical elements that were addressed by both the Justice Committee report and the dissenting opinions, and that will inform our final proposal".

2005 – Justice John Major announces his retirement from the Supreme Court.

2005 – Justice Minister Irwin Cotler announces a new and more elaborate process that would be used to fill the vacancy set by Justice Major. After the usual informal consultations with the attorney general, chief justices and leading members of the legal profession, the Minister would submit a short-list of five to eight candidates to an advisory committee composed of a member of Parliament (or Senator) from each recognized party in the House of Commons, a nominee of the provincial attorney(s) general, a nominee of the provincial law society, and two prominent Canadians who were neither lawyers nor judges. The committee would provide the Minister with a short-list of three names from which the appointment would be made. The Minister of Justice would then appear before the Standing Committee on Justice to explain the selection process and the qualifications of the person selected.

29 November 2005 – The Liberal Government is defeated in the House of Commons and Parliament was dissolved for an election to be held in January 2006.

23 January 2006 – The Conservative Party of Canada wins a narrow minority government. The Government announces that it will select a nominee for the Supreme Court from the list created by the Liberal advisory committee. In addition, the Government announces that it will introduce a Parliamentary committee to conduct a public hearing of the nominee. The Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada is subsequently established.

27 February 2006 – The Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada holds a televised hearing of the Prime Minister's nominee Federal Court of Appeal Justice, Marshall Rothstein. Justice Rothstein becomes the first Supreme Court nominee to answer questions from the members of the Ad Hoc Committee.

1 March 2006 – Prime Minister Harper announces in a written statement that he had selected Justice Rothstein and would recommend him for appointment by the governor-in-council.

6 March 2006 – Justice Rothstein was duly appointed and sworn in as Justice of the Supreme Court of Canada.

2008 – Prime Minister Stephen Harper announces that he will create an ad hoc advisory panel to assist him with finding a suitable nominee to replace the retiring Supreme Court Justice Michel Bastarache.

2008 – Prime Minister Harper announces that unlike the advisory committee used to appoint Justice Rothstein, the new ad hoc committee will be composed solely of members of Parliament. The panel would consist of two MPs from the current government and one from each of the opposition parties.

11 August 2008 – Toronto Star reports that NDP Justice Critic, Joe Comartin, disapproves of the Supreme Court advisory panel's members. Comartin suggests that the panel should consist of members outside of government as well as MPs.

August 2008 – The Supreme Court Selection Panel established by the Harper government breaks down and the panel is suspended by the Government.

5 September 2008 – Prime Minister Stephen Harper announces the nomination of Nova Scotia Court of Appeal judge Thomas Cromwell to the Supreme Court of Canada. Harper insists that he was forced to make the appointment because the Supreme Court did not wish to sit the Fall session without a full Coram of judges. Harper states that Justice Cromwell will face an ad hoc Parliamentary scrutiny committee before he is sworn in as Justice of the Supreme Court.

December 2008 – Parliament is suspended after the opposition parties threaten to take down the government over their handling of the global financial crisis. The public hearing for Justice Cromwell had yet to take place.

5 January 2009 – Justice Cromwell is quietly sworn in as Justice of the Supreme Court of Canada without facing an ad hoc Parliamentary scrutiny committee. Prime Minister Harper argues that there was no time left for parliamentarians to 'scrutinize' his choice, but that he would reinstate the public process the next time around.

Appendix III – Judicial Interview Process of the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada
(This form is a reproduced copy of that found in P. Hogg, "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada" (Toronto: Osgoode Hall L.J. 44, 2006).

INTRODUCTION

This is an historic moment. It is a first time that a Government nominee for appointment to the Supreme Court of Canada has been interviewed in public by a committee composed of Members of Parliament. The purpose of this new process is to make appointments to the Court more open, and to promote public knowledge of the judges of the Court.

The process is not without controversy. Everyone would agree in principle that important public decisions be open and public. But there are those – many of them in the legal profession – who fear that a Parliamentary review of judicial appointments carries more risk than benefit. The critics argue that an open process will tend to politicize the judiciary, and publicly embarrass the distinguished people who are nominated for appointment. This committee, today, has the opportunity to show the critics that they are wrong. This committee has the opportunity to demonstrate that the Canadian virtues of civility and moderation can make an open and public process work.

ROLE OF COMMITTEE

The authority to make appointments to the Supreme Court of Canada is possessed by the Governor-in-Council. That is prescribed in the *Supreme Court Act*, and that has not been changed. So this appointment will have to be made by the Governor-in-Council, which will act on the advice of the Prime Minister. This committee is charged with providing advice to the Prime Minister. He has undertaken to take account the deliberations and views of the committee in deciding whether or not to proceed with the appointment of Mr. Justice Rothstein.

This committee has the task of interviewing Mr. Justice Rothstein to determine whether he is well qualified to serve on the Court. It really is a job interview, and like any other job interview the questions to the candidate should respect both his dignity and his privacy. As well, any questions put to the candidate should proceed from understanding of the role that is played be a judge of the Supreme Court of Canada. I want to say something about that role.

ROLE OF JUDGES

Judges decide cases by finding the facts that are relevant and applying the law to those facts. In the appeals that reach the Supreme Court of Canada, there is the further complication that the law itself is usually unclear. That is usually why the case has gone all the way to the highest court. In that case, the judges have to decide what the law is, as well as how it applies to the facts of the case.

Before each appeal is heard the judges are required to read and digest a massive amount of material. They read the decisions of the lower courts that are being appealed, they read at least some of the transcript of the evidence at trial, they read the decided cases that are arguably precedents for the case, they read the articles by law professors that bear on this issue, and they read the factums – the briefs of argument – that are filed by counsel on both sides of the case. And then, when the appeal is heard, the judges listen to oral arguments of counsel on both sides, and they test those arguments by asking questions. Only after carefully considering all of this material, and weighing the arguments on both sides, are the judges able to reach a decision.

The Supreme Court of Canada decides about a hundred appeals every year. Each one of them involves the reading and research that I have just described. And of course the Court has to reach a decision on each appeal, and then write an opinion. The Court of nine judges is usually unanimous, but in minority of cases the Court is divided and one or more of dissenting opinions have to be written. So it is a heavy workload that we require of our Supreme Court judges.

LIMITS ON QUESTIONS

When you think about the role that Mr. Justice Rothstein will be called upon to play if his nomination is confirmed, it becomes obvious that there are some questions that he cannot be expected to answer.

He cannot express views on cases or issues that could come before the Court. He cannot tell you how he would decide a hypothetical case. He might eventually be faced with that case. For the same reason, he cannot tell you what his views are on controversial issues, such as abortion, same-sex marriage or secession. Those issues could come to the Court for decision in some factual context or other. Any public statements about the issues might give the false impression that he had a settled view on how to decide those cases – without knowing what the facts were, without reviewing all the legal materials, and without listening to and weighing the arguments on both sides.

Another kind of question that is inappropriate for a judge to answer is the question of why he decided a particular case in a particular way. Because Justice Rothstein is a sitting judge, he has written many opinions. These are listed in the dossier that members of the committee have been given. Several of the opinions have been included in full as samples. His reasons for decision in each of those cases are set out in writing. While he can talk in general terms about his work as a judge, and even about the issues in particular cases, he cannot give an oral explanation of why he decided a particular case. He has done that in his written opinion. That opinion is a precedent that lawyers and other judges will rely upon. They should be able to rely on the written opinion, and not have to hunt down oral explanations by the judges as well. Written opinions are available to all. Oral explanations are limited to those who hear them.

QUALITIES OF THE NOMINEE

What the members of the committee can and should do is to satisfy yourselves that this person has the right stuff to be a judge of the Supreme Court of Canada. Does he have the professional and personal qualities that will enable him to serve with distinction

as a judge on our highest court? Let me suggest six qualities that you might want to explore in your questioning.

1. He must be able to resolve difficult legal issues, not just by virtue of technical legal skills, but also with wisdom, fairness and compassion;
2. He must have the energy and discipline to diligently study the materials that are filed in every appeal;
3. He must be able to maintain an open mind on every appeal until he has read all the pertinent material and heard from counsel on both sides;
4. He must always treat the counsel and the litigants who appear before him with patience and courtesy;
5. He must be able to write opinions that are well written and well reasoned; and
6. He must be able to work cooperatively with his eight colleagues to help produce agreement on unanimous or majority decisions, and to do his share of the writing.

Ladies and gentlemen of the committee: If today you find the person with those qualities, the nation will thank you, and the Prime Minister will have an easy choice ahead of him. That concludes my remarks.