

Nomination of Supreme Court Judges: Some Issues for Canada

*The Honourable Claire L'Heureux-Dubé**

CANADIANS HAVE PROBABLY HEARD as much about the Supreme Court of Canada in the last five years as in the thirty years before. The media are covering our judgments with greater regularity. And, if these judgments are increasingly newsworthy, then I put it to you that, probably, our decisions are increasingly relevant to people other than lawyers. This, of course, is mostly the result of our new Constitution in 1982 and particularly the *Charter of Rights and Freedoms*.¹

I guess that you would be disappointed if I did not speak about the *Charter*. I will, but on a particular aspect and that aspect is in relation to the greater visibility which the Court has acquired since the advent of the *Charter*.

One of the reasons for this new visibility is the kind of cases the Supreme Court of Canada is now dealing with. One observer in 1966 entitled an article "The Supreme Court of Canada: A Quiet Court in an Unquiet Country!"² That, of course, was before the *Charter*! Before the 1980's, the Supreme Court decided cases between private parties, and cases involving intergovernmental disputes over jurisdiction. Constitutional law meant the division of powers in sections 91 and 92 of the *Constitution Act, 1867*.³

Then along came the *Canadian Charter of Rights and Freedoms* in 1982. At the time, some of the premiers voiced concern about the possible power now given to judges (one particularly concerned was

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

² R.I. Cheffins, "The Supreme Court of Canada: A Quiet Court in an Unquiet Country" (1966), 4 *Osgoode Hall L.J.* 259.

³ An analysis of recent decisions is found in K.E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990).

Premier (now Mr. Justice) Sterling Lyon of this province).⁴ One fundamental concern was that the elected representatives of the people would not have the last word in creating public policy in Canada.⁵ As a long-standing principle of British parliamentary democracy, the supremacy of Parliament and the provincial legislators was considered to require the so-called "notwithstanding" clause in the *Charter*.⁶ Indeed, it was a crucial addition to the overall package agreed to by the provinces in November 1981.⁷

This position assumes that the courts have new discretion, new powers as a result of the implementation of the *Charter*.⁸ It assumes a degree of judicial activism.⁹ As you are well aware, courts have always had the responsibility of interpreting the Constitution, and when one government passed legislation improperly interfering with the jurisdiction of the other government, then courts could declare the statute *ultra vires* the enacting government. But the *Charter* adds another variable to the equation. Before 1982, the constitutional struggle was between governments. Now the *Charter* has shifted the focus to these same governments' relationship with the individual

⁴ L.D. Barry, "Law, Policy and Statutory Interpretation under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms" (1982) 60 Can. Bar Rev. 237.

⁵ W.R. Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1986) 11 Queen's L.J. 1 at 24, describes the *Charter* as having caused "some shifting in the points of equilibrium between courts and the legislatures." See also the references in note 8, *infra*.

⁶ This is s.33 of the *Charter*, which allows Parliament and the provincial legislatures to override ss.2 and 7-15 of the *Charter* by specific enactment in a piece of legislation.

⁷ R. Romanow, J. Whyte, & H. Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984), especially at 207-12.

⁸ See, e.g., K.E. Swinton, "Competing Visions of Constitutionalism: Federalism and Rights" in K.E. Swinton and C.J. Rogerson, eds., *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) at 279, especially at 293; P.H. Russell, "The Effect of a Charter of Rights on the Policy-making Role of Canadian Courts" (1982) 25 Can. Pub. Admin. 1; P. McCormick, "The Courts: Toward a Provincial Role In Judicial Appointments" in ?? Gibbons *et al.*, eds., *Meech Lake and Canada: Perspectives from the West* (Edmonton: Academic Printing and Publishing, 1988) 45 at 49; ?? Knopff and ?? Morton, "Nation Building and the *Canadian Charter of Rights and Freedoms*" in A. Cairns and C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 47; A. Drache, "Supreme Court holds real power in Canada" *Financial Post* (27 December 1990) p.?

⁹ See, e.g., A.F. Bayevsky, "The Judicial Function under the *Canadian Charter of Rights and Freedoms*" (1987) 32 McGill L.J. 791; M. Gold, "Of Rights and Roles: The Supreme Court and the *Charter*" (1989) 23 U.B.C. L. Rev. 507.

person, in the context of the fundamental rights the *Charter* guarantees each person in this country.¹⁰

The *Charter* places added responsibilities on judges, and particularly on Supreme Court judges, who speak in the last resort. We must interpret the underlying values and principles of Canadian society as they are articulated in the *Charter*. In that new role, the Court has a duty to strike down any law which is found to be inconsistent with the Constitution. In that sense, the *Charter* has given the Supreme Court judges an enhanced role, since it obliges us to interpret the extent and scope of rights and freedoms guaranteed in the *Charter*. This is a most difficult task given the absence of precedents and parameters to guide us, particularly since a *Charter*, like the Quebec *Civil Code*, enunciates only general principles and does not address particular situations — as for example the *Income Tax Act* would. But this is, however, the “mission” entrusted to us by Parliament on behalf of the citizens of this country, both a difficult and a challenging mission — and an exciting one.

There are those who say that judges are now, more than ever, making laws. As you know, judges have always made law. When the laws are ambiguous or vague or lacking, judges have done so through their interpretation of what the law was intended to achieve. Parliament can always, of course, amend the law if it disagrees with the Court’s interpretation, and for that matter, it can pass new laws to accord with the Courts’ interpretation — and it has done so from time to time. This is still true under the *Charter*. Parliament still passes the laws.¹¹ Now, however, court decisions concerning some of those laws strike closer to home given the nature of the debate over rights. Certain fundamental personal rights cannot be infringed when a law is passed. People charged with a crime have the right to be presumed innocent and to be given a fair trial, and the law cannot take that away without valid justification. We all have fundamental freedoms, such as freedom of expression and freedom of religion. We have the right to be treated equally without regard to our race or sex or age. People cannot be unreasonably searched and their property then seized; if we are arrested or detained by the police, we all have

¹⁰ A discussion of the effects of this situation is found in A. Cairns, “Constitutional Minoritarianism in Canada” (The J.A. Corry Lecture) in R.L. Watts and D.M. Brown, eds., *Canada: The State of Federalism 1990* (Kingston: Institute of Intergovernmental Affairs, Queen’s University, 1990) at 71.

¹¹ Barry argues that Parliament and the legislatures will have a *better* ability to direct public policy under the *Charter* than before it: *supra*, note 4.

the right to know that we can remain silent and to be informed of our right to counsel. You will note that most of these are rights or freedoms belonging to us as *individuals*. And it is the government which cannot infringe these rights – not our neighbour or our boss, unless the government is involved. Statutes, particularly human rights legislation, deal with your boss or neighbour, but the Canadian Constitution does not.

So, what the Court does now is not altogether different from before. The Court is still ensuring that the government is acting constitutionally. Before the *Charter*, courts ensured that the federal government did not trample on the toes of provincial governments, and *vice versa*; the difference now is that the courts are obliged to ensure that no government tramples on the toes of each person. If the government previously could not go out of its own house, now no government can set foot in the basement.

Academics and legal commentators recognize that, since the *Charter*, the courts have embarked on a policy-making role of “different” dimensions. Beyond the power to strike down laws, and the obvious effect of that, the principles and reasoning employed by courts to arrive at a decision will affect the drafting and amendment of laws. In that way, the fundamental values of the *Charter*, as articulated by the courts, may be considered by the legislatures in enacting statutes.

Because the Court has been given a greater role to play in shaping Canadian public policy in areas which affect more directly the citizens of this country, it has become more visible as a court. This new phenomenon has spilled over to the individuals who are members of the Court. And this phenomenon has recently been compounded by the fact that eight of the current members of the Court have been nominated by the present Prime Minister over the last six years. This has prompted academics and the media, in particular, to search for a way to ensure that the members of a court which wields such powers are properly chosen – the present method of appointment not being adequate, in their view. It is this dimension of the *Charter* that I would like to discuss with you today.

As a starting point, I will briefly allude to the system of nomination of federally appointed judges currently in use in Canada. It is the constitutional prerogative of the federal government to choose the

candidates and to appoint them to superior courts and appeal courts as well as the Supreme Court of Canada.¹²

As far as superior and appeal courts are concerned, there seems to have always been wide informal consultation by the Minister of Justice with members of the bar and bench and in particular with the Canadian Bar Association.¹³ The process has recently been formalized. The federal government has created a Commissioner for Judicial Affairs, an office independent of the Department of Justice, to act as a "personnel office" for the federal judiciary. The Commissioner solicits and keeps background information on people interested in or suggested for appointment, and forwards this information to permanent committees set up in each province. Each of these committees has five members, including a federally appointed judge and four other representatives respectively appointed by the provincial and Canadian Bar Associations, the provincial government, and the federal government. The committee reviews the qualifications of each possible appointee, and advises the Justice Minister whether the candidate is qualified. The Minister remains the final arbiter and chooses the nominee to recommend to the Cabinet.¹⁴

This process does not apply to the appointment of judges of the Supreme Court of Canada. No formal consultation process exists for such appointments, although we assume that there is wide consultation with the Bar and Bench as well as members of the political parties and Cabinet. Although the appointment is made by the Governor in Council,¹⁵ the Prime Minister of Canada, in practice, names the appointee. Unlike the United States, that nominee is not subject to the procedure of confirmation — a procedure, many of you will recall, well publicized when President Reagan failed in his

¹² The "Governor General" has the constitutional power of appointment under s. 96 of the *Constitution Act, 1867*, but it is exercised by the federal Cabinet: see P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 136-38.

¹³ Justice Ministers Pierre Trudeau, John Turner and Otto Lang changed the process in the 1960s and 1970s, consolidating the consultation process with the Canadian Bar Association and adding one staff member to the Justice Minister's office to assist with judicial appointments. See P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 118-20; and J.S. Ziegel, "Federal Judicial Appointments in Canada: The Time is Ripe for Change" (1987) 37 U.T.L.J. 1 at 7.

¹⁴ Canada (Department of Justice), *A New Judicial Appointment Process* (Ottawa: Supply and Services Canada, 1988) at 8-14.

¹⁵ *Supreme Court Act*, R.S.C. 1985, c. S-26, as am. by R.S. 1985, c. 34 (3d Supp.), s. 4(2).

attempt before the U.S. Senate Judiciary Committee to put Judge Robert Bork on the Supreme Court of the United States.

Focusing for the moment on the Supreme Court of Canada, the *Constitution Act, 1867* provides for the establishment of a "General Court of Appeal for Canada."¹⁶ After a long debate, the Supreme Court was established in 1875,¹⁷ but it did not really become "supreme" until the abolition of appeals to the British Privy Council in 1949.¹⁸ The *Constitution Act, 1867* made no reference to the nomination of judges of the Supreme Court, nor does the *Constitution Act, 1982*, which simply states that the "composition" of the Court cannot be modified without unanimous consent of the provinces and the federal government.¹⁹ There is no mention of regional representation in the Constitution, although the *Supreme Court Act* requires that three Supreme Court judges must be trained in Quebec civil law.²⁰ The tradition since 1949, however, has been that 3 judges come from Ontario, 2 from the western provinces, and 1 from the Atlantic provinces.²¹ Whether this tradition should be preserved is one of the questions discussed in relation to the nomination process.²²

¹⁶ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 101.

¹⁷ The legislation was originally passed as the *Supreme and Exchequer Courts Act 1875*, S.C. 1875, c. 11. For an account of the process of passing the legislation, see J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985) c. 1.

¹⁸ Appeals were abolished by S.C. 1949 (2d sess.), c. 37 after the Privy Council had found the abolishing legislation to be *intra vires* the federal government: *A.G. Ont. v. A.G. Can.*, [1947] A.C. 127.

¹⁹ See s. 41(d) and s. 42(d) of the *Constitution Act, 1982*, *supra*, note 1.

²⁰ *Supreme Court Act*, R.S.C. 1985 c. S-26 s. 6.

²¹ A.W. MacKay & R.W. Bauman, "The Supreme Court of Canada: Reform Implications for an Emerging National Institution" in C.F. Beckton & A.W. MacKay, *The Courts and the Charter* (Toronto: University of Toronto Press, 1985) (vol. 58 of studies prepared for the Royal Commission on Economic Union and Development Prospects for Canada) 37 at 72.

²² Professor Snell recounts the particular experience of the Western provinces with regional representation, noting that

. . . [f]or the first 28 years of its history the Supreme Court of Canada was without representation from the west, either the prairies or British Columbia. Given the proportion of the population (according to the 1881 census, the west held 3.2%) and the lack of depth and sophistication in what was a very young legal fraternity, this absence of representation was perhaps understandable. [note excluded.]

Currently the process of appointment to the Supreme Court of Canada does not constitutionally require the involvement of the provincial governments or any Bar Association. Neither does it formally involve elected members of Parliament or the legislatures, outside of the Cabinet. Should it? If so, at what level: power to choose? to appoint? to confirm? These are some of the questions in the current debate. Although they are not the only ones — far from it — two considerations emerge and seem to be at the heart of the preoccupations of those politicians, media, and academics alike who have expressed opinions on the subject. They relate to the need for the appointment process to reflect the Canadian division of powers between the provincial and federal governments, while at the same time proposing that the enhanced role of the Supreme Court since the *Charter* warrants a greater public scrutiny of its members. It is in that light that I intend to review Canadian proposals for reform of the appointment process.²³

I. A TRULY CANADIAN PROCESS

THE LAST TWENTY YEARS in Canada have seen much public discussion of our Constitution. The recent First Ministers' conferences, and the public debate have generated about the proposals for constitutional amendments, have not gone unnoticed. A general concern was voiced over the fact that one level of government controls exclusively the appointment of those judges who arbitrate most of the jurisdictional disputes between governments.²⁴

He makes reference to the efforts of the local western bar associations to get a representative on the court from the west in 1893. Resolutions were passed in Winnipeg, Regina, Calgary, and Vancouver urging the federal government to appoint a westerner because, in the words of the Manitoba resolution, "his local knowledge of the Laws and circumstances of these provinces would materially assist the Supreme Court in the consideration of appeals therefrom . . ." Professor Snell also maintains that the other reason for the Manitoba resolution was the "feeling that the Court, composed solely of Easterners, was incapable of acting fairly towards the west": J.G. Snell, "The West and the Supreme Court of Canada: The Process of Institutional Accommodation of Regional Attitudes and Needs" (1985) 14 Man. L.J. 287 at 287-89.

²³ See K.G. Banting, "Federalism and the Supreme Court of Canada," paper prepared for the Ontario Law Reform Commission and presented at Queen's University 14 September 1989 (forthcoming).

²⁴ McCormick, *supra*, note 8, describes this "anomaly" as follows at 45:

Professor Russell strongly supports what he calls a more "democratic" method of appointment. Allow me to quote him:

In a constitutional democracy like Canada which has come to assign such an important role to the judiciary in adjudicating disputes about the powers of government and the rights of citizens, it is inappropriate for the executive of one level of government to control unilaterally the appointment of judges to the court that heads up the judicial branch. . . . There is just too much at stake to leave the Prime Minister and cabinet — one group of politicians — with an untrammelled opportunity to load the Court with their political cronies or their ideological soul-mates.²⁵

Some reform proposals have been advanced by politicians, others by academic commentators, still others by groups recommending changes to the whole system of government. But, for the most part, the reforms suggest alterations to address concerns over the developing nature of Canadian federalism — giving provincial governments or certain regions of the country a larger role in the appointment process.

The reform proposals may be charted on a continuum, based on the degree to which public participation is allowed. The most secretive would place the decision in the hands of one person, whose personal discretion would be conclusive. The most open would be, presumably, an elected Court. In the end, however, what should be considered is (i) who draws up the list of possible candidates; (ii) who proposes the one nominee; (iii) who actually makes the decision; and (iv) if necessary, who confirms the decision.²⁶

It should be remembered that many of the proposals to change the Supreme Court in the last 20 years have been part of the greater negotiation and reform process. They are part of a larger package

. . . it has always been a constitutional anomaly that our Supreme Court frequently acts as a final arbiter in federal-provincial jurisdictional conflicts despite the fact that it was unilaterally created by the federal Parliament, has its size and jurisdiction set by federal legislation, and is staffed by unilateral federal appointment. When federal-provincial disputes loom large on the Court's dockets, the situation is not unlike a hockey game where one team brings its own referees.

McCormick's clear concern is what might be called "court-packing" by a federal government. For him, the introduction of the *Charter* has changed the court's role and thus the "old procedures" for Court appointments should no longer be applicable: *supra* at 49.

²⁵ P.H. Russell, "Meech Lake and the Supreme Court," in Swinton & Rogerson, *supra*, note 8, at 97 and 104-05.

²⁶ This approach is similar in part to that of C. Baar, "Comparative Perspectives on Judicial Selection Processes," paper prepared for the Ontario Law Reform Commission and presented at Queen's University, 14 September 1989 (forthcoming) at 16-19.

which I cannot detail here today, but, for discussion purposes, we can lift reform suggestions from their context to a certain extent. This is helpful when we come to compare them with other countries' experiences.

A. The Politicians

Let us begin in 1971, with the so-called "Victoria Charter." This proposal came out of federal-provincial negotiations between politicians. This idea would have "entrenched" the Supreme Court in the Constitution, with nine members, of which three would be from Quebec. The appointments would still be made by the federal government, but Victoria would have formalized the consultation process. The Attorney General of the province from which the proposed judge would come would have to approve of the choice. If there was no agreement, a "nominating council" would be chosen to recommend a candidate.²⁷

After the whole proposal worked out in Victoria failed, various other ideas based on this were considered. In 1976 Prime Minister Trudeau sent a letter to all the provincial premiers with several suggestions, including the Victoria proposal for Supreme Court appointments. By 1978, the federal government had issued a White Paper on the Constitution and introduced Bill C-60 into the House of Commons. As the first phase of the government's reform, Bill C-60 would have increased the number of judges to 11, with four appointed from Quebec. After the federal and provincial governments agreed on a nominee, the appointments also would have been confirmed by a newly constituted Upper House which would replace the current Senate.²⁸

In the late 1970s various provincial governments staked out positions on the question of the Supreme Court. At different times the Alberta and Quebec governments proposed that a separate constitutional court be established, with different representation by regions. British Columbia advanced the idea of 11 members, to be approved by a reformed Upper House of Parliament. Some authors suggest that Ontario proposed that the 11 attorneys general of the federal and provincial governments constitute a nominating council to appoint the members of the Court.²⁹

²⁷ See Romanow *et al.*, *supra*, note 7 at 35.

²⁸ *Ibid.* at 8-10.

²⁹ *Ibid.* at 37.

B. Government Advisors

What did government advisors say? The Task Force on Canadian Unity, the Pepin-Robarts Commission, released its report in February 1979.³⁰ The Task Force heard submissions across the country, noting there was increasing attention focused on the Court as a result of some cases involving division of powers over natural resources. In the context of its recommendations on greater institutional reform and a new Upper House (to be called the House of the Federation), the Task Force recommended an 11 person court, with five judges from a civil law background and six with common law training.³¹ Regarding appointments, the Task Force recommended that the federal government be required to consult with the Quebec attorney general on civil law appointments, and the attorneys general of all the common law provinces on other appointments. The appointments would then be ratified by a committee of the new House of the Federation, presumably in public hearings.³²

Around the same time, the Canadian Bar Association's Committee on the Constitution released a report which recommended keeping the Court at its current size, although it was ambiguous about the conventional regional representation. The Committee suggested that no region could expect representation (except Quebec, because of its *Civil Code*). The Committee agreed that once the federal government had selected a candidate, a judiciary committee of the reconstituted Upper Chamber would consent to the nomination.³³

³⁰ Task Force On Canadian Unity, *A Future Together* (Ottawa: Queen's Printer, 1979).

³¹ The Task Force also was more detailed in their ideas about the Supreme Court it envisioned. The recommendation classified three kinds of cases and three benches accordingly. First, for cases involving provincial law, there would be a five person panel of judges versed in the appropriate law (that is, civil law judges would sit on Quebec cases); second, for cases concerning federal law there would be a quorum of 7 or 9 judges on the panel hearing the case; and third, the full Court would hear constitutional cases. The recommendations "proposed this near-equality of representation and internal structure of benches both because of the two basic legal systems within Canada and because of the wider political duality within Canada": *ibid.* at 101. On the question of political duality and the Supreme Court, see R. Décary, "La Cour supreme et la dualité canadienne" (1979) 62 Can. Bar Rev. 702.

³² *A Future Together*, *supra*, note 30 at 101.

³³ Committee on the Constitution, *Towards A New Canada* (Montreal, Canadian Bar Foundation, 1978).

C. The Academics

What about the academics? Prior to the debate over the Meech Lake Accord, one of the leading constitutional law scholars in this country, Professor Lederman, now Professor Emeritus at Queen's University, considered all the proposals I have just mentioned, and drew several conclusions. A specialist on this question, he favoured an increase in the size of the Court to 11, as well as regional representation. He suggested also that new judges be nominated by a committee, a standing federal-provincial body (not *ad hoc*) to be almost entirely made up of elected members of Parliament and provincial legislatures.³⁴ Consent of two-thirds of the members would be required to place a nominee on a short list, from which the appointing authorities could choose the judge.³⁵

In their submissions to the Macdonald Commission in 1985, Professors MacKay and Bauman, for their part, suggested an appointing council, which would serve both to survey the candidates and, more importantly, to make the final decision on who to nominate. This council would be made up of thirteen persons chosen from a variety of backgrounds, seven of whom would be women. Each member would have to be acceptable to the federal government and to at least four provinces, and would serve a ten year term.³⁶

There are other organized bodies and people who have also contributed to the debate, but it would be too onerous to detail their

³⁴ Like Lederman, Russell favours "broadly-based nominating committees" for the other judicial appointments made by the federal government. These committees could then provide a short list to the provincial government when a Supreme Court vacancy arises. The committees would be made up of "representatives of the federal and provincial governments, appropriate chief justices, representatives of the Bar and the general public" and would thus provide better accountability for the public in the appointments: Russell, *supra*, note 25 at 97-112.

³⁵ W.R. Lederman, "Current Proposals for Reform of the Supreme Court of Canada" (1979) 47 Can. Bar Rev. 687. Interestingly, Lederman quotes a speech of Laskin C.J. (at 699) which endorses a role for an advisory committee. Other recent articles by Lederman on the Supreme Court include: "Thoughts on Reform of the Supreme Court of Canada" (1970) 8 Alta. L. Rev. 1; "Constitutional Procedure and the Reform of the Supreme Court of Canada" (1985) 26 C. de D. 195; "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1986) 11 Queen's L.J. 1; "Judicial Independence and Court Reforms in Canada for the 1990's" (1987) 12 Queen's L.J. 385.

³⁶ MacKay & Bauman, *supra*, note 21 at 79-84.

views here.³⁷ Then there were the Meech Lake proposals. I do not intend to go into a debate of the merits of the proposals put forward in the Accord; I will merely report its contents. The Agreement itself would have amended the *Constitution Act, 1867* to give constitutional recognition to the Supreme Court. Vacancies on the Court would be filled by the federal Cabinet from a list of names submitted by the provincial governments. In the case of Quebec, 3 seats would be allocated, as now, and the 6 other members of the Court would be drawn from the remaining provinces.³⁸ No change was proposed in the number of judges, however, nor in the jurisdiction of the Court.

These are some of the main Canadian proposals over the last twenty years. If one were to look for a trend, it would be that most of the proposals of the 1970s sought to achieve a selection method with the involvement of both the federal and provincial governments. This is perhaps reflective of the atmosphere of intergovernmental negotiations from which the ideas were born. The Task Force on Canadian Unity and other proposals appear to be concerned also with open participation by the elected representatives, although the Meech Lake proposals did not reflect this. It is the degree of participation of the Canadian people in the process which might differentiate the proposals. The question then is whether our elected representatives can play a sufficiently informed and independent role to ensure good judicial candidates. Or are the nominating councils better suited to represent the community at large?

Most people will not quarrel with the need for several judges from Quebec to deal with the civil law; but should the Court's membership

³⁷ In addition to articles cited in this paper, see: *Report of the Royal Commission of Inquiry on Constitutional Problems* (Quebec: Queen's Printer, 1956); J.Y. Morin, "A Constitutional Court for Canada" (1965) 43 Can. Bar Rev. 545; J.C. MacPherson, "The Potential Implications of Constitutional Reform for the Supreme Court of Canada" in S.M. Beck & I. Bernier, *Canada and the New Constitution: The Unfinished Agenda*, vol. 1 (Montreal: Institute for Research on Public Policy, 1983) 165; D. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990) c. 10. Beatty provides some commentaries on other Supreme Courts and their appointment processes. He does not favour the "nominating council" idea, as these he claims would not ensure that the merits of each appointment could be guaranteed (although he recognizes that Professor Lederman's idea of a council made up of elected representatives would solve this, at 265). Rather, he favours direct participation by the provinces and recommends that the Meech Lake approach of direct provincial nomination is the best compromise.

³⁸ Amendments to the *Constitution Act, 1867* proposed by the Accord included adding s. 101A (recognition of the Court), s. 101B (three judges from Quebec), and s. 101C (method of provincial involvement).

address what people call "regionalism," that is, should there be mandatory balance of representation from the west, east, centre and the north of the country? What about a separate court for constitutional matters?

There are many questions and many proposals for change, most of which appear to address issues of Canadian federalism. Of course these proposals did not appear out of thin air. They were made with other countries' experience in mind as well as the Canadian approach. As the politicians, academics, task forces and committees did not ignore the international scene, neither should we.

D. Other Countries

Therefore, let me turn now to some of the other methods of choosing judges already in place in other countries.

There are four or five general approaches taken by other countries to choosing the judges for their highest courts.³⁹ The Canadian system is modelled on the British method, in which the Lord Chancellor is responsible for the appointment of judges, even to their highest court, the House of Lords. The appointments are seen as within the Crown's prerogative and in practical terms the responsibility is heavily on the Lord Chancellor. In France, as in many civil law countries, a judicial career begins after law school, when lawyers enter the public service to become a judge or magistrate for the rest of their service. Elsewhere, as in the United States, many judges are elected at the state level — although since the 1940s some U.S. states, beginning with Missouri, have had nominating councils which choose the candidates for the election. Fully 33 of the 50 states now use these nominating councils.⁴⁰ For federal and Supreme Court judges, the President of the United States nominates a candidate, who is then confirmed by the Senate.

A comparison with countries organized on the federal model, as Canada is, is more suitable for the purposes of this discussion. In federal countries, responsibility for different matters is placed in different levels of government. Each operates independently within its own sphere. The governments may also share responsibility for different aspects of the same subject matter. Often at the national level there is one elected body representing the people by population,

³⁹ Ziegel, *supra*, note 13 at 4. Comparative analyses of various court appointment processes can be found in Baar, *supra*, note 26; and Beatty, *supra*, note 37, c. 10.

⁴⁰ An account of the development of the "Missouri Plans" is in N. Krivosha, "In celebration of the 50th anniversary of merit selection" (1990) 74 *Judicature* 128.

and another representing the states or provinces in the federation. How do these countries appoint judges to their supreme courts? Professor Beatty makes this point:

The federal character of countries like the United States, Switzerland and West Germany is reflected in their appointment process through the participation of a second chamber in their national legislatures, which is organized to recognize the regional interests of these states.⁴¹

Since Canada is also a federal country, it is interesting to look at the process in similarly organized countries, such as Australia and Germany.

1. Australia

The Australian federal system has created a rigid separation of powers between the executive, Parliament, and the judiciary.⁴² Their Constitution, adopted in 1900, puts "judicial power" in the High Court of Australia and in such other federal courts as the central Parliament creates.⁴³ The High Court currently has 7 judges,⁴⁴ including the chief justice, although the Constitution requires only a chief justice and two other judges.⁴⁵

The Australian Constitution has created a House of Representatives, elected according to the population of a district, with an election every three years. In their Senate, the six Australian states are represented equally with members elected for six years at a time. As in Canada, the national government appoints members of the judiciary, including the High Court.⁴⁶

The Cabinet makes the appointments on the advice of the federal attorney general. As in Canada, the Australian states in the 1970's were anxious to get some influence over the appointments, apparently in response to several court decisions favouring the federal govern-

⁴¹ Beatty, *supra*, note 37 at 266-67.

⁴² P.H. Lane, *A Manual of Australian Constitutional Law*, 4th ed. (Sydney: The Law Book Company, 1987). See especially Part II at 253-66.

⁴³ *Commonwealth of Australia Constitution Act* (U.K.), 63 & 64 Vict. c. 12, s. 71.

⁴⁴ *High Court of Australia Act, 1979*, (Cth.), s. 5.

⁴⁵ *Australian Constitution*, *supra*, note 43, s. 71. The quorum of the High Court appears to be only two members, subject to certain exceptions: *Judiciary Act, 1903*, (Cth.), s. 19.

⁴⁶ While in Canada it is technically the Governor General in Council which officially appoints, the *High Court of Australia Act, 1979* states in s. 5 that the Australian appointment is made by the "Governor General by commission."

ment.⁴⁷ Reacting to this pressure, the passage of the *High Court of Australia Act, 1979* has made it a requirement that the states be consulted on appointments.⁴⁸ This process, interestingly enough, resulted in the first appointment of a judge from West Australia. Two Australian states, Tasmania and South Australia, have never had a representative on the High Court.⁴⁹ Thirty of the thirty-seven members ever appointed to the Court have been from two states: New South Wales (19) and Queensland (11).⁵⁰

Another interesting aspect of the Australian High Court is the number of former politicians on the bench. Indeed, on its creation in 1903, one of the three judges was the first Prime Minister of Australia, Mr. Justice Edmund Barton, who appointed himself! Several appointments have been met with vocal objections, even recently. Not all of these objections were over political patronage,⁵¹ but there are several examples of former politicians on the Court, totalling 5 chief justices and 13 of the 37 total appointments.⁵²

The similarities with Canada are strong — in particular, the Australian emphasis is also on government participation in a process closed to the public.

⁴⁷ M. Cooper, *Encounters With the Australian High Constitution* (North Ryde, New South Wales: CCH Australia, 1987) at 118. Similar motivation has been ascribed to the Canadian provinces in the early 1980s in response to decisions of the Supreme Court of Canada: P.W. Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?" (1979) 57 Can. Bar Rev. 721.

⁴⁸ *High Court of Australia Act, 1979* (Cth.), s. 6.

⁴⁹ Neither has Newfoundland since its entrance into Canada in 1949.

⁵⁰ Coper, *supra*, note 47 at 118.

⁵¹ Appointee Albert Piddington was nominated in March 1913 — and resigned in April without ever taking his seat on the Court. Why? The federal Attorney General sent him this telegram:

"Confidential and important know your views Commonwealth versus State rights. Very Urgent."

This indiscretion was only topped by the appointee's response:

"In sympathy with supremacy of Commonwealth Powers."

That was the end of Piddington's appointment: *Ibid.* at 121-23.

⁵² *Ibid.* at 121.

2. Germany

Now consider the case of Germany.⁵³ That country has a separate federal constitutional court, called the *Bundesverfassungsgericht*, which was created in 1951. The Court consists of two panels (called *Senates*) each of which consists of eight judges. Three judges from each panel must come from one of Germany's superior federal courts, and the tenure of a judge is twelve years with no re-election.

I say "re-election" because all the judges are elected by the representatives in the federal Parliament. The Parliament consists of two houses. The Lower House (or *Bundestag*) represents the people directly, and the Upper House (or *Bundesrat*) represents the interests of the member states of Germany (or *Länder*). Jurisdiction over different matters is assigned to each House, although the Upper House has veto power only over legislation trenching on state power. The most interesting feature of this system for our purposes is that each House elects half of the Constitutional Court's members.⁵⁴ Within the electing House, a judge must receive the support of at least two-thirds of the members. This, according to one author⁵⁵ makes the process very political – and in this case the author means partisan among the political parties. The political parties play this game: we'll elect your candidate, if you'll elect ours.

3. Summary

This brief overview of the appointment processes in some other countries has provided us with some of the ideas which have made their way into the Canadian, mostly academic, proposals for change in the appointment of Supreme Court justices. These proposals can be summarized as follows: first, a formal mechanism where the federal government must consult with or choose from the candidates submitted by the provincial governments; second, approval of the federal nomination by an Upper House representative of the provinces; and

⁵³ G. Brinkmann, "The West German Constitutional Court: Political Control Through Judges" [1981] Public Law 83; G.N. Schram, "The Recruitment of Judges for the West German Federal Courts"(1973) 21 Am. J. Comp. Law 691. See also generally Beatty, *supra*, note 37, c. 10.

⁵⁴ To be precise, each House has the responsibility to select half the members of each *Senate*; the *Bundestag*, because of its size uses a 12 member committee made up of deputies representative of the political parties. The *Bundesrat*, which is much smaller, is able to vote as a whole. The Federal President then must make the chosen appointments: Schram, *ibid.* at 693, 696-702; Beatty, *supra*, note 37 at 258.

⁵⁵ Brinkmann, *supra*, note 53 at 91.

third, a nominating or advisory council with membership from governments, the legal community, and non-lawyers, to seek out candidates and, possibly, to make the decisions. These proposals have emphasized the federal organization of Canada. That, however, was not the only concern I mentioned. The evolving role of the Canadian Supreme Court was another concern, to which I now wish to turn.

II. THE CHARTER: THE CHANGING ROLE OF THE SUPREME COURT

IN A RECENT ARTICLE, Peter J. van Koppen has tried to correlate methods of appointing judges with the degree to which judges are said to be "judicial activists."⁵⁶ Van Koppen suggests that two models have developed: in one there is little political involvement in the appointment process; while in the other there is much political involvement, often by partisan methods. He postulates that the more politically active the judges' decisions are, the more political the process for choosing these judges should be.⁵⁷

⁵⁶ P.J. van Koppen, "The Dutch Supreme Court and Parliament: Political Decision Making Versus Nonpolitical Appointments" (1990) 24 Law and Soc. Rev. 745. See also Baar, *supra*, note 26.

⁵⁷ The same article concentrates on the Supreme Court of the Netherlands. The Dutch Court announces all its decisions as unanimous: no dissents are possible (at 755). The Dutch Constitution declares that Dutch statutes are untouchable by the judiciary, except where a treaty conflicts. They cannot strike down a law as unconstitutional, as some Canadian judges can. The Dutch Supreme Court has thirty-one judges, and each case is decided by a panel of five. The appointment procedure has remained virtually unchanged since the adoption of the Dutch Constitution in 1814 and the creation of the judicial system in 1827. Van Koppen describes the process (at 762):

The Supreme Court initiates the procedure itself by notifying the Second Chamber of Parliament of a vacancy and providing a ranked list of six candidates. . . . The Second Chamber then votes to draw up a ranked list of three nominees . . . from which the Crown appoints the new justice. The Second Chamber is not at all bound by the long list of the Supreme Court, but the Crown must choose from the three nominees on the short list.

He notes that the last time the Second Chamber did not use the three names at the top of the long list was in 1975 and that at no time since 1948 has the Second Chamber altered who is first on the ranked list going to the Queen. In fact, there was no debate on any nominee between World War Two and 1979.

It will be noted that this allows participation of elected representatives, after the selection process is well under way. No role in the screening or nominating of candidates is played by the public.

Professor Russell, for his part, suggested that with the advent of the *Charter*, the public would have to be prepared for a “crash course on judicial policy-making.”⁵⁸ Earlier, I made reference to the influence Supreme Court decisions may have, not only on the law but in the future drafting and amending of laws. In that connection, Professor Swinton suggests that a more complex effect of the *Charter* will emerge. She sees the *Charter* as a “new pillar to Canadian constitutionalism.”⁵⁹ Because the *Charter* applies to all governments and Supreme Court judgments are binding across the country, her view is that the *Charter* will have a standardizing effect on the policies of provincial governments. Then, if the degree to which the Court defers, or does not defer, to legislative policy-making is consistent, the effect of the *Charter* will be to diminish the room for regional or provincial legislative diversity. This in itself, in her opinion, gives the provinces more reason to seek a voice in the appointment process.

As to the political nature of a Court’s duties, as that influences the nomination process, Germany is a good model. I have already referred to the German method of appointing judges to the Constitutional Court. What I did not mention is that Germany has different courts for deciding private law problems⁶⁰ — the Constitutional Court’s mandate is to deal mostly with intergovernmental and human rights questions, a role our Supreme Court performs in addition to others.⁶¹

⁵⁸ Russell, *supra*, note 8 at 33.

⁵⁹ Swinton, *supra*, note 8 at 285.

⁶⁰ Other federal courts include the High Court, Administrative Court, Labour Court, Social Security Court, and Tax Court: Brinkmann, *supra*, note 53 at 90; Schram, *supra*, note 53 at 693.

⁶¹ The Court is responsible for interpreting the Basic Law of Germany. Professor Brinkmann (*supra*, note 53) elaborates at 86:

... not only must the Constitutional Court ... solve conflicts of competency between two Member States of the Federation (*Länder*) or the Federation and one *Land*; but its powers go far beyond this and protect the whole Constitution, including fundamental rights. The FCC watches over the interplay between the constitutional organs of the Federation and the *Land*, makes sure the Government and its officials protect the free democratic basic order and pay due respect to fundamental human rights. Constitutional jurisdiction serves exclusively to protect the Constitution. It relates to the social need to restrict any exercise of state power to certain basic norms for the well-being and protection of the community. [footnotes excluded]

Despite being independent from other organs of the governments, he notes, the Constitutional Court “is regarded as being on an equal footing with the other organs set

The German court has the power to declare a piece of legislation void as unconstitutional; it may interpret a statute "in conformity with the Constitution"; and may declare a statute unconstitutional but not void if there has been an omission by the legislators which can be easily remedied. Professor Brinkmann notes another result the Constitutional Court may find, as follows:

The last type of ruling is the pronouncement of a statute as "still constitutional." The court, however, appeals to the legislator to amend or repeal the statute; a time limit may or may not be imposed. If the legislator fails to act, the statute may become unconstitutional.⁶²

The latitude afforded the German judges and the political role recognized and developed in Germany for its Constitutional Court are reflected in the judges' election by the Houses of Parliament. Professor Brinkmann suggests that the judges' election makes them "democratically legitimate."⁶³ The selection process is therefore not only representative of the federal nature of Germany but is also reflective of the political nature of the Court's duties.

The United States is another example where, as we know, the Supreme Court is empowered to strike down laws inconsistent with the *Bill of Rights*. Many of us are aware of the Court's active role in the U.S. civil rights movement of the 1950s to 1970s. The appointment process to the Supreme Court also reveals the political aspect of the Court's work.⁶⁴

So far, in the appointment mechanisms discussed, we have seen that public or representative opinion may play a role in the process of choosing judges prior to the nomination. This may occur in public, as in Germany, or in private, as in Canada and Australia. The United States Constitution requires a different route. The President consults his advisors and makes a nomination. This nomination must then be

up under the Basic Law: the *Bundestag*, *Bundesrat*, Federal President and Federal Government" (at 87).

⁶² *Ibid.* at 96.

⁶³ *Ibid.* at 91.

⁶⁴ It is recognized that the framers of the U.S. Constitution did not necessarily involve the Senate in confirming the Supreme Court judges because of the Court's role as interpreter of the *Bill of Rights*. The draft Constitution was finalized in September 1787 and ratified in full by May 1790. The first ten amendments to the Constitution were passed in 1791. But the power of judicial review did not emerge until 1803, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) — although some observers also point to *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

approved by the United States Senate.⁶⁵ The usual process is that the Senate Judiciary Committee will interview the nominee and other witnesses, and present a recommendation to the whole Senate. The nominee is then approved or rejected by the Senate. The Executive branch consults in private, and the elected Upper House confirms very publicly.

One author has described the United States appointment process as the "confirmation mess."⁶⁶ Many of us probably remember the media coverage of Judge Bork's nomination to the Supreme Court. Judge Bork was seen as a radical conservative and the Senate did not ratify him.⁶⁷

The importance of the U.S. nominee to the Supreme Court lies in that Court's extremely important function of interpreting the *Bill of Rights*, and its power to strike down statutes inconsistent with the Constitution. The past 200 years of American life have seen a tremendous and ever-increasing role for the courts in the field of individual rights. Many of you are familiar with the Court's interventions on issues like abortion, school desegregation, freedom of expression, discrimination, and, most of all, the *Miranda* rule. These are decisions of such importance that they have inspired not only U.S. legislators but the world's judiciary.

As noted, the President nominates and the Senate consents to the nomination. We know that the Senate contains 100 persons, two from each American state. Several authors note that the Constitution and the records of the 1787 Convention do not reveal what is meant by the phrase "Advice and Consent" of the Senate, particularly whether this means the same thing for judges as it does for ambassadors and Cabinet members, or for that matter for the ratification of treaties, which requires the same thing.⁶⁸ The *Federalist Papers* do comment on this:

⁶⁵ *U.S. Const.*, art. II, s. 2, states in part: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and consuls, Judges of the Supreme Court . . ."

⁶⁶ S. Carter, "The Confirmation Mess" (1988) 101 *Harv. L. Rev.* 1185.

⁶⁷ Ackerman argues that President Reagan was attempting to transform the direction of the Court by placing an ideologically compatible judge on the bench. A leading intellect can, in Ackerman's opinion, shift the balance of the Court one way or another so that overall the decisions of the Court become more liberal or conservative: B.A. Ackerman, "Transformative Appointments" (1988) 101 *Harv. L. Rev.* 1164.

⁶⁸ P.A. Freund, "Appointment of Justices: Some Historical Perspectives" (1988) 101 *Harv. L. Rev.* 1146 at 1147. Freund refers also to J. Harris, *The Advice and Consent of the Senate* (1953) CITATION??.

the role of the Senate was to act as protection against the President using favouritism to appoint political or ideological kin to the bench,⁶⁹ and the Senate has exercised its power on many occasions.⁷⁰

Most American people would say that the confirmation of judges provides the "public scrutiny and understanding"⁷¹ necessary to the American perception of a democratic government. Thus, on this view, public opinion should be considered by those confirming the presidential nominee. This view has fostered such questions as: should public opinion really matter? Aren't we seeking the best quality of legal mind? Impartiality, a sense of fairness, demonstrated intellectual ability, and proven record of legal ability – can these qualities not be judged objectively? Isn't the legal community itself best suited to choose those who are eminently qualified to be judges? Who better?, you might ask.

One American professor does not think so:

It is because the Supreme Court wields the power that it wields, that appointment to the Court is a matter of general public concern and not merely a question for the profession. In good truth, the Supreme Court is the constitution. Therefore, the most relevant things about an appointee are his breadth of vision, his imagination, his capacity for disinterested judgment, his power to discover and to suppress his prejudices.

. . . In theory, judges wield the people's power. Through the effective exertion of public opinion, the people should determine to whom that power is entrusted.

⁶⁹ Carter, *supra*, note 66 at 1187 notes that Hamilton recognized this purpose in *The Federalist*, No. 57.

⁷⁰ The term "rejections" may not be proper, because some nominations have been withdrawn in the face of a hostile Senate, and some have been "postponed" indefinitely. In the 19th century alone there were twenty-five unsuccessful nominations, almost one quarter of the attempts. Overall there have been at least 34 nominees either rejected outright or withdrawn by the White House. Several judges have been confirmed and have declined. One nominee of President George Washington was made Chief Justice when the Senate was in recess; by the time it returned, the new Chief Justice had presided on a term of the Court but he was still rejected as a nominee by the Senate! See Freund, *supra*, note 68 at 1147; W.F. Swindler, "The Politics of 'Advice and Consent'" 56 A.B.A.J. 533 at 536; L.E. Walsh, "Selection of Supreme Court Justices," 56 A.B.A.J. 555. For a history of U.S. nominations, see H.J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 2d ed. (New York: Oxford University Press, 1985).

⁷¹ Freund, *supra*, note 68 at 1153.

That professor was Felix Frankfurter, later a justice of the U.S. Supreme Court (1939-62).⁷²

Recent American academic observers have also supported the public role of the U.S. Senate. They point to the idea that the Senate's task is to check the possibility of favouritism in the President's nomination.⁷³ And many hold to the notion that the proceedings are and should be political. Columbia Law School Professor H.P. Monaghan argues that

[t]he entire appointment process is best understood as largely beyond the operation of norms of legal right or wrong; instead it involves mainly questions of prudence, judgment and politics.

... we are better off recognizing a virtually unlimited political license in the Senate not to confirm nominees.⁷⁴

This poses an interesting paradox for Professor Carter of Yale University. He agrees that the process is inherently political, and suggests that the Senate in fact reacts to the popular opinion of the nominee. In Judge Bork's case, the Senate reacted to the popular perception that Bork was a radical conservative by rejecting him. As Carter puts it, Bork's "views as understood by the American people seemed out of step with their own."⁷⁵ Thus the Senate implemented the majority's will by rejecting him. The paradox arises because it has always been presumed that the role of the Supreme Court was to uphold the individual rights in the Constitution *against* the tyranny of the majority. In Carter's view, the fact that the majority agrees with the nomination (or at least does not disagree) implants the temporary majority's views on the Court, which should not necessarily be the case. In fact, he says, this actually prevents the Court from doing its job.⁷⁶

The result for Carter is that two things are relevant in the process of confirming a nominated judge. The judge must be the sort of person "for whom moral choices occasion deep and sustained reflection" and he or she must be, in the opinion of the state, an individual whose

⁷² Quoted by Freund, *ibid.* at 1153.

⁷³ For instance, Carter, *supra*, note 66 at 1187; H.P. Monaghan, "The Confirmation Process: Law or Politics?" (1988) 101 Harv. L. Rev. 1202 at 1203.

⁷⁴ H.P. Monaghan, *ibid.* at 1207.

⁷⁵ Carter, *supra*, note 66 at 1192-93.

⁷⁶ *Ibid.* at 1193.

"personal moral decisions seem sound."⁷⁷ The latter requirement means that the judge must be able to react well in times of crisis, since, in his words,

[a]t such times, what matters most is not what sort of legal philosophers sit on the Court, but what sort of moral philosophers sit there.

And:

it is far less useful to know that a nominee has ruled that private clubs violate no constitutional provisions when they discriminate against nonwhites than to know whether the nominee has herself belonged to a club with such policies, and for how long.⁷⁸

One should note that it all somewhat fits together: the essentially political process where the people influence the Senators' choice is shown to the public through the news media. Television especially can demonstrate easily that a nominee practises against what many people would preach. Yet it is far more difficult to explain the intricacies of constitutional law, especially without the use of a thirty-second film clip.

Some people argue the converse position, that such an open political process serves neither justice nor the candidates well, and in the end does not achieve the result aimed at. In 1929, one American Congressman warned against the hearings turning into a "legislative rodeo";⁷⁹ Judge Bork said the atmosphere in the hearing room reminded him of a Roman circus!⁸⁰ The argument is that a public hearing provides only a superficial examination of the candidate and, from the outset, eliminates eminently qualified candidates from the Supreme Court. Why, they ask, would anyone want to face the public ordeal, with the entire nation prying into the nominee's private life and family? Should the elected representatives try to elucidate the way a case will eventually go? You may think too, that whether or not the candidate

⁷⁷ *Ibid.* at 1199.

⁷⁸ *Ibid.* at 1199.

⁷⁹ Senator T. Connally of Texas, quoted in Freund, *supra*, note 68 at 1160.

⁸⁰ R.H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990) at 296. He described the Senate hearing room:

Green baize tables, cameras, hard lights, the room packed with people, the atmosphere of a Roman circus about to begin.

has used illegal drugs is obviously something easily and effectively reported by the media, while legal and philosophical views are not.

Some argue further that the whole process violates the independence of the judiciary, since it often requires a candidate to indicate how he or she will vote on a specific issue. Judges, they argue, cannot be beholden to anyone — especially the government, which will often appear before the Court. Most candidates refuse to answer specific questions about issues that might come up before the Supreme Court. If they do answer (and sometimes they have little choice) two problems arise: first, what about the public perception of partiality or bias? How does that reflect on the independence of the judiciary and the separation of powers? Second, what happens if a candidate *does not* decide cases according to what they said at the hearing? Can this pose a moral dilemma to the judge? Is this desirable?

Of course an open, public nomination process, such as exists in the United States, is not the only alternative, should one come to the conclusion that a change in the appointment process is necessary. A variety of intermediate options have been put forward which, while providing some degree of scrutiny, still do not put the candidates through such gruelling tactics nor put so much emphasis on the superficial, political, and even partisan planes. One must realize that the American system of checks and balances between President and Congress is foreign to the Canadian form of government.

This being said, how much do we need to know about our judges before they are appointed? Are our club memberships relevant, as Professor Carter argues? Are our personal lives? What about former clients, or positions such as directors of companies or of charity organizations? What if the candidate didn't get high marks in law school? What about his or her particular philosophy? What kind of judges do we want?

Which appointment process promotes the most informed debate? Will it result in the nomination of the best candidate? Will it enhance respect for the Court or discredit it? What about the judge, whose weaknesses have been exposed so widely? What about the judge's family? Will the process become a political debate designed to pit a political party against another or enhance the power of one politician? What is really relevant?

Has our appointment process, as it has existed since Confederation, served us so badly up to now that it needs to be drastically altered? Or has the role of the Court evolved so dramatically that the nomination process is no longer adequate? If so, of all the possible options presently discussed and others in operation in the western world,

which is best suited to serve the needs of our Canadian society? How best can we determine whether a candidate or a nominee has such required intellectual, moral and personal abilities? Is public opinion a sure barometer? Is expert opinion from the legal and academic communities *better*? Are politicians proper arbitrators? Is a process open to the public and the media preferable to a closed one? Do we want candidates for judgeship chosen on the basis of their political tendencies, personal philosophy or intellectual ideology? All these questions form part of the debate and must be answered before remodelling the existing Canadian way of making judicial appointments.

At the end of the day, however, this country needs to ensure that the best measure of justice is rendered to each and every Canadian. The process of choosing judges should reflect that high standard.

I have taken some time today to raise what I consider to be an important issue in the evolution of the relationship between the Supreme Court, the governments in Canada and the people of Canada. If we accept that the role Supreme Court judges play in the legal and constitutional life of this country has evolved, then it is important to consider what that implies. Changes may be incremental, and may be part of a greater reform of the central institutions of the country in the next decade or sooner. But it is our responsibility to debate these questions fully, and if we accept that the courts are to play a more fundamental role in the daily lives of Canadians, then we should reflect on the proper process to ensure that the courts and the judges best perform this difficult, challenging, and exciting task.