# JUDICIAL APPOINTMENT, DEMOCRATIC ASPIRATIONS, AND THE CULTURE OF ACCOUNTABILITY

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> So far as the judicial function is capable of it, courts of justice must work in a reality of freedom from factors that are foreign to their ministrations. There must be a hovering awareness of ultimate principles and ends. There must be a steadfast adherence to the intellectual convictions of our jurisprudence. Only in that manner can they execute their office as an untrammeled, independent, and constituent organ of government, accountable only to the public through its great councils.
>
> Ivan Rand[1]

## INTRODUCTION

When Ivan Cleveland Rand was appointed to the Supreme Court of Canada on 22 April 1943, the country knew little about him, his suitability for the position, or the Supreme Court on which he was about to play such a pivotal and transformative role. In 1959, as the author of the most significant set of reasons in the Supreme Court's *Roncarelli v. Duplessis*, Rand J. set the stage for a constitutional culture organized around constraining the executive branch from unfettered authority.[2] *Roncarelli* stood, and stands, for the proposition that no executive authority in Canada is unlimited. The Canadian *Bill of Rights*, the Quebec *Charter of Human Rights and Freedoms*, and the *Charter of Rights and Freedoms*, which followed in *Roncarelli*'s wake, extended that culture of constraint to cover all governmental authority (including legislative authority).

*Roncarelli*, therefore, reflects the "Rand Paradox". The judge most credited with subjecting executive authority to the rule of law was himself appointed to the Supreme Court in an exercise of unchecked and unreviewable executive authority—that is, the authority of the federal executive to appoint judges to the Supreme Court, and to all federally appointed trial and appellate courts. The rule of law in Canada, in other words, is supervised by judges appointed according to a process that effectively lies beyond the reach of the rule of law. For many, this is a paradox we can and

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[1] Ivan Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951) 9 U.T.L.J. 1 at 13.

[2] *Roncarelli v. Duplessis*, [1959] S.C.R. 121 [*Roncarelli*]; Justice Rand's decision in *Roncarelli* and its implications were the subject of the Rand Lecture delivered in 2004 by my colleague David Dyzenhaus and published as David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2004) 53 U.N.B.L.J. 111.

should live with. Judicial appointments may be closed, opaque, and without safeguards against arbitrary selections, but the process works generally well, and has produced a cohort of independent-minded judges (like Ivan Rand) who have embraced rights protection, and exhibit through their decisions little, if any, correlation to the partisan ideologies of the governments who appointed them.[3] As a result, for many, fixing judicial appointments truly is a solution in search of a problem.

This is an understandable view, but misses the point. The system of appointing judges in Canada should continue evolving because it is out of step with Canada's legal and political culture, not because the judges we have are unworthy.[4]

Our current appointments system is out of step with legal culture because it is inconsistent with the independence of the judiciary. The whole edifice of judicial independence, as elaborated in cases such as *Valente* and the *Provincial Judges Remuneration Reference*, is to insulate judges from improper influence from the government of the day.[5] For this reason, the Supreme Court identified areas where objective safeguards would have to be in place, such as security of tenure, financial independence and administrative independence. What good is security of tenure, financial independence, or administrative independence, however, if judicial candidates are perceived as beholden to the government of the day because of how they are selected? If currying partisan favour is understood as a prerequisite for judicial appointment, then the independence of judges is tainted irrespective of what protection might be afforded, *ex post*, to those who pass through the political gauntlet.

Our current appointments system is out of step with political culture primarily because it lacks transparency, and provides for no oversight. In a post-Gomery, post-Arar era, accountability has become the *sine qua non* of Canadian politics, and no amount of hearings after the fact, or advisory committees beforehand, can alter the reality that the federal and provincial governments choose judges based largely on undisclosed criteria in largely unknown circumstances. As one study put it, judicial appointments in Canada suffer from a "democratic deficit".[6]

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[3] On the importance of the personality and culture of the Canadian judiciary, see Ian Greene *et al.*, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998) and Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987). On the correlation between judicial decision-making and the ideological preferences of the government that appointed those judges, see Ben Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada," online: Social Science Research Network <http://papers.ssrn.com/sol3 /papers.cfm?abstract_id=1013560>.

[4] Of course, a caveat is in order on this last point. Those who think we have a first rate judiciary are not privy to the list of those passed over for the bench, so at best this is a skewed empirical claim in either direction.

[5] *R. v. Valente*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island R. v. Campbell; R. v. Ekmecic; R. v. Wickman Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, 3 [1997] S.C.R. 3 [*Remuneration Reference*].

[6] Richard Devlin, A. Wayne MacKay & Natasha Kim, "Reducing the Democratic Deficit: Representation,

In this study, I am interested less with the democratic deficits of the appointment process and more with how the appointments process reflects (or fails to reflect) our democratic aspirations. The judges who governments appoint, and the way in which they are appointed, embody a set of values about democracy. As those democratic values change, this argument suggests, so will the appointment process and the judges who come through it.

At the time of Confederation, the democratic aspirations were built around Parliamentary supremacy, the legitimacy of a trusted executive branchm, and faith in elites such as the legal profession. Today, the authority of Parliament has receded in the face of judicial supervision under the *Charter* on the one hand and the concentration of power in the executive on the other hand. As a result, the notion of the executive branch having a free hand to pursue its preferences has been under siege. The more powerful and concentrated the executive becomes (even the federal Cabinet now seems little more than the mouthpiece for the Prime Minister's Office), the more anxious the public becomes about how that power should be contained and constrained. The Reports of the Public Inquiries in Arar and Gomery resonate with the call for greater oversight, justification, and transparency in relation to executive authority. This culture of accountability has coincided with an erosion of trust in elites generally and the legal profession in particular.[7]

In this study, I highlight the misalignment between the present system of judicial appointments and core values of judicial independence and accountability. I suggest judicial appointments will likely be caught up in this evolving legal culture of constraint and the evolving political culture of accountability as well. Judicial appointments, in other words, will and must change in order to continue to reflect our democratic aspirations.

The analysis below is divided into two parts. In the first part, I chart the evolution of judicial appointments in Canada and the implications of recent efforts at reform. In the second part, I discuss how the legal culture surrounding judicial independence and the political culture surrounding transparency and accountability are likely to drive further reforms in judicial appointments. The result, I believe somewhat optimistically, will be both to constrain the executive in its exercise of the appointment power, and to enhance the role of the judge in Canadian democracy.

## PART ONE: THE EVOLUTION OF JUDICIAL APPOINTMENTS IN CANADA

The recent evolution of judicial appointments in Canada reveals some puzzling trends. The system of judicial appointments is becoming at once more transparent

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Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38 Alberta L. Rev. 734.

[7] On the loss of trust in lawyers as a profession, see Angela Fernandez, "Polling and Popular Culture (News, Television, and Film): Limitations of the Use of Opinion Polls in Assessing the Public Image of Lawyers" in *In the Public Interest: The Report & Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law & the Independence of the Bar* (Toronto: Irwin Law, 2007) at 209.

and more political. In other words, it appears both to be evolving in more democracy-enhancing ways and, simultaneously, in ways that threaten the democratic role for the judiciary as a counter-majoritarian, rights-protecting body.

While much attention has been focused on the fluid evolution of Supreme Court appointments, the more varied evolution of provincially appointed judges and the subtle evolution of federally appointed lower court judges receives less scrutiny. Below, in cursory fashion, I set out the present system of judicial appointments in Canada.[8] The framework within which I view the present system, as stated above, is one of democratic aspirations. The question, therefore, is to what extent the evolution of judicial appointments has tracked the evolution of Canada's democratic aspirations (and to what extent it ought to).

## 1. The Constitutional, Statutory, and Administrative Context for Federal Judicial Appointments

To understand judicial appointments in Canada, it is necessary to see the constitutional, statutory, and administrative context for those appointments, and how they interact. For example, the constitutional context dictates two different streams of appointments—one stream federally appointed and one stream provincially appointed. Each level of government has provided for an appointment process through statute, and each statute has given rise to particular administrative practices. Those statutes and practices, however, must also conform to the broader constitutional principles of the rule of law and judicial independence. These contexts are sketched briefly below.

### (A) The Constitutional Context

Under the *Constitution Act, 1867*, judges of s. 96 and s. 101 courts are appointed by the Governor-General in Council (i.e. the federal Cabinet), on the recommendation of the Minister of Justice (save for appointments to the Supreme Court of Canada and of Chief Justices, which are made on the recommendation of the Prime Minister). Together, these judges will be referred to as "federally appointed judges".

Section 92(14) of the *Constitution Act, 1867*, allocates to the provinces the administration of justice. The provinces have used this legislative authority to enact legislation that provides for the appointment of judges to provincial trial courts (which exercise jurisdiction primarily in criminal and family matters). These judges will be referred to as "provincially appointed judges".

The *Constitution Act, 1867*, does not speak to the content of the judicial appointments process, or to the criteria for judicial selection. The *Charter of Rights and Freedoms* is also silent on the appointments process, although s. 11 of the *Charter* states that "any person charged with an offence has the right . . . (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing

[8] The analysis below is primarily concerned with federal judicial appointments.

by an independent and impartial tribunal".

The constitutional backdrop for judicial appointments involves not just those aspects of the text of the *Constitution* relating to judicial appointments but also to the unwritten or underlying principles of the *Constitution*. At least three such principles bear on the question of judicial appointments: (a) the separation of powers; (b) the rule of law; and (c) judicial independence. Each is outlined below.

### *i. Separation of Powers*

The doctrine of the separation of powers is otherwise referred to as a reminder that no branch of government should overstep its bounds and that each show proper deference to the legitimate sphere of activity of the other.[9] As the Supreme Court recently stated, "No one doubts that the courts and the legislatures have different roles to play, and that our system works best when constitutional actors respect the role and mandate of other constitutional actors".[10]

Clearly, the judicial branch could not perform its role if the executive branch abused the power of judicial appointment to ensure that courts ruled in the government's favour on matters of political importance. While the Supreme Court has long recognized that the judiciary, executive, and legislative branches of government have separate roles, only after the enactment of the *Charter* has the Supreme Court wrestled with the implications of this doctrine for Canada's constitutional system.

Indeed, there is some irony in the leadership of the Supreme Court developing the separation of powers doctrine. In a very real sense, it is not at all clear that the judiciary represents a distinct branch of government in Canada. Both provincially and federally, there is a Minister responsible for the courts. Court staff report through the ministry of the Attorney General and are ultimately accountable to the Minister. Governments set the courts' budget. Governments decide where courthouses will be built (has anyone conducted a study to determine how often new courthouses are build in ridings held by the government in power at the time?). A recent study by the Canadian Judicial Council concludes that every Canadian jurisdiction is presently governed by an "Executive" model of court administration, whose distinguishing feature is its control by the executive branch of government.[11] And, of course, the executive choose the judges. Where there is good cause, the executive can also have judges removed from the bench. In what way, precisely, is the judiciary a distinct branch of government?

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[9] See especially *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 389, McLachlin J [*New Brunswick Broadcasting*]. See also *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para. 32ff.

[10] *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] 3 S.C.R 381 at para. 104.

[11] See Canadian Judicial Council, "Alternative Models of Court Administration", online: <http://www.cjc-ccm.gc.ca/cmslib/general/models-e.pdf>. (I disclose that I was one of the researchers who worked on this study).

### *ii. The Rule of Law*

While the separation of powers appears to raise more questions about judicial appointments than it resolves, the rule of law seems to present a more straightforward constitutional rationale for constraining the executive power to appoint judges. Put bluntly, the rule of law requires judges who are independent of government influence or manipulation. The executive power to appoint judges, therefore, must be supervised (either by judges or by another independent body with a mandate to safeguard the rule of law) to ensure it is not abused to subvert the rule of law. Aharon Barak, in his study, *The Judge in a Democracy*, observed that, "The role of the judge in a democratic society is to bring about the realization of the rule of law...The rule of law leads to the conclusion that that the final interpreter of the law should be the court, and not the legislature or the executive".[12] While this logic may seem compelling, even obvious, it has not been embraced in Canada, at least not in the context of judicial appointments.

The rule of law is widely supported, but rarely invoked in the judicial appointments debate. Yet, whatever view one takes on the scope and meaning of the rule of law, it is clear that it falls to judges ultimately to interpret and apply.[13] In the *Secession Reference*, the Supreme Court described the importance of the rule of law in the following terms:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, *supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.[14]

Following *Roncarelli* v. *Duplessis*, as noted above, the rule of law has come to embrace the principle that no discretion is "untrammelled".[15] No matter how broad the discretion that is conferred on the executive, all government decision-making must conform to certain basic tenets, such as being rendered in good faith, and not

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[12] Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) at 56.

[13] For recent appraisals, see Allan C. Hutchinson, "The Rule of Law Revisited: Democracy and Courts" in David Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999) at 196; Jeffrey Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] Pub. L. 671; and T.R.S. Allen, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 L.Q. Rev. 221.

[14] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 70.

[15] *Roncarelli, supra* note 2.

for ulterior or improper motives. This concept has been applied to the appointment of adjudicators, but not (yet) to the appointment of judges.[16]

In *CUPE v. Ontario (Minister of Labour)*, the Supreme Court held that a Minister's appointment of retired judges to serve as labour arbitrators was invalid because the retired judges were not "qualified" within the meaning of the statute empowering the Minister to make the appointments in question.[17] Writing for the majority, Justice Binnie observed:

> The decision in Roncarelli, despite the many factual differences, foreshadows, in part, the legal controversy in this case. There, as here, the governing statute conferred a broad discretion which the decision maker was accused of exercising to achieve an improper purpose. In that case, the improper purpose was to injure financially (by the cancellation of a liquor licence) a Montreal restauranteur whose activities in support of the Jehovah's Witnesses were regarded by the provincial government as troublesome. Here, the allegations of improper purpose behind the unions' challenge are that the Minister used his power of appointment to influence outcomes rather than process, to protect employers rather than patients, and, as stated by the Court of Appeal, to change the appointments process in a way "reasonably" seen by the unions as "an attempt to seize control of the bargaining process".[18]

As the *Retired Judges* case shows, courts may hold governments legally accountable for their use of the power to make adjudicative appointments. Ironically, it is not at all clear that a Canadian court would intervene, if asked, to invalidate a judicial appointment, even if evidence of ulterior and improper government motives surfaced. The rule of law, however, has little meaning if it cannot be meaningfully enforced. Is there a principled basis on which to say that certain categories of executive action, such as judicial appointments, should be entirely immune from judicial review for breach of the rule of law?[19]

When it comes to the application of the rule of law to the judicial sphere, however, judges may be vulnerable to the charge that the rule of law is a rhetorical device used by judges to preserve their own privilege.[20] While this concern has some purchase with respect to judicial supervision over judicial remuneration commissions, it ought not to affect judicial scrutiny of the government appointments

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[16] See *MacKenzie v. B.C. (Minister of Public Safety and Solicitor General)*, 2006 BCSC 1372, 272 D.L.R. (4th) 455. The government's appeal to the B.C. Court of Appeal in 2007 was dismissed on the grounds of mootness.

[17] *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 (the *Retired Judges* case).

[18] *Ibid.* at para. 92.

[19] The argument that judicial selection fails to comply with the rule of law is developed in more detail in F.C. DeCoste, "Political Corruption, Judicial Selection and the Rule of Law" (2000) 38 Alta. L. Rev. 654.

[20] See e.g. Peter Hogg & Cara Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U.T.L.J. 715.

process.

While justiciability concerns may sometimes render specific appointment decisions inappropriate for adjudication (i.e. courts may lack the legitimacy or capacity to adjudicate them), this presumably would not apply to merit based, judicial appointments.[21] If the rule of law does have a role in the appointment process, what ought it to be? At a minimum, would a candidate have a recourse if evidence surfaced that she or he had been passed over (or another person appointed) on the basis of bad faith or as part of an ulterior and improper arrangement? This question is addressed below in the context of judicial independence.

***iii. Judicial Independence***

Judicial Independence, as alluded to above, is closely connected to the constitutional principles of the separation of powers and the rule of law. Each principle depends, to some important extent, on the notion of an independent judiciary. What is the source of judicial independence, and how ought it to interact with other constitutional principles, such as Parliamentary sovereignty and ministerial responsibility? The first jurisprudence on judicial independence as a free-standing constitutional concept comes in the wake of the *Charter*'s enactment, and specifically seeks to elaborate on the *Charter* protection contained in s. 11(d) of an independent and impartial tribunal in criminal proceedings.

In *Valente* the Supreme Court addressed the argument that the Criminal Division of the Ontario Provincial Court was not independent within the meaning of s. 11(d) of the *Charter*.[22] Justice Le Dain identified the three essential conditions of judicial independence in Canada: security of tenure, financial security, and administrative independence.

In the course of his comments on security of tenure, Justice Le Dain condemned the system of appointment during pleasure. Thus, when a Provincial Court judge has reached retirement age, but has not accumulated sufficient years of service to be entitled to a pension, he may be "re-appointed" by the Lieutenant Governor in Council (i.e. the provincial Cabinet) on the recommendation of the Attorney General. This reappointment is during pleasure. Justice Le Dain considered that holding office during pleasure "cannot reasonably be perceived as meeting the essential requirement of security of tenure for purposes of s. 11(d) of the *Charter*".[23] Consequently, a judge who holds office during pleasure cannot be an independent tribunal within the meaning of s. 11(d).

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[21] See *Black v. Canada (Prime Minister)*, [2001] O.J. No. 1853 (C.A.) where the Ontario Court of Appeal held that the decision of the executive to award honours was non-justiciable. For a critique of this decision, see Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002) 47 McGill L.J. 435.

[22] *R. v. Valente (No. 2)*. [1985] 2 S.C.R. 673 [*Valente*].

[23] *Ibid.* at para. 37.

In *Valente*, Justice Le Dain emphasized the connection between judicial independence generally and the relationship between the judiciary and the executive branch of government more specifically:

> It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government".[24]

Chief Justice Dickson, in *Beauregard v. Canada,* added that, "judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusions by, or even intertwining with, the legislative and executive branches".[25] We may conclude on this point by recalling the remarks of Justice Le Dain, who said that:

> [T]he relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence, but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.[26]

This fundamental distinction between individual and institutional independence is a legacy of *Valente* and *Beauregard*, which is still fully relevant today.

Another important clarification made in *Valente* was the distinction drawn between impartiality and independence, both guaranteed by s. 11(d) of the *Charter*. Justice Le Dain's reasons are clear in this regard:

> Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.[27]

Finally, *Valente* makes clear that the standard for judicial independence in Canada is not a static threshold, but one of perception—whether the judiciary is perceived as independent. Justice Le Dain noted that, "The perception must,

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[24] *Ibid.* at para. 20.

[25] [1986] 2 S.C.R. 56 at 77 [*Beauregard*].

[26] *Valente, supra* note 22 at para. 20.

[27] *Ibid.* at para. 15.

however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees".[28] The issue here is not simply how a judge may or may not decide a particular case, but whether the public has confidence in the administration of justice.[29]

In *Lippé*, the Supreme Court took further the analysis of the relationship between independence and impartiality in terms of the public's confidence in the justice system:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.[30]

In the *Remuneration Reference*, handed down by the Supreme Court in 1997, the Supreme Court elaborated that judicial independence flows not only from s. 11(d), but also from an unwritten principle of the Canadian *Constitution* (otherwise, while provincial courts would enjoy the protection of judicial independence, the Tax Court or a unified Family Court, which do not hear criminal cases, might not be). The other significance of the *Provincial Remuneration Reference* worth noting is that until that case, the judges of the lower courts, essentially the provincially appointed judges, received only a limited measure of protection of their judicial independence. They were not covered by ss. 96 to 100 of the *Constitution Act, 1867*, and s. 11(d) only applied to courts exercising criminal and penal jurisdiction. There has thus been a marked change, since "judicial independence [has] grown into a principle that now extends to all courts, not just the superior courts of this country".[31]

The *Reference* emerged out of litigation in three separate provinces, Prince Edward Island, Alberta, and Manitoba, where provincially appointed judges were faced with salary reductions enacted by law. The three cases, joined for purposes of the reference, addressed how the guarantee of judicial independence constrains provincial governments and legislatures from reducing the salaries of provincial court judges".[32]

Chief Justice Lamer highlighted that, in addition to the *Charter* and the judicature provisions of the *Constitution Act, 1867*, judges should also look to the

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[28] *Ibid.* at para. 22.

[29] See *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 29.

[30] *Lippé c. Charest* (1991), 5 C.R.R. (2d) 31 at para. 69 (SCC).

[31] *Remuneration Reference*, *supra* note 5 at para. 106.

[32] *Ibid.* at para. 1.

preamble of the *Constitution Act, 1867*, to find a fundamental support for the principle of judicial independence. Judicial independence "is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*".[33]

The Supreme Court held that the principle of judicial independence requires an institutional process for determining judicial salaries that is separate and apart from the ways in which civil servant salaries are set. The Supreme Court developed the idea of remuneration commissions with judicial and executive participation for these purposes. These commissions, and the extent to which governments are bound to follow their recommendations, have been the subject of near continuous litigation ever since. In a sense, they have come to dominate the judicial independence debate.

The puzzle underlying the judicial independence jurisprudence from the Supreme Court is the absence of any real engagement with the issue of appointments. In *Re Currie and Niagara Escarpment Commission*, in the context of an early *Charter* interpretation, Justice Ewaschuk wrote that the appointment procedure as it exists in Canada does not result in judges becoming "dependent" on the government:

> Accepting that political input is made in respect of judicial appointments in this country at all court levels, even in respect of the Supreme Court of Canada, a judge cannot be said to be dependent on the appointing government. At best he [sic] may after appointment be grateful, but not dependent.[34]

Why would it compromise the public's confidence in the justice system to have government reduce judicial salaries, but not compromise the public's confidence in the justice system to have government choose only judges of a particular race, gender, socioeconomic class, or partisan affiliation? How can it be that judicial independence appears unaffected by how a government selects the judiciary? As Chief Justice Lamer emphasized, the goal of judicial independence is that "the relationship between the judiciary and the other branches of the government be *depoliticized*".[35] As the recent CALT Panel on Supreme Court Appointments observed:

> We might be tempted to think that this important assertion applies only to judges who have already been appointed. Yet why would the imperative of depoliticization apply only to those who are already judges? What would be the logic of an argument according to which politicization could be a possible vector in the appointment process, but that it has to disappear once the process is complete? At the constitutional level, it seems that the distinction between the appointment process and the appointment itself does not hold....Indeed, it is impossible to claim that the principle of judicial independence is maintained if appearances say that the

[33] *Ibid.* at para. 83.

[34] *Re Currie and Niagara Escarpment Commission* (1984), 13 C.C.C. (3d) 35 at para. 25 (Ont. H.C.).

[35] *Remuneration Reference, supra* note 5 at para. 125.

> appointment process is tainted by political interference. The distinction therefore does not hold because it creates an artificial and implausible separation between two stages in a judge's career, namely appointment and practice, while these two stages are intimately related in the eyes of the public.[36]

The Supreme Court has been silent on this question to date. However, the logic and principles developed to elaborate judicial independence all suggest that the current federal appointments process would not survive serious scrutiny.

Thus, while it is impossible to say that the executive is constitutionally constrained in the judges it chooses, it is also inaccurate to say that the constitutional principle of judicial independence does not extend to the appointment process.

It is worth noting that just as the *Constitution* itself remains a living tree, the notion of judicial independence may continue to evolve as well.[37] As the Supreme Court observed in *MacKeigan*, the essential features of judicial independence identified by Justice Le Dain in *Valente* do not represent "an exhaustive codification of the elements necessary for judicial independence".[38] What this case-law does establish is that for a condition of judicial life to be inconsistent with judicial independence, it is not necessary to show that the executive has interfered with the judiciary to advance ulterior goals, but simply that it *could* do so. This would seem to be an argument easily made in the context of judicial appointments. The problem (to the extent this is viewed as a problem) is the absence of a likely litigant to raise such a concern.

Would an ordinary citizen have standing to challenge the appointment of a judge she or he did not like, or believed was the result of an improper exercise of the appointment power. In the *Retired Judges* case, unions could credibly argue that the appointment of a labour arbitrator directly affected their interests. Whose interests are similarly affected by the appointment of a judge? The other option, that a disgruntled, unsuccessful candidate would challenge a government's failure to appoint him or her, or appointed someone else less qualified, seems highly unlikely to be brought, and virtually implausible to imagine succeeding. By contrast, if a group like the Canadian Bar Association brought such a challenge (and it has come out strongly against the judicial appointments process at different junctures), a court may well deny the CBA public interest standing on the grounds that other, more directly affected individuals could bring such a challenge if they wished.[39] This dilemma speaks to another dynamic that shapes the judicial appointment debate—to

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[36] See "Report of CALT Panel on Supreme Court Appointments", online: Canadian Association of Law Teachers <http://www.acpd-calt.org/english/docs/SupremeCourt_panel.pdf> at 5.

[37] *Remuneration Reference*, *supra* note 5 at para. 106.

[38] *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 at 826 [*MacKeigan*].

[39] Precisely this argument was adopted by the British Columbia Supreme Court in dismissing a *Charter* application brought by the CBA alleging that the B.C. government owed a constitutional duty to provide legal aid in civil matters to those unable to afford a lawyer. See *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, [2007] 1 W.W.R. 331.

the extent that constitutional principles constrain the executive in the exercise of its appointment power, these principles must be elaborated by and ultimately embraced by the executive itself.

**(B) The Statutory Context**

At first glance, the most likely body to give effect to the constitutional constraints on the executive appointment power is the legislature. The role of the legislative branch of government, after all, is clarifying the boundaries of legitimate executive power. Why should this be any different in the context of judicial appointments?

The federal *Judges Act* does, in fact, set out minimum qualifications for appointment to a s. 96 or s. 101 court.[40] The prospective appointee must be a member of the Bar (i.e. entitled to practice law) in one of the provinces of Canada. The prospective appointee must also have practiced law, or acted in some equivalent capacity, for a minimum of ten years prior to appointment. The statutory criteria are perhaps more noteworthy for what they do not include. Lawyers need not have particular subject area proficiency; they need not be "qualified" in the sense the term is used in statutes providing for appointment to adjudicative boards and tribunals; and they need not exemplify any particular characteristics such as impartiality, integrity, etc.

In addition to the skeletal criteria for all federally appointed judges, there are also special appointment criteria for Supreme Court appointments. Section 5 states that the judges shall be chosen from present or former judges of a superior provincial court or from lawyers who have been at a province's bar for at least ten years. Section 6 requires that at least three of the judges be chosen from the Quebec Court of Appeal or Superior Court, or from lawyers in the Province of Quebec. These are the key features of the appointment of judges to the Supreme Court.[41]

The statutory environment for the appointment of provincial judges is generally similar to federal appointments—that is, the appointments are made by Cabinet and eligibility is limited to lawyers who have a minimum of ten years of practice experience. The differences between federal and provincial judicial appointments are also noteworthy.

Ontario's Judicial Appointments Advisory Committee (JAAC) is often cited as a leader in Canada (and globally) in a transparent process without partisan

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[40] *Judges Act*, R.S.C. 1985, c. J-1.

[41] The composition of the Supreme Court is now subject to a specific amending procedure under the *Constitution Act, 1982*. Article 41 provides that this issue is subject to the constitutional amendment procedure, which requires the agreement of the federal authorities (House of Commons and Senate) *as well as* all of the provincial legislative assemblies. In other words, it requires unanimity. Section 42(d) of the *Constitution Act, 1982*, also says that any change to the Supreme Court, aside from changes to its composition, has to comply with the procedure set out in Article 38. The amendment procedure in Article 38 does not require the unanimity of political bodies, unlike that set out in Article 41.

interference.[42] The JAAC began as a pilot project of Ontario's reform oriented Attorney General, Ian Scott, in 1988. The JAAC began its work under the chairmanship of Professor Peter Russell with the mandate: "First, to develop and recommend comprehensive, sound and useful criteria for selection of appointments to the judiciary, ensuring that the best candidates are considered; and, second, to interview applicants selected by it or referred to it by the Attorney General and make recommendations."[43]

The pilot grew in size and scope and the JAAC was formally established on 28 February 1995 by proclamation of the *Courts of Justice Act* amendment passed in 1994. That *Act* mandates that the JAAC's purpose is to "make recommendations to the Attorney General for the appointment of judges".[44] The JAAC is comprised of two provincially appointed judges, three lawyers appointed by the Law Society, the Ontario Bar Association and the County and District Law Presidents' Association, and two people who are neither judges nor lawyers. The JAAC receives applications for judicial positions, vets candidates, conducts interviews, and provides a ranked list of recommended appointments to the Attorney General, who makes the final selection.

Significantly, however, the legislative embrace of the JAAC in Ontario followed executive leadership in embracing this concept. The danger with legislative leadership in areas pervading the judiciary is the danger of undermining judicial independence through the perception of partisan interests being pursued by Parliamentarians. For example, when Bill 66 (the *Judicial Accountability Act*), a private member's Bill that enjoyed the support of the then Conservative Attorney General and Premier, was introduced in the Ontario legislature in 2000, a storm of protest ensued.[45] The proposed law would track judicial sentencing practices and the Tories were accused of interfering with judicial independence. The opposition was effective and the law was never passed.[46]

### (C) The Administrative Context

The constitutional and statutory contexts provide only the barest of outlines as to the process and substance of judicial selection. The rest is left to the executive to

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[42] See F.L. Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition" in Kate Malleson & Pete Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) at 69-70 [*Morton*].

[43] "Judicial Appointments Advisory Committee—A Brief History", online: Ontario Courts <http://www.ontariocourts.on.ca/jaac/en/>.

[44] *Courts of Justice Act*, R.S.O. 1990, c.43, as am. by S.O. 1991 (Vol. 2), c. 46, at s. 43(8).

[45] See "Bill 66, *Judicial Accountability Act, 2000*, 1st sess., 37th Leg., Ontario, 2000", online: Ontario Legislative Assembly <http://www.ontla.on.ca/documents/StatusofLegOut/Session1stat.htm#Bill 66>.

[46] S. Bourette, "Legal Community Warns against Judicial Report Cards" *The Globe and Mail* (16 May 2000), A10; T. Boyle, "Lawyers Slam Bill as Attack on Judiciary" *The Toronto Star* (16 May 2000) A7; and A. Lindgren, "Bill Targeting Judges Draws Fury from Legal Community" *National Post* (16 May 2000) A21.

determine the process and the criteria it wishes.

### *i. Federal Judicial Appointments*

At the same time as Ian Scott launched the pilot project that would lead to the JAAC in Ontario, a new process for selecting federally appointed judges was also announced. This occurred in April of 1988, and was intended to coincide with the sixth anniversary of the enactment of the *Charter*.[47] This development was the result of a review of the judicial appointments process, requested earlier by then Prime Minister Mulroney, which had brought about consultations with a wide array of interested groups and individuals, including a review of previous recommendations made by the Canadian Bar Association.[48]

The highlights of the new appointments process were an application process from all interested individuals who met the minimum legislative requirements for a federal judicial appointment (that is, ten years of membership in a provincial bar, which by extension included the requirements of a law degree and successfully passing provincial bar admission examinations). Applications would then be vetted by an advisory committee to provide broad based and objective advice on their qualifications for appointment. At least one committee was set up for each province and territory.[49] Membership on the advisory committees consisted of one nominee each from the provincial or territorial branch of the Canadian Bar Association, the provincial or territorial Law Society, the Chief Justice for that jurisdiction, the Attorney General or Minister of Justice of the province or territory, and the federal Minister of Justice.[50]

The process is administered by the Commissioner for Federal Judicial Affairs, who provides administrative support for each of the advisory committees. Elsewhere, I have expressed doubt over the role of this non-political figure in the judicial appointments process:

> It is clear that the establishment of the advisory committees and the involvement of the Commissioner's Office have not necessarily excluded political factors from the judicial appointments' process. Rather than

[47] For a detailed description of this reform, see Andre Millar, "The 'New' Federal Judicial Appointments Process: The First Ten Years" (2000) 38 Alta. L. Rev. 616 [Millar]. See also Ian Greene *et al.*, *Final Appeal: Decision-making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998) at 37-39 and Peter Russell & Jacob Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41 U.T.L.J. 4.

[48] See Canadian Bar Association, *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985) [*McKelvey Report*].

[49] In 1994, the committee for Ontario was expanded to become three committees based on three regions, while Quebec was divided into two regions.

[50] In 1994, provincial and territorial Committees received two additional members, increasing the representation of non-lawyers and resulting in a total of seven members for each Committee. Lawyer Committee members were barred from being candidates themselves until a full year after the expiry of their Committee term. Finally, in 2007, a controversial additional representative of the law enforcement community was added to the committee.

> ensuring that a candidate's political past is not considered, the present system would appear to aim at a high minimum standard of appointment.[51]

After considering the qualifications of individual candidates, committees advised the Minister of Justice whether each is qualified or not qualified for appointment. Eventually, in 1991, the categories were reorganized into three classifications—"unable to recommended", "recommended" and "highly recommended", but the "highly recommended" classification was removed in 2007.[52] The 2007 revisions to the Advisory Committees included a change in their composition, and specifically the addition to the Committees of a representative of the law enforcement community.[53]

Where a committee advises that a candidate is not qualified, the committee is required to give reasons for that conclusion. In the interests of fairness, the individual concerned has an opportunity to review and comment on these reasons, if he or she so wishes.

In addition to receiving the advice of the committees, the Minister consults provincial and territorial Ministers and Chief Justices directly about appointments within the province or territory concerned. After the advice of the appropriate provincial committee has been received, and other consultations have been carried out, the government makes the final decision on an appointment.

As a matter of practice, Federal Ministers of Justice have not recommended to Cabinet a candidate not previously recommended by an advisory committee. In 1994, then Minister of Justice Allan Rock offered a personal undertaking not to do so.[54] However, a breach of such an undertaking, or the recognized practice, could give rise to no enforceable remedy. And, more to the point, the Committees typically will find such a broad swath of applicants at least "qualified", that they provide little meaningful constraint on the federal government's appointment power (and, worse than that, suggest that the Committees serve an accountability function that they in fact have neither the authority nor the will to perform).

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[51] Phillip Bryden & Lorne Sossin, "Judges" in Dodek & Hoskins, eds., *Barristers and Solicitors in Practice* (Toronto: Butterworths, 1998) at para. 11.32.

[52] The category "unable to recommend" includes two sub-categories—qualified and non-qualified.

[53] This modification gave rise to an unprecedented expression of dismay from the Canadian Judicial Council (CJC). On 9 November 2006, the CJC, on behalf of all judges in Canada, asserted that proposed changes to the Advisory Committees which vet candidates for federal judicial appointments would compromise the judicial independence of the Advisory Committees. On 20 February 2007, the CJC issued a second press release stating that the change to the Advisory Committees, and in particular the decision to remove the distinction between "qualified" and "highly qualified" as recommendations open to the Advisory Committees, "raises questions about whether the most qualified individuals will be identified for appointment". In both instances, the CJC purposively sought to influence public debate about a political decision in relation to the appointment process. The CJC's intervention in the debate on judicial appointment attracted criticism from the media. An editorial in the National Post on 22 February 2007, for example, suggested that the CJC's press release on the change to the Advisory Committees itself undermined judicial independence. See "Judges with attitude", Editorial, *The National Post* (22 February 2007) A20.

[54] See the discussion in Millar, *supra* 47 at 620.

The process described above applies to all federal judicial appointments except appointments to the Supreme Court of Canada. Supreme Court appointments in Canada have followed a somewhat different track, one that has embodied more hints of democratic aspirations than other federal judicial appointments.

### *iii. Supreme Court Appointments*

The legislative framework for Supreme Court appointments, as set out above, is straightforward. The most remarkable and distinctive feature of the appointment criteria is the provision in the *Supreme Court Act* requiring less than three judges of the Supreme Court be from Quebec. This legislative respect for minority rights led to other customs (although not so entrenched as to become conventions in the constitutional sense). Among these was the regional representation among the other six spots on the Supreme Court, which are now apportioned with one judge from British Columbia, one judge from Alberta, Saskatchewan, or Manitoba (ideally on a rotating basis), three judges from Ontario, and one judge from one of the four Atlantic Provinces.

These customs extended not only to provincial origin but to ethnic and linguistic origin as well. For a time, the practice was to have one of the three Quebec judges represent the Anglophone, Protestant community, and to have at least one judge from outside Quebec be a Catholic. The appointment of the first Jewish Supreme Court justice (Bora Laskin) led to some reshuffling of the religious deck as it represented the first time a judge had been appointed who was not Catholic or Protestant.

It is fair to say that attention to the religious origins of the justices of the Supreme Court has faded. Indeed, the fact that the appointment of Justice Marshall Rothstein resulted in one third of the Supreme Court coming from the Jewish community (Justices Abella and Fish being the other two) generated little, if any comment.[55] Indeed, if there is a religious barrier left to be crossed, it is the absence of a Supreme Court justice of Muslim, Hindu, or Buddhist background notwithstanding the large size of those communities in Canada.

Ethnic origin also no longer appears to present a significant barrier. In the

[55] That said, following Justice Abella's appointment, counsel for Léon Mugesera and his family, who were appealing a deportation order to the Supreme Court, sought a stay based on the argument that then Minister of Justice Irwin Cotler was strongly influenced by Jewish individuals and organizations plotting to have Justice Abella appointed to the Supreme Court so she could sit on and reject Mr. Mugesera's appeal. The motion was rejected as an abuse of process, prompting the Court to conclude: "Regretfully, we must also mention that the motion and the documents filed in support of it include anti-Semitic sentiment and views that most might have thought had disappeared from Canadian society, and even more so from legal debate in Canada. Our society is a diverse one, home to the widest variety of ethnic, linguistic and cultural groups. In this society, to resort to discourse and actions that profoundly contradict the principles of equality and mutual respect that are the foundations of our public life shows a lack of respect for the fundamental rules governing our public institutions and, more specifically, our courts and the justice system". *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, 2 S.C.R. 91 at para. 17.

1980s, the Supreme Court welcomed members of Italian-Canadian (Iacobucci) and Ukranian-Canadian heritage (Sopinka). The absence, however, of appointments of Supreme Court justices from non-European background is notable.

One feature of nearly all judicial appointments unlikely to be addressed in the future is the socioeconomic bias towards the affluent. Most judicial appointments will draw on mid-career lawyers with successful reputations, and it should not be surprising that such people will tend to be well-off. Indeed, in the unlikely event that they were not well-off prior to their appointment, their judicial salaries will ensure they are affluent from that point forward.

The appointment of Bertha Wilson in 1982 was the first appointment of a woman to the Supreme Court of Canada. It also created, arguably, a custom relating to gender representation on the Supreme Court. Writing in the 1970s, Paul Weiler observed that, "The most obvious limitation in the membership of the Supreme Court is that it is an all-male society".[56] Today, with four women on the Supreme Court, including its Chief Justice, it is difficult to conceive of gender as a meaningful barrier to appointment.

The question worth asking, however, is whether the representative nature of the Supreme Court should be entrenched. A recent panel report on Supreme Court appointments, commissioned by the Canadian Association of Law Teachers (CALT), recommended that the proportion of women on the Supreme Court not be permitted to drop below the current level of four, and further recommended a requirement that at least one member of the Supreme Court be of aboriginal heritage (either as a constitutional or statutory amendment).[57] The issue of to what extent regional, ethnic, linguistic, racial, religious, or other identity factors should figure in the appointment process is discussed below in relation to the concept of "merit".

Because amendment to the appointment process of Supreme Court judges is now governed by the constitutional amending formula in the *Constitution Act, 1982*, the composition of the Supreme Court has featured prominently as a subject of constitutional reform. Revising the appointment process was an active point of discussion and recommendation in both the Meech Lake and Charlottetown Accords. Recent reforms to the appointment process, however, have focused on the administrative process rather than the constitutional context. It is to an abbreviated summary of these recent developments that I now turn.

### *iv. Reforming the Supreme Court Appointment Process, 2002-2007*

In October of 2002, in the lead-up to his leadership campaign for the Liberal party, Paul Martin gave a speech at Osgoode Hall Law School in which he spoke of the

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[56] Paul C. Weiler, *In the Law Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974) at 18.

[57] See "Canadian Association of Law Teachers Panel on Supreme Court Appointments", online: Canadian Association of Law Teachers <http://www.acpd-calt.org/english/docs/SupremeCourt_panel.pdf>.

need for greater accountability in federal government appointments and to some form of Parliamentary involvement in that process. He promised as Prime Minister to slay the "democratic deficit" just as he had the fiscal deficit while Finance Minister in the 1990s.[58]

In 2004, the Honourable Irwin Cotler, who was the Minister of Justice in the Liberal government of Paul Martin, appeared before a standing Parliamentary Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to discuss the government's existing approach to Supreme Court appointments. He described the appointment process "not so much secretive as unknown".[59] He noted that no government had appeared before a Parliamentary body to explain the process, and proceeded to do so, in the following terms:

> The first step taken in this appointments process is the identification of prospective candidates. As you are aware, candidates come from the region where the vacancy originated; be it the Atlantic, Ontario, Quebec, the Prairies and the North, and British Columbia regions. This is a matter of convention, except for Quebec where the Supreme Court Act establishes a requirement that three of the justices must come from Quebec.
>
> The candidates are drawn from judges of the courts of jurisdiction in the region, particularly the courts of appeal, as well as from senior members of the bar and leading academics in the region. Sometimes names may be first identified through previous consultations concerning other judicial appointments.
>
> In particular, Mr. Chairman, the identification and assessment of potential candidates is based on a broad range of consultations with various individuals. As Minister of Justice, I consult with the following: the Chief Justice of Canada and perhaps other members of the Supreme Court of Canada; the Chief Justices of the courts of the relevant region; the Attorneys General of the relevant region; at least one senior member of the Canadian Bar Association; at least one senior member of the law society of the relevant region.
>
> I may also consider input from other interested persons such as academics and organizations who wish to recommend a candidate for consideration. Anyone is free to recommend candidates and indeed some will choose to do so by way of writing to the Minister of Justice, by way of example.
> The second step is assessment of the potential candidates. Here the predominant consideration is merit. In consultation with the prime minister, I use the following criteria, divided into three main categories—professional capacity, personal characteristics, and diversity.

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[58] Paul Martin, "The Democratic Deficit" (Speech delivered to Osgoode Hall Law School, October 2002).

[59] See Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, "Evidence Number 7", online: Bora Laskin Law Library, University of Toronto Faculty of Law <http://www.law-lib.utoronto.ca/Conferences/judiciary/readings/evidence7.doc> [*Cotler*].

> Let me begin with professional capacity, and under this heading of professional capacity are the following considerations and I will just cite them. Highest level of proficiency in the law, superior intellectual ability and analytical and written skills, proven ability to listen and to maintain an open mind while hearing all sides of the argument, decisiveness and soundness of judgment, capacity to manage and share consistently heavy workload in a collaborative context, capacity to manage stress and the pressures of the isolation of the judicial role, strong cooperative interpersonal skills, awareness of social context, bilingual capacity and specific expertise required for the Supreme Court.
>
> Expertise can be identified by the court itself or by others. As I mentioned, Mr. Chairman, this goes to what might be called the professional capacity. This is the comprehensive set of criteria here.
>
> Qualités personnelles. Sous le titre des qualités personnelles, voici les facteurs considérés: degré de titre personnel et professionnel le plus élevé, entité, intégrité, franchise, respect et égard pour autrui, patience, courtoisie, tact, humilité, impartialité, tolérance, sens personnel de responsabilité, bon sens, ponctualité, fiabilité.
>
> Diversité. Ce titre porte sur la mesure dans laquelle la composition de la cour reflète convenablement la diversité de la société canadienne.[60]

Cotler followed this appearance with a further appearance before this Committee in 2005 once candidates had been selected to replace Justices Louise Arbour and Frank Iacobucci, who had retired in that year. Cotler presented the names of his nominees (Justices Louise Charron and Rosalie Abella), and for the first time in Canadian history a Minister of Justice invited questions from Committee members about the search process and about the qualifications of the nominees.[61] The nominees themselves did not appear before the Committee. After that appearance, the government appointed Justices Charron and Abella to the Court.

In 2005, Cotler announced a new process that would be used to fill the vacancy of retiring Supreme Court Justice Major. The new process would include the existing informal and confidential consultations between the Federal Minister of Justice and the relevant provincial Attorney General, Chief Justice of the Province, and representatives of the Bar. The Minister of Justice would then submit a short list of five to eight candidates to an Advisory Committee composed of a Member of Parliament from each party, a nominee of the provincial Attorneys General, a nominee of the provincial law societies and two prominent Canadians who are neither lawyers nor judges. The Advisory Committee would consider the candidates and determine a short list to provide to the Minister of Justice. The Minister would then announce the government's appointment and appear before Parliament's Standing Committee on Justice to elaborate and defend the qualifications of the

[60] *Ibid.*

[61] Opposition members on the Committee decried the fact that they had been given little more than a day's notice, and no opportunity to see the briefing materials on the candidates that had been compiled by the government, and which Minister of Justice Cotler brought with him to the Committee.

government's appointee. The Parliamentary Committee had no power to confirm or reject a candidate but this final and public aspect of the appointment process represented a watershed nonetheless.

The process was only partially fulfilled when the Liberal government was defeated on 25 November 2005. The Advisory Committee had been appointed and had been submitted six names by the Minister of Justice. The Conservatives won the ensuing election and one of the policies of the new government was to implement a public, parliamentary interview process for proposed appointees to the Supreme Court of Canada.[62]

The new Conservative Minister of Justice, Vic Toews, used this new process to complete the selection process for replacing Justice Major. The government chose a name from among the six names that had been forwarded by the previous government to the Advisory Committee.

The government established an "*Ad Hoc* Committee to review a Nominee for the Supreme Court of Canada". The Committee consisted of twelve M.P.s drawn from each party in proportion to their standings in the House of Commons (five Conservative, four Liberal, two Bloc Québécois, and one NDP). The Minister of Justice, who was one of the Conservative members, was the chair of the Committee. His predecessor, Mr. Cotler, was one of the Liberal members. Peter Hogg describes the committee hearing, in which he participated as a special adviser, in the following terms:

> The Committee held a three-hour televised hearing in the Railway Room, Centre Block, Parliament Buildings, on Monday February 27, 2006. The name of the nominee, Justice Marshall Rothstein of the Federal Court of Appeal, had been made public the previous Wednesday, and members of the Committee had been supplied with a dossier which included his curriculum vitae, a list of all of his decisions, four sample opinions in full, a list of his publications and four sample publications in full. The hearing took from 1.00 p.m. to 4.30 p.m.. It opened with a short introduction of the nominee and the process by the chair (the Minister), then with opening remarks by me, then with opening remarks by Justice Rothstein, then with questions from the members of the Committee, then with a closing statement by me and a closing statement by the chair. During the question period, Justice Rothstein was asked approximately 60 questions in two rounds of questioning (three per member on the first round, two per member on the second round; and the Committee elected not to continue for a third round).
>
> The Committee did not prepare a written report. The proceedings were watched on television by the Prime Minister, and no doubt the Minister of Justice reported to him. As well, at the conclusion of the hearing, the Minister invited the members of the Committee to communicate their

[62] The call for Parliamentary hearings is long-standing—see e.g. Jacob Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada" in Ted Morton, ed., *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 2002) at 159.

> views 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.[63]

Justice Rothstein was appointed shortly after the hearing (which had concluded before its allotted time had expired, as the members of the Committee agreed they had heard enough to reach a conclusion). The conclusion was an enthusiastic endorsement of Justice Rothstein, and he was sworn in as a justice of the Supreme Court of Canada on 6 March 2006.

Thus, the evolution of Supreme Court appointments in Canada has culminated in a process with both an Advisory Committee for vetting names prior to the government's decision and a hearing process before a Parliamentary Committee after the selection of a candidate for appointment. Importantly, however, the government is not bound by the outcome of either process. The Advisory Committee only considers names forwarded by the government and the government is not limited to the Committee's choices. The Parliamentary Committee can express agreement or disagreement with a judicial selection but the government may nonetheless appoint whomever it wishes. Thus, in one sense, the appointment process has been fundamentally changed during the Martin and Harper governments. In another sense, the government continues to exercise complete and unreviewable authority over judicial appointments as it always has. Perhaps both characterizations of Supreme Court appointments are valid. Perhaps ambivalence is the most accurate description to capture the approach of the government to its Supreme Court appointments. If so, where will this ambivalence lead? It is to the future that I now turn.

## PART TWO: WHAT IS THE DEMOCRATIC WAY FORWARD? THE CONVERGENCE OF ACCOUNTABILITY AND INDEPENDENCE

If, as I have suggested, judicial appointments should reflect democratic aspirations, what will these aspirations look like in the future? As Judith Resnick has observed, there is no self-evident process for judicial selection in a democracy, but there are principles that tie judicial selection clearly to the idea of merit:

> Democracy tells one a good deal about rights to justice, equality before and in the law, and constraints on the power of the state, its courts included. But absent a claim that all government officials in a democracy must be elected, it is difficult to derive from democracy any particular process for picking judges. In contrast, democratic principles do rule out a few procedures for judicial selection—such as by inheritance or through techniques that systematically exclude persons by race, sex, ethnicity, and class.[64]

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[63] Peter Hogg, "Appointment of Justice Marshall Rothstein to the SCC" (2006) 44 Osgoode Hall L.J. 527.

[64] Judith Resnick, "Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure" (2005) 26 Cardozo L. Rev. 579 at 579.

Among those who believe our system of judicial appointments ought to be reformed, there are many who see it already as a work in progress. Judicial appointments have emerged as a point of significant political debate in Canada. Prime Minister Martin pioneered an advisory committee for Supreme Court appointments, and sought to position himself and his party as a supporter of judicial independence and *Charter* values in the face of the social conservatism and hostility to the judiciary ascribed to the Conservatives.

Judicial appointments featured strongly in the 2004 election campaign, with the Liberals raising the spectre of the Conservatives running roughshod over the *Charter* through the appointment of Conservative judges. In 2006, Prime Minister Harper ushered in the era of hearings for Supreme Court appointments, as outlined above. While not confirmation hearings *per se*, the hearing process nonetheless ensures that there is a forum for political accountability to play a role in the appointments process.

The accountability forum provided by the Parliamentary Committee hearing begs more difficult questions—what standard should Parliamentarians use to scrutinize potential Supreme Court appointments? How will a similar spirit of transparency be brought to bear on the selection of all federal judicial appointments?

### 1. Merit

Few would disagree with the idea that judicial appointments should be merit-based, but not everyone would agree on what merit means. In the context of the "merit principle" in civil service appointments, the Federal Public Service Commission has traditionally defined merit in terms of three related values: fairness, equity and transparency.[65] While fairness relates to objectivity and transparency relates to results that are "clear and explainable", equity is said to include reasonable access to competitive opportunities for appointment and representativeness. Representativeness as a goal is described simply as "reflective of the Canadian society in all its diversity".[66]

Some aspects of identity arguably go to critical judicial skills. For example, access to justice in a legal system committed to two official languages requires sufficient bilingual judges.[67] The complexity and importance of aboriginal law in Canada's legal system suggests the need for more judges familiar with aboriginal justice concepts and systems.

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[65] See Public Service Commission Advisory Council, "Merit in the Public Service", online: Public Service Commission Advisory Council <http://pscac-cccfp.gc.ca/publications/rpt_merit/index_e.php>.

[66] *Ibid.* For further discussion on the issue of a representative public service, see Lorne Sossin, "Discretion and the Culture of Justice" (2006) S.J.L.S. 356-84. For a discussion of a representative judiciary, see K.D. Ewing, "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary" (2000) 38 Alta. L. Rev. 708.

[67] See GTA Research, "Environmental Scan: Access To Justice In Both Official Languages", online: Department of Justice Canada <http://www.canada.justice.gc.ca/en/ps/franc/enviro/index.html>.

Criteria for federal judicial selection are provided to the Advisory Committees, but these read more like a laundry list into which every conceivable consideration was inserted rather than a focused set of qualifications. For example, the list includes such standards as "proficiency in the law", "well-rounded legal experience", "scholarly ability", "non-mainstream legal experience", and "receptivity to ideas".

To be sure, merit is a tough concept to apply to a generalist judiciary. For the critics, merit is often characterized most not by what qualities or characteristics it includes, but rather by what it is not—namely, political patronage. Patronage represents the appointment of supporters of a particular political party. Patronage historically has played a key role in Canadian politics.[68] It has also dogged the federal judicial selection process. What has changed is the public tolerance of the practice. Many cite the turning point as the 1984 election debate between Liberal Prime Minister John Turner and Conservative challenger Brian Mulroney, in which Mulroney chastised Turner for patronage appointments rewarding the former supporters of retiring Prime Minister Trudeau (including the appointment of six Liberal politicians to the bench). Mulroney swept into power with a majority government, and patronage's days seemed numbered. This affair added fuel to the fire of reform. A CBA Committee, with Professor Peter Russell as its research director, published its report in 1985, *The Appointment of Judges in Canada*, and recommended bold new constraints on federal appointment powers, including provincial nominating committees and an expectation that the Minister of Justice would appoint only from the lists these committees submitted.[69] A CALT Report published in 1985 pursued similar recommendations (with slight variations in the composition of the nominating committees), and in 1988, as outlined above, the advisory committees were adopted by the Mulroney government.[70]

Jacob Ziegel and Peter Russell published a study in 1991 showing that Prime Minister Mulroney presided over a judicial selection process in which patronage was still "pervasive".[71] Testimony during the Gomery Inquiry fifteen years later suggested the Chrétien government continued the practice of letting political considerations play a role in judicial selection. In 2005, in response to these revelations, the House of Commons Subcommittee on the Process for Appointment to the Federal Judiciary was established to investigate the role of patronage. Academic study supports the conclusion that the Liberal government continued to appoint judges with a history of supporting the Liberal party (for example, through campaign donations).[72]

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[68] See Jeffrey Simpson, *Spoils of Power: The Politics of Patronage* (Toronto: Collins, 1988).

[69] See *McKelvey Report*, *supra* note 48.

[70] See Canadian Association of Law Teachers Special Committee on the Appointment of Judges, *Judicial Selection in Canada: Discussion Papers and Reports* (Toronto: Canadian Association of Law Teachers, 1987).

[71] Peter Russell & Jacob Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointment and the New Judicial Advisory Committees" (1991) 41 U.T.L.J. 4.

[72] See Troy Riddell *et al.*, "Federal Judicial Appointment: A Look at Patronage in Federal Appointments

An absence of patronage, however, does not necessarily mean a system is merit-based. Nor does the fact that a lawyer is politically active and/or donates money to the party of her or his choice mean they are not qualified for a judicial post. The presence of a demonstrated connection to the government, however, at least creates a *prima facie* appearance of a conflict that needs to be justified. In 2005, the Canadian Bar Association sensibly advocated a two-year "cooling-off" period between even minor political activity and a lawyer's eligibility for judicial selection with this concern in mind.[73]

Merit must include objectively determined, and consistently applied standards of proficiency in a given area, but it does not end there. It also includes diversity of experience, open-mindedness, understanding of vulnerability, and the list could (and perhaps should) go on. What matters most in a democracy, I would suggest, is not the precise criteria for merit but the transparency of the criteria, and the authenticity of the reasons for choosing one individual over another. Merit, in other words, is as much about process as substance.

Irwin Cotler, then Minister of Justice, in his remarks to the Parliamentary Committee in 2004 outlining the existing appointments process, indicated that, "In reviewing the candidates, I may also consider jurisprudential profiles prepared by the Department of Justice. These are intended to provide information about volume of cases written, areas of expertise, the outcome of appeals of the cases and the degree to which they've been followed in the lower courts".[74] Judith Bellis, an official with the Department of Justice who accompanied Minister Cotler, elaborated on these "jurisprudential profiles" in the following terms:

> [W]e essentially track both what happens in relation to the appeals, and in particular it is of use for the minister to be aware of the outcome in the Court of Appeal, or in particular, the Supreme Court of Canada. That is not just whether the position of the writing judge was upheld, but as you know, in some cases, it is notable that the decision of a judge who writes in dissent in a lower court decision, may in fact be followed in the Supreme Court of Canada. So it's not just what happens in terms of success, if you like.
>
> The other factor that ministers find useful to know is essentially the influence that the cases written by a particular judge may have had in the case law below, to the degree that the cases are followed and become guiding precedents and of legal consequence. That's also useful information to ministers.
>
> I should point out, as I did when I appeared the last time, that as you can appreciate, these statistical profiles are a piece of information. They are

Since 1988" (2008) 43 U.T.L.J. 39.

[73] See Canadian Bar Association, "Federal Judicial Appointment Process", online: The Canadian Bar Association <http://www.cba.org/CBA/submissions/pdf/05-43-eng.pdf> at 5.

[74] *Cotler, supra* note 59.

> only one piece of information, and some would suggest they're a very limited piece of information. But it is one that I think ministers find gives them comfort that they have a complete package.

While this describes the process of research into a judge's record, it does not disclose the purpose. Is it to ascertain how often a judge votes one way or another on controversial issues? Is it to determine how often a judge has dissented or been overturned (and if so, what would one conclude based on a high or low rate of dissents or being overturned?). What does the volume of decisions written by a judge tell government about her or his qualifications for the job? These are not abstract questions. They are, I would suggest, the questions that matter most. There is no doubt that government seeks jurisprudential information for reasons related to its selection process. The question is whether there is a good reason for these reasons to remain secret.

For a government to claim simply that it seeks people of a "judicial temperament" or who are "impartial" obscures more than it reveals. It is little better than to make the Potter-esque claim that the government will know a good judge when it sees one.

We often frame our concern with the rule of law as one designed to prevent "arbitrary" decisions. Arbitrary decisions are not, however, decisions taken for no reason. They are, rather, decisions taken for undisclosed reason. In a democracy, some reasons for judicial selection will and should be seen as more legitimate than others. Increasingly, however, it is the demand for justification itself that is coming to define our democratic aspirations. This demand, in my view, not only arises as a logical extension to the requirement of merit, but is also justified as a necessary condition of judicial independence.

## 2. Independence

Democratic aspirations, I would suggest, lead to the search for effective and independent checks on elected government. The institution which enjoys the greatest public confidence in this regard is the judiciary (which, of course, is noteworthy in light of the degree to which the process of judicial appointment is controlled by the government).

Judicial independence is at law a right of those who come before court, not a right of the judges to be asserted against governments or other sources of external interference. The goal in the Supreme Court's jurisprudence, particularly with respect to financial independence, as discussed above, relates to mechanisms that lead to the executive-judicial relationship being depoliticized. Why should depoliticizing judicial appointments be any less significant for judicial independence than financial independence (or administrative independence, which relates also to the staffing and resources made available to courts)?

Since *Valente*, and with increased scrutiny since the *Remuneration Reference*, the Supreme Court has pondered the meaning of the "essential conditions" of judicial

independence. The debate regarding appointments has focused on whether judges have become extensions for the ideological commitments of the governments that appoint them. Do judges appointed by a Conservative government decide differently than judges appointed by a Liberal government? Are appointees politically active in, or financial donors to, the party that controls the government which appoints them? While these are important questions which deserve attention, they are beside the point, I would suggest, when it comes to judicial independence.[75] It is not *actual* manipulation of the judiciary by a government that gives rise to the constitutional concern under the doctrine of judicial independence, but rather the possibility of such manipulation. It is for this reason that the focus of a judicial independence framework ought to be the safeguards in place to preclude such manipulation. In *Valente*, for example, the Supreme Court had no evidence that *per diem* provincial court judges were deciding cases to please the government so as to get more work. In the *Provincial Judges Remuneration Reference*, the Supreme Court had no evidence that public service-wide salary reductions were calculated to intimidate the judiciary in any of the provinces involved. Such evidence in these cases was not necessary in order for the Supreme Court to conclude in both settings that the lack of safeguards to protect judicial independence amounted to a breach of the *Constitution*.

Similarly, in the case of judicial appointments, the only relevant question should be: what objective safeguards are in place to prevent the government from improperly influencing judicial decision-making through the appointments process? What mechanisms are in place, in other words, to demonstrate to the public that the relationship between the executive and judicial branches in relation to appointments has been "depoliticized"? It should not take any well-informed observer long to answer these questions concerning federal appointments. There are no meaningful safeguards in place and no mechanisms that depoliticize this relationship. In this analysis, mere advisory structures that the government is free to ignore for any reason clearly cannot count either as a safeguard or a mechanism designed to depoliticize appointments.

I should add that the point of framing this argument in these terms is not to suggest that the courts should adjudicate and remedy purported breaches of judicial independence in the appointment sphere. It is awkward enough to watch the Supreme Court attempt to resolve litigation between judges' associations and governments over the remuneration commissions. It is appropriate that either Parliament or the executive decide on an appropriate appointment process—the Supreme Court may play an important role, however, as in *Valente*, through identifying and elaborating the "essential conditions" of judicial independence in this setting.

What, then, are these "essential conditions"? The number and content of such conditions will likely be the subject of debate, but as a contribution to that debate, I want to suggest three. First, and further to part one above, a merit based appointment system enhances independence.

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[75] See the recent research undertaken by Ben Alarie and Andrew Green, *supra* note 3.

Second, the process of appointment should involve institutional mechanisms that provide meaningful separation between the executive and the judiciary. This could involve a more robust role for the Federal Judicial Commission, selection committees, or some other transparent, consultative mechanisms. The modalities of the mechanism viewed as the best fit lie beyond the scope of this analysis (although, on that subject, there is likely a persuasive case for the approach recently adopted by England and Wales, which have established a judicial appointment commission).[76] Whatever its ultimate form, for it to protect judicial independence, the process must enhance public confidence. It must, in other words, be consistent with the depoliticization that lies at the heart of judicial independence as developed in *Valente* and the *Provincial Judges Remuneration Reference*, but must extend to the sphere that those decisions notably avoid, namely the appointment process.

However, Ted Morton has suggested in a recent essay on judicial appointments that power is always politicized, so the best we can hope for is the exercise of power in transparent ways.[77] While I share the desire for greater transparency, I do not see why this should mean giving up on the goal of depoliticization. In my view, the government's role in relation to judicial appointments is best characterized as stewardship. The independence of the judiciary cannot depend merely on the trust of government, nor can it be sustained without that trust. I am not naïve enough to believe we will ever remove political calculation from any appointment power. We have examples, however, of the positive impact of constraining those calculations. A good example is the Ontario JAAC, discussed above. The recently established UK Judicial Appointment Commission (JAC) goes even further—established by the *Constitutional Reform Act* of 2005 and launched in the Spring of 2006, the JAC is an independent, non-departmental public body charged with governing the appointment process and presenting the Lord Chancellor with recommendations for appointment to all judicial offices in England and Wales.[78] If a recommendation is not selected, reasons must be given.

Third and finally, the government must be prepared to account for their decisions, to Parliament and to the public.

I also wish to emphasize the connection between judicial independence and the role of the judiciary as a counter-majoritarian bulwark for minority rights. This role for the judiciary necessarily presupposes that judges can and will oppose the government of the day when it seeks, on majoritarian grounds, to erode minority rights and interests. In this way, democratic values are enmeshed within the principle of judicial independence.

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[76] For a description of the judicial appointment commission for England and Wales, see Kate Malleson, "The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?" in Kate Malleson & Peter Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) 39 [*Malleson*].

[77] *Morton, supra* note 42.

[78] See Judicial Appointments Commission, online: <http://www.judicialappointments.gov.uk/index.htm>. For background on the JAC, see *Malleson, supra* note 76.

### 3. Accountability

As set out above, the touchstone for Canadian political culture in the 21st century has become "accountability".

In the wake of the Inquiry into the Sponsorship Program (or, as it became known, the Gomery Inquiry), the federal government has made accountability a cornerstone policy commitment, culminating in the 2006 *Federal Accountability Act*. With respect to federal appointments generally, the Conservatives picked up where the former Liberal government left off with its 2004 blueprint *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform* (which proposed that appointments to certain key positions, including heads of Crown corporations and agencies, should be subject to prior parliamentary review). The Conservative government recommended an arm's length body that would supervise federal appointments. When it became clear, however, that the government's choice to head this body would not meet with Parliamentary approval, the whole scheme was scrapped, and the government pledged (threatened?) to return to "business as usual".

Accountability has been the subject not only of the Gomery Inquiry and its political ripples. The Arar Inquiry and Air India Inquiry have also focused on accountability for executive action, and the need for independent oversight and accountability. One could look at the past five years and conclude that accountability represents the dominant political idea in Canada.

An accountability culture suggests a focus both on transparent criteria for selection and justification to ensure that the criteria were appropriately applied. For example, in the new appointments commission established for England and Wales, the government is not bound to appoint from the list provided by the Commission, but is required to give reasons for why it has decided to reject the recommendation of the Commission.

The Federal government, after taking office in 2006, initially proposed a new appointment commission, to be headed by Gwyn Morgan, a former CEO of EnCana. The commission was intended to reduce patronage and establish merit-based criteria for all federal appointments. When opposition parties indicated they would not support Harper's choice for head of the commission, Harper announced that he would be "scrapping" the commission and proceeding with appointments "in the traditional manner".[79] While this commission was not envisioned to have a role in federal judicial appointments, it reflects the accountability concern with the executive appointment power more broadly. Governments still hold to the notion that appointments are an extension of government policy-making, and whatever mechanisms may exist to guide or constrain that appointment power remains the government's to make and to unmake as it sees fit.

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[79] See Kady O'Malley, "Did They Have a Choice: A Look at the Conservatives' Recent Patronage Appointments" *Macleans* (8 February 2007) online: Macleans <http://www.macleans.ca/canada/features/article.jsp?content=20070207_175153_6228>.

The Parliamentary committee hearing that took place in the context of Justice Rothstein's appointment may be repeated in future Supreme Court appointments, or it may be modified. While this process brought a welcome degree of transparency to the Supreme Court appointment process, is this the same as accountability?

Accountability represents not simply a goal in and of itself, but it is arguably the foundation for the other goals of merit and independence as well. The only way to ensure merit-based appointments is through transparency as to the criteria applied in judicial appointments. The requirement of justifications for judicial appointments represents a potential "essential condition" of independence, as a meaningful safeguard against bad faith appointments and subverting the appointments process for ulterior ends.

The timing of accountability measures is important as well. While the Parliamentary hearing has the potential to add transparency to the appointments process, there would be a concern with accountability beginning at the point in time in which the government convenes a hearing to introduce a candidate for the Supreme Court. Accountability must infuse the entire process of judicial appointments and not just at the Supreme Court level. Without attempting to limit the ways in which the process may be more accountable, I want to suggest three examples of the kinds of measures that come to mind.

First, accountability depends on a clear and comprehensive base of data. This need is particularly apposite in the context of the trial and court of appeal appointments. We know virtually nothing about who is applying, who is not applying, and why, nor how the government chooses from among "qualified" applicants once the lists generated by the advisory committees are complete. This information gap could be addressed through the publication of an annual report of the Commissioner for Federal Judicial Affairs or of a new body with this mandate, which discloses, among other relevant information, the number of judicial vacancies opened and filled in a year, the number of applicants in total, the number of applications considered per advisory committee, information about the linguistic, regional, gender, and ethnic make-up of applicants, those deemed qualified, and those selected, and so forth.[80]

Second, accountability is enhanced through the issuance of publicly available

[80] The website for the Commissioner for Federal Judicial Affairs does post some of this data, including the number of judicial vacancies and the number of women judges appointed. See Office of the Commissioner for Federal Judicial Affairs, "Number of Federal Judges on the Bench as of March 1, 2008", online: Office of the Commissioner for Federal Judicial Affairs <http://www.fja.gc.ca/fja-cmf/ja-am/n-judges-juges-eng.html>. Such an expanded data collection and analysis role may well be consistent with the existing FJA mandate, which is described in the following terms: "We are a federal agency statutorily created to support and promote judicial independence for the benefit of the public by providing a wide range of services to the Canadian judiciary". Data collection and reporting along the lines proposed is now the practice of the England and Wales Judicial Appointments Commission. See Judicial Appointments Commission, "High Court Judges, England and Wales", online: Judicial Appointments Commission <http://www.judicialappointments.gov.uk/current/high_ct_judges_outline.htm>.

guidelines or other material that clarify both the process of judicial selection and the substantive criteria being applied. The purpose of these guidelines would not be simply to clarify which kinds of considerations are legitimate, which kinds of considerations are not legitimate, and which kinds of considerations may only be legitimate in certain situations. While guidelines by their very nature would not bind the selection process, they would send a clear and public message about how that process should be undertaken, and may impose a burden of justification whenever the government opts for a different approach.

Third and finally, accountability depends on oversight—in other words, a body with the authority and capacity to ensure the guidelines for judicial selection are being applied. Such a body could also provide recourse for individuals or groups who have specific concerns about particular appointments. If, for example, it appeared Francophone applicants were applying in greater proportion but being appointed in lesser proportion to Anglophones, this body could investigate the systemic or circumstantial reasons why. Effective oversight thus depends both on the data and the publicly disclosed criteria mentioned above.

## CONCLUSION

Judicial appointments express democratic ideals in at least two different ways. First, our constitutional system confers on the executive branch a role as guardian of judicial appointments in the public interest. In this way, while judges are unelected, the government's role in appointments provides a foundation for the courts' democratic legitimacy.

The combination of the executive's appointment power, and the absence of checks or constraints, could allow a government, if it wished, to leave its ideological stamp on the judiciary. This understanding of the democratic purpose of judicial appointments is well accepted in the U.S. (although the Senate confirmation process does impose some limits on how far a President can go in this regard). It is, by contrast, the subject of substantial hand-wringing in Canada. While patronage may have played an enduring role in appointments, this has had a partisan rather than ideological impact. A situation in which the judiciary is seen as the prize of electoral politics, and just another vehicle for furthering the policy agendas of government, would seem to represent the opposite of the "depoliticization" contemplated by the Supreme Court's jurisprudence on judicial independence. It is unlikely, I would suggest, that such a view would receive broad public support. If anything, the public has become less accepting of interference with judicial independence than ever before.

Based on these concerns, some observers would go further and claim that electoral politics must play no role whatsoever in judicial appointments, and for this reason, assert that any Parliamentary role in the appointment process should be suspect. While I have expressed this role in the past, I am no longer sure this concern is justified. At the very least, the concern needs to be qualified.[81] The use of the

[81] See Lorne Sossin, "Don't Treat Judges Like Politicians" *The National Post* (6 June 2004) A18.

Parliamentary Committee process by Ministers of Justice Irwin Cotler and Vic Toews to justify the appointments process and to introduce the resulting candidate, respectively, do not appear to have introduced partisan political attacks or ideological gauntlets into the appointment process (although there are few guarantees that this could not happen in the future). Nor, however, have these developments addressed the desire for greater accountability and transparency in the appointments process (and, of course, they have not touched at all the federal appointment process at the trial and court of appeal levels). As I have suggested above, the present appointments process is out of step with both judicial independence and accountability concerns, and so the reform process is likely to continue (and to deepen) in the coming years. While democratic aspirations do not and have not changed the appointments process overnight, they ultimately have driven the reforms seen to date.

The second way in which judicial appointments express democratic ideals is through the public's confidence in, and support for, the court's protective role over minority rights. A strong democracy needs to protect minority views and minority groups from majoritarian preferences, but this aspect of democracy has always had special resonance in Canada. Whether expressed through the protection of language rights under federalism or the protection of civil liberties under the *Charter*, the Canadian judiciary must be well attuned to this core dimension of Canadian society. This democratic aspiration should also play an important role in the reform process. How merit is defined, what data are collected and disseminated about the appointments process, and which communities are over or under represented in Canada's judiciary, all bear on the role of the courts in a constitutional democracy and in a pluralist society.

These democratic ideals, as I have sketched them above, lead in my view to mutually reinforcing directions for change in judicial appointments. A system of judicial appointments that protects judicial independence and provides for greater accountability will promote democratic values such as respect for minority rights. By the same token, the aspiration for a judiciary able to credibly protect minority rights requires an accountable appointment system that respects judicial independence. While it is impossible to know exactly where democratic aspirations arise, it is clear that in Canada, those aspiring for governmental accountability, judicial independence, and the protection of minority rights owe much to Ivan Rand's convictions.

This leads us back to the paradox with which I began, that a judge appointed under a system of unchecked executive authority could be responsible for such a turning point in Canadian public law, and the harbinger of today's accountability culture. If federal judicial appointments are reformed in line with the principles set out above, will we see more or fewer "Rands"?

Former Chief Justice Lamer suggested that worthy candidates for the Supreme Court may not wish to be subject to the spectacle of Parliamentary questioning. In light of the positive experience of Justice Rothstein's appearance before a Parliamentary committee, this criticism likely has lost some of its sting. Peter Hogg has offered a more compelling critique with respect to an advisory committee vetting

candidates prior to selection, which is the tendency to lean toward middle-of-the-road, acceptable candidates. Would a truly bold appointment—a Bora Laskin or a Bertha Wilson—ever be the consensus choice of a broad spectrum committee? This question is an appropriate one on which to conclude, as the challenge of translating accountability, judicial independence, and democratic aspirations in the judicial appointments setting is not ultimately about mechanisms but rather about people.

In the present system, notwithstanding application procedures, merit criteria, and advisory committees, there remains a perceived, and occasionally an actual, political litmus test. Sometimes, this test manifests itself in a marked preference for candidates with a history of support for the political party in power. Sometimes, this test manifests itself in a marked preference for candidates without a history of support for one of the opposition parties. Sometimes, the test is a self-fulfilling prophesy, as lawyers who envision a judicial career seek to curry favour with the government of the day in subtle and not so subtle ways. Finally, sometimes, the litmus test is more imagined than real. Nonetheless, I suggest that its perceived or actual relevance has prevented some of the best and brightest potential jurists from seeking a judicial appointment, and left others languishing in the ranks of the "qualified" but not selected group of candidates. If this litmus test were removed, and the government demonstrated through its reform of the appointments process that it sees its own role as one of stewardship for the integrity and independence of the judiciary, I contend that the potential for more "Rands" in the future would be greatly enhanced.

In other words, the response to the "Rand Paradox" is simple. Sometimes, democratic change requires judicial leadership, just as change in the system of judicial appointments undoubtedly will require political leadership. This is as true in 2008 as it was in 1959.