

# *An Opportune Moment: The Judicial Appointment Reforms and the Judicial Credentials Demanded by the Charter*

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In 2005, Minister of Justice Irwin Cotler proposed and tabled in Parliament a number of reforms to the federal judicial appointment process. These reforms were designed to increase the transparency and enhance the accountability of the procedures by which judges are appointed to federally operated Canadian courts, including the Supreme Court of Canada. Included in the reform package was a Code of Ethics for members of the judicial appointment committees, as well as a directive to publish on an annual basis the identity of the members of the judicial appointment committees, the number of total applications for judicial office, and the number of that total that have been recommended or highly recommended by the committee. Crucially, a set of guidelines for the operation of the judicial appointment committees was provided, which outlined the overriding principles that committee members were to consider during the appointment advisory process. These principles included:

- Merit as the terminal objective. “The overriding objective of the appointments process is to ensure that the best candidates are appointed, based on merit.”<sup>1</sup>

- Diversity within the framework of merit. “[T]he Supreme Court of Canada bench should to the extent possible reflect the diversity of Canadian society.”<sup>2</sup>
- Accountability and nonpartisanship through two-pronged transparency. “First, ensuring the process is publicly engaged, known and understood. Second, structuring the process to bolster public confidence that decisions are made for legitimate reasons that are not linked to political favouritism or other improper motives.”<sup>3</sup>

While speaking with the Honourable Irwin Cotler at a mid-2006 conference,<sup>4</sup> I asked him about the future of those reforms, given the federal election of the Conservative Party several months earlier. Though he remained confident that the reforms could improve public understanding of and confidence in the appointment process by increasing transparency and accountability, whether the reforms would be adopted, implemented, and entrenched by the current government and successive administrations remained an open question for him.

His uncertainty was not surprising. In the winter of 2006 the “Cotler procedure” was given its first — albeit partial — application after Supreme Court Justice John C. Major retired from the bench. Justice Minister Cotler and the outgoing Liberal government had formed a nomination committee prior to their departure from power. From the “long list” provided by Mr. Cotler, that committee had produced a “short list” of three candidates for the replacement of the retiring justice. During my conversation with Mr. Cotler, he stressed that the three “short list” candidates who were forwarded to Stephen Harper, the new Prime Minister, were to the greatest extent possible selected by a committee formed in accordance with, and operating through, the procedures and guidelines advocated by the Cotler proposals tabled in Parliament in 2005.

Initially, the Harper government showed encouraging signs of their willingness to validate, entrench, and give continuity to the Cotler procedure by incorporating it into the practices of their own government, thereby taking the first necessary steps of “institutionalizing” it as a procedural tradition and, eventually, as a constitutional convention. Harper ultimately selected Federal Court of Appeal Justice Marshall Rothstein, one of the three “short list” candidates advanced by the nomination committee that had been guided by the “Cotler procedure.” Following up on election promises to “reform” a “unilateral” appointment procedure that he and the Conservative party had long been critical of, Harper created an Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada — the first of its kind in Canadian history — which placed the Prime Minister’s nominee before members of Parliament, and their putatively searching, American-style judicial hearing questioning, though the system was never presented or generally perceived as an American import.

Although Prime Minister Harper boasted that “[t]he way in which Justice Rothstein was appointed marks an historic change in how we appoint judges in this country,” bringing “unprecedented openness and accountability to the process,”<sup>5</sup> the parliamentary judicial

hearing, which was not part of the original Cotler proposal, was in the end conducted like a Soviet arraignment — intentionally theatrical and inconsequential. Before the first questions were even asked, Harper emphasized that the *ad hoc* committee would have absolutely no veto power over the Prime Minister’s nomination, and the committee members were asked to refrain from asking the nominee to discuss his personal views on particular moral controversies or his stances on subject areas that were, or could become, areas of Supreme Court jurisprudence (*i.e.*, “To what extent would the nominee give further effect to the rights and guarantees contained within the *Charter*?”<sup>6</sup>). Canadian representatives in Parliament learned little about Harper’s nominee other than that when it came to judicial appointments, the Prime Minister’s “man” was still untouchable. Though the tenor and tempo of the new appointment procedure harmonized well with the byzantine movements of Canada’s high court appointment history, it stood in jarring juxtaposition to the Conservative rhetoric of “transparency” and “accountability” in the judicial appointment process. And as if to add insult to injury, the Prime Minister’s Office released a statement cautioning momentarily heartened reformers: “The hearing by the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada was an interim process designed to fill the specific vacancy left by Justice Major. Full details of a process to fill future vacancies will be announced at a future date.”<sup>7</sup> The first performance of the Cotler procedure was botched, and the audience told that they might never see a second attempt.

The Conservative government now has a unique, but temporal opportunity to declare that judicial appointment reform is not just the limited initiative of one former justice minister and a motley crew of special interest groups and legal academics, but a nonpartisan national priority. In the immediate term, the best way for the current government to achieve this is to openly and avowedly appropriate Mr. Cotler’s reforms, with the declared intention of institutionalizing their practice as a binding constitutional convention that could only be ignored at a steep political price. Examined

below is the exigent need for the entrenchment of these and even greater reforms — including, I argue, making an applicant’s predisposition to give full force and effect to the *Charter* and the rights contained therein an important barometer in the consideration of his or her “merit.” This aspect and goal of Canadian judicial appointment reform has been conspicuously absent from the recent literature. Existing studies and proposals for reform of the judicial appointment process have been deficient in that they fail to connect:

- the primary role and activity of a federally-appointed justice,
- the new institutional role and mandate of the Canadian courts in the *Charter* era, and
- the relevant criteria to be considered during the judicial appointment process.

Parts of the subsequent discussion will thus reiterate and develop upon Lorraine Weinrib’s lonely dissenting voice,<sup>8</sup> in an attempt to focus debates about judicial appointment reform on the new considerations, needs, and realities of our *Charter* era.

Over the last decade, public confidence in the Canadian federal court system — and the appointment process in particular — has been tenuous. Indicators such as the 2001 Ipsos-Reid poll that showed 84 percent of Canadians believed that the Supreme Court was “influenced by partisan politics”<sup>9</sup> are familiar to academic and media circles. This cynicism is not limited to the general public; members of Parliament, including those who sat on the House of Commons Subcommittee on the Process for Appointment to the Federal Judiciary, have called for ways to “ensure that merit is the only consideration when people are appointed to the bench.”<sup>10</sup> One member of that committee stated in the House: “We need the best minds, the best individuals and the most qualified persons comprising the bench at all levels.”<sup>11</sup> He was not endorsing the existing reality. In recognition of these public and professional sentiments, Mr. Cotler acknowledged, before the House of Commons, that “[w]e would agree

that yet another shared objective is increased transparency and accountability.”<sup>12</sup> Mr. Cotler also explained to the House what was at stake in the success or failure of creating a judicial appointment process in which the Canadian nation had confidence:

[T]he review of the appointments process is a task of great importance to our country, given that the Supreme Court is at the pinnacle of our court system and that our court system is a fundamental pillar of our constitutional democracy. It is the court of last resort for all legal disputes in Canada, most notably those involving questions of federal and provincial jurisdiction under the Constitution as well as those concerning rights violations under the Charter . . . .<sup>13</sup>

For Mr. Cotler, the strength or weakness of the appoint system is the strength or weakness of “a pillar of our constitutional democracy.”<sup>14</sup> This is likely: the growing judicialization of politics, and the transfer into the judicial sphere of national-status questions, restorative justice formulae, and — with the advent of the *Charter*, the fundamental dilemmas of a political community, have empowered what critics like Ran Hirschl deride as an unelected “juristocracy” that plays a growingly decisive role in determining, defining, and resolving the workings of the Canadian polity.<sup>15</sup> These criticisms must not remain unanswered. Determining how we get who we get on the federally operated courts influences no less than the final character of our democracy. I have thus sought to identify three broad criteria for evaluating a high court appointment process:

- politicization of the process,
- transparency of the process, and
- representational-effectiveness of the process and result.

Subsequently, I define and delineate these criteria using normative, theoretical, and jurisprudential frameworks, using these categories to evaluate the current appointment process. This exercise reveals low to moderate performance across all three indicators. I

then look to the potential for reform. While “import” mechanisms such as judicial elections and inquisitorial review offer means of “democratizing” the judicial appointment process, the Canadian political system is an environment more conducive to moderated reforms that have some historical precedent or grounding in our legal and political traditions. The most viable and sensible of such reforms would be the creation of *potent* nominating commissions, a goal towards which Mr. Cotler’s reforms are a crucial first step.

## The Necessity of Democratizing the Third Branch of Government

In one of the seminal works of the literature, constitutional scholar Peter Russell called the Supreme Court of Canada the “third branch of government.”<sup>16</sup> The public desire to “democratize” the federal judicial selection process became salient following the adoption of the *Charter*, and is now reaching a *crescendo* with the growing understanding and awareness of the seemingly limitless opportunities that the *Charter* provides for the expansion of the high court’s dominion of justiciability. This awareness is made palpable by the conspicuous transfer of national status questions and seminal moral and political controversies such as *Reference re Secession of Quebec*<sup>17</sup> and *Reference re Same-Sex Marriage*<sup>18</sup> to the judicial sphere, and ultimately to the Supreme Court. Russell connected judicialization with the demand for democratization of judicial appointments as early as 1987: “[A]s the power and discretion of judges comes to be more broadly recognized, a deeper democratic urge for more openness and accountability in their selection arises.”<sup>19</sup> On the twentieth anniversary of the *Charter*, former Supreme Court Justice Frank Iacobucci observed, “Alongside the increased public interest in the judiciary and *Charter* there has been much commentary and numerous proposals regarding the appointment of judges. The debate is based upon the argument that since the judiciary has been greatly empowered

under the *Charter*, the appointment of judges should be more transparent and democratically controlled.”<sup>20</sup>

Hirschl<sup>21</sup> argues that there has been a gradual yet veritable structural shift in Canadian and other Westminster-style democracies away from the principle of parliamentary supremacy and towards the reality of constitutional and judicial supremacy — a movement that, coupled with highly arbitrary, discretionary, and politicized appointment systems, grates at the democratic character of these polities. Hirschl sees the elected Canadian political sphere transferring “the most pertinent and polemical moral dilemmas and political controversies a democratic polity can contemplate”<sup>22</sup> to the purview of unelected judges, a process he calls judicialization, and which is derivative of political “self-interested hegemonic preservation.”<sup>23</sup> As conniving as it sounds, hegemonic preservation involves threatened, yet power-wielding, political elites attempting to maintain and develop their political hegemony by insulating their policy making from the “vicissitudes” of majoritarianism and democratic politics. They do this by initiating the establishment of institutions that promote judicial intrusion into the prerogatives of executives and legislatures, resulting in elite-favoured and often immutable outcomes. For Hirschl, these seemingly sinister and certainly undemocratic motivations “are important reasons for the expansion of judicial power in Canada during the last two decades.”<sup>24</sup> The problem, however, with a judicial-constitutional tower built on odiously undemocratic foundations is the prospect of consistent countermajoritarian norm-creation and the maintenance of a cultural “metanarrative” that advances and protects the agenda of ruling political elites and that, unlike traditional legislative, ministerial, and bureaucratic decision-making, leaves behind an almost indelible political-ideological framework under the constraints of which the Canadian polity must operate. This danger is why Hirschl and other scholars argue that while the Canadian Supreme Court is making “substantive political choices”<sup>25</sup> such as *Reference re Secession of Quebec*,<sup>26</sup> “[d]emocracy requires



that the choice of substantive political values be made by elected representatives rather than by unelected judges.”<sup>27</sup>

If one accepts that with the *Charter* era now roaring, the prospects for narrowing the scope of justiciability in the Supreme Court of Canada look both untenable and undesirable, then answering the devastating critiques of skeptical democratic libertarians like Hirschl requires a judicial appointment system that, to every extent possible, minimizes arbitrariness, unchecked elite discretion, and crass politicization. This is still fanciful in Canada. Yet there are scarcely few other ways to intelligently respond to the questioning of critics like Hirschl, who ask how an appointment process that advances “unelected, unaccountable judges”<sup>28</sup> with “questionable democratic credentials”<sup>29</sup> who are “not likely to hold policy preferences that are substantially at odds with those held by the rest of the political elite”<sup>30</sup> (since they were appointed by an “explicitly political nomination process”)<sup>31</sup> can be reconcilable with our traditional democratic commitment to the openness, transparency, and accountability of the most powerful governmental institutions. This call for democratization of the judicial appointment process is not just appealing to civil libertarians, it also resounds forcefully with those on the “left” who feel that the courts — whose appointees have always been emblems of the center of the Canadian politico-ideological spectrum — have not gone far enough in imbuing the *Charter* with force, weight, and meaning.<sup>32</sup>

It is thus not difficult to hear a concordant, bipartisan demand for the democratization of the judicial appointment process, which Greene calls “a front-end mechanism of accountability.”<sup>33</sup> Put another way, neither the interests of *Charter* Canadians nor the interests of *Charter* skeptics — no interests, save the institutional demands of nepotism, cronyism, and corruption — are advanced by maintaining the current system of judicial appointment.

That the relevant jurisprudence also demands a *transparent* and *accountable* process is neither tangential nor trivial. In *Valente v. The Queen*,<sup>34</sup> the Supreme Court elaborated an indirect constitutional guarantee of “judicial independence” and specified “institutional independence” as its necessary corollary. Four years later in *Edmonton Journal v. Alberta (Attorney General)*,<sup>35</sup> the Court fettered “institutional transparency” to the concept of “judicial independence.” Taken together, these rulings began a jurisprudential framework for the liberation of the federal judicial appointment process from the at-her-Majesty’s-pleasure-and-prerogative system of unchecked and highly politicized executive discretion that essentially characterized the twentieth century Canadian system.

## Evaluation of System-Specific Deficiencies

Having established the normative and public demand for the reformation of an appointment process that is roundly perceived as undemocratic, we can return to exploring the specific weakness and issue areas most in need of attention and reform: transparency, representational effectiveness, and politicization.

### Representational effectiveness

Representational effectiveness is broadly defined as the extent to which the selection process incorporates and reflects the multifarious demographic, ethnic, religious, racial, gender, and regional diversity of the Canadian nation. The nomination and appointment process for Canada’s highest court should be construed as a vehicle for recognition by the Canadian nation of its cornucopian demography and, moreover, as an opportunity to extend a declaratory — normatively prescriptive — imprimatur to it.

Regional and gender equality at the Supreme Court level are the only areas of representational success. Completely representative provincially, the Court has also progressed from a male-only institution, prior to Justice Bertha Wilson’s appointment in 1983, to near-gender equality

by 2004, with a four-to-five ratio of female-to-male justices (including a female Chief Justice). This process of gender equalization has also transcended the declaratory level of Canadian Supreme Court appointments: in fact, between 1989 and 1994, female applicants to federal courts more than doubled, from 12 to 26 percent.<sup>36</sup> However, effective representation ends there. Not a single member of Canada's over one million Aboriginals, 700,000 African-Canadians, or three million Asian-Canadians has ever been appointed to the Supreme Court, leaving over 17 percent of Canada's population without ever having been "represented" at this "third branch of government." Later, I discuss whether attempts to ameliorate this failure of representativeness can be balanced against the demands of a merit-based appointment system.

### Transparency

We can understand transparency as the extent to which the selection process is open to public scrutiny and accountability. In *Edmonton Journal*, the Supreme Court firmly articulated the necessity of transparency, stating that "the courts must be open to public scrutiny and to public criticism of their operation . . . ."<sup>37</sup> Logically this openness should also extend to the process that in the first place decides who will sit on the bench. However, according to Russell, "[W]e know so little about what lies behind the [Canadian Bar Association] committee's verdicts" on judicial candidates that "it is difficult to judge the fairness or appropriateness of its assessments."<sup>38</sup> Indeed, according to their own report, the Canadian Bar Association's review process is enveloped in a "mystique of secrecy."<sup>39</sup>

### Politicization

Politicization can be understood as the extent to which the selection process is influenced by factors other than the aptitude, experience, and merit of the candidates. As early as 1922, a Canadian Bar Association report observed "that the vicious system of making judicial nominations rather as rewards for political services than for the professional qualifications of candidates shows no sign of disappearing

from our customs . . . ."<sup>40</sup> The federal track record of successive politicized appointments at the provincial level inspires little confidence in their handling of the Supreme Court appointment process; between 1905 and 1970, "94.8 percent of the former politicians appointed by Liberal governments to Ontario courts were Liberals."<sup>41</sup> In what Russell called "the orgy of patronage appointments"<sup>42</sup> that took place in 1984, the Liberals appointed six professional politicians to judicial posts, of whom "one or two could be defended on their merits . . . , [though] it is doubtful that anyone would say that each . . . meets Lang's standard of the 'best possible choice.'"<sup>43</sup> According to Weinrib, "while the appointees have of late possessed much better credentials, many still have had professional, governmental and personal ties to leading figures in the government."<sup>44</sup> Russell and Ziegel have noted that party politics also heavily influenced the appointment process of the Mulroney Government.<sup>45</sup> In 1973, Prime Minister Trudeau abrogated a constitutional convention and appointed Bora Laskin to the position of Chief Justice, although he was not the most senior sitting justice and had only three years experience on the Supreme Court. Unmistakably, he was elevated because of his national unity, pro-federalist ideology, and his decade-long chief justiceship was instrumental in centralizing the Canadian nation through the assignment of ever-broader powers to the federal government. The argument that the cabinet has taken a "neutrality" approach to potential Supreme Court appointees' stances on federalism is not aided by the fact that between 1997 and 2002, "the federal government won seventeen significant victories and lost only three substantive appeals to provincial governments,"<sup>46</sup> or by the fact that the Supreme Court has expressed an "explicit anti-secessionist impulse"<sup>47</sup> in every Quebec-related ruling. Moreover, according to Russell, "Partisanship in recruiting the federal judiciary has, to be sure, systematically excluded supporters of third parties."<sup>48</sup> Indeed, "Behind the closed door of a cabinet meeting, the considered recommendation of the Minister of Justice or Attorney General may go for nought in the face of . . . partisan, personal or other considerations."<sup>49</sup> According to a Manitoba

Law Commission report in 1994, the effect of this extreme politicization on public confidence in the legal system “could be corrosive,”<sup>50</sup> and the report argued that the politicization of the appointment process “may precipitate the belief among the public and the legal profession that . . . judges, having attained their position as a result of the governments favor, are therefore obligated to the government . . . .”<sup>51</sup> Indeed, by 2001, 70 percent of Canadians surveyed believed that partisan politics influenced the decisions of the Supreme Court, which, according to respondents, would probably “line up on the side of the federal government because the judges were appointed by it.”<sup>52</sup> Weinrib concurs that the present system is “at times heavily influenced, to its detriment, by partisan political considerations.”<sup>53</sup> She holds the “partisan use” of the appointment power responsible for the “damage to the public perception of the impartiality of the bench and the mixed quality of judicial appointments.”<sup>54</sup> From the classical institutional and structural perspectives on divided, checked, and balanced government, one must also immediately deplore as inappropriate politicized intrusion a federal cabinet being given *carte blanche* in appointing members of a high court that is entrusted with a solemn responsibility to invalidate, when necessary, legislation advanced by that very cabinet.

Apologies for such egregious deficiencies are as uncommon as they are politically contrived. Nevertheless, increasing performance across all three indicators — representational effectiveness, politicization, and effectiveness — is by no means a complementary, self-reinforcing process. Often these areas of needed reform make demands at cross-purposes with one another. The decision to redress the gender imbalance of the courts at times resulted in a 50 percent reduction in the size of the candidate pool<sup>55</sup> — a bargain that when made regularly and over time (in any direction, whether privileging males or females) probabilistically comes at the expense of merit when merit means selecting the best of the qualified candidates. Further pressure to make the Court a vehicle for declaratory representation — whether racial, ethnic, linguistic, or religious — will pose no less of

a threat to merit than did historical decisions that at times reduced the selection pool to white, Anglican males. Conversely, decreasing the politicization of the appointment process could involve a commensurate deterioration in the representational effectiveness of the appointments. Decisions made on the basis of “apolitical,” merit-based criteria might diminish the competitiveness of disadvantaged ethnic, regional, racial or socio-economic groups *vis-à-vis* the established, well-educated and predominantly white, urban intellectual elite. Likewise, greater transparency might increase politicization as prime ministers and cabinets begin to see the new appointment process as a vehicle for demonstrating to constituents that they are selecting candidates with the “right values” — pandering showmanship that is of slightly less concern in an opaque and unaccountable selection process. Thus a holistic construction of “democratization” must be applied to any appointment reform proposal, since meaningful and progressive change of a court appointment system necessitates a nuanced balancing of:

- increased transparency,
- increased representational-effectiveness,
- decreased politicization, and
- sensitivity to the unique dynamism of the Canadian nation.

The Cotler proposal to Parliament in 2005, discussed earlier in this article, constitutes an excellent first step to sensibly balancing these criteria and considerations. One reason is that any reform package that successfully balances and incorporates the four above-mentioned criteria would likely feature at its core the adoption of a vitalized nominating commission containing representatives from both levels of government, empowered to actively seek out suitable candidates and make ranked recommendations that could only be ignored at a steep political cost. Lederman, the Canadian Bar Association and the Canadian Law Teachers,<sup>56</sup> as well as many other reports and findings (e.g., those

made by Friedland and Russell) have been proposing some variation of such a system for at least the past two decades. According to these proposals, a specially constituted council, staffed by the sitting Chief Justice of the court to which the appointment is being made, representatives of the Canadian Judicial Council, the federal Minister of Justice, the Canadian Bar Association, the general public, and, crucially, the attorneys general of the concerned provinces, would hold primary responsibility for federal court nominations.<sup>57</sup> Under such a system, the general public, provincial bars and governments, and members of the opposition could all submit names for consideration. Although pursuant to section 96 of the *Constitution Act, 1867*,<sup>58</sup> and the *Supreme Court Act*,<sup>59</sup> Cabinet would still make the final Supreme Court appointment, a political convention would presumably develop whereby the political costs of ignoring the commission's recommendations would be prohibitive.<sup>60</sup> This system has three distinct advantages:

- broadening participation in the selection process to include both levels of government and a greater diversity of interests, backgrounds, and political agendas, which would likely broaden the demographic representation and ideological spectrum of the nominees;
- increasing the transparency of the selection process by producing nominees that are ranked according to a publicly known schema; and
- decreasing the arbitrary and patronage-based aspects of the current politicized process, and decreasing to some degree the hegemonic preservation of the governing elite's ideological agenda<sup>61</sup> through their partisan selection of amenable judicial ears and voices.

The decrease in politicization that an empowered nomination commission would produce would also further the expansion of the *Charter*. The current ideological-brokerage model of judicial appointments — appointing candidates who represent a

narrow, centrist sliver of the full Canadian legal-ideological spectrum — operates at the expense of what should now be the *raison d'être* of the Supreme Court of Canada: giving fuller force and effect to the *Charter* and the revolution it inspired. This task would require unfurling the *Charter's* concise and limited language and transfiguring the result into a rich panoply of legal norms, and a case-law discourse of nuanced jurisprudential distinctions. Doing this will not just take judicial leadership — it will require jurisprudential prescience and an almost preternatural socio-political sensitivity. How an appointment process can discover and select justices with these qualities — the qualities required of a *Charter* justice — demands consideration.

## Judicial Appointment for the *Charter* Era

The last decade has shown that neither culture wars fought on constitutional battlegrounds nor the related decline of merit as *the* criterion to be considered in an appointment to the nation's highest court are endemic to the United States. The Canadian federal judicial appointment system has, to date, categorically declined the opportunity to establish, as a norm, the incomparable importance of raw *skill* to the act of adjudicating the meaning of the *Constitution Act* and the *Charter*. Instead of using the appointing power as a symbol of the association between merit and the demands of judging, the pre-2006 system of federal judicial appointments in Canada — up to and including Supreme Court appointments — became complicit in the denigration of the national status of public law by leaving out individual *faculty* and *ability* from the list of traits and qualifications most immediately considered in the judicial appointment process. It failed to comprehend that seemingly obvious — even platitudinous — imperative to look for *the best of the best* when making appointments to the national court system. *Individual faculty* and *ability* must become the primary considerations of an empowered nominating commission, which understands the strong association



between those character traits and success as a *Charter*-entrenching Canadian justice. What does it imply about the seriousness with which the Canadian nation pursues the rule of law and the aspiration to a categorical commitment to constitutionally protected rights when past affiliation with the federal Liberal Party<sup>62</sup> is a more reliable historical predictor of appointment to the federally operated court system — including the Supreme Court — than is proven experience in solving complex legal problems, and the documented ability to harmonize innovatively the competition between conventional precedents and rights claims putatively undergirded by layered textual guarantees? The high court in any nation sets the standard for the entire judicial system, and indubitably, making merit the most important criterion for appointment to the Supreme Court of Canada — and all other federally operated courts — as Mr. Cotler's reform package prescribed, would elevate the performance standard at every level of the judicial system.

Justice Rosalie Abella, who currently sits on the Supreme Court, once noted that “every decision-maker who walks into a court room to hear a case is armed not only with the relevant legal text, but with a set of values, experiences, and assumptions that are thoroughly embedded.”<sup>63</sup> During the late twentieth century, successive Canadian federal governments, in their failure to avowedly associate a candidate's predisposition to advance the *Charter*'s “set of values” with the “meritoriousness” of that candidate, declined the opportunity to seriously take up the *Charter* on its own premise.

## The Credentials Demanded by the *Charter*

The polemic over the relevant credentials to be considered during the judicial appointment and selection process has been fecklessly defined and hopelessly obfuscated by the mythology of the Supreme Court Justice as objective arbitrator. In this view, the Court Justice is merely the flesh embodiment of Lady Justice, blindly and disinterestedly weighing scales, or an erudite soccer referee who has not thought even fleetingly

about which teams he wants to win. But the role of a Supreme Court justice in a constitutional order- and rights-based polity — and the various roles of a Canadian *Charter* justice in particular, must be demythologized. The role of the justice is not situational “objectivity,” and the putative attainability of this epistemically phantasmal position — not to speak of its desirability — must be met with the same ruthless skepticism in legal theory that its metaphysical counterpart encounters in all post-Nietzschean philosophical discourse. The justice is only “disinterested” in the narrowest and most procedural sense; normatively, the *Charter* justice should want one team to win. He or she represents a value system and a moral order, attempts to advance it and to empower it, and stands as its guardian. The justice understands that constitutions,<sup>64</sup> in general, and bills of rights — including the *Charter* — in particular, were on the one hand enacted against the grain of majoritarianism — in order to mitigate and preempt its excesses — and on the other, crafted as guarantees that the democratic character of our most important political institutions would not become diluted. A Canadian *Charter* justice thus has an acute historical sense and is at every moment reminding him or herself of the fragility and vulnerability of democracy, and of the mystique and allure of intolerance, hate, and fanaticism. The justice understands that she or he must spend every waking hour standing sentry against the first movements of tyranny and oppression, and that the justice's only instrument is the mind — the ability to reason, compellingly and convincingly. The justice knows he or she must never be seduced by optimistic views of human progress, knows not to naively place faith in the unaided success of truth in the market place of ideas, knows a descent into barbarism is not just possible — it is called for and demanded on a daily basis, in every dark corner of every nation. He or she invests no hope in “inherent human goodness,” for the justice knows that there will always exist the inveterately malicious, rapacious, and ignorant — and those who want nothing more than to denigrate and debase the dignity of other human beings. This is the Canadian *Charter* justice, and this is whom any and every nomination process must seek out in earnest: a tireless sentry whose singular and unending

devotion to a value system, to a *moral order*, makes a falcon of a human — one who perceives at a mile's range, the first scurrying movements of tyranny in the valley of the nation.

## The Timely Untimeliness of a Rights-Era Jurist: Opportune Moments and the Historical Sense

As President of the Supreme Court of Israel, Aharon Barak took a meager and timid parliamentary allotment of Basic Laws, in a country without a written constitution, and developed them into the most elaborate jurisprudential framework for civil and human rights in the entire Middle East. He has described the rights-based, socially transformative balancing act that high courts attempt in the following way:

In many cases, the job of a supreme court is to reflect a deep public consensus. But sometimes a court must crusade for a new consensus. *Brown v. Board of Education*, in which the U.S. Supreme Court outlawed segregation in public schools, is a good example. A supreme court would not survive public misgivings if it announced a new *Brown* every week. But a supreme court will also not survive misgivings if it fails to seize the opportunity to decide a *Brown*.<sup>65</sup>

So a justice is a tightrope walker and a tumbler, one who achieves balance, moderation, and stability while still moving forward — like that falcon over a valley — through his or her ability to *see* and *perceive*. What does this mean precisely?

The rights-era jurist, like the constitution-entrenching jurists who came before, breathes at the pace of John Marshall, for he or she is timely in untimeliness. Timely untimeliness is a sensitivity to opportune moments for the introduction of something largely unprecedented at or near the critical moment when the precedent is almost indiscernibly — but veritably — weakest or most vulnerable. The person who is sensitive to opportune moments, who is timely in his or her untimeliness, is necessarily one of the few who can discern this *almost* or *initially* imperceptible “tipping

point,”<sup>68</sup> which to the many is obscured or occluded by the perspective that any particular historical moment affords. The person who is timely in his or her untimeliness thus has a *historical sense* that is in fact “transhistorical.” Thus, great statesmen and revolutionaries — such as Napoleon and Bismarck, Bolivar and the American Founders — by necessity possess an acute historical sense. Avant-garde artists, whether visual, musical, or literary, as well as philosophers and theorists who deal in the historically contingent, all, almost by definition, possess a historical sense — though their historical medium may be predominantly aesthetic and only concomitantly political (but often reverse is often true). And as Thomas Kuhn argued in his enormously influential *The Structure of Scientific Revolutions*,<sup>67</sup> “paradigm shifts” in the sciences — movements away from or against the previously dominant and accepted theory or scientific worldview — do not occur as a direct, immediate, or inevitable result of new experimental evidence (new or old). Rather, they happen through the appearance of a new, more cogent contextualization of the evidence that more seamlessly accounts for and integrates past, present, and future occurrences in that field of understanding. The individuals most responsible for major paradigm shifts have a deep historical sense.

The greatest jurists are no different. They are timely in their untimeliness, and can be so because of their acute historical sense. The judicial greatness of John Marshall and Earl Warren was located in their historical sensitivity — in their ability to perceive the critical moment when the undesired precedent was weakest or most vulnerable, and to act in response — introducing something unprecedented and “untimely” at a time when it stood the greatest chance of being received, accepted, and followed.

The realization that legal sensibility requires extralegal senses goes at least as far back as Oliver Wendell Holmes’ *The Common Law*.<sup>68</sup> Holmes argued that every time a judge decides a major constitutional question (especially in the area of rights) he necessarily chooses between contending legal theories and legal-

philosophical outlooks. Thus the *true* decisive considerations in such a decision are very often drawn from outside the law — from what we now might call the *political* realm. The example of *Brown*, the greatest American civil rights case of the twentieth century, is particularly illustrative. Robert G. McCloskey, in his influential classic *The American Supreme Court* writes:

[O]ne should note that Southern segregation was an international embarrassment in the cold war being entered into with the Soviet Union and its allies, who pointed up the unjust treatment of African-Americans whenever Western anticommunists criticized what was happening in Eastern Europe. In its brief to the Court in *Brown*, the United States explicitly brought up “the problem of racial discrimination . . . in the context of the present world struggle between freedom and tyranny” and noted segregation’s “adverse effect” on America’s winning that struggle.<sup>69</sup>

A new *Brown* or *R. v. Big M Drug Mart*<sup>70</sup> cannot be announced every week, and a Supreme Court justice’s ability to pick the right week — or year, or decade — and not miss the moment or get it wrong and set back the effort, depends on his or her extralegal, *political* sensitivity and awareness. As Charles Epp argues in *The Rights Revolution*, the American rights revolution developed out of a broader “support structure for legal mobilization,” which was what ultimately “propelled new rights issues onto the Supreme Court’s agenda,” and “although judicial policies undoubtedly contributed to the development of that support structure, changes in the support structure have typically resulted from forces that are broader than the Court’s policies alone.”<sup>72</sup> In the 1950s - 60s in the United States, the Warren Court not only wrote *Brown*, it orchestrated a simultaneous metamorphosis across multiple areas of constitutional rights (including due process, freedom of the press, freedom of speech, civil rights, and the right to privacy), and thus transformed the place and program of the American constitution in American political life. It succeeded because of its justices’ acute political-historical sensitivity to those broader forces — because of their timely untimeliness.

Fulfilling the promise of the *Charter* will require the appointment of men and women with these same qualities.

Judges who could anticipate or perceive opportune moments though an acute historical-political sense did far more for the advancement and entrenchment of civil liberties and basic human rights than those who could not. Those who understand that the Supreme Court of Canada is the engineer and builder of the architecture of the *Charter* must urgently ensure that timely political untimeliness, and an acute historical sense, become important criteria in the selection and appointment of judges.

One way to predict whether a candidate will excel in this domain might be to administer a “test” that gives the candidate an opportunity to demonstrate his or her historical-situational reasoning. Such a test might ask the candidate to select what they consider to be a presently amorphous or narrowly developed — or misguidedly developed — right (or aspect of a right) guaranteed by the *Charter*, and to provide an argument for why the present historical moment is opportune for the broad reception and implementation of a fuller — or differently directed — development of that right, as the United States was in the early 1960s, prior to the *Brown* decision. Requiring this additional argument in writing would not be a tremendous departure from the one criteria by which judicial candidates are already evaluated — their written legal rulings — but unlike lower-court written opinions, would showcase their ability to articulate and defend a judicial desire for an abstract social or political end. Following a “black market” principle — if something will continue to exist inevitably and inexorably, the best policy is to bring it into the daylight, regulate it, and gain some modicum of control over it — since the Court will go on making the kinds of distinctly political decisions mentioned herein, it is only sensible that the appointment process at least ensure that they are capable of making political decisions well. The written argument requirement would provide nomination and appointment commissions with a valuable insight into a candidate’s political-historical sensitivity

and, *ipso facto*, their potential for giving the *Charter* a greater chance at effective, balanced, and exhaustive implementation.

In its attempt to increase the accountability and transparency — the democratic credentials — of the current judicial appointment process, Mr. Cotler's reform package is a crucial first step in realizing a judicial appointment system designed specifically for a democratic, *rights-based* polity, for a *Charter* Canada, and it would provide an excellent framework for allowing the candidate criteria discussed in this article to come before the consideration of prime ministers. Only once Canadians know how they get who they get on the Court can they really start debating how to get who they want and *need*. Thus Mr. Cotler's reforms should be adopted by the current government, which must take the next step in Canadian judicial appointment reform.

## Notes

- \* Daniel Nadler is currently a Research Fellow at Harvard University, daniel.nadler@gmail.com.
- 1 The Honourable Irwin Cotler, "Proposal for the Reform of the Supreme Court of Canada Appointments Process" (7 April 2005), Speech given before the House of Commons, online: Department of Justice Canada Newsroom <[http://www.canadajustice.ca/en/news/sp/2005/doc\\_31432.html](http://www.canadajustice.ca/en/news/sp/2005/doc_31432.html)>.
- 2 *Ibid.*
- 3 *Ibid.*
- 4 The 11th Biennial Jerusalem Conference in Canadian Studies, Hebrew University of Jerusalem, 2 - 6 July 2006.
- 5 Office of the Prime Minister, "Prime Minister Announces Appointment of Mr. Justice Marshall Rothstein to the Supreme Court" (1 March 2006), online: <<http://www.pm.gc.ca/eng/media/asp?id=1041>>.
- 6 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
- 7 *Ibid.*
- 8 Lorraine Weinrib, "Appointing Judges to the Supreme Court of Canada in the Charter Era: A Study of Institutional Function and Design" in *Appointing Judges: Philosophy, Politics and Practice: Papers Presented to the Ontario Law Reform Commission* (Toronto: Ontario Law Reform Commission, 1991)[Weinrib].

- 9 Neil Seeman, "Taking Judicial Activism Seriously" *Fraser Forum* (August 2003) 8.
- 10 Department of Justice Canada, "Speaking Notes for the Honourable Irwin Cotler, Reforms to the Judicial Appointments Process," online: Department of Justice Canada Newsroom <[http://www.justice.gc.ca/en/news/sp/2005/doc\\_31694.html](http://www.justice.gc.ca/en/news/sp/2005/doc_31694.html)>.
- 11 *Ibid.* This is a quotation of Irwin Cotler quoting a translation of the remarks of the Chair of the subcommittee.
- 12 *Ibid.*
- 13 *Supra* note 1.
- 14 *Ibid.*
- 15 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004) [*Towards Juristocracy*].
- 16 Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987).
- 17 [1998] 2 S.C.R. 217, 1998 SCC 793 (CanLII).
- 18 [2004] 3 S.C.R. 698, 2004 SCC 79 (CanLII).
- 19 *Supra* note 16.
- 20 Frank Iacobucci, *The Charter [Canadian Charter of Rights and Freedoms]: Twenty Years Later*, *Supreme Court Law Review* (2003) 19 *Supreme Court Law Review* (2d) 402.
- 21 Hirschl, *Towards Juristocracy*, *supra* note 15; see also Ran Hirschl, "Beyond the American Experience: The Global Expansion of Judicial Review" in Mark Graber & Michael Perhac, eds., *Marbury versus Madison: Documents and Commentary* (Washington, D.C.: Congressional Quarterly, 2002) at 131.
- 22 Hirschl, "Beyond the American Experience," *ibid* at 148.
- 23 Hirschl, *Towards Juristocracy*, *supra* note 15 at 11.
- 24 *Ibid* at 20; Hirschl argues that judicialization has "transformed national high courts into major political decision-making bodies" at 221. Canada is only one of the many Western nations that have experienced the empowerment of the judiciary *vis-à-vis* other branches of the national government. However, the extent to which this redistribution of power grates at the democratic character of a particular polity is proportional to the "democratic character" of the newly empowered branch. Herein lies the importance of the judicial appointment process, and the questions of legitimacy raised by Canadian judicialization in particular.
- 25 *Ibid* at 189.
- 26 *Supra* note 17.
- 27 Hirschl, *Towards Juristocracy*, *supra* note 15 at



- 189.
- 28 *Ibid.* at 222.
- 29 *Ibid.*
- 30 *Ibid.* at 80.
- 31 *Ibid.*
- 32 See, for example, Allan C. Hutchinson, "Process to bring judicial politics into public view" *The Lawyers Weekly* (23 September 2002), online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=155>.
- 33 Quoted in Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 233 [Friedland].
- 34 [1985] 2 S.C.R. 673, 1985 SCC 25 (CanLII).
- 35 [1989] 2 S.C.R. 1326, 1989 SCC 20 (CanLII) [Edmonton Journal].
- 36 Cheryl Thomas & Kate Malleson, "Judicial Appointments Commissions: The European and North American Experience and the Possible Implications for the United Kingdom" (1997) Discussion Papers, Lord Chancellor's Department, Research Secretariat, London, s. 5.
- 37 *Supra* note 37.
- 38 *Supra* note 16 at 119.
- 39 *Ibid.* at 132.
- 40 Quoted in Weinrib, *supra* note 8.
- 41 *Supra* note 15 at 115.
- 42 *Ibid.* at 116.
- 43 *Ibid.* at 116, 120.
- 44 Weinrib, *supra* note 8.
- 45 Peter H. Russell & Jacob S. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judiciary Advisory Committees" (1991) 41 *University of Toronto Law Journal* 4.
- 46 *Ibid.* at 81.
- 47 *Ibid.*
- 48 *Supra* note 16 at 117.
- 49 William Angus quoted in Russell, *ibid.* at 113.
- 50 Quoted in Friedland, *supra* note 33 at 233.
- 51 *Ibid.*
- 52 Hirschl, *Towards Juristocracy*, *supra* note 15 at 82. Hirschl quotes from Kirk Makin, "Canadians feel Supreme Court tainted by partisan politics: poll." *Globe and Mail* (3 July 2001) A1 [Makin]. In that poll, however, "an overwhelming majority nonetheless strongly approve[d] of the top court."
- 53 Weinrib, *supra* note 8.
- 54 *Ibid.*
- 55 It could be argued that the candidate pool is never reduced in any particular instance of an appointment, but rather, that the new willingness to give all demographics a "fair evaluation" will over time result in the gender balance of the court reflecting the gender balance of society. However, what actually occurs at the political level on all too many occasions is the felt need to replace a female vacancy with a female appointment — lest the Prime Minister be charged with deconstructing the gender balance of the Court. Once "restorative justice" becomes the appointment order of the day, all candidates, save the eligible members of the previously unrepresented demographic, will on particular occasions be all but excluded from serious consideration.
- 56 See Friedland, *supra* note 33; Russell, *supra* note 16; W.R. Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981); Canadian Bar Association, *Report of the Canadian Bar Association on the Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985); Canadian Association of Law Teachers (CALT), *Judicial Selection in Canada: Discussion Papers and Reports* (CALT Special Committee on the Appointment of Judges, 1987).
- 57 *Supra* note 15 at 132.
- 58 *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
- 59 *Supreme Court Act*, R.S.C. 1985, c. S-26.
- 60 *Ibid.* at 134.
- 61 It is an ideological agenda that tries, incoherently and inefficiently, to synthesize the social left with the economic right: *Reference re Same-Sex Marriage* and *R. v. Morgentaler* with *Dolphin Delivery Ltd. v. R. W.D.S.U.*, *Local 580* and *Chaoulli v. Quebec (Attorney General)*. See *supra* note 18; [1993] 3 S.C.R. 463, 1993 SCC 158 (CanLII); [1986] 2 S.C.R. 573, 1986 SCC 5 (CanLII); and [2005] 1 S.C.R. 791, 2005 SCC 35 (CanLII), respectively.
- 62 And now the Conservative Party, which has wasted no time in making flagrant partisanship the salient qualification for appointment to federally operated provincial superior courts.
- 63 Quoted in "Convenient judges for Liberal aims" *Calgary Herald* (27 August 2004), reprinted in Fraser Institute, "Commentaries," online: <<http://www.fraserinstitute.ca/shared/readmore1.asp?sNav=ed&id=298>>.
- 64 *Supra* note 62.
- 65 Former President Barak made these remarks at a seminar on "Judges and Judging," University of Toronto Faculty of Law, September 2006. *Brown v. Board of Education*, 347 U.S. 483 (1954) (LII) [Brown].
- 66 This idea of a tipping point, well developed in sociology and economics (for example, Morton

Grodzins' work on demographics in the 1960s, and the 1970s economic work of Nobel laureate Thomas Schelling, and Mark Granovetter's threshold model of collective behavior) must be investigated and clarified in the realm of judicial decision making and the interplay between high court legal reasoning and public sphere politics.

- 67 Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).
- 68 Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, 1881).
- 69 *The American Supreme Court* (Chicago: University of Chicago Press, 2000) at 149.
- 70 [1985] IS.C.R 295, 1985 SCC 69 (CanLII).
- 71 Charles Epp, *The Rights Revolution, Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998) at 69.