APPOINTMENTS TO THE SUPREME COURT OF CANADA

Jacob S. Ziegel

INTRODUCTION

Entrenchment of the Supreme Court of Canada in the Canadian constitution was one of the many casualties of the voter's rejection last October of the Charlottetown Accord and, we are assured, it is likely to be many years before politicians will embark on another heavy dose of constitution changing. However, this does not mean that public interest and concern about the way judges are appointed to our highest court has abated, or that nothing can be done outside the *Constitution Act* to put the selection process on a more credible footing. Recent public reaction to the appointment of Justice Jack Major[1] attests to growing public awareness of the importance of the Court's role and, therefore, of the men and women who sit on the Court.

This attention is fairly new. *The Supreme Court Act*[2] does not prescribe how members of the Court are to be selected: it deals only with minimum qualifications, mandatory retirement age, and the requirement that three of the nine judges must come from Québec.[3]

A comparison of modern federal systems[4] shows that a variety of methods are adopted for the selection of members of a country's highest constitutional court. Canada belongs to a small group of countries in which the federal executive enjoys unfettered discretion to make the appointments without any statutory obligation to consult with or act on the recommendations of any other body, or submit the chosen candidate for public scrutiny before the appointment is confirmed.

There is a great deal of anecdotal talk about how the federal government goes about in practice filling vacancies on the Supreme Court, but very little hard fact. All we know for sure is that the Department of Justice claims to consult widely and to canvass names before submitting its recommendations to the incumbent Prime Minister, who makes the final decision. The cabinet, apparently, is not formally consulted.

We have inherited this system of executive appointments from the United Kingdom; but there are vital differences between our system and the environment in which the British system operates. In the United Kingdom, with rare exceptions, the law lords are drawn from sitting members of the English Court of Appeal and, with respect to the Scottish law lords, the Court of Sessions in Scotland. They, in turn, were leaders at the English and Scottish Bars before their appointments to the trial bench and subsequent elevation through the ranks. Apart from the Lord Chancellor, it is generally agreed that since the end of the Second World War political affiliations have played no role in the selection of law lords.

Even more significant is the fact that the United Kingdom has no written constitution and no entrenched bill of rights. The role of the House of Lords therefore differs fundamentally from the role of the Canadian Supreme Court and that difference, already huge, continues to grow exponentially.

Because of these differences, the British system of executive appointments was never an ideal model for Canada. This would not have mattered so much if successive prime ministers had been able to resist the temptation or pressures to make appointments for partisan or patronage reasons. The temptation was not resisted and, at least until Lester Pearson's tenure as prime minister, a significant number of appointees fell short of the highest qualities desirable in a member of our highest court.

In my estimation, this was one of the reasons why, for the first 75 years of its existence, the Supreme Court enjoyed an indifferent reputation among ultimate courts of appeal in the Commonwealth, its judgments being rarely referred to outside Canada. It is true the Court also suffered from working in the shadow of the Privy Council. The Council had the final word in almost all important constitutional litigation and, frequently, in private law cases as well. Nevertheless, in my view, a seriously flawed selection system contributed to the Court's diminished stature and its depressingly uncritical adherence to English authorities and English precedents even when they were not binding on the Court.

Appeals to the Privy Council were abolished in 1949, but the Supreme Court was slow to assert its legal and intellectual independence. I would mark the beginning of the new era with Bora Laskin's appointment as Chief Justice of the Court in 1973. For others, the critical date may be the adoption of the *Constitution Act 1982* and the enactment of the *Canadian Charter of Rights and Freedoms*. Undoubtedly the overall quality of members of the Supreme Court has greatly improved over the past 25 years and many of the Court's judgments can hold their own, especially in the public law area, with the decisions of ultimate courts of appeal in other common law jurisdictions, including the United States. We have been served, and are being served supremely well, by judges of the stature of Laskin, Dickson, Wilson, La Forest, Le Dain, Cory, Iacobucci, and McLachlan. This shows, I think, that recent prime ministers have been much more conscious than their predecessors of the importance of choosing carefully, and that the influence of other factors has declined.

Nevertheless, there is little room for complacency. This is shown by the fact that between 1972 and 1992 nine judges retired from the Court before reaching the mandatory retirement age of 75, and in a substantial number of cases retired well before reaching the age of 70.[5] Some of the premature retirements were attributable to illness or intellectual or emotional burnout, but others cannot be so easily explained.

These numbers reflect continuing weaknesses in the selection process and, it seems to me, ambiguity in the minds of the appointees: is it such an honour to sit on the Court? Do they have the right temperaments and qualification for the demanding work? Even if contemporary prime ministers could be persuaded to exercise their prerogative with utmost integrity and disinterest (surely Herculean qualities in the Canadian context), there would still be formidable objections in principle to vesting this enormous power in the federal executive without adequate checks and balances — checks and balances that are currently non-existent.

The need for public accountability and transparency in the selection process has always been there, but its importance has grown immensely since the abolition of appeals to the Privy Council and adoption of the *Charter*. We are now masters in our own home, but increasingly the ultimate masters are not the politicians, federal or provincial, or the Canadian people, but the judges of the Supreme Court.

They are the ones who determine whether the *Charter* is to be applied liberally or conservatively, or a bit of each; whether the *Charter* is to be used defensively or aggressively; when legislative judgments are to be respected and when overridden; how the division of powers between the federal and provincial governments is to be mediated under our constitution; and to what extent the development of private law principles and doctrines should be entrusted to judicial hands or left to the legislatures. This is an intimidatingly long list, to be sure, and raises the profoundly difficult question whether we are wise to expect so much from a gifted but nevertheless unelected group of nine men and women.

I am not going to try to answer the question. The point is that the decision to vest so much power in the Supreme Court *has* been made and, having been made, it behooves us to search out the selection method best designed to elicit maximum input from the constituencies most likely to be affected by the Court's decisions and to reflect fairly contemporary values in Canadian society.

I will discuss shortly what my preferred selection method is, but let me first pause to buttress my pleas for greater democratic input with the following quotation from an article Felix Frankfurter wrote in 1930 before he was himself appointed to the U.S. Supreme Court:[6]

> It is because the Supreme Court wields the power that it wields, that appointment to the Court is a matter of general public concern and not merely a question for the profession. In truth, the Supreme Court *is*

> the Constitution. Therefore, the most relevant things about an appointee are his breadth of vision, his imagination, his capacity for disinterested judgment, his power to discover and to suppress his prejudices. ... In theory, judges wield the people's power. Through the effective expression of public opinion, the people should determine to whom that power is entrusted.

Frankfurter's views surely are equally apposite in this Canadian context.

Provincial Participation

In recent years a growing number of academic commentators and influential media like *The Globe & Mail* have echoed the same refrain. Nevertheless, starting with the Victoria Charter in 1971 and ending with the Charlottetown Accord, most of the attention over the past 20 years has focused on *provincial* input into the selection process, not on democratic input from Parliament or elsewhere. In between there have been at least ten other proposals from provincial governments, legislative committees, and the Canadian Bar Association.[7]

The details vary but most of the proposals have a common core. The position of the Supreme Court is to be entrenched in the Constitution, the number of judges is also to entrenched, and one-third of them are to come from Québec. Most importantly, under all the recent proposals, appointments by the federal government must be based on nominations or short lists put forward by the provincial Attorney General from whose province the nominee is to be appointed. In case of a deadlock between the provincial and federal Attorneys General, the Victoria Charter and some of the other proposals required the establishment of a nomination council to break the impasse. The Charlottetown Accord dispensed with a nominating council and, instead, allowed the federal government to make an interim appointment until a provincial Attorney General provided a list of candidates acceptable to the federal government.

It is easy to see why in the 1970s and 1980s so much attention focused on the provincial input. Debates over division of powers and the status of Québec dominated the political scene: recognition of provincial roles in the selection of Supreme Court judges formed a logical part of the agenda.

Nevertheless, there were troubling features about many of the proposals. None of them required a province, in drawing up its short list, to consult with anyone. No doubt, in practice, the incumbent Attorney General would ask around, but it would not be a transparent process, and it would have all the weaknesses of the current federal selection process. The only difference is that we would have two sets of executives making the selections instead of one. One would have to be naive to assume that it would not have led to much clandestine bargaining between the two governments. It was on these grounds that the Special Committee on Judicial Appointments of the Canadian Association of Law Teachers (CALT) opposed the Meech Lake Accord provisions dealing with the appointment of the Supreme Court judges.[8]

There is another important consideration. The Canadian proposals appear to be alone among modern federal constitutions in requiring the federal government to pay so much heed to the preferences of a single province in making appointments. By way of contrast, the *High Court of Australia Act,* 1979 requires the Commonwealth Attorney General to consult the Attorneys General of *all* the states before making his or her recommendations to the Commonwealth cabinet.[9]

To use another illustration, the Germans recognize the federal element by requiring one-half of the members of the Federal Constitutional Court to be elected by the *Bundesrat*, the federal legislative upper chamber. The members of the *Bundesrat* are designated by the *Länder*, the German counterpart to our provinces. Federal systems of government following the U.S. model recognize the federal element by requiring nominees to the highest constitutional court to be approved by the legislative chamber (the Senate in the U.S. case) representing the constituent units of the federation.

Let me pose this question. Are we in Canada wise to attach so much importance to the role of individual provinces or regional interests in the selection of Supreme Court judges? I appreciate the pride and satisfaction lawyers in a Province may feel in being able to look at a judge on the Court as being "their" man or woman; and the influence of the Québec precedent in engendering this attitude.

Nevertheless, we pay a significant price for this form of provincialism, and it leads to the arbitrary type-casting of judges. Does Frank Iacobucci owe greater loyalties to Ontario than to British Columbia,

his native province, because he worked at the University of Toronto before being appointed federal Deputy Attorney General and then Chief Justice of the Federal Court of Canada? Did Gerald Le Dain lose his Québec roots, where he practised law for many years and taught at McGill, because he was subsequently appointed Dean at the Osgoode Hall Law School? To change the focus slightly, given the problems the federal government claims to have encountered trying to find an Alberta woman judge willing to allow her name to go forward,[10] why should not the federal government have felt free to look for a suitable female candidate elsewhere in the Prairies?

With the possible exception of Québecers, Canadians, I believe, have become sufficiently mobile and flexible to recognize the folly of tying the federal government to rigid constitutional conventions in the selection of common law judges. Most are willing to give the federal government greater leeway having regard to individual circumstances and the range of available candidates. It also seems to me that the justification for direct provincial input has greatly diminished. The number of division of power cases now coming before the Supreme Court is quite modest. It is *Charter* cases and criminal cases not involving constitutional issues, and frequently a combination of the two, that today absorb so much of the time and intellectual energies of the Supreme Court.

Nomination Commissions and Confirmation Procedures

If I am right in these perceptions, then I think it strengthens the case for changing our focus and concentrating more heavily on two questions that have not received the attention they deserve. These two questions are: should there be a nominating commission or council to provide the federal government with a short list of candidates when a vacancy arises on the Supreme Court; and do we need a confirmation procedure, whether or not there is a nominating commission, to review and pass upon the nominee actually selected by the federal government?

Role of Nomination Commissions

The use of nomination commissions is usually associated with the state of Missouri, where it was first introduced in 1940 to avoid the shortcomings of electoral systems for the appointment of judges. It has since been copied in about two-thirds of the American states. These commissions, made up of bar and lay representatives and at least one judge, draw up a short list of recommended candidates from which the governor is required to select one. The judge then serves for a short period following which his continuance in office must be approved by the voters.

The use of judicial nomination commissions has also caught on in Canada at the provincial level. The concept is used in some fashion in British Columbia, Ontario and Québec for the selection of provincially appointed judges.[11] The system works well, and there is general agreement that it is incomparably superior to the patronage and otherwise random selection systems that preceded it. The use of nomination commissions or councils also appealed greatly to the Special Committee of the CBA to whose report I have referred to earlier, and to a similar committee of the CALT which reported in the summer of 1985, several months before the CBA committee did. Both committees favoured extending the use of nomination commissions for the selection of judges to the Supreme Court. In the latter case they envisioned the commission being made up of senior representatives of the legal profession, a nominee of the Attorney General of the province from which the appointment was to be selected, a nominee of the federal Minister of Justice, and one or more well regarded lay persons.

It took the federal governments almost two and a half years to react to the reports. The federal government, it turned out, favoured a radically different type of advisory committee, and such committees have now been established in each of the provinces. Their job is *to screen* persons applying for judicial office and to advise the Minister of Justice whether the applicant is highly recommended, recommended, or not recommended. There is much that is wrong with the structure and operations of these committees. Their most important weakness is that they are not free to seek out candidates and compile a short list of the best qualified. Given these shortcomings, it is not surprising that most observers dismiss the advisory committees as little more than window dressing designed to distract attention from continuing complaints about the role of patronage appointments. Even this formality does not apply to appointments to the Supreme Court. Here the federal government continues to make its selections unaided and unhampered by any formal screening mechanisms

and the recommendations of any committee, however designated.

Confirmation Procedures

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

First, I see no evidence of any willingness by this or any other foreseeable federal government to relinquish its unfettered nominating power in deference to the recommendations of a nominating council. Federal politicians, it seems, treasure too highly the trappings of power and the prestige that goes with them. Second, I am not persuaded that a nomination commission with a majority of traditionally oriented lawyers, although undoubtedly high-minded and dedicated, should be entrusted with a *de facto* final say in the selection of the most powerful group of judges in Canada.

My third reason is the most important. It is precisely because of the intensely political role — I use the word political in a positive and not pejorative sense — played by the Supreme Court judges in applying and interpreting the Charter, as well as the rest of the constitution, that I deem it critical to inject a democratic and balancing note in the appointing process. Canadians should be able to learn about, see, and evaluate the candidate before his or her appointment becomes a *fait accompli*. If the federal government has chosen well, with or without the help of a nomination commission, it will have little to fear. The candidate is likely to earn quick approval from the confirming authority.

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

In truth, the notion of a confirmation procedure is no longer radical. It appeared in the report of the Ontario Advisory Committee on the Constitution in 1978 and in Bill C-60 introduced by the federal government in the same year. Both provided for confirmation of Supreme Court nominees by a revised Upper Chamber. In the case of Bill C-60, approval would have been necessary by the Upper Chamber even though the nominee would have been selected by the cooperative efforts of the Attorney General of Canada and the Attorney General of the province from where the nominee was to be appointed. The Charlottetown Accord saw a confirmation role for the revised Senate in the appointment of members of senior government agencies and boards. It would surely be anomalous if the public were given a greater opportunity to comment on the putative head of the CBC, the CRTC or the Canadian Transport Commission, than to assess the qualities and suitability of a future member of the Supreme Court, or of the judge selected to become the Chief Justice of Canada.

It may be that those who claim to be appalled at the prospect of judicial nominees having to run the gauntlet of a confirmation process are confusing different questions and are too readily drawing false inference from the U.S. model. Theoretically, a confirmation process that does not involve public hearings or questioning the nominee, in public or otherwise, is entirely feasible. It does not appear to be widely appreciated that until 1929 the Senate Judiciary Committee met exclusively in executive session to consider nominees for the U.S. Supreme Court, and nominees were not required to appear in person before the Committee until 1939.[12]

Still, I recognize there is not much point in going to the trouble of establishing a confirmation procedure if the hearings are not to be held in public and interested groups are not permitted to make submissions. What is wrong with that? Much, we are told, and those who oppose any type of confirmation requirement or public hearings, or both, base their opposition on the American experience. Hearings, we are told, that inquire into the private lives of nominees, as occurred in the Clarence Thomas nomination, or that cross-examine the nominee about his views on the constitution, as happened in the Robert Bork nomination, are either demeaning to the judicial office or compromise the independence of the judiciary.

I believe the critics misinterpret the significance of both these events. Bork came under intense scrutiny because his constitutional philosophy was anathema to many segments of American society.[13] Clarence Thomas ran into fierce opposition because he was seriously underqualified, professionally, intellectually, and probably in temperament, to sit on the most powerful court in the Western world. He had been chosen by President Bush to support a right-wing agenda on the Court and not because of a distinguished public career or his understanding of the U.S. Constitution. If the hearings in the Thomas case became embarrassingly personal it was because, as President Bush must have known it would, Thomas' colour made it very difficult to attack his lack of qualifications to sit on the Supreme Court.

In any event, it seems to me, Canadian criticisms of the U.S. confirmation hearings are a little too precious and greatly underestimate the resilience of candidates for high judicial office. Yes, it would have been better if the confrontation between Anita Hill and Clarence Thomas could have been avoided but, overall, Americans who watched the proceedings learned a great deal about the role of Supreme Court judges and gained a heightened appreciation of its importance.

I would welcome such learning experiences in Canada.

Jacob S. Ziegel
Professor of Law, University of Toronto.

AUTHOR'S NOTE: This is a moderately revised version of a lunch time address given to students at the Faculties of Law at the University of Alberta and the University of British Columbia by the author in March 1993.

Endnotes

1. See Editorial, *The Globe & Mail* (17 Nov. 1992); "Judging the Judge" *The Globe & Mail* (23 Jan. 1993) D1; and "A 'Lawyer's Lawyer' Ascends to the Top Court" *The Globe & Mail* (23 Jan. 1993) D5; and "A Disputed Choice" *Maclean's Magazine* (23 Nov. 1992) 54.

2. *The Supreme Court Act*, R.S.C. 1985, c. S-26.

3. *Ibid.*, ss. 4(1), 6, 9(2).

4. See Carl Baar, "Comparative Perspectives on the Judicial Selection Process" in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: OLRC, 1991) at 143.

5. The nine judges were Roland Ritchie, William McIntyre, Jean Beetz, William Stevenson, Bertha Wilson, Gerald Le Dain, William Estey, Yves Pratte, and L-P. de Grandpré. For further details see *The Globe & Mail* (10 Aug. 1992) A7.

6. See Paul A. Freund, "Appointment of Justices: Some Historical Perspectives" in *Essays on the Supreme Court Appointment Process* (1987-88) 101 Harv. L. Rev. 1146 at 1153.

7. A convenient summary of the various proposals to 1987 will be found in the Report of the Committee of the Canadian Bar Association, *The Supreme Court of Canada* (1987), Append. 3-2.

8. The CALT committee was struck in 1985 to generally review the procedure for the appointment of judges by the federal government at all levels of court. The author was a founding member of the committee and served as its chair from 1986 until 1990.

9. For the details see *Australian Judicial System: Report of the Advisory Committee to the Constitutional Commission* (Canberra, 1987), §§5.28-33.

10. "Few women willing to join top court, Campbell says" *The Globe & Mail* (17 Nov. 1992) A6.

11. Reliable accounts of the structure and operations of the provincial committees are readily available. A bill is currently before the Ontario Legislative Assembly to give permanent status to the Ontario Committee. See *Courts of Justice Statute Law Amendment Act*, 1993, Bill No. 68, 1st Reading, 7/7/93, s.22.

12. Freund, *supra* note 6 at 1157-58.

13. For two contrasting views on the Bork nomination see Nina Totenberg, "The Confirmation Process and the Public: To Know or Not to Know" (1988) 101 Harv. L. Rev. 1227 and Patrick B. McGuigan & Dawn N. Weyrich, *Ninth Justice: the Fight for Bork* (Free Congress. Research & Education Foundation 1990). For Bork's own account, see Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Collier Macmillan, 1990).