

# Judging the Judges: Judicial Independence and Reforms to the Supreme Court of Canada Appointment Process

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# Judging the Judges: Judicial Independence and Reforms to the Supreme Court of Canada Appointment Process\*

The Honourable Michael J. Bryant\*\*

The most important constitutional issue facing Canadians today is the role of the judiciary in the state. The appointment of judges, their security of tenure, their administrative independence and other facets of institutional independence are all aspects of what is becoming the dominant constitutional issue of our time.

Twenty years ago we talked about what the *Charter of Rights and Freedoms* would do. Ten years ago, we talked about where the remarkable Charter jurisprudence would go and how far it would go. Today, more and more the public debate focuses on the judges themselves. Nothing could have a greater effect on constitutional law than changes to the independence of the judiciary. It is in this context that I offer my perspective on possible reform of the appointment process for judges of the Supreme Court of Canada, and how such reform could in turn affect how other federal and provincial court appointments are made.

## I. JUDICIAL INDEPENDENCE

The Supreme Court itself has very well articulated what judicial independence is and why it is so important. In *The Provincial Judges Reference*,<sup>1</sup> the Supreme Court recognized that the “constitutional

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<sup>1</sup> *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75.

home” for judicial independence was not only the Charter or the *Constitution Act, 1867*, but also the unwritten and organizing principles of the Constitution tracing as far back as the *Act of Settlement, 1701*. The Court noted that there were two goals inherent in judicial independence:

- the maintenance of public confidence in the impartiality of the judiciary; and
- the maintenance of the rule of law.<sup>2</sup>

To further these goals, the Court held that there were limits to legislative sovereignty over judicial institutions.<sup>3</sup> That is, the judiciary is independent from the other branches of government.

Earlier, the Court had recognized two dimensions of judicial independence: the individual independence of judges and the collective independence of the courts as an institution.<sup>4</sup> Institutional independence arises from the position of the courts as “organs and protectors of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic proc-

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<sup>2</sup> *Id.*, at para. 10.

<sup>3</sup> *Id.*, at para. 108:

It follows that the same constitutional imperative – the preservation of the basic structure – which led Beetz J. (In *OPSEU v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2) to limit the power of legislatures to affect the operation of political institutions, also extends protection to the judicial institutions of our constitutional system.

See also the comments of Justice Le Dain in *R. v. Valente*, [1985] 2 S.C.R. 673, at 685, [1985] S.C.J. No. 77:

Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

<sup>4</sup> As stated in *R. v. Valente, id.*, at 687:

The 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.

ess...”.<sup>5</sup> It is institutional independence that enables the judiciary to fulfil its role as protector of the Constitution.

In considering changes to the appointment process, I believe we must proceed with caution. What is at stake is the relationship between the branches of government that form the basic structure of our society.

## II. TWO DEBATES UNDERWAY

Two very different debates are taking place over judicial independence. The first one is being conducted by what I call “legal populists” and their theme is so-called judicial accountability. While serving as an MPP in the Official Opposition, I opposed various attempts by members of the legislature to limit or “rein in” the judiciary, such as a proposed measure to keep track of sentences made by judges by way of report cards.<sup>6</sup>

Those legal populists calling for judicial accountability typically criticize the courts for treading where legislators bridle. There is an insidious logic to this legal populism. The courts are the people’s courts, the argument goes, and therefore the people deserve to have justice dispensed in a fashion somehow consistent with public opinion. I believe that this reaction is nothing less than partisan “sour grapes” masquerading as an institutional critique. I do not believe that such criticism is truly about the institution and how the judges are appointed. I believe the concern is about the jurisprudence being rendered and the results of cases. That is what is driving legal populism.

On the other hand, a very different debate is underway that has little or no direct connection with this legal populism. Its focus is on how an independent judiciary engages with the executive branch of the state. In some ways this debate may serve to fend off the legal populists — by building public confidence around the independence of the judiciary so as to, in my view, expose the legal populist critique. Here are some of the questions being raised by this other voice in questioning how judges are appointed.

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<sup>5</sup> *Manitoba Provincial Judges Assn. v. Manitoba, supra*, note 1, at para. 123, citing a passage from the Court’s decision in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, [1986] S.C.J. No. 50.

<sup>6</sup> Ontario *Hansard*, April 26, 2001.

First, how does the constitutional guarantee of administrative independence — within the context of the institutional independence of the judiciary — square with the reality that judges are a critical player in the administration of justice? The bar, the bench and government are all players in the justice system. Government is accountable to the legislature and the people. The bar does not have constitutional independence. The bench does.

Here is one illustration. The courts in Brampton, Ontario have the highest caseload in the country and, from time to time, backlogs arise there that need attention. Recently, Brian Lennox C.J. of the Ontario Court of Justice and I have agreed to send in more mobile courts, more judges, more Crown attorneys and more court workers than ever before. I will be held accountable in the House and otherwise to the people for how successful or unsuccessful this effort is. But I cannot mandate the Chief Justice to send these people into that court.

The issue is: How is the judiciary going to be accountable for the administration of justice, while at the same time preserving the administrative independence that has been guaranteed by our Constitution as articulated in the *Valente* decision<sup>7</sup> and again, most recently in *The Provincial Judges Reference*?<sup>8</sup>

How can judicial appointments attract the measure of independence befitting the rightly unaccountable branch of the state, while ensuring that the executive that appoints the judges is accountable to the legislature and to the people? The editorial boards of various major newspapers have been pressing lawmakers to look at this issue for some time.<sup>9</sup> The recommendations range from greater transparency, so that there is a greater understanding of how the system works, to arguments that border on the legal populist approach.

### III. DEMOCRATIC REFORM ON THE AGENDA

It was in the context of the need to build public confidence in the appointments system that the Prime Minister announced in December

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<sup>7</sup> *R. v. Valente*, [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77 [hereinafter “*Valente*”].

<sup>8</sup> *Manitoba Provincial Judges Assn. v. Manitoba*, *supra*, note 1.

<sup>9</sup> “Judicial Reform Overdue: Once again, let’s consider confirmation hearings for judges”, *National Post* (4 November 1999), A18.

2003 that the federal government would “specifically consult the Standing Committee on Justice and Human Rights on how best to implement prior review of appointments of Supreme Court of Canada judges”.<sup>10</sup> In February 2004, this commitment was repeated in the Action Plan for Democratic Reform released by the Martin government.<sup>11</sup> I can certainly understand the impulse for democratic reform. It is present at the provincial level as well.<sup>12</sup>

In addition to my role as Attorney General, I serve as Ontario’s first Minister Responsible for Democratic Renewal. Our government has established a Democratic Renewal Secretariat to work toward meaningful improvements in the political system. It is our intention to consult extensively on possible innovations in voting, new spending limits for political parties and innovative ways to engage youth in the democratic process.

I have been giving a lot of thought to the issue of Supreme Court appointments lately. As both Attorney General with constitutional responsibility for the administration of justice in the province, and Minister Responsible for Democratic Renewal, I may be uniquely positioned to look at all sides of the issue.

This question assumed an added urgency in the Spring of 2004 with two Ontario vacancies to the Supreme Court due to the retirements of Justices Iacobucci and Arbour.

#### IV. STANDING COMMITTEE HEARINGS

The Honourable Irwin Cotler, the federal Minister of Justice and Attorney General of Canada, spoke to the Commons Standing Committee on Justice and Human Rights on March 30, 2004. He said that he would move forward with making recommendations to the Prime Minister for filling the two upcoming vacancies in a way that is “as comprehensive as possible in terms of the range of people who are consulted, and as

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<sup>10</sup> News Release, available online at <<http://pm.gc.ca/eng/news.asp?id=1>>.

<sup>11</sup> <[http://www.democraticreform.gc.ca/actionplan/actionplan\\_e.htm](http://www.democraticreform.gc.ca/actionplan/actionplan_e.htm)>.

<sup>12</sup> In Ontario see <<http://www.attorneygeneral.jus.gov.on.ca/english/drs/>>. For British Columbia, see <<http://www.citizensassembly.bc.ca/public>>. For New Brunswick, visit <<http://www.gnb.ca/cnb/promos/Leg-Dem/index-e.asp>> and for Quebec visit <[http://www.mce.gouv.qc.ca/srid/reforme\\_bref\\_en.htm](http://www.mce.gouv.qc.ca/srid/reforme_bref_en.htm)>.

uniformly systematic as possible in terms of the criteria by which candidates are identified”<sup>13</sup>.

Mr. Cotler pledged to come back to the committee after those appointments are made and explain in detail both the process followed, and the details of the evaluation that resulted in the nominees. I think this is a thoughtful and prudent way to proceed in the short term, and will allow for a thoughtful and prudent approach to making long-term changes to the appointment process.

The federal minister also discussed exactly how the nomination process works and exactly what protocol has been followed by the federal Justice Minister. I think this may have been the first time that a Parliamentary committee has heard exactly how this works. I imagine that some people were surprised at how comprehensive the process is right now in terms of the people who are consulted. One of the alternatives the committee will consider is whether or not the formalization of that process will fulfil the need to ensure confidence in the appointments system — or whether further measures are necessary.

Mr. Cotler also highlighted a reality that underlies every judicial appointment — whether federal or provincial — and that is the constitutional framework, as he put it. He reminded everybody that in the constitutional framework the authority to appoint rests with the executive branch of government. That is a constitutional given. That is our starting point, he said, because that responsibility cannot be delegated. He went on to say that obviously the process can be improved upon, but whatever approach is chosen has to take into account the constitutional framework.

As well, I was pleased to see that Mr. Cotler highlighted the need for provincial input. He said it was important to consult with provincial Chief Justices, provincial bar associations, provincial leaders of the bar and other interested provincial bodies. He added that it will be necessary for him to consult with the provincial Attorney General of the province where the appointment is taking place, because it is the provincial Attorney General who has the requisite understanding and expertise to assess prospective nominees from the region.

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<sup>13</sup> <<http://www.law-lib.utoronto.ca/conferences/judiciary/readings/evidence7.doc>>.

Of course, the fact that these hearings have commenced is largely an expression of the Prime Minister's original pledge to ask the committee to examine ways to implement prior Parliamentary review.

What form will this prior review take? The chair of the Commons Justice Committee, MP Derek Lee, has said he senses a very clear consensus in the committee. There is little appetite for an open-style hearing. He added that the door seems to close whenever the option of an American-style Senate hearing comes up. I agree with him and with this consensus. I want to add my voice to those who support the view that this is not the direction that we ought to pursue.

## V. COMPARING U.S. AND CANADIAN APPROACHES

I am reminded of the experience of the late Justice Felix Frankfurter of the Supreme Court of the United States. As a law professor before joining the court, Frankfurter argued strenuously for public scrutiny of Supreme Court appointments. He wrote:

It is because the Supreme Court wields the power that it wields, that appointment to the Court is a matter of general public concern and not merely a question for the profession. In good truth, the Supreme Court *is* the Constitution. ...In theory, judges wield the people's power. Through the effective exertion of public opinion, the people should determine to whom that power is entrusted.<sup>14</sup>

This is the most articulate summation of legal populism that I have found. It is the exception to the rule that this is purely partisan sour grapes dressed up as an institutional critique.

When he penned those words, Frankfurter could hardly have imagined that he would be the first to discover what they would come to mean in practice. He was nominated to the Supreme Court in 1939 and was called before the Senate Judiciary Committee — then a precedent-setting event. This was the beginning of the Senate's practice, so familiar today, of questioning Supreme Court nominees in person.

Frankfurter apparently attended his hearing reluctantly. Before he was questioned, he read a prepared statement that amounted to a com-

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<sup>14</sup> F. Frankfurter, "The Appointment of a Justice", in *Felix Frankfurter on the Supreme Court*, P. Kurland (ed.) (1970), at 211, 216-17.



plete conversion from what I have termed the legal populist position. He said:

I should think it improper for a nominee no less than for a member of the Court to express his personal views on controversial political issues affecting the Court. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplement my past record by present declarations.<sup>15</sup>

At the hearing, Frankfurter was questioned about such matters as possible links to the Communist Party, his friendship with an official of the British Labour Party, and his membership on the national committee of the American Civil Liberties Union.

Asked to recall the experience, he later said: “I thought that it would be just a little room where we’d sit around. I found that this was Madison Square Garden.”<sup>16</sup>

There is a lesson here, as we contemplate reform of the Supreme Court of Canada appointment process. We must take care that our good intentions do not ultimately lead to the kind of spectacle you would find at Madison Square Garden or the Air Canada Centre.

It may be instructive to contrast the Canadian process with the American process in more depth. Here in Canada, under the *Constitution Act, 1867*, the federal Parliament has the authority to establish a “general court of appeal for Canada”.<sup>17</sup> Using this power, the federal Parliament established the Supreme Court of Canada in 1875. The statute that creates and governs the court today is *The Supreme Court Act*.<sup>18</sup>

Supreme Court judges are appointed by the Governor in Council — that is, the federal cabinet. Under the legislation, at least three justices

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<sup>15</sup> H. Phillips (ed.), *Felix Frankfurter Reminisces* (1960), at 284.

<sup>16</sup> *Id.*, at 284.

<sup>17</sup> Section 101. Section 96 of the *Constitution Act, 1867* provides that “the Governor General”, that is the federal government, “shall appoint the judges of the superior, district and county courts in each province”. Section 92(4) of the *Constitution Act, 1867* confers on each province the power to make laws in relation to “the establishment and tenure of provincial offices and the appointment and payment of provincial officers”. Under this provision, the province appoints and pays the judges of the inferior courts. In Ontario, this is the Ontario Court of Justice.

<sup>18</sup> R.S.C. 1985, c. S-26.

must be from Quebec. Since 1949, a pattern of regional representation has been more or less maintained by tradition: three justices from Quebec, three from Ontario, two from the western provinces and one from the Atlantic provinces. Aside from that, the only other formal qualification is that a judge must be a member of one of the provincial bars and have a minimum of 10 years experience. Section 5 of the *Supreme Court Act* sets the bar at 10 years — section 6 mandates that at least three judges be from Quebec.<sup>19</sup>

So in this country there are few legal provisions governing the appointment of Supreme Court judges. And there appear to be no constitutional conventions that have developed in this area either.

Under our system, there is no requirement to have appointments ratified by the Senate, the House of Commons or a legislative committee. While confidential consultations are held with the organized bar and bench, the appointments take place outside public scrutiny.

The American system is the polar opposite. It is conducted in full public view, but that brings its own problems, as Frankfurter pointed out.

Yale Law Professor Stephen Carter describes the American system as the “confirmation mess”.<sup>20</sup> The origins of this “mess” go back to the framers of the U.S. Constitution. Their outlook was shaped by the decade preceding the Revolutionary War. As one account puts it, the British had advanced “to the most eminent stations men without education and of dissolute manners”.<sup>21</sup>

The framers of the U.S. Constitution were determined to avoid this by putting limits on executive authority. The debates at the time centred on whether to vest the power to appoint in the entire legislature, the Senate alone, the President alone, or in the President with the advice and consent of the Senate. The Convention of 1787 settled for the latter as a compromise. Over the years the Senate has not hesitated to wield its

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<sup>19</sup> *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 6.

<sup>20</sup> See Stephen L. Carter, *The Confirmation Mess: Cleaning up the Federal Appointments Process* (New York: Basic Books, 1994).

<sup>21</sup> *The Oxford Companion to the Supreme Court of the United States* (Oxford University Press, 1992), at 41.

power. In all, it has refused to confirm some 30 out of 144 Supreme Court nominees, although its zeal has diminished over time.<sup>22</sup>

Prior to 1929, Senate confirmation hearings were conducted in closed session, except on two occasions. Since then, the nomination sessions have been public unless closed by majority vote. And since 1939 nominees have been questioned in person.

It is widely accepted that the Senate has introduced political and ideological, if not blatantly partisan, considerations into the confirmation process. This practice has existed since the first nominees put forward by George Washington. Perhaps the most spectacular example was the 1987 rejection of Judge Robert H. Bork. It is still discussed whether Bork was actually “borked” — that is, treated unfairly — but no doubt the debate was an ideological one turning on his previous rulings and views.<sup>23</sup>

## V. RISKS OF POLITICIZING THE COURT

While the Canadian process has its faults, few would want to replace it with the U.S. approach — as the Commons committee appears to have noted. The biggest problem in my view with importing the confirmation mess from the United States into Canada is that American-style hearings — open to the public and broadcast on national TV — necessarily create expectations and a mandate for the nominee. The nominee articulates answers to all of the litmus test questions asked by the senators. The nominee says here is my position on this and on that. This creates a mandate for that nominee to be that particular kind of judge. It does not promote a constitution that lives and breathes and evolves through that judge. That judge is now a conservative judge, a liberal judge, a this judge or a that judge.

This is not how it is done in Canada. Of course, governments of different political stripes have appointed judges. But a direct correlation cannot be made between who appointed them and what kind of jurisprudence they ended up rendering at the end of the day.

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<sup>22</sup> Abraham, *Justices, Presidents, and Senators* (Rowman & Littlefield Publishers Inc. 1999), at 28.

<sup>23</sup> “Bork Wasn’t Borked”, *Washington Post* (21 May 2001).

If the U.S. system were adopted here, the mandate and the expectations of nominees would come with it. This would strike at the impartiality of judges. Not only that, the judgment of appointees would be handcuffed to some extent because they came to the bench with a certain mandate and there would be expectations for them to fulfil that mandate — or at least there would be that perception. This is the problem with a more transparent system — if transparency focuses on the judge as opposed to the process.

On the other hand, transparency of the process makes sense. Indeed, as the Minister Responsible for Democratic Renewal in Ontario, I am personally and politically committed to greater transparency in government.

From the public's vantage point, there are two concerns about the appointment process — one around partisanship and the other around the quality of nominees. The public needs to know that the process is fair, rigorous and exhaustive. A more transparent process could well strengthen public confidence in the Court itself.

On increased transparency of the process, I say, absolutely. But I seriously question transparency as to the judges' views because this creates expectations and threatens to politicize appointments. I worry about what happens to our democracy if the judiciary is forced to become politicians with robes on. If judges were in any way to duplicate elected branches of the state, we all lose a check and a balance on government and the legislature. That is not the case now, but we must prevent this from happening.

In the case of *Ell v. Alberta*,<sup>24</sup> the Supreme Court of Canada specifically commented that political interference in the appointment process is undesirable. The Court said:

Unquestionably, the perception that appointment to judicial office is political in nature undermines public confidence in the administration of justice.

In the *Provincial Judges Reference*, the Court expressly held that there is a constitutional imperative that — to the extent possible — the relationship between the judiciary and the other branches of government

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<sup>24</sup> *Ell v. Alberta*, [2003] 1 S.C.R. 857, at para. 45, [2003] S.C.J. No. 35.

should be “depoliticized”.<sup>25</sup> The legislature and executive cannot, and cannot appear to, exert pressure on the judiciary.

The institutional independence of the judiciary reflects a deep commitment to the separation of powers between the judiciary and the other branches of government. Any reform of the appointment process will have to meet the constitutional test of judicial independence.

Let me add that this does not mean that the door to reform is constitutionally closed. In the same case of *Ell v. Alberta*,<sup>26</sup> the Supreme Court also signalled a more deferential approach to possible reform. Alberta had brought in new legislation intended to improve the qualifications and independence of Alberta’s justices of the peace. Justices of the peace who did not meet these criteria were removed from office and offered administrative positions. The constitutionality of these provisions was challenged as infringing the constitutional guarantee of judicial independence.

The Court found otherwise, ruling that “a removal from office that is reasonably intended to further the interests that underlie the principle of judicial independence is not arbitrary.”<sup>27</sup> The Court believed that judicial independence should not be interpreted in such a fashion as to hinder necessary reforms to improve public confidence.

I know it is risky to predict what the Court might decide. But I would venture to say that this balanced approach will prevail in the Supreme Court of Canada if a reform of its own appointment process is ever challenged on constitutional grounds.

## VI. THE QUALITY AND CHARACTER OF THE COURT

Another concern with importing the U.S. system into Canada is that it might turn away outstanding candidates. Here I am thinking about L’Heureux-Dubé J., the second woman to be appointed to the Supreme Court of Canada.

Justice L’Heureux-Dubé testified before the House of Commons Standing Committee on Justice, Human Rights, Public Safety and

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<sup>25</sup> *Manitoba Provincial Judges Assn. v. Manitoba*, [1997] 3 S.C.R. 3, at para. 131, [1997] S.C.J. No. 75.

<sup>26</sup> *Ell v. Alberta*, *supra*, note 24, at para. 46.

<sup>27</sup> *Id.*, at para. 33.

Emergency Preparedness on March 30, 2004.<sup>28</sup> Her testimony was important and insightful because she was the only judge who appeared before that Committee. In her testimony before the Committee, L'Heureux-Dubé J. indicated that she might have declined the nomination to the Supreme Court if she had been asked to appear before a parliamentary committee.

I believe that a wide open process would change the character of the Court. An American-style system would attract applicants who are comfortable going before public hearings and answering questions. These tend to be more the extroverted types who like to talk at length and lay out their beliefs. If nominees had to appear before a committee, I do not believe this requirement would necessarily turn aside every single excellent candidate. But, thinking about the Court's membership today and over the last 20 years, it is clear certain judges would never have participated in this. American-style hearings would change the character of the Court and I feel that is just as important as deterring qualified applicants.

## VII. ALTERNATIVE APPOINTMENT MODELS

So, if not U.S.-style open hearings, then what?

One alternative is the creation of an independent non-political commission that vets potential nominees and makes recommendations. This approach would resemble the way justices have been appointed to the Ontario Court of Justice since the Honourable Ian Scott set up the process in the late 1980s.<sup>29</sup> This is the process, by the way, that a British

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<sup>28</sup> <<http://www.parl.gc.ca/InfoCom/PubDocument.asp?DocumentID=1281895&Language=E>>.

<sup>29</sup> Ontario's system for appointments to the Ontario Court of Justice goes back to December 15, 1988, when the then Attorney General, the Honourable Ian Scott, announced in the Ontario Legislature the establishment of the Judicial Appointments Advisory Committee as a pilot project, and set out its 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.

On February 28, 1995, the *Courts of Justice Act* established the committee by legislation. All appointments to the Ontario Court of Justice must be made by the Attorney General from amongst a list of applicants recommended to him by the committee, and chosen in accordance with its own process of criteria, policies and procedures. These criteria, policies and procedures are publicly available.

consultation paper said is “generally cited as a model example”<sup>30</sup> of independent judicial appointments. The Government of Canada also has a series of advisory committees for appointments to federal and provincial superior courts.<sup>31</sup>

Looking abroad, South Africa has an advisory body. There, the President appoints judges from a list of nominees prepared by a Judicial Service Commission. The commission must provide a list with three names more than the number of appointments to be made. The President may make appointments from the list, and must advise commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.

The commission is chaired by the Chief Justice and composed of three judges, the Minister of Justice, four lawyers, one law professor, four provincial representatives, four presidential nominees, six Members of Parliament — at least three of whom are opposition members — and in some cases other judicial and provincial representatives.

On the other hand, instead of giving advice, an independent commission could make selections that are mandatory. This is how Israel does it — although in Canada we would have to work within the constitutional framework whereby it is the executive branch making the appointment.

Israel’s Judicial Selection Committee is composed of the Minister of Justice as chair, another cabinet minister, two Members of Parliament, the Chief Justice and two other justices of the Supreme Court and two representatives from the bar. Politicians are in the minority in this system.

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<sup>30</sup> Department for Constitutional Affairs Consultation Paper, *Constitutional reform: a new way of appointing judges*, July 2003.

Britain has announced that it would abolish the office of the Lord Chancellor, who has appointed British judges. One of the options being considered is a judicial-services commission, a panel of knowledgeable individuals who would make a recommendation of qualified applicants on a short list from which the government would choose.

<sup>31</sup> The federal judicial appointments process has been in place since 1988. It is administered by the Commissioner for Federal Judicial Affairs and applies to appointments to the federal and provincial superior courts. The applicants are reviewed by an advisory committee comprised of seven individuals from the bench, bar, and general public. If candidates are ranked recommended or highly recommended, they are included in a bank of approved candidates from which the Minister of Justice can make a recommendation for appointment. This practice has not been applied to Supreme Court of Canada appointments.

In March 2004, the Canadian Bar Association came forward with a proposal for the Government of Canada to consider. The bar association suggests creating a Special Advisory Committee to make recommendations to the government for each Supreme Court vacancy. These committees would include bench and bar representation, as you might expect. What's new is that each committee would also include four Members of Parliament from the Standing Committee on Justice and Human Rights.<sup>32</sup>

I have one comment on the involvement of elected representatives in the selection process. Putting Members of Parliament on an advisory committee again creates expectations. Members of Parliament are elected with a political mandate. This is their job and they are rightly accountable to the people. They will be under enormous pressure to perform and report back to their constituents on what happened in the committee, assuming of course that it was open to the public in some fashion.

The only way I can see this working without politicizing the process would be to maintain confidentiality as the Ontario process does — although again, Members of the provincial Parliament are not involved. I am thinking of an approach that resembles cabinet confidentiality. MPPs or MPs who are in cabinet are elected with a political mandate and they go into cabinet and make arguments and know that information will remain in the cabinet room. There are rare, but unfortunate, cabinet leaks and this fact should make us pause before we rush into a decision about having MPs sit on such advisory committees.

Here is a further point to think about. The present system has led to some surprising nominations that, with the passage of time, have been heralded as courageous or inspirational. It could be argued that the more people involved in the process, the safer appointments are likely to be. A review process could become a barrier to bold or creative appointments, and make it more likely that appointments will be the product of brokering.

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<sup>32</sup> Canadian Bar Association, *Supreme Court of Canada Appointment Process*, March 2004.



### VIII. CONCLUSION

In conclusion, Parliament is absolutely right to deliberate on this matter in the way that it has been. Nothing could be more important than getting democratic reform right. I also commend and very much support the constitutional framework and the description thereof provided by Mr. Cotler that will help guide the deliberations.

The House of Commons Committee has not heeded the clamour of the legal populists. Yet I would encourage those with a scholarly interest in the subject not to dismiss legal populism as trivial. The bench and the bar take the independence of the judiciary for granted. But this view is not necessarily shared and the virtue of it is not necessarily understood by everybody. It is the job of elected officials to explain it. It is also the job of those who are able to speak to the public — and who are accountable to the public — to defend judicial independence.

Whatever the path chosen, reform of the Supreme Court appointment process must respect the fundamental principle of judicial independence. Reform must foster the objectivity, the creativity and the integrity that have characterized the past and present Supreme Court of Canada. In other words, it must attract and allow for the appointment of the best of the best, the most excellent of the excellent.

Nearly two centuries ago, Lord Brougham said that it was the boast of Augustus that he found Rome of brick and left it of marble. I believe that we have inherited and we have now a judicial system — an administration of justice — made of marble. Our challenge is to ensure we leave it of gold.