

**APPOINTING JUDGES:
PHILOSOPHY, POLITICS AND PRACTICE**

Papers Prepared for the
Ontario Law Reform Commission

APPOINTING JUDGES TO THE SUPREME COURT
OF CANADA IN THE CHARTER ERA: A STUDY IN
INSTITUTIONAL FUNCTION AND DESIGN

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TABLE OF CONTENTS

1. INTRODUCTION
2. APPOINTING JUDGES TO THE SUPREME COURT OF CANADA
 - (a) Legal structure of appointing power
 - (b) Patterns in Supreme Court appointments
 - (c) Advent of constraints on discretion
3. SUPREME COURT OF CANADA'S ADJUDICATORY FUNCTIONS UNDER THE *CHARTER*
 - (a) The literature
 - (b) Guardian of the Constitution
 - (c) The legal norms
 - (d) Weaknesses
4. THE INSTITUTIONAL IMPLICATIONS OF THE *CHARTER* FOR THE SELECTION OF SUPREME COURT JUSTICES
5. CONCLUSION

1. INTRODUCTION

The relationship between the nature and quality of adjudication and the design of judicial appointment powers is, surprisingly, a relatively unstudied topic.¹ While many Canadian discussions of the appointing power

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¹ See Douglas A. Schmeiser, "Appointment of Judges in Other Countries", in *Judicial Selection in Canada, Discussion Papers and Reports*, Canadian Association of Law Teachers Special Committee on the Appointment of Judges, (February 1987) 106: "... Canadian society has not given substantial consideration to the training, quality, and process of appointment of its judges." For such a discussion and proposals see E.A. Tollefson, "The System of Judicial Appointments: A Collateral Issue", (1971) 21 U.T.L.J. 162. For reference to the English context, see Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, (1976) at 46. For the lack of attention to this topic in the United States see, for example, Michael H. Shapiro, "Introduction: Judicial Selection and the Design of Clumsy Institutions", (1988) 61 S. Cal. L. Rev. 1555 at 1557 and Ruth Gavison, "The Implications of Jurisprudential Theories for Judicial Election, Selection and Accountability", 61 (1988) S. Cal. L. Rev. 1617 at 1618 n.2.

make reference to the qualities that judges must possess, the comments are usually brief, general or in the negative. Surprisingly, our actual experience in the legal system has not produced a detailed, analytic treatment of the requisite talents, experience, attitudes or skills. The clearest statements of desirable attributes relate to professional achievement and experience. Broader discussions offer little beyond vague and abstract statements as to character, integrity and merit. The lack of precision is reflected in the view, voiced in a number of discussions and implicit in others, that the process of evaluating potential judges is in essence irrational and subjective. At the same time, however, commentators appear to acknowledge the fundamental importance of good judges to the quality of our legal system, a system understood as principled.²

A comprehensive study would start from the nature of excellence in the exercise of judicial authority and work back to the pursuit of excellence in the design of the appointing power. Such a study, however, would be difficult in view of our lack of consensus as to the nature of adjudication, our reluctance to devise standards of evaluation, and our uncertainty regarding their consistent and dispassionate application. Given that answers to these large questions are beyond our grasp, can we begin the project anyway? Is there something that can be said now about the Supreme Court of Canada's new *Charter* role that illuminates, if not the question of judicial appointment generally, at least the considerations appropriate to appointments to that Court?

The question is particularly relevant because of the Meech Lake Accord recommendations for constitutionalization of the Supreme Court and appointment of its judges. These proposals reflected the paramount objective underlying the agreement, namely, the desire to bring the province of Quebec back into the constitutional fold after its exclusion from the agreement that launched the 1982 patriation of the Constitution with the *Charter*. Accordingly, the first ministers did not tailor their proposed amendments to the appointment procedure to the needs arising from the adjudicative role thrust upon the Court in the adoption of the *Charter*. Instead they turned their attention to our pre-existing constitutional arrangements, namely federalism and its attendant demands upon the structures of government. In so doing, they missed an opportunity to integrate the *Charter* into the structure of the institution most radically transformed by its adoption.

The narrowness of concerns addressed in the Meech Lake Accord was particularly significant in light of the proposals outstanding from both the Canadian Bar Association³ and the Canadian Association of Law

² Jacob S. Ziegel, "Federal Judicial Appointments in Canada: The Time is Ripe for Change:" (1987) 37 U.T.L.J. 1 at 23: the impartiality and integrity of our judges and the non-political character of the appointing power are matters of pressing concern; the reform of the present unfettered process imposes a "test of our political maturity as well as of our commitment to the rule of law and the principles of the Charter".

³ *Report of the Canadian Bar Association on the Appointment of Judges in Canada*, (Ottawa: Canadian Bar Foundation, 1985) ("the C.B.A. Report").

Teachers⁴, which call for drastic revamping of the appointing power generally, as well as to the Supreme Court of Canada in particular. These bodies, working independently, have undertaken extensive consideration of the modes of appointing arrangements used in other countries as well as the history of the appointing power in Canada. They have put forward for consideration a system of judicial nominating committees in order to bring broader consultation into a system at times heavily influenced, to its detriment, by partisan political considerations and at best too informal and unstructured to serve other values consistently.

The literature informing these two bodies' recommendations, while not in any way inconsistent with the *Charter* demands upon the judiciary, makes only cursory reference to the new *Charter* functions of the Supreme Court of Canada. Instead, it highlights considerations of ideological balance, social philosophy and the essentially political nature of judicial determinations. What is missing is a detailed consideration of the way in which judges actually analyze *Charter* issues in our highest court.

Eight years into the *Charter* era, the Court has, in the first cycle of *Charter* cases, canvassed most of the rights and delivered its first judgments on the equality clause. Its decisions have elucidated the major institutional features of the *Charter* and developed a settled mode of interpretation. The main characteristic of this jurisprudence is its pursuit of legal norms to flesh out the *Charter's* text and its recognition of the contours of the judicial role it is to carry out. Moreover, the contours of the special role of the Supreme Court of Canada as the nation's highest court on *Charter* issues has emerged.

My objective, in this paper, is to suggest how the *Charter's* demands have transformed the judicial role and to trace the implications of these demands for the appointing process. My approach is internal to the legal system, in contrast to the broader themes of political philosophy, judicial activism or political choice in the literature. Much of the analysis I offer about the now familiar features of the Court's evolved mode of *Charter* analysis will not directly engage the larger political debates about the propriety of rights protection. My presupposition is that the *Charter* must be accepted, as I understand the Court to have accepted it, as a radical transformation of our legal system. In altering the kind of issues that come before the Court as well as the analytic tools for evaluating litigants' claims, the *Charter* has drastically transformed the Court's agenda, but has not — as I shall argue — given the Court a non-judicial role. The judges must still work with legal concepts, engage in legal analysis and provide legal remedies. Thus while the *Charter's* legal norms are newly entrenched and the remedial opportunities are enriched, there is considerable continuity in the adjudicative role.

⁴ Canadian Association of Law Teachers, Special Committee on Judicial Appointments, "Report", May 1986 ("the C.A.L.T. Report"). This Report was distributed to Canadian Law Libraries in a collection of Discussion Papers, *Judicial Selection in Canada Discussion Papers and Reports*, *supra*, note 1, at 217, and is available from C.A.L.T. See Ziegel, *supra*, note 2 at note 1.

This analysis will lay the basis for discussion of the implications of adjudication of rights claims for the appointing power. When we appreciate the actual modes of reasoning new to *Charter* jurisprudence, we can better understand the abilities, experience and character traits most conducive to good *Charter* judging. Then we can turn to the greater challenge, creating an educational and professional culture that will offer the best pool of talent from which the appointers will make their choices.

2. APPOINTING JUDGES TO THE SUPREME COURT OF CANADA

The appointment process for the Supreme Court of Canada derives from the British system. Unfortunately, in its transplantation to Canada the procedure appears to have lost its institutional strengths. This contrast is not without irony: the partisan exercise of the appointing power in Canada may have evolved because the Privy Council, in functioning as the highest appellate court for Canadian litigation until 1949, dispelled the need for those appointing members of the Canadian bench to act upon long-term concern for the disposition of Canadian cases and the growth of the Canadian legal system. The following brief canvass of changing practices in the exercise of the appointing power to the Supreme Court of Canada, against the background of the critical literature and recent reform proposals, manifests the growing national realization that past practice is inappropriate to the current stature and role of its highest court.⁵

(a) LEGAL STRUCTURE OF APPOINTING POWER

The Supreme Court is a statutory court, founded by the Parliament of Canada, pursuant to s. 101 of the *Constitution Act, 1867*, as a general court of appeal. The *Supreme Court Act* makes these appointments the prerogative of the Governor in Council, i.e., the federal Cabinet. When the Court was created, not at Confederation, but in 1875, there was some expectation that it would assume the role of final appellate court. This change did not take place until 1949.⁶

The appointing power for Supreme Court judges took on the contours of the constitutional provision for appointments of superior court judges⁷, which replicated the English practice. In this model, the executive holds

⁵ My purpose is not to present a definitive discussion of Canadian appointment of judges to its Supreme Court but to set out the current understanding of this component of the general controversy about judicial appointment. For detailed treatments, see Angus, "Judicial Selection in Canada: The Historical Perspective", (1969) J. of Cdn. L. S. 220 and Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969).

⁶ See S. Ian Bushnell, "The Appointment of Judges to the Supreme Court of Canada: Past, Present, and Future", in *Judicial Selection in Canada, Discussion Papers and Reports*, supra, note 1, at 1-2.

⁷ See *Constitution Act, 1867*, s. 96-100.

unfettered power of appointment. In England this system has now escaped the hold of partisan considerations and, accordingly, does not attract the kind of criticism levied at its Canadian counterpart. This contrast suggests that while the appointment power consists of a mechanism by which power is exercised, the mechanism itself does not dictate the values by which it is exercised.⁸

The modern English appointing system thus appears to have escaped the vicehold of partisan politics and to produce judges of unassailable ability.⁹ The Lord Chancellor, appointed at the recommendation of the Prime Minister, makes recommendations for superior court appointments and is influential in bringing forward names for the positions of Law Lord, Lord Chief Justice and Master of the Rolls. He does not consult with cabinet colleagues but works from his own familiarity with the members of the bar, confers with senior members of the judiciary, and relies upon the work of a small but important office in the permanent civil service. High Court appointments are, by statute, awarded to barristers of at least ten years' standing; in practice senior members of the bar secure appointments, after sitting as deputy judges for a temporary period. High Court judges, recently, have made up the pool for appointment to appellate positions.¹⁰

⁸ That we have the English system, but operate it to different purposes, is often ignored. See, for example, the "Submission on Meech Lake Accord" prepared by the Special Committee on Judicial Appointments of the Canadian Association of Law Teachers, to the Select Committee on Constitutional Reform, Ontario Legislative Assembly, March 1988, appendix C. Here the English system is considered as one of three "alternative models" for judicial appointment, but rejected because it is not "realistic or desirable to copy the British system in Canada". While this model is attractive because of the "independence and objectivity" of modern Lord Chancellors, it could not operate here because "successive ministers of justice and provincial attorneys general have become too deeply identified with the faults of the existing system to make their latter day successors the focal point of reform."

⁹ See Ziegel, *supra*, note 2, at 4-5 and The C.B.A. Report, *supra*, note 3, at 17-20. The Report states that there are three reasons for the demise of political affiliation as a factor in the appointment of judges in England (in addition to the Lord Chancellor's unique position, in sitting in the House of Lords and therefore immunized from the politics of the House of Commons): first, barristers who participate in politics do not reach the stature at the bar prerequisite to a political appointment; second, the profession, parliamentarians and the public have come to view partisan factors as inappropriate; and third, the leaders of the government exercised an act of political will to rise above partisan and political considerations. The Report does not consider the extent to which such reasons could motivate change in Canada.

¹⁰ See Schmeiser, C.A.L.T. discussion papers, *supra*, note 1, at 106-7; Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976); R.E. Megarry, "The Anatomy of Judicial Appointments: Change but not Decay" (1985) 19 U.B.C.L.R. 113. Professor Ziegel, *supra*, note 2, at 6 n.11 suggests that criticisms of the English system rest not on the quality of appointments but on its secrecy, leading to support for a Judicial Services Commission to recommend possible appointees and to receive applications. He also refers to Griffith, *Politics of the Judiciary*, 3e, 1985 for the view that the English bench would be improved by drawing judges from beyond the upper middle class.

This system offers no checks and balances either before or after appointment, no representation from the bar or the public, no formal procedures or criteria of selection, other than experience at the bar. Power is vested in a member of the executive constrained by the Lord Chancellor's role. Nevertheless, it is exercised apparently free of the partisan and political concerns that otherwise occupy the holders of executive office. The conventional constraints that keep this system oriented toward quality appointments rest in the traditions of impartiality and integrity that attach to the office of Lord Chancellor and to the exercise of the appointing power itself. There are other factors that work to support the system as well, such as the relatively small size of the eligible pool of nominees (a function of the divided bar) and the developed system of evaluating excellence among barristers.¹¹ In addition, once a system functions on a merit basis at its highest level, here the superior court judiciary, the standards in other levels, including the practice of law itself, also rise.

The features of the English system of judicial appointment as well as its operation reflect certain attitudes towards law and adjudication. Although these values permeate the Canadian legal system also, they are not honoured as they might be in the context of appointment of judges. For example, the life tenure signals a commitment to the impartiality of judges, their freedom to make decisions without an eye to promises or rewards. This feature is a hallmark of the evolution of the independence of the judiciary from the executive and legislative branches in English legal history. It reflects the recognition that law is not merely different from politics but best when insulated from it.¹² This commitment to the rule of law has entered our system through the judicature sections of the *Constitution Act, 1867* and their interpretation. In the hands of judges, therefore, the commitment of our legal system to the adjudication of legal and constitutional issues, both at the initiating and appellate level to independent judges, has been secure.¹³

Other features of our legal system also signal commitment to the rule of law. For example, our appellate system with the Supreme Court at its pinnacle reflects the aspiration that law enjoy consistent application and interpretation throughout the country. The inherent jurisdiction of the

¹¹ For example, the appointment of Queen's Counsel, which is also the responsibility of the Judicial Appointments Division, is based on rigorous requirements and investigation. See C.B.A. Report, *supra*, note 3, at 19.

¹² The historical development and importance of this value see W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. at 769-809 and 1139-1179. For a more recent discussion by Professor Lederman see "Judicial Independence and Court Reforms in Canada for the 1990's" (1987) 12 Queen's L.J. 385.

¹³ This is the basic thrust of the jurisprudence generated under section 96 of the *Constitution Act, 1867* as well as certain *Charter* cases. For the former category, see for example *Tomko v. Labour Relations Board (N.S.)*, [1977] 1 S.C.R. 112, *Ref re Residential Tenancies Act of Ontario 1979*, [1981] 1 S.C.R. 714, *Crevier v. A.G. Quebec*, [1981] 2 S.C.R. 220, *A.G. Quebec v. Farrah*, [1978] 2 S.C.R. 638, *McEvoy v. A.G. New Brunswick*, [1983] 1 S.C.R. 704; for the latter see *The Queen v. Beauregard* (1987), 30 D.L.R. (4th) 481 (S.C.C.) and *Valente v. The Queen* (1986), 24 D.L.R. (4th) 161 (S.C.C.).

superior courts and their unassailable jurisdiction in constitutional cases, assure the availability of law-based dispute resolution between individuals and between individuals and the state, especially in regard to the exercise of public power. The structure of appellate adjudication also undergirds the primary position of law in our political structure by vesting the fact-finding function in single judges of original jurisdiction with appeal to panels of appellate court justices on written statements of law as well as oral argument.¹⁴

The values derivative from the rule of law, so evident in the structure and the functioning of our legal system have not, as the following section of this paper demonstrates, informed the exercise of the appointing power at the highest level in Canada. The evolution of an admirable appointing practice in the prototype English system suggests that the design of the mechanism of appointment is not the prime variable for non-partisan, non-political, quality judicial appointments. After briefly reviewing the Canadian practice, and the critical literature it has spawned, I will discuss how the failure of commentators to focus more precisely on the Supreme Court's role and general functions, and more recently on the distinctiveness of its *Charter* responsibilities, has produced recommendations for reform that may not work to improve the system in the most meaningful ways.

(b) PATTERNS IN SUPREME COURT APPOINTMENTS

The extent to which political concerns have dominated the choice of appointees to the Supreme Court of Canada is somewhat difficult to ascertain because the process has not been open to public or professional view. Some of the features of the system may, however, be contrasted to the English system. One major difference has been the involvement of the federal Cabinet, which makes the appointment, acting on the advice of the Minister of Justice.¹⁵

The early years of the Canadian Supreme Court were not prestigious.¹⁶ It appears that potential appointees preferred provincial court appointments as having higher stature and did not want to live in Ottawa. The Court was also not considered a strong court. It was possible to bypass the Court in

¹⁴ The importance of the rule of law as separate and distinct from politics informs both the structure of our legal system and the practice of law as well. This arrangement is to be contrasted with the idea of courts and law as basically counter-majoritarian, evident in the American modes of appointing judges and attitudes to the place of law in society. This contrast reflects the difference between the sovereignty of law (including the constitution), on the one hand, and sovereignty of the people, on the other.

¹⁵ Much of the information set out here derives from Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw Hill Ryerson, 1987) and Bushnell, *supra*, note 6 at 1.

¹⁶ Bushnell recounts that in 1879, a private member's bill to abolish the Court was not only introduced as a private member's bill; it was put on the order paper for second reading with the assent of the government leader and a majority vote in the House of Commons. See Bushnell, *supra*, note 6 at 3.

the appeal process and go directly to the Privy Council and there is anecdotal evidence of agreements on the part of litigants to appeal to the Privy Council regardless of the outcome in the Supreme Court of Canada. In 1922, a Canadian Bar Association report advocated retention of the Privy Council as the final appellate court because of the "greater learning, more varied experience and wider vision" of that body as well as its relative freedom from "political, racial or religious bias and from local prepossessions." The report continued:

[The majority] observes with regret 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 . . .¹⁷

Whether the Court deserved such treatment is a question best left to our legal historians. In this context it is sufficient to acknowledge that until well into this century the attraction of quality candidates may have been compromised to some extent by the nature of the willing pool as much as the policies involved in choosing from it.

Those policies are evident in the statistics. In the period before abolition of appeals to the Privy Council, political experience and ties were a strong factor in appointments to the Supreme Court. Between 1875 and 1949, the year of abolition of appeals to the Privy Council, of the 40 judges appointed to the Supreme Court of Canada, 22 had held electoral office in a legislature and thirteen had been ministers. Eight of these appointees were active politicians at the time of their appointment. A significant number of those appointed were unsuccessful politicians.¹⁸ Appointments to the Supreme Court appear to have been a particular prize for successful federal politicians for other federal appointments do not display such a high incidence of political backgrounds.

When the Supreme Court became Canada's final appellate court we see a different pattern. On an examination of jobs held before appointment one sees the following breakdown when comparing the pre-1949 and post-1949 appointments. Judges composed 57.5 percent of the pre-abolition appointments and 14 percent thereafter. Politicians fell from 17.5 percent to 4.5 percent while practitioners rose from 20 to 31.8 percent. Deputy Ministers went from 5 percent to nil.¹⁹ Unfortunately this information does

¹⁷ Quoted in Bushnell, *supra*, note 6 at 19-20.

¹⁸ The description of the data is somewhat unclear and no footnote is given. See Bushnell, *supra*, note 6 at 20-21. Peter Russell, *supra*, note 15, at 337 notes that "the process of selecting judges was not exactly a talent hunt" and that the politicians and officials regarded the Court and its judges as "instruments of the federal government". See also Snell and Vaughan *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 115 ff. See Cairns, "Who Should the Judges Be? Canadian Debates about the Composition of a Final Court of Appeal", prepared for Berkeley Seminar on Federalism, April 1990, for a discussion of the politics of the appointing power.

¹⁹ Bushnell, *supra*, note 6, at 24.

not reveal political experience or ties other than as indicated by job held at the time of appointment, but the contrast suggests that with the abolition of appeals to the Privy Council came a definite change in the career path of Supreme Court appointees.

Aside from career background, other factors also appear to have influenced appointment decisions. Only Justice Bora Laskin, in the period up to 1987, came from a background other than Scottish, English, Irish or French.²⁰ While ethnic origin may determine religious affiliation, the pattern in Supreme Court appointments has been rigid enough to suggest conscious design. From the creation of the Court until 1909, appointment to a seat vacated by a Catholic went to a Catholic and appointment to a seat vacated by a Protestant went to a Protestant. The 1909 appointment of Justice Anglin, an Irish Catholic from Ontario, appeared to hinge to some extent on his religion. The pattern reappeared thereafter, with Justice Hughes, an Irish Catholic, replacing Justice Anglin in 1909 and Justice Kerwin, also an Irish Catholic, replacing Justice Hughes in 1962. In 1924, Justice Abbott became the first Protestant appointed from Quebec. The pattern of religious continuity on the Court disappears thereafter.²¹ While the most important qualification for appointment appears to have been related to participation in elective politics, other factors clearly influenced final selection.

The composition of the Court has also been influenced by the federal composition of the country. Quebec has always had a fixed number of seats on the Court. The other seats originally were accorded to Ontario and the Atlantic provinces. In 1905, the first western judge was appointed, from Manitoba. The current distribution of the nine seats rests on various bases. Three seats are accorded to Quebec by statute or perhaps by the constitution.²² Other seats are distributed by tradition: 2 or 3 to Ontario, 1 to the Atlantic provinces, 1 to 2 to the Western provinces, with British Columbia having an untested claim to one.

(c) ADVENT OF CONSTRAINTS ON DISCRETION

Amid considerable criticism of the unfettered nature of the appointment power, two major changes occurred that, while not binding on the executive, reflected a concern for the quality of judicial appointments.²³ In

²⁰ The recent appointment of Justice John Sopinka was touted at the time as an "ethnic" appointment. He has Ukrainian background.

²¹ Bushnell, *supra*, note 6, at 11-13.

²² The *Supreme Court Act* assigns Quebec three seats. The amending formula adopted in the *Constitution Act, 1982*, s. 41(d) may, by reference to changes to the Supreme Court under the formula, entrench this requirement.

²³ In regard to the appointments made under the *Constitution Act, 1867*, only constitutional amendment could bind discretion. To the extent that the Supreme Court of Canada has been constitutionalized by the *Constitution Act, 1982*, it falls into the same category.

1967, Pierre Trudeau, as Minister of Justice, approved the establishment of a committee of the Canadian Bar Association to advise on the qualifications for appointment of persons referred to the committee by the government. The evaluation took the form of a rating of well-qualified, qualified, or not qualified. It did not review names for Supreme Court nominees, perhaps because the appointments were made from the appellate bench.²⁴ The Committee, eventually 24 lawyers from leading, urban law firms across the country did not meet to confer on candidates. Instead members passed on their views, individually, to the Chair who then passed on a "consensus" opinion to the Minister of Justice. The time frame for a response was often quite short, for example 48 hours, and the information secured by telephone contacts. The committee was not designed to handle the number of names referred and had some difficulty evaluating persons whom the members had never met or with whose practice they were unfamiliar.²⁵

In 1974, then Justice Minister Lang appointed a special advisor whose task it was to seek broadly for names and information as to qualifications. The process was not directed at individual appointments but at creating a list. The approach is reminiscent of the civil service support staff assisting the Lord Chancellor in his nomination of possible judicial appointees to the Prime Minister in England. The advisory function was not binding on the Minister or on Cabinet. The qualities considered prime for appointment included "sympathy, generosity, charity, even-temperament, integrity, an ability to listen, and an 'impeccable' personal life" as well as "legal ability and experience", religious and ethnic origin, specialized abilities, public service, age and sex.²⁶

Appointments to the Supreme Court of Canada have not been directly touched by these efforts at enlarging the pool and improving the qualifications of its members. There is the possibility of indirect effect because recent appointments have gone to sitting judges, usually at the appellate level. If an effective and efficient system of appointments to the superior courts were in place, the improved quality of appointments would eventually be felt in the Supreme Court of Canada as well. This optimism leaves one important consideration aside. Are there qualifications that relate solely to the Supreme Court *qua* Supreme Court? The literature suggests the unstated view that adjudicative functions are common to all courts and that elevation from court to court follows from demonstrated ability in one's previous position. This attitude may explain why—eight years after the coming into effect of the most drastic change to judicial functions this country has ever seen, a change that has put particularly heavy new burdens on the Supreme

²⁴ Ziegel, *supra*, note 2, at 12 and n. 36.

²⁵ The National Committee on the judiciary is described at 29-34 of the C.B.A. Report, *supra*, note 3.

²⁶ W.H. McConnell, "The Judges, the Courts, and the Constitution: A Third Branch of Government for Canada?", (1988) 52(2) Sask L. Rev. 335 at 345 and Edward Ratushny, "Judicial Appointments: The Lang Legacy" in Linden (ed.) *The Canadian Judiciary* (1976) 31. The latter article is a brief history and account of the Lang approach by his Special Advisor.

Court—there has been little discussion of the design implications for the appointing power to that Court. Before turning to the considerations that should inform selection of Supreme Court judges, I will briefly outline my view of the nature of *Charter* adjudication in Canada's highest Court.

3. SUPREME COURT OF CANADA'S ADJUDICATORY FUNCTIONS UNDER THE CHARTER

(a) THE LITERATURE

The extensive literature on the appointment of judges in Canada devotes little attention to the Supreme Court of Canada *per se*. Ignored is the general role of the Supreme Court as the final court of appeal, as the ultimate interpreter of our constitution, and as the bulwark of our system of constitutional democracy. Perhaps one can explain this phenomenon in its own terms, i.e., by concluding that this failure to single out the Supreme Court as requiring distinctive judicial talent reflects a generally held view that it does not. Or, one might take the view that the Supreme Court, in acquiring the best legal talent in the system, escapes the problems of an appointment process that offers no consistent assurance of quality. Another way to explain this silence is to understand the repeated, broad-ranging complaints about the practice of appointing judges in Canada as pervasive, extending to all levels of court, so that the Supreme Court attracts no special comment.

The most extensive comments relate to the Court as an institution deliberating upon questions of federalism. It is inappropriate, it is said, for only one level of government to appoint the judges to such an important federal institution. Similarly, commentators have stressed the need for regional representation on the Court to ensure familiarity with the distinctive features of each major region. The argument for judges from Quebec goes further, asserting the need for civil law training & experience as well as background in the practice of law in the French language in order to deal with civil law issues and cases argued in French.²⁷

The Court's position at the apex of the appellate system has also drawn comment. The Canadian Bar Association, for example, stresses the need for the independence of the Court as well as the appearance of independence.²⁸ The Court's stature has also been the basis for a call for the "best" judges.²⁹

Although calling for "excellence" and "merit", the literature rarely articulates the qualities desirable in judges at the highest level. Indeed, it

²⁷ Peter W. Hogg, *Meech Lake Constitutional Accord Annotated*, (1988) at 33.

²⁸ *Report of the Canadian Bar Association Committee on the Independence of the Judiciary*, (Ottawa: Canadian Bar Foundation, 1985) at 51-53. Independence from the Justice Department is stressed.

²⁹ Bushnell, *supra*, note 6, at 8. This comment is made in the context of a discussion of the distinctive "lawmaking" function of judges on the Supreme Court.

alludes frequently to the hopelessness of the task of articulating the qualities required or desired and the subjective nature of the task of ascertaining whether a particular candidate for appointment meets the grade. The Canadian Bar Association Report on Appointment of Judges in Canada contains an unusually detailed venture into cataloguing the criteria but this is not a list directed at the special role of the Supreme Court. There is seldom any attempt to reconcile the tension between the calls for "merit", "excellence" and "superlative credentials" and other desiderata, e.g., regional representation.³⁰

Surprisingly, this general silence has continued despite the adoption of the *Charter*. The *Charter* has changed the Court's docket, necessitated new modes of analysis, provided a different theoretical and comparative landscape, and imposed the burden of integrating the *Charter* into the complex structure of the Canadian legal order. While the Canadian legal literature abounds with articles on the *Charter*, and even on the Supreme Court of Canada and the *Charter*, there has been relatively little writing about the implications for judicial appointment procedures of the Supreme Court of Canada's new *Charter* role. One finds no discussion of the high institutional costs of leading the nation into a new phase of judicial review of constitutionalized rights and freedoms. Indeed, the Meech Lake proposals, which addressed the issue of appointments to the Supreme Court with no reference to the critical literature on the appointing power or the proposals it has produced, stands as the most recent exemplar of avoidance of this issue.

The new "public policy" or "political" role of the Court on *Charter* cases is the subject of frequent comment but not extended analysis. For example, Professor Russell has called for "ideological balance" on the Court, echoing the American controversy about the role of the American Supreme Court in rights litigation, and also suggested that as the *Charter* displaces federalism as the "significant" component of the Court's work, regional concerns may have to bend to the pursuit of this balance.³¹ The Canadian Bar Association sees the *Charter* as increasing the need for independence for the Supreme Court as well as the desire for the best possible appointees. In particular, it notes that the Court's determination that it has jurisdiction

³⁰ For one such discussion see McCormick, "The Courts: Toward a Provincial Role in Judicial Appointments", Gibbons (ed.) *Meech Lake in Canada: Perspectives from the West* (Edmonton: Academic Printing & Publishing, 1988) at 46-7. For the limits of process upon the quality of judges and the suggestion that judges must be educated to their role, see Tollefson, *supra*, note 1.

³¹ The concern is for "ideological pluralism", rather than "ideological neutrality" because Supreme Court appointees will bring commitments to "major philosophical and jurisprudential issues" to the Court. The discussion goes on to contrast the preference for provincial rights of Justice Beetz to the centralism of Chief Justice Laskin, in the federalism context, and the deference to legislatures demonstrated by Justice McIntyre and the inclination to treat *Charter* rights and freedoms as absolutes by Justice Wilson. See, Peter H. Russell, "Meech Lake and the Supreme Court", in K.E. Swinton and C.J. Rogerson (eds.) *Competing Constitutional Visions: the Meech Lake Accord* (Toronto: Carswell, 1988) at 103 and 107-8.

to deliberate, upon the *Charter* consistency of cabinet decisions makes appointment of judges by the federal Cabinet inappropriate.³²

The literature on the appointment of judges to the Supreme Court thus takes a surprisingly limited view of the new demands of the *Charter* on Supreme Court judges. The transformation of the Court's role is considered almost exclusively in political, rather than legal, terms. The literature also draws very little on what the Court has been saying about its *Charter* role and even less upon what those judges who have led the Court in adumbrating the new Canadian jurisprudence of rights have been doing in *Charter* cases. Eventually, there will be a pool of lawyers and judges who will have been educated, and who will have practiced law, in the *Charter* period. In the interim, there will not be a large pool of lawyers and judges who have extensive background in the particular skills, knowledge base, and modes of argument that are specific to rights adjudication. The appointment process should be a sufficiently finely tuned instrument to address the special needs of the Supreme Court in the early years of the *Charter*. To understand the dimensions of the task of *Charter* adjudication, I now turn to a discussion of its nature and content.

(b) GUARDIAN OF THE CONSTITUTION

The burden of the *Charter* on the Supreme Court is not entirely new. To some extent one can understand the *Charter* as broadening existing functions. In the decades that the Court has been the final arbiter of constitutional questions of the highest importance, it has put its stamp on many areas of constitutional law, while signalling future departure from both interpretive approaches and specific doctrine laid down by the Privy Council.³³ We have come to expect the Court to function as the highest appellate court on disputed questions of law-making jurisdiction and, through interpretation, to establish both the rigidity and the resilience of the constitutional principles that underlie the constitution's strictures.

In the period leading up to the adoption of the *Charter*, cases like the *Senate Reference*³⁴ and the *Patriation Reference*³⁵ presented the Court with the opportunity to reflect upon the deeper themes of our constitutionalism and, as we can now understand in retrospect, a period of transition to its

³² C.B.A. Report, *supra*, note 3 at 8, 60-61.

³³ E.g., the modern Supreme Court has determined a new role for the POGG authority, extending federal power to regulate the economy (*Ref. re Anti-Inflation Act*, [1976] 2 S.C.R. 373 and natural resources (*R. v. Crown Zellerbach Canada Ltd.* (1988), 49 D.L.R. (4th) 161 (S.C.C.)). And the Court may have signalled even more dramatic transformation for the trade and commerce power, see e.g. *City National Leasing v. General Motors* (1989), 93 N.R. 326 (S.C.C.).

³⁴ *Re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54.

³⁵ *Reference re Amendment of the Constitution of Canada* (Nos. 1, 2 and 3), [1981] 1 S.C.R. 753.

new role under the patriated Constitution and the *Charter*. In these cases the Court was not faced with the usual battles between the federal and provincial governments for regulatory authority under the division of powers set down originally as watertight compartments in sections 91 and 92 of the *British North America Act, 1867*. At issue were the very principles that precipitated Canada's federalism, that gave form to our national and provincial institutions of government and that generated the universe of interpretive rules in which the Court functioned in less momentous times.

This period was not taken up solely in introspection on the categories of our constitutional organization. As the Court developed new confidence in the larger and more abstract issues of our federalism, it was also becoming more confident in the area of legislatively protected human rights. From the early conceptual confusion and institutional timidity of its interpretation of the *Canadian Bill of Rights*, the Court emerged as a champion of statutory rights protections. This development in the Court's work reflects its recognition of the importance of the commitment to anti-discrimination in the opportunities for housing, employment and services in modern society, as demonstrated by their enactment in each province and at the federal level, as well as the movement internationally to hold nation states to prescribed values of individual dignity and integrity. But while the Court was able to interpret and enforce these statutory orderings of private relationships with conviction as to the egalitarian principles underlying their adoption, it was not able to extend this approach to constraints on law-making power itself. In its interpretation of the *Canadian Bill of Rights*, the Court appeared unable to give interpretive force to the values stated in the instrument because it could not satisfy itself of the legitimacy of the judicial role entailed.

This perplexity about the role of the judiciary in policing the laws enacted by legislatures, so evident in the tension between the majority and dissenting judgments in the cases under the *Canadian Bill of Rights*, set the stage for the remarkable judgment in the *Patriation Reference*.³⁶ Here the Court considered the propriety of an initiative, undertaken by the federal government and only two of ten provinces, to seek amendment of the Constitution by the U.K. Parliament in the form of adoption of entrenched rights and freedoms applicable to both the federal and provincial governments. The Court determined that, while an amendment secured in this way would have legal force, the lack of more extensive support from the other provinces marked a breach of constitutional convention.³⁷ The Court's remarkable

³⁶ *Supra*, note 35.

³⁷ First the Court concluded that both federal and provincial jurisdiction would be circumscribed by the *Charter's* adoption. Next, it determined, by historical and political analysis, that amendments to the constitution having this effect had traditionally emerged from federal provincial consensus. This conclusion then acquired both expected and unexpected significance. The Court ruled, as had been expected, indeed as had two of the three provincial appellate courts that considered the question earlier, that the amended constitution would have full legal force. In an unexpected caveat, however, the Court ruled that if the federal government proceeded without greater provincial support, it would effect a breach of constitutional convention.

excursion into the territory of constitutional convention, a matter of political rather than legal significance, may reflect its projection of the workings of the proposed *Charter*. The Court may have anticipated the need for the highest form of political legitimacy for its role in checking every act and enactment against the new *Charter's* strictures. If the Constitution were to impose such a function on the judiciary, the Supreme Court would not want the provinces to view the new restrictions on its powers as politically illegitimate in terms of the traditions of Canadian federalism.³⁸

The Court's ruling on the political impropriety of the federal initiative sent the first ministers back to the negotiating table and to a hitherto unattainable compromise. The Court's twin rulings imposed great pressure on the negotiations: they gave impetus to the federal initiative by holding out the spectre of a legal *fait accompli*, yet at the same time heartened the hold-out premiers' in their resistance to the diminution of provincial powers in light of the uncertainty as to the effect of the ruling as to constitutional convention on the political actors who would have to move the amendment through the U.K. Parliament.

The outcome of these eleventh hour discussions was a transformation of the institutional structure whereby rights were to be guaranteed. The courts were to articulate the content of the guaranteed rights and freedoms, determine in particular instances the fact of infringement, and where appropriate, determine that infringements were justified limitations upon those rights and freedoms "in a free and democratic society". This much the previous drafts had provided. New to the project of rights entrenchment was a legislative override of the rights and freedoms that did not engage values already entrusted to the courts, i.e. the values of our federalism and constitutional democracy. Thus while the courts were to enjoy what has become the traditional role of courts under a rights protecting instrument, they were not to have the final say for the most controversial rights and freedoms, i.e., those that embraced values of individual dignity and integrity against the state. For those interests, the legislatures or Parliament by simple majority would hold sway over the Constitution's guarantees if they expressly signalled the intention to do so. The overriding power was further conditioned with a five year maximum duration, a period coincident with election frequency.

This novel institutional structure for rights protection, which followed upon the Court's sophisticated distinction between the spheres of legal and political constitutionalism in the *Patriation Reference*, has facilitated a distinctive mode of rights protection. The presence of the override has liberated the Court from the burdens of ultimate political responsibility for

³⁸ The Court may even have had in mind the difficulties which the American Supreme Court, viewed as a federal court interpreting federal values, experienced in terms of the acceptance by the southern states of its civil rights rulings. The tension in the United States works on two levels, in contrast to the Canadian situation, because it was the dual court system as well as the identification of the constitutional values as federal, that fuelled the controversy about legitimacy.

its rulings on the most controversial of the rights in the context of liberal democracy. When and if a judicial ruling proves intolerable, the political avenue of the override is available. For this reason, we have seen little of the crisis of legitimacy that other countries have experienced in the aftermath of unexpected rulings upholding rights protection by the judiciary. Because the judiciary does not have the ultimate authority to negate the discredited enactment or exercise of power, it can attend to the more legal aspects of rights protection without political distractions.³⁹

The override, however, does not merely continue the pre-*Charter* powers of Parliament and the legislatures. On the contrary, the use of the legislative power to override guaranteed rights and freedoms requires an express statement of override and may continue for only a maximum five year period. If a government wishes to extend its application, it must move to re-enact it in the same terms. These features of the override endow what was formerly merely a legislative policy with deep constitutional implications. Moreover, the maximum five year period keeps both the policy itself as well as these constitutional implications before the public eye. The price for using the override is therefore high, one that engages not only responsibility for enacting the policy in question but for doing so despite its inconsistency with the *Charter's* norms.

The institutional structure of the *Charter* thus frames roles for courts and legislatures that are appropriate to the traditional functions of courts and legislatures in our system of constitutionalism. Legislatures do not lose control of the policy-making function in regard to the values that before the *Charter* were within their exclusive legislative prerogative. But they must either answer to the courts for the violation of these values or secure prior legislative approval of their temporary subordination to other priorities. The forum for these determinations is, as before, the system of constitutional democracy enjoyed before the *Charter*; the costs are the currency of political support. Similarly, the function of the courts remains distinctly legal. To the judiciary goes the task of articulating the content of the rights and freedoms, findings of infringement, and justification of limitations. These responsibilities engage the values that imbue the rights and freedoms at every stage and thus do not make of the courts, as critics have asserted, superlegislatures. That label best applies to legislatures when they invoke the notwithstanding clause to forestall or temporarily reverse judicial determinations limiting their policy choices.

This general background is important to understanding the specific legal role of the courts under the *Charter*. The thread that ties the various modes of *Charter* analysis together is the division of authority along institutional lines that the *Charter* dictates. The Courts, free by virtue of section 33 from the political responsibility for the implications of their holdings for governments, can concentrate on the primary judicial task at hand, namely, the transformation of the *Charter's* general and relatively terse language into

³⁹ See Lorraine E. Weinrib, "Learning to Live with the Override", (1990) 35 McGill L.J. 541.

a principled and detailed system of legal norms.⁴⁰ The controversy that might be generated by particular issues and rulings need not plague the judges because it is irrelevant to their disposition of the legal questions presented for resolution. The judges' work has undisputed political significance on the political stage. In its production, however, the judges rely on legal modes of analysis, leaving political evaluation of its deliberations and its conclusions to others.

(c) THE LEGAL NORMS

As guardian of the *Charter*, the Court is the authoritative expositor of its legal norms. In this role, and in a relatively short span of time, the Court has developed a systematic framework for *Charter* adjudication and laid out the contours of its understanding of *Charter* interpretation. Despite the fact that its cases arise in an unpredictable order and are presented with varying degrees of proficiency in the new skills and knowledge required for *Charter* litigation, much of the Court's early case by case adjudication reveals an orderly framework for *Charter* adjudication. The main characteristic of the Court's initial approach was its commitment to the values that inhere in rights protection, namely, the pre-eminent dignity of the individual as the irreducible core of political community.⁴¹

The Court has created a format for adjudication that both systematically organizes the variety of considerations arising in rights litigation and maintains the legal character of the analysis. The primary feature of this format is its two stage sequence. Under section 1, rights enjoy a two level guarantee, one of the right or freedom itself – set out in other sections of the text – and the second a guarantee of only a specific type of limitation on the content of the right or freedom in question.⁴² The sequential format follows from the text of section 1 by distinguishing the formulation of the content of the

⁴⁰ The judiciary must also integrate the system of rights protection into the larger framework of our constitutionalism. See, e.g., *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 and *Ref re Bill 30, An Act to Amend the Education Act*, [1987] 1 S.C.R. 1148.

⁴¹ I do not claim that every case demonstrates these characteristics, but that the mainline thinking of the Court in the major cases does. I argue elsewhere that the divergence from this path is not so much a matter of disagreement within the universe of the *Charter's* interpretive possibilities, as rejection of it altogether. See, "Two Models of Rights Protection: *Charter* Adjudication in the Supreme Court of Canada", forthcoming. The tension between these two approaches, which I do not develop here, is not to be denigrated. Indeed, on the occasions when what I have called the "majoritarian model", i.e., the approach that rejects the *Charter* as part of the supreme law of the Constitution, emerges as the majority position of the Court, much confusion is generated. For the purposes of this paper my concern is that the selection process produce judges who can develop clear and cogent legal argument while leaving the propriety of entrenching the *Charter* as well as the wisdom of the impugned enactment or decision to others.

⁴² Section 1 states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably

right from consideration of the permissibility of limitation upon it. The clear separation of the two parts of the adjudicative function in this way bolsters the legal quality of *Charter* review in both stages of judicial review.

In the first stage, the Court assesses the allegation of infringement of one or more guaranteed rights or freedoms. This analysis is the most traditional part of the review function under the *Charter* as it involves interpretation of the stated guarantee and evaluation of the alleged facts of infringement. After many years of *Charter* litigation, one can expect that the content of these rights will be reflected in the body of rulings generated by a wide variety of litigated cases, but in the early period, when this accumulation of case law is unavailable, the Court has refrained from offering broad definitions of the rights and freedoms. Instead, it has adopted a "purposive" mode of interpretation, reading the rights and freedoms as a codification of the values of human dignity that inform the project of rights protection generally.⁴³ Sometimes the judges find manifestations of these values in other parts of our legal system (such as the common law, statutory history, dissenting opinions from the pre-*Charter* period), in other systems of rights protection at both the national and international level or beyond legal material in theoretical writings on rights. Whatever the source relied upon, the judicial task is to set out the normative qualities of the activities protected by the *Charter* guarantees.

The first stage of analysis takes the point of view of the rightholder, not of the policy maker devising or defending the enactment or decision alleged to infringe the *Charter* guarantee. For example, the Court has imagined itself in the place of an accused standing before his family, employer and community charged with an offence but not brought to trial for an inordinate period; a member of a religious group whose patterns of commerce, both personal and occupational, are affected by religious belief and practice; as an individual whose mother tongue is that of the minority and not of the majority in the educational setting; as a pregnant woman seeking a permissible therapeutic abortion when availability of abortion is rationed on grounds other than therapeutic need. This imaginative entering into the world view of the rightholder enriches the analysis by giving contextual reality to the claim.⁴⁴

justified in a free and democratic society.

For a more detailed discussion of the interpretation of s.1 see L.E. Weinrib, "The Supreme Court of Canada and Section 1 of the *Charter*", (1988) 10 Sup. Ct. L. Rev. 469.

⁴³ On occasion the Court has styled its interpretation "large and liberal", language that has suggested to some readers that the approach is broad and expansive rather than principled. The Court's approach is to read the right or freedom guaranteed in terms of the underlying project of rights protection, not to presuppose wide entitlement.

⁴⁴ In order to assure greater access to the point of view of those most affected by the alleged infringement, the Court has allowed intervenors to represent public interest and advocacy groups which have a stake in the particular interests in issue. Also, the Court has relaxed strictures, e.g. proof of facts and finding of facts only at trial level, in order to ensure that it has the broadest database available in order to understand the social and economic implications of its determinations. This pattern is also evident in the litigation of *Charter*

In the second stage, the Court preserves the legal character of the analysis by continuing to adhere to the normative review undertaken in the first stage. The Supreme Court initially, somewhat surprisingly, resisted the view—common to the literature accompanying the *Charter's* coming into force—that the second stage of adjudication afforded by the *Charter's* express provision for justifiable limitations on guaranteed rights and freedoms invites the Court to consider broad-based calculations of social welfare. In contrast to the common wisdom, the Court has stated that this analysis is tied to the same legal frame of values as inform the first stage of *Charter* adjudication, namely the values that underwrite rights protection.⁴⁵ In leading cases, it has restricted itself to that legal framework and eschewed consideration of interest balancing, maximization of social welfare and financial or administrative expediency.⁴⁶

The legal quality of analysis in the second stage is facilitated by the shift in onus that the Court has established between the two stages of adjudication. In the first stage, it is the rightholder who bears the burden of proving the alleged content of the guarantee and the fact of infringement. For these questions, it is appropriate for the applicant or plaintiff to bear the burden of persuasion, because the facts and the interests are accessible by research into legal or theoretical material and the facts of the occurrence in question. Because the Court wants to be enlightened as to the point of view of the claimant, it is the claimant who is best placed to inform the Court. In the second stage, however, the applicant or plaintiff does not have access to the material that the Court seeks. The data, policy grounds or inter-mesh of government-wide considerations that may have motivated the enactment or decision impugned are beyond the claimant's reach. Moreover, the applicant or plaintiff does not know whether the state would choose to maintain the impugned measure in the face of a finding of infringement by a court. Therefore, it is appropriate for the state to bear the legal burden of justification and for the claimant to react to the arguments, if any, put forward in support.⁴⁷

cases at first instance and at the appellate level. See *McKay v. Manitoba* (1989), 61 D.L.R. 4th for the Supreme Court of Canada's statement that *Charter* adjudication requires a factual record informed by expert insight into social, political and economic implications and projections of future impact of the issues under review.

⁴⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103, at 135, per Chief Justice Dickson:

Inclusion of these words ["free and democratic society" in section 1] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. . . . The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

⁴⁶ *Singh v. Min. of Employment & Immigration*, [1985] 1 S.C.R. 177, *Ref. re s. 94(2) of the Motor Vehicle Act*, (B.C.), [1985] 2 S.C.R. 486, *Re Andrews and Law Society of B.C.*, [1989] 1 S.C.R. 143, *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712, and *R. v. Keegstra*, unreported (Dec. 13, 1990, S.C.C.).

⁴⁷ The shift in onus to the state in the second stage also facilitates the Court's view that the *Charter* imposes responsibility on the state for the impact or effects of its policies, and not

The distinctiveness of the justification stage of *Charter* adjudication goes beyond the rejection of arguments based on cost and convenience and general societal well-being. The Court has eschewed these instrumental grounds as inappropriate bases for justification for limitations on guaranteed rights and freedoms and has also refused to consider explanations for policies as "reasonable", or as supporting a particular vision of morality or political organization. Thus in leading cases such as *Morgentaler*⁴⁸ and *Ford*⁴⁹, the Court has required the state to maintain its commitment to the values that inhere in the rights, even in their limitation.

This approach has been buttressed by the presence of section 33 in the *Charter*, allowing legislatures to override certain *Charter* rights by simple majority when formal prescriptions are followed. Because the Court is not the final arbiter of the major questions that come before it, it can indulge in the legal analysis that it does best and let that analysis lead to the appropriate conclusions. While the Court must bear public scrutiny for its reasoning, it need not bear the political burden of its rulings. The responsible legislative body, be it Parliament or a legislature, must decide to live with the decision or override it on any grounds, not just those that the Court can entertain as principled justification.⁵⁰

(d) WEAKNESSES

Any weakness apparent in the Supreme Court's early development of a legal system for adjudication of *Charter* issues, both in terms of adjudicative features and legal substance, lies in the sheer magnitude of the project, not in any lack of commitment to the legal nature of the undertaking. The Court had to see deeply into the principles of Canadian constitutionalism and the entrenchment debate in order to understand that the *Charter* has deepened rather than transformed its task of monitoring the adherence of the other branches of government to the values of fairness, equality and respect for difference, which are the foundation of our constitutional order. The *Charter* does, however, require the Court to realize these values in new ways and by

merely for their intended effects. Because the state is not only a respondent to the litigation, but bears a burden of persuasion if it chooses to argue that its policies are justified limitations on guaranteed interests, it is not inappropriate to recognize responsibility for the unintended, unforeseen and unknown impairment of *Charter* rights and freedoms.

⁴⁸ *Morgentaler v. The Queen*, [1988] 1 S.C.R. 30.

⁴⁹ *Ford*, *supra*, note 46.

⁵⁰ This view is borne out by reference to the aftermath of the *Morgentaler* decision, *supra*, note 48. We have not seen in Canada the crisis of legitimacy that the American Supreme Court has experienced after it decided *Roe v. Wade* (1973), 410 U.S. 113, recognizing a right to "privacy" including unfettered access to abortion in early pregnancy although the volatility of the issue in the two countries is comparable. The federal government, asked immediately after the *Morgentaler* judgment was released if it was going to use s. 33 to override the Supreme Court of Canada's judgment, indicated that it would not. In my view, the override mechanism insulates the Court from accusations of usurpation of the policy-making function in a democracy.

reference to new bodies of material. The wider intellectual landscape required in the adjudication of *Charter* claims, as well as the new skills necessary to deal with this new reference material, have put demands on the Court that must eventually impinge upon the appointing process.

There are a number of areas where the Court's analysis has been flawed, inconsistent, and poorly reasoned. This is not the place to elaborate upon the failings of the Court's *Charter* jurisprudence in detail. For the purposes of drawing a link between what the Court should be doing well and the selection of judges, it is sufficient to briefly canvass some of the areas where the Court's judgments demonstrate a need for improvement.

One of the weakest areas is the reliance upon American case law and rights theory. Members of the Court have, on occasion, indicated keen awareness of the differences between the American and Canadian constitutional structures, history and principle. Yet, in the judgments one often sees reference to American case law for propositions for which those cases have never stood in the American system, for outmoded principles, and for ideas that are wholly inappropriate for Canada.⁵¹ Rarely, one finds incorrect accounts of the historical development or the current state of American doctrine. Critical and uninformed absorption of American rights jurisprudence can only undermine and distort the *Charter*. In our constitutionalism at least, we should be able to escape from the shadow of the American giant.

The Court has turned more often to American references than to other systems of rights protection. While there appears to be understanding on the part of a number of the judges that the *Charter* is part of the movement since the second world war towards rights protection, recourse to international systems of rights protection as models for the *Charter's* text and its mode of rights protection has been rare. In addition, there have been relatively few references to cases in these systems. Recourse to patterns and examples of rights protection closer to our own would ease the Court's burden of creating argument from first principles on every occasion.

When the Court deals with larger, more abstract ideas, one often sees reasoning that is not as strong or as clearly articulated as is more focussed analysis. For example, the Court has had some difficulty with its examination of legislative schemes that offer exemptions, particularly exemptions to the rightholder that do not go far enough to escape the badge of rights infringement.⁵² Broad concepts have also posed difficulty. Members of the

⁵¹ See, e.g., *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, *Jones v. The Queen*, [1986] 2 S.C.R. 284 and *Morgentaler*, *supra*, note 48, *Rocket v. Royal College of Dental Surgeons of Ontario* (1990), 71 D.L.R. (4th) 68 (S.C.C.), and the dissent in *Keegstra*, *supra*, note 46. For analysis of the use of American constitutional law in *Morgentaler*, see Lorraine E. Weinrib, "The *Morgentaler* Judgment: A Study in Constitutional Rights, Statutory Purposes and Institutional Design", forthcoming, U.T.L.J.

⁵² E.g., *Jones*, *supra*, note 51, *Edwards Books & Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713, and *Morgentaler*, *supra*, note 48.

Court have had difficulty articulating and developing argument based on contrasts between substance and procedure,⁵³ substance and form,⁵⁴ and criminal and civil areas of law.⁵⁵ Similarly, when the occasion demanded consideration of the interconnection of various component parts of the legal system, e.g., the common law and the *Charter*⁵⁶ or various parts of the constitutional system,⁵⁷ the analysis has not been as strong as it might be.

Members of the Court have also made surprisingly little use of rights theory in *Charter* cases.⁵⁸ The absence of discussion of the *Charter's* distinctive features in terms of the various theories of rights protection available has made the Court's task more difficult because some of the varied components of its interpretation of and extrapolation from the *Charter* text have appeared to be less systematic than they are because they lack the theoretical underpinnings that demonstrate coherence. I would be surprised if the Court's rulings would be as good as they have been if the judges were not absorbing general theoretical principles from wider reading. Reference to this material, where it has informed the judge's approach, would be helpful because it would lead the academics, lower court judges, and the profession along the judges' intellectual pathways.

The Court has also been uneven in its analysis of kinds of material which did not often come before the court formerly in the litigation of pre-*Charter* cases. For example, *Charter* cases often include mammoth records bringing to the Court's attention statistical information, expert opinion that is often untested by cross-examination, government studies and reports, and similar material from other countries and from international rights-protecting systems. The sheer volume of such material poses problems for the resources of the Court. In addition, this material poses questions of fairness to all the parties when it is accepted without the customary constraints put upon admission of evidence by courts of law. On occasion, the Court has made reference in its judgments to material that was not put before the courts by the parties at all. Since the Court often makes determinations in cases that have not been fully documented by the litigants, one can understand that the Court would want to supplement its information base when

⁵³ *Morgentaler*, *supra*, note 48, but contrast *Singh*, *supra*, note 46 and the *Motor Vehicle Reference*, *supra*, note 46.

⁵⁴ *Ford*, *supra*, note 46.

⁵⁵ *R.W.D.S.U., Local 58 v. Dolphin Delivery*, [1986] 2 S.C.R. 573.

⁵⁶ *Dolphin Delivery*, *supra*, note 55, but contrast *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

⁵⁷ *Ref re. Bill 30*, *supra*, note 40. Contrast *R. v. Big M Drug Mart*, *supra*, note 40 and *R. v. Turpin*, [1989] 1 S.C.R. 1296.

⁵⁸ Notable illuminating references include *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 where the writing of Ronald Dworkin and John Rawls is cited, *R. v. Therens*, [1985] 1 S.C.R. 613 where Dworkin is cited by Le Dain J. and *Edwards Books*, *supra*, note 52, where, in dissent, Wilson J. also makes reference to Dworkin's writing.

the occasion warrants. There are wide implications for the integrity of the system, however, when the Court goes beyond the record without giving the parties the opportunity to consider this material.⁵⁹

The demands of the *Charter* are heavy indeed. One must deal with issues of great concern to the litigants—and often of momentous public interest as well—in the context of the broadest and deepest configurations of our legal order, while informing one's analysis with the most developed sources of reference in other systems of rights protection and in the theory of rights. And this very difficult mode of analysis must be reduced to one text in a series of consistent, clear and well-reasoned judgments. A reader of the Supreme Court's *Charter* cases will be aware that a number, but not all, of the members of the Court have engaged in the task with energy and intellectual intensity. When all members of the Court do not take on the burden of the *Charter* caseload, an exceptionally heavy burden is placed on the others. Perhaps the pattern is a function of the transition into the *Charter* period such that several of the judges have found it difficult to come to terms with the new demands. Or perhaps the illness that has plagued the Court recently has reduced its capacity to meet all *Charter* cases with adequate time and commitment of institutional resources. Whatever the explanation, the *Charter* component of the Court's caseload is too large and too important for less than the full Court to follow closely and carry forward with high standards and full commitment.

4. THE INSTITUTIONAL IMPLICATIONS OF THE CHARTER ON THE SELECTION OF SUPREME COURT JUDGES

This inside view of the actual task that the Supreme Court of Canada performs in one important area of its jurisdiction can inform the selection process for its justices and, by setting standards for that process, establish a richer intellectual culture in the legal profession as well. The function of *Charter* adjudication, once understood as a sophisticated system of legal analysis engaging a broad range of legal, social and political thought, requires an ascertainable range of ability, skills and interests. An effort at articulating these qualities is the first step in developing a system of appointment for the Supreme Court that would provide the best appropriate talent for the highest level of our judicial system. It would also suggest the desirability of fostering certain intellectual interests and modes of thinking within the system of ongoing legal education and professional training.

⁵⁹ See, eg., *R. v. Askov* (1990), 74 D.L.R. (4th) 355 (S.C.C.) and *McKinney v. Univ. of Guelph*, unreported (Dec. 6, 1990, S.C.C.). In a related area, the Court has not followed a consistent path in its decisions about admitting intervenors in *Charter* cases. The question of the role of intervenors is important as is the consideration of the extent of their participation when they are given permission to participate. Often intervening public interest groups have access to data and studies not generally available that may be of interest to the Court. The question arises whether such material can be made available to the Court for the first time at the Supreme Court of Canada level, when the parties have little opportunity to respond.

Attention to the individual talents and skills of nominees should not shape the appointing process to the exclusion of consideration of the collegial functioning of the Court as the court of final resort. Sitting as a full nine person court, especially in major cases, the judges must be able to do a better job than any number could do individually or in smaller groups. This, presumably, is the reason for the structure of our appellate court system into bodies that deliberate in groups on questions of legal, rather than factual, content. As our highest appellate court, the Supreme Court is charged with the task not only of finally resolving important disputes as to the lawful exercise of state power, but also of formulating well-reasoned judgments for its decisions. These reasons for judgment should place the result in the context of existing legal decisions as well as in the wider universe of appropriate jurisprudential principles; they should also resolve any discrepancies among the provincial appellate courts on the issue. Those who disagree with the majority holding should write lucid, well-argued dissenting opinions that set out the basis for disagreement in terms of factual material and principle. While one cannot reasonably expect every judge to hold the wide-ranging intellectual background that must be the corporate resource of the Court in *Charter* cases, one can expect the selection process to be sensitive to the inter-active nature of the Court's deliberations and to ensure that new appointees add to the substantive knowledge as well as the consensus building and judgment-writing resources of the bench.⁶⁰

This brief sketch of intellectual and collegial tasks of Supreme Court judges in *Charter* cases suggests that a good selection process should set down criteria for nominees. Candidates should be able to demonstrate strong showing on the variety of skills and knowledge required for the production of the clearest, closely argued judgments on *Charter* issues. In addition, they should manifest intellectual drive to resolve difficult and controversial questions according to legal principles, without diverging into consideration of political consequences that might follow. Equally important is the patience for the painstaking task of building argumentation in conference and in opinion writing. Part of this function is the willingness to review other opinions for consistency of reasoning, strength of argument and supporting material as well as to detect errors or weaknesses. Because consensus in result on difficult questions of first impression is not to be expected, one must take care that all appointees have the ability to write concise, well-reasoned and well-articulated dissents.

A clue to the judges' understanding of their work is discernible in the selection process they have developed for hiring their individual clerks and administrative assistants. The judges look for evidence of academic

⁶⁰ I leave aside the question of administrative skills which must at least be in the possession of the Chief Justice. Appointment to that position, and the question of whether there should be an associate chief justice position as well, are beyond the range of this paper. Suffice it to say that a similar type of analysis to that offered in the text would suggest the necessary criteria and process for appointment to administrative and leadership roles on the Court.

excellence, a variety of intellectual interests and academic background, and a wide range of representation from across the country in terms of origins and law school attendance. In addition, the Chief Justice has an executive assistant who has responsibilities for the work of the clerks and also assists the Chief Justice in his legal and administrative tasks. Those who have held that position to date possess credentials in the academic world and experience in the conduct of litigation.

The partisan use of the appointing power has generated extensive comment on the damage to the public perception of the impartiality of the bench and on the mixed quality of judicial appointments, but little constructive criticism. The proposals put forward to assure better appointments tend to the dilution of the executive's prerogative to appoint its friends and stalwarts, but only by way of formalizing a procedure for wider participation in the process of seeking and evaluating candidates. The widespread criticism of the unfettered executive power to appoint judges to our highest courts, by the legal profession, academics and the press, has failed to grasp that an appointing power vested in politicians will be exercised on partisan political grounds unless political constraints direct otherwise. And "otherwise" may exclude partisan political grounds but include many other considerations that are nevertheless political. The change in the nature of appointments to the Supreme Court of Canada, when appeals to the Privy Council were abolished, is a case in point. It demonstrates the growth of a political convention displacing partisan concerns in favour of appointments of persons who had other claims to experience, expertise and skills when the importance and prestige of the Court grew. 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. The focus on better quality reflects the realization by those exercising the appointing power that there was political mileage to be gained by acknowledging the Supreme Court as above simple partisan politics.

The recent proposals by the Canadian Bar Association and the Canadian Association of Law Teachers call for nominating committees to solicit names and to evaluate potential nominees in order to broaden participation in the creation of the list of nominees for the executive's exercise of the appointing power.⁶¹ The proposals are similar in that they include representation from the judiciary, the Minister of Justice, the Canadian Bar Association and the public. These proposals to broaden the qualifications of those who participate in the review of potential nominees are intended to neutralize at least the early effects on the process of partisan influence. They do not, however, adequately respond to the many criticisms of the existing system and for that reason might not, in actual operation, offer much improvement. In the following paragraphs I canvass some of the shortcomings of the proposed committees in order to prepare the way for discussing the need to delineate the selection process in a way other than setting down

⁶¹ For a general discussion and comparison of the recommendations, see Ziegel, *supra*, note 2, at 15.

qualifications for membership in nominating committees. I will later suggest that there must be even wider membership on these bodies and that the process and criteria of selection must be released into the public domain.

The nomination committee model presupposes that professional peer evaluation will produce a better pool of candidates for appointment by the executive. The assumption, however, does not upon examination appear to rest on firm ground. Professions do not necessarily produce criteria of their own excellence⁶² and leaders of the legal profession may not necessarily have the experience or expertise in appellate advocacy and adjudication so as to be the best arbiters of the kind of excellence that the Supreme Court of Canada requires. In terms of nominations to the Supreme Court of Canada, the bar association input may be less helpful than for other courts since so few lawyers—and thus so few leaders of the bar associations—engage in appellate advocacy and fewer still in cases that reach the Supreme Court of Canada. The real expertise in the quality of those working in the appellate courts, especially in specialized areas of law like the *Charter*, may be academics trained in law and fields close to law, not the practicing bar.⁶³

The idealized escape from politics that this model promises may be illusory as well: nominating committees may merely engender a different form of politics, at the bar association, rather than the partisan level, but again at the expense of qualified persons.⁶⁴ Professionals tend to be conservative, to value those with whom members can identify, and to reflect elite values. One can see these patterns already present in the bar association

⁶² Gavison, *supra*, note 1.

⁶³ It is not surprising that the Canadian Bar Association does not make this point; it is somewhat surprising that the Canadian Association of Law Teachers does not. Bushnell, *supra*, note 6 at 5 makes a similar point, noting that the advent of academic legal education has improved the criticisms of the legal output of the courts. Shimon Shetreet, in *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, (1976) at 58-9, discusses the practice of appointing academic lawyers to the bench in England and the United States. He notes that in England such appointments are considered inappropriate for the trial bench because the procedure and evidentiary concerns would be too unfamiliar. However, he notes, the Justice Subcommittee had recommended the appointment of academic lawyers to the Court of Appeal and the House of Lords. The American example is cited with approval in this regard in its appointment of law professors to the appellate courts in both the state and federal systems as well as to the Supreme Court. My point is not about appointing academics, although one of our most illustrious appointees to the Ontario Court of Appeal and the Supreme Court was undoubtedly the late Chief Justice Bora Laskin who for many years was a leading academic in constitutional law as well as other fields. It is that academics hold an expertise in evaluating appellate law-making that is not often duplicated in the profession. Such expertise would be useful in the appointment process and could be tapped either by having law school deans sit on advisory committees or by seeking the views of academics in various fields when an appointment is under consideration.

⁶⁴ See Carl Baar, "Judicial Appointments and the Quality of Adjudication: Lessons from the American Experience" in *Judicial Selection in Canada, Discussion Papers and Reports*, *supra*, note 1, 177 at 186-7 for discussion of the ills of cronyism, clonism, conservatism, exclusivity, subjectivism. The Canadian Bar Association concedes some of these problems, but does not think them of much weight. See C.B.A. Report, *supra*, note 3, at 29.

committee system put in place in 1968.⁶⁵ One can also see the same tendency in the Canadian Bar Association's own writing on the subject of the impartiality appropriate to judicial appointees.⁶⁶

The Canadian Association of Law Teachers suggests the creation of a particular committee for Supreme Court of Canada appointments while conceding that the process had been cleansed of late of "political partisanship and personal ties" that played a role until recently.⁶⁷ The body is to consist of:

- the Chief Justice of Canada
- a nominee of the Canadian Judicial Council
- a nominee of the Minister of Justice
- a nominee of the attorney-general(s) of the province or provinces from which the candidate is likely to be selected
- two members of the Bar
- a member of the public to be nominated by the other members of the council

The concern here, as stated in another context by representatives of CALT, is to provide "a balanced cross-section of the various constituencies with the greatest interest in appointments to the Supreme Court".⁶⁸ Here we see an interest in broadening participation, but little manifestation of concern as to the quality of candidate or the qualifications desired. The only reference

⁶⁵ Ziegel, *supra*, note 2, at 9 and 12, criticizes the secrecy, oral discussions with no dossier or *curriculum vitae*, reliance on second and third hand information that may be unreliable and out of date and the tendency to favour those who practice in big cities and elite practices. At 10, he concludes that the "system . . . is positively hostile to selecting candidates exclusively on basis of merit". The C.B.A. Report, *supra*, note 3, also sets out these features of the process of its advisory committee to the Minister of Justice, under the heading "insufficient data", at 45-6. There does not seem to be much self-criticism beyond that indicated in the heading. To be fair, however, the short time frame, sometimes only 48 hours to review a number of potential appointees, made informal proceedings necessary.

⁶⁶ The C.B.A. Report on the Independence of the Judiciary, *supra*, note 28, at 31 ff., rejects civil servants and in house counsel as inappropriate candidates for judicial appointment. The former, according to the Report, would be incapable of deciding a case impartially if their former government employer appeared as a litigant. There is no reference to the tradition of the independence of the judiciary or the civil service in Canada or advantages of the exceptional public law training that government lawyers receive, which few lawyers in private practice possess. In house counsel are considered ineligible on similar grounds. Unlike their counterparts in large law firms, they do not acquire the independence and impartiality that derives from having served a number of clients over the years. No mention is made of the large number of private practitioners and firms that do extensive and sometimes exclusive work for large corporate or government concerns and thus have practices very closely analogous to both government lawyers and in house counsel.

⁶⁷ See Canadian Association of Law Teachers Special Committee on Judicial Appointments "Recommendations", June 1, 1985, in *Judicial Selection in Canada, Discussion Papers and Reports*, *supra*, note 1, at 201.

⁶⁸ Letter to the Prime Minister dated May 26th, 1987 re Meech Lake Accord and Nomination of Supreme Court of Canada Judges. A copy of this letter was kindly supplied to me by my colleague, Professor Jacob Ziegel.

to procedure, if it be that, is the recommendation that the committee recommend a short list of names of members of the bar and/or a judge from a provincial or federal court. The Report indicates that a list of three would be optimal. In its only reference to criteria, the report notes that while previous judicial experience is an "advantage", the "work and role" of the Supreme Court differs significantly from that of other courts so that it should not be made a prerequisite for nomination.

The workings of a committee of such divergent membership is difficult to imagine. Without a stipulated mode of proceeding and without criteria for evaluation, one cannot project how it would succeed in naming candidates with undisputed merit. The judicial and provincial representatives, for example, presumably have more direct routes of communication with members of the federal executive generally and the Minister of Justice in particular. Indeed, they may prefer to air their preferences for appointments privately rather than at a committee meeting or on paper for circulation to committee members. If the committee does not function corporately, but simply funnels evaluations to its chair, one wonders why a committee structure is necessary at all. In addition, while the public representative might appear to bring some broader perspective to the process, one can see how such an individual might find it difficult, given the stature and professionalism of the other members, to do more than observe the process, if there is one, with some detachment.⁶⁹ There is no indication that the member of the public, who would presumably have less access to information about the persons under discussion, will be given access to a body of material. Indeed, there is no indication that all of the members of the committee will be looking at all the candidates or evaluating them on the same body of information.

A clear disadvantage of the proposal is the lack of criteria for evaluation of potential nominees. The literature is so vague, and the persons on the committee likely to hold such varying perspectives on questions of merit, integrity and judicial ability that some common mode of calibration might be difficult to develop.⁷⁰ As a result, it would be impossible to rank the candidates. Perhaps an unranked list of candidates would serve the purpose of wrenching the decision-making away from blatant political preferences while leaving some room for choosing according to this sort of concern or others deemed advantageous to the federal executive. Concerns other than pure merit are already included in the design of the committee in the selection of the participating provincial attorney general according to the

⁶⁹ The public member of the committee is to be recommended by its other members and may therefore reflect the values of the committee itself, broadly conceived, and not of the public at large in any meaningful way. Who do members of such a committee know and to whom would they offer such a prestigious appointment? Since the member sits on the committee at the suggestion of the other members, he or she might be loathe to take independent positions, to ask for more material for evaluation or to insist upon clarification of opinions that appear to rest on personal or professional ties.

⁷⁰ See Gerald L. Gall, "The Qualities of a Judge" in *Judicial Selection in Canada, Discussion Papers and Reports*, *supra*, note 1, at 119, contrasting the perspective of the bench and bar on the desirable traits of potential appointees.

province(s) likely to receive the appointment, although the tension between regionalism and merit is not recognized in the body of the proposal. The Bar Association committee put into operation in 1968, graded the candidates as "very qualified", "qualified", and not "qualified". This type of approach might be appropriate for appointments to the trial or appellate bench, but given the Supreme Court's collegial operation, more insight into the strengths that any candidate would bring to the bench would be much more helpful to the appointing authorities.

One might also speculate about the role of the provincial attorney general on the committee. He or she is responsible for the administration of justice in the province and in many cases is an *ex officio* member of the province's law society. In addition, the attorney general sits as a member of the provincial executive and is involved in the kind of partisan politics that this proposal is intended to dilute or eliminate. There is an added role that the attorney general might play, in hoping for an appointment of a resident nominee, rather than someone from another province more attractive to the federal executive. These concerns may affect the way that the attorney general functions in the committee and may distract from consideration of substantive grounds of quality.

The main advantage of the proposal is its formalization of the procedure for appointment, but problems in regard to merit evaluation still may arise. One can speculate that the proposal might produce a larger pool and very complex dealing. It is hard to imagine such a committee working as a corporate unit. It is also difficult to see how it would manage the vast amount of paper work necessary to consider a large number of applicants in a thorough fashion. Indeed, there is no specific mention of the extensive supporting work that such a committee, functioning as it should, would require to develop dossiers and ensure the accuracy, currency and adequacy of the material collected. The evaluation process, without such preparation, might develop into a contest of reputation, public recognition and personal ties. Thus, many of the failings of the bar association committees have not been excluded. The vague statement about the value of previous judicial experience signals a reluctance to deal with the need for and evaluation of questions of ability in the skills of appellate judging.

A better approach, I would suggest, is to start not with the membership of nominating committees but with the values and criteria that should drive the nomination and selection process. It should be undisputed that the best legal minds in the country should be serious candidates for the Supreme Court of Canada because the Court has the responsibility for shaping the contours of our legal and constitutional system. Because the Court's work is so distinctive, the nomination and appointment process should not be regarded as a mode of promotion for judges or lawyers who have excelled in other areas of legal work. The focus must be on one's talents, experience and commitment to the appellate function at the final appeal level, a function requiring to some extent talents additional to those that mark excellence on the trial and appellate courts.

When legal excellence is assured, other considerations that involve the collegiate quality of the Court arise. The *Charter* work of the Court is primarily on questions of first impression, requiring focussed thinking in the history and variety of our legal system, comparison with other legal systems, and reference to theoretical writing. The wider the body of knowledge and experience in these systems of thought available to the Court, the better its judgments will be. Accordingly, nominations and appointments should reflect a view of the overall needs of the Court in order to produce a "mix" of talents and experience that promote the best insight and analysis of the problems that come before it.

There are other concerns as to the "mix" of the Court beyond intellectual breadth and experience in the legal system. As a national institution, the Court should include persons from every part of the country. Since these judges hold tenure to age seventy-five without accountability to the public or to the other branches of government, it is important that their impartiality and integrity, as well as their professional skills, be impeccable. Therefore, the regional component of appointment decisions does not suggest representation. The idea is not that a judge would forward the concerns or interests of his or her province of origin, for example when it appeared as a party in private litigation or a constitutional case involving division of powers or the *Charter*. On the contrary, the wide flung origins of the judges are primarily symbolic of the national stature of the institution with reference to its independence from the centrism often apparent in other federal institutions and its power to overrule the determinations of the highest appellate provincial courts. While the judges are not to forward the interests of their provinces or regions, or to transfer regional animosities or federal-provincial rivalries into the courtroom, they are to bring to the bench their familiarity with the values, history and sensitivities of Canadian life.

These considerations as to region and federal structure are also reflected in the special regard for Quebec that has been recognized since the creation of the Court. The ideas of representation already discussed apply to Quebec in different ways because of the civil law system as well as the differences in language and culture to which the Supreme Court must always be sensitive. The role of the Supreme Court as the final arbiter of cases arising in the Quebec courts on questions of civil law has diminished in recent years and thus presses less urgently on the Court's restructuring. There has also been marked improvement in the ability of judges appointed from provinces other than Quebec to listen to cases in French, without simultaneous translation, and, on occasion, to ask questions of counsel arguing cases in French as well. Indeed, the Court has recently included two judges who were eligible for nomination from Quebec as well as from other provinces.⁷¹ The identification with the Court as Quebecers' final court of appeal thus remains important in terms of its traditional representation and has extended to the qualifications for appointment generally.

⁷¹ Justices Le Dain and La Forest.

Personal characteristics of the judges also enter into consideration of the "mix" on the Court as a whole. As noted earlier, religion appears to have played a relatively strong role in the early appointment pattern to the Court, although its influence appears to have abated.⁷² Other factors are now taking the place of religion in our culture and by extension are entering the criteria for appointment as well. Whereas the Court formerly reflected the upper middle class, male, founding peoples of the country, it has in recent times included Chief Justice Bora Laskin, a Jew of Russian origin, now includes Justice John Sopinka, of Ukrainian extraction, Justice Frank Iacobucci, of Italian extraction, and has included three women, Justices Wilson, L'Heureux-Dubé and MacLaughlin. Again, these changes do not reflect a crude idea of representation but a recognition of the wider ethnic variety in the composition of Canada's population today, new career opportunities for women, and the desire on the part of the federal executive to be seen to value these changes. While these considerations are political, they are not partisan, and they provide beneficial egalitarian symbolism for the profession and for the public at large. The process whereby one chooses judges to make up the court of final resort on *Charter* issues must reflect the *Charter's* egalitarian values.

The symbolism of the Court's prestige must extend beyond the accomplishment of its members and their ties to various parts of the country; it must engage the quality of the court's work. There are various ways to evaluate the legal and intellectual quality of candidates for positions in our society, and academic considerations are often included; yet, it is often said that academic qualifications are not good indicators of ability for judicial positions and indeed that academic qualifications can detract from proficiency. It is true that early academic excellence is often relied upon to mark potential in situations where experience and achievement are still lacking. This is the basis on which the career system of judges works in civil law countries.⁷³ It is also true that intellectual abilities may find demonstration in ways other than academic distinction. The general disdain for academic accomplishment in the literature on judicial appointment displays an over-emphasis on professional values and fails to recognize that many of our strongest and most creative judges on the Supreme Court of Canada have had excellent academic credentials.⁷⁴

The idea that Supreme Court justices need not come from the appellate courts of the provinces may also bear re-examination. Other systems have recourse to evaluation either prospectively or retrospectively that our system

⁷² See text at *supra*, note 21.

⁷³ See John Bell, "Principles and Methods of Judicial Selection in France" and David S. Clark, "The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat", (1988) 61 S. Cal. L. Rev. 1757 and 1795.

⁷⁴ I use the term academic somewhat broadly, to include teaching, writing, law reform and government service. These activities give opportunities to reflect upon the wide concerns that arise in public law as well as the more theoretical aspects of the role of law in society.

of tenure till retirement age does not. For example, in England an informal apprenticeship system is in practice for initial trial positions so that the candidate has the opportunity to consider the tasks and responsibilities first hand before making a commitment and the appointing authorities have a better basis on which to evaluate potential judging quality. Other systems provide an opportunity for the public to either re-elect or vote to retain judges. Since the Canadian system lacks both these prospective and retrospective opportunities to evaluate the work of appointees, the best appointments will be reliably made on the evaluation of past activities of the candidate that best approximate the work to be done on the Supreme Court itself. While it is true that trial and provincial appellate court work is different from that of the Supreme Court, if not in subject matter at least in terms of the level of responsibility for final determination of issues and for the general development of areas of law, it is difficult to imagine any better indicator of ability, potential and commitment. Some judges flourish in new positions, but if one looks carefully at their records one can see the early indicators of their promise. Appointments that do not come from the lower courts, and preferably from appellate court settings where the discipline of opinion writing and the collegiality of a corporate bench are inculcated, should be based only on the strongest of dossiers and a broad consideration of the wider features of the Court's needs.

The selection of judges is to be seen, therefore, as an institution forwarding certain values. The Court must be understood as the pinnacle of our legal system, which includes all the lower courts as well as the legal profession. The qualities sought for in judicial appointments at the highest level, like the work of the Court itself, will set the tone for the day to day workings of our legal culture. For these reasons, the criteria must not only be crystallized, they must be in the public domain. In this way, individuals who aspire to appellate and supreme court appointments can shape their careers in order to fulfil the expectations of the position. Just as partisan politics as a criterion encouraged certain kinds of activity in those who wished to be judges, other criteria will encourage other sorts of activity.

Once the criteria are listed, they must be ranked in some way. Perhaps some criteria can be quantified, such as intellectual depth and breadth that the individual would bring to the Court. Other criteria, such as integrity, interest in the community may be matters that should be verified in individual cases, but not quantified. Special interests or talents would also be of interest for those who make the final decision because of the concern for the mix of knowledge and skills on the Court at any time. The same criteria should be applied to all prospective candidates.

The amassing of this information must produce a dossier that is fair, accurate, complete and current. The easiest way to provide such a dossier is to provide adequate time and resources for its preparation. Most employment applications originate with the individual who wants the job. There is no reason why the potential appointee should not be treated as all job applicants are treated and asked to provide a *curriculum vitae* to the committee as well as a list of references, both in the profession and outside it. The

prospective appointee should also give a statement indicating his or her own qualifications for the task as well as illustrations of meaningful professional projects in the past and samples of writing. It is unlikely that such requirements would discourage worthy applicants. Comments that suggest otherwise may simply reflect an aversion to change or a rejection of the possibility of evaluating quality. Neither of these two considerations should stand in the way of the desire to find the best candidates on a reliable basis.

The evaluators must come from a variety of viewpoints in order to forestall doubts as to the objectivity and impartiality of the evaluation process. They are not to be seen as representing constituencies, but as using their general knowledge, experience and professional expertise in order to select the best candidates. The evaluators should be able to elicit more information about the candidates through their professional and personal contacts, but care must be taken that all of the information gathered is reliable and current.

Perhaps the most remarkable feature of the recent proposals by the Canadian Bar Association and the Canadian Association of Law Teachers is the omission of a procedure for the functioning of the nominating committees. There is concern that the pool of candidates be open and that availability of positions be made public. To this I would add a recommendation that the committees ensure that a complete dossier is prepared for all serious candidates and that investigations of references and of further information be undertaken systematically. The work of the committee should be formal, in writing, and complete in all cases. To the extent possible, the candidate should be able to review the file in order to assure accuracy. Confidential references should be secured as to all the factors that are under consideration, including comments from lawyers and judges who have worked with the individual, academics and non-lawyers as well. Political experience and contacts should be included in the material. The committee should work as a committee, creating an annotated recommendation to the federal executive. This recommendation should include more than simply a statement of qualification. It should indicate individual strengths and weaknesses to facilitate informed consideration of the "mix" of skills and knowledge on the Court at any time. In addition, where a number of names is forwarded by the committee, they should be ranked.

While I have referred to a committee, I am not convinced that this adoption of this feature of the American system is preferable to the English model of a highly ranked, independent and permanent office in the civil service. There are obviously high standards for privacy that the committee arrangement may not meet. In addition, the main criticisms, I understand, of the special advisor position to the Minister of Justice have not related to the institutional arrangements but to the lack of experience of the holders of the office, the frequent turnover of incumbents, and the excessive work load. There are advantages to having an ongoing, stable office to amass information about potential nominees to, for example, all appellate courts. Delay in making appointments would be minimized and candidates might be encouraged to improve their dossiers in certain ways, e.g., by increasing

proficiency in French or by building expertise in certain subject matters, in order to increase the chances of appointment.

5. CONCLUSION

Too little of the material on the appointment of judges in Canada has focussed on the Supreme Court of Canada and almost none has looked at the special needs that entrenchment of the *Charter* has precipitated. The partisan nature of appointments generally appears to have disappeared from this level of the judiciary, but we know too little about the considerations that drive the process. Perhaps we have less able judges than we might have otherwise. We do not know. But it is possible to suggest that the entire function of law in our community is diminished to the extent that we as a nation miss the opportunity to use the appointing power as a symbol of excellence as well as an instrument of seeking excellence.

The highest level of the judiciary is too important to leave to the executive and to the legal profession. We can see that this type of arrangement has produced a system that we would reject as too informal, potentially unreliable and unfair for many of the less important decisions that our public officials make from day to day. In the past few decades the Supreme Court of Canada has acquired the status of the highest appellate Court in Canada; more recently, in the years leading up to the adoption of the *Charter*, it has begun to take on the stature of that position. We have seen that political conventions have grown up that have insulated the Court from partisan political appointments. We have also seen, more recently, that the 1982 changes to the Constitution have encouraged Canadians to feel that the Constitution is theirs and not merely a tool in the hands of the various politicians who acquire power under it. It may be that the adoption of the *Charter* will continue this process of identification and carry the average citizen's concern as to the quality of law that relates to *Charter* guarantees into the process of Supreme Court justices as well. It is not the mechanisms of appointment that dictate the operative values of the appointment process, it is the conventions that constrain the exercise of political power. If the people, the profession and the politicians all see advantage in appointing the best legal talent for *Charter* cases to the Supreme Court, then new political conventions will arise.⁷⁵ By opening up discussion of the criteria desired and the process of evaluation, we can begin to develop those new conventions.

⁷⁵ This paper focuses on the implications of the *Charter* role of the Court on appointment decisions. The Court's public law jurisdiction as well as its private law jurisdiction also raise implications for the appointing power. While beyond the range of this discussion, these implications should also inform consideration of the current appointment process and proposals for change.