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**Supreme Court Appointments:
It's Time for a Change**

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The Canadian Study of Parliament Group (CSPG), as part of its efforts to foster knowledge and understanding of Canadian parliamentary institutions, is sponsoring the annual National Essay Competition. College and university undergraduate and graduate students in any discipline across Canada are invited to submit essays on any subject matter broadly related to Parliament, legislatures or legislators. The winning essays are made available free of charge, in both official languages, on the CSPG Web site. The views and opinions contained in these papers are those of the authors and are not necessarily reflective of those of the CSPG.

Essay

The appointment process for Supreme Court justices in Canada must be reformed in order to ensure judicial independence and preserve a state of democracy. The current appointment system in which the Prime Minister exercises unilateral power to choose appointees both compromises judicial independence and demeans the principles of democracy. Democracy has long been established as a strong value in Canadian governance throughout history, in our political systems and socialization, and more recently has been reinforced with its inclusion in the preamble of the Canadian Charter of Rights and Freedoms (Canada, Department of Justice). The essence of democracy lies in the concept of rule by the people and the right of citizens to participate meaningfully in the governance of society. Traditionally, representative democracy has been the outlet through which Canadians have exercised their democratic rights, electing representatives who form the legislative branch of government, within which the majority party forms the executive branch. As elected representatives, members of the executive and legislative branches are held accountable to citizens for decisions they make in governing society, thus recognizing the principle of popular sovereignty within a democracy.

The judiciary makes up the third branch of government in Canada, as appointed officials who act as impartial arbiters of disputes between parties, which may include individuals, governments or both. With the advent of the Charter of Rights and Freedoms in 1982, the role of the courts and particularly the Supreme Court was expanded with the introduction of entrenched rights and freedoms. The right to judicial review, wherein the courts may strike down any law or portion thereof if it is found to be discriminatory or otherwise infringing upon the Charter, guarantees protection of these rights and freedoms. The effect has been that the courts are now passing final judgment on many important social and economic issues (Fogden and Makarenko), substituting and sometimes usurping the role previously held by elected legislators. Another important function of the Supreme Court of Canada is its role as the “referee of federalism”(McCormick 9). The Constitution provides for a federal system of government (s.91 and 92) in which the powers of the provincial and federal governments are divided in such a way that neither is “subordinate to the other” (Dyck 249). The Supreme Court acts as the adjudicator of intergovernmental disputes and provides judicial interpretation of these key sections of the Constitution.

It has been widely established that the courts must operate in accordance with the principles of impartiality and judicial independence, and the relationship between the two has been the subject of consideration by the Supreme Court itself. In his reasons in the case of *R. v. Lippé*, Chief Justice Lamer (as he then was) stated as follows:

The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality. (139)

Thus the judiciary is “expected to operate independently of the executive and legislative branches of government” (Dyck 198), free of outside influence or political partisanship, despite being comprised of individuals appointed unilaterally by the executive branch. The perception, however, is that the system is largely based on political partisanship, perhaps because no safeguards exist to discourage this practice. Although it is generally accepted that there have been “few or no problems with recent...appointees” (Fogden and Makarenko), the issue here is not that recent appointments have been “egregiously bad... the problem is that nothing in Canadian law or practice prevents this from happening in the future” (McCormick 9).

The appointment process is established largely in convention rather than legislation, as are many Canadian political institutions (Rand 232). The Supreme Court itself is not entrenched in or specifically provided for in the Constitution, although Parliament is empowered to establish courts under section 101 of the Constitution Act, 1867. The Supreme Court was created pursuant to the Supreme Court Act in 1875, but the Judicial Committee of the Privy Council in Britain stood as the final appeal court for Canada until 1949 (Canada, Supreme Court). While the Supreme Court Act states in section 4 that “judges shall be appointed by the Governor in Council by letters patent under the Great Seal”, it is largely silent as to how they should be chosen. Because Canada is a constitutional monarchy, the power of the Governor in Council is exercised on the advice of the Prime Minister, the result being that the Prime Minister has extremely wide discretion to appoint anyone who meets the minimal requirements set out by the Act.

Although one might think that the Supreme Court seats would be given as an elevation or promotion to current judges of lower courts, this is not a convention. Some appointees do come from the bench, but many are defeated political candidates or other party supporters (Rand 354). So, if it is unnecessary to work one’s way up through the ranks, what exactly is necessary to be appointed to a seat on the highest court in the land? The Supreme Court Act requires that appointees must be judges, or lawyers or notaries with at least ten years’ standing (s.6) and that at least three judges on the panel must be from Quebec (s.5). Convention dictates that of the remaining six seats of the court, three of the judges are appointed from Ontario, two from the West and one from the East. Although tempered by the practice

of consulting with the Federal Minister of Justice, Provincial Attorneys General, bar associations and other legal institutions, the Prime Minister exercises unilateral power in choosing appointees (Fogden and Makarenko). Even the practice of engaging in consultations is inconsequential, because these consultations are held behind closed doors and often without notice, smacking of cronyism and patronage.

The increasing popularity of referring political “hot potatoes” such as abortion, euthanasia, and same sex issues to the Supreme Court for determination is a driving force behind the need for reform. If the Supreme Court, through judicial interpretation, is now the body that decides what the law and constitution will mean, “there is a problem with a system in which people serve on the Supreme Court because the Prime Minister unilaterally decided that they should”(McCormick 9). Moreover, in matters of intergovernmental importance, this unfettered power of the Prime Minister gives way to an apprehension of bias toward the federal government on the part of the federally appointed justices. Whenever a judgment is delivered which favours federal interests over those of a province, the Supreme Court is left open to criticism as “Ottawa’s court, and therefore incapable of fair judgment”, contributing to its so-called federalism deficit (McCormick 9). Whether this is merely an apprehension of bias or actual bias is debatable, but it is clear that perception plays a key role in establishing impartiality.

As an elected representative, it could be said that the Prime Minister is held accountable by the electorate for patronage appointments. However, Supreme Court appointments are lifetime appointments and thus the panel will long outlive a change in government. The result is a situation which calls for a system that would prevent injustices rather than one purporting to respond to them indirectly and after the fact. But if the current system is unacceptable, to what end should it be reformed?

As our closest neighbour and our motherland respectively, the judicial appointment systems of the United States and Great Britain are worthy of examination. In the United States, Supreme Court justices are appointed by the President (executive branch of government), but then must stand up to scrutiny by the elected members of the Senate Judiciary Committee in order to receive Senate confirmation (Lieberman). Although this system ensures that the electorate has some say in the appointment process through their elected representatives, it is widely looked upon as an unacceptable politicization of the judiciary. If potential judges were to be required to submit themselves to cross-examination and review by legislators in this way, the perception that the judiciary is answerable to the legislative branch would be intensified, further detracting from the principle of judicial independence (Canadian Bar Association 1). Moreover, the Canadian senate is not composed of elected representatives,

the merits of which are for the subject of another paper. Suffice it to say that the American model would require substantial tweaking even if Canadians were prepared to accept the concept of congressional style hearings for Supreme Court nominees.

The judicial appointment process in Britain differs substantially from its North American counterparts. The highest appeal court in the land operates as a committee of the House of Lords, being composed of Law Lords who make final appellate judicial decisions. Law Lords are members of the House of Lords (which serves a somewhat parallel function to the Canadian Senate) and are appointed by the Lord Chancellor, who is the Speaker of the House (United Kingdom). The system rests largely on convention and tradition, and is organized dissimilarly to the Canadian structure in that it does not currently provide for an independent judicial branch. However, the British model is worthy of mention because it is in the midst of reform, mainly aimed at removing the dual functionality of a Law Lord who, in the current model, sits in the legislative and judicial chambers simultaneously. In the proposed model, a Supreme Court would be established as the highest court in the land, with an independent Judicial Appointments Commission, composed of judicial representatives, members of the legal community and laypersons that would make recommendations to the Secretary of State as to judicial appointments (UK Supreme Court). The Secretary of State would then remain answerable to Parliament for his or her appointments, promoting the underlying concept of responsible government in the model.

The impetus for the proposed reforms is the underlying principle of judicial independence, as expressed by Lord Falconer, Secretary of State for Constitutional Affairs for the United Kingdom: “It is increasingly anomalous for a Minister to oversee the selection of judges... We are fortunate to have a judiciary that is politically neutral, uncorrupt, and of the highest calibre, with an international standing second to none. However, we intend that a Judicial Appointments Commission will insulate more the appointment of judges from politicians” (qtd. in UK Supreme Court).

The idea of establishing a judicial appointments committee is neither new nor unique to Britain. As a result of the findings of the Canadian Bar Association’s McKelvey Report, published in 1984, advisory committees composed of representatives from the public, legal profession, judiciary and governments were established to provide non-partisan identification and assessment of potential judges (Canadian Bar Association 5). The committees evaluate nominees and report to Cabinet as to whether each individual is “recommended, highly recommended or not recommended” but lack the mandate to provide a short list of candidates (Russell and Ziegel). It is interesting to note that these committees were established for every level of Canadian courts except the Supreme Court, despite the recommendation having been put forward for implementation at all levels of the judiciary (Canadian Bar Association 3).

Certain specialized features of the Supreme Court may have contributed to the reluctance of the government to establish a permanent advisory committee, such as the relative infrequency of judicial appointments to the Supreme Court as compared to the other courts. Such a committee would also have to address representation of all regions and thus would likely be difficult to facilitate and rather unnecessary when considered in terms of the convention that dictates the regional composition of the Supreme Court.

If a permanent committee is unworkable, then why not establish ad hoc committees to deal with appointments as judicial vacancies arise? This was presumably the reasoning of the government earlier this year when the Interim Ad Hoc Committee on the Appointment of Supreme Court Judges was created to vet the nominees for two vacancies that had arisen with the departures of Justices Arbour and Iacobucci. A panel was created consisting of parliamentarians from all parties with standing in the House of Commons, and a representative from each of the Law Society of Upper Canada and the Canadian Judicial Council. The Minister of Justice made a public presentation to the committee and submitted to questioning in order to provide information on their backgrounds and qualifications. At the conclusion of the hearings, the panel found the nominees, Justices Rosalie Abella and Louise Charron, to be “eminently qualified for appointment to the Supreme Court of Canada” (Lee).

While the establishment of an advisory committee is a step in the right direction, it is far from satisfactory as a mechanism for meaningful reform of the appointment system. The panel itself noted in its report that they were provided with little information about the panel, hampering their ability to adequately question the Minister. Further, two nominees were put forward to fill two vacancies, negating the ability of the committee to engage in a comparative evaluation of the candidates (Lee). The simple fact that the ability to make nominations remains in the purview of the executive shows a lack of willingness on the part of the government to allow meaningful outside participation in the process. Moreover, it was made clear that the nominations would stand regardless of the committee’s recommendation, effectively reducing the process to a farcical level seemingly designed to “give a cloak of legitimacy to the naked power exercised by the Prime Minister” (LeRoy).

What is needed now is a collaborative system for choosing the judges who will sit in judgment of the most important issues in our society. The advisory committees (save and except the Ad Hoc Committee mentioned above) have developed the best model so far by their inclusion of a wide variety of representatives. One of the problems with the current committees is that their recommendations are not binding in any sense. Another glaring deficiency, as demonstrated by the Ad Hoc Committee on Supreme

Court Appointments, is the practice of a committee reviewing a candidate who has been hand picked by the Prime Minister, which surely falls short of the goal of allowing independent input into appointments. Any meaningful reform must allow for real input of interested parties – the electorate, both through their provincially and federally elected representatives, and by the inclusion of lay people; the legal profession, through its regulatory bodies; and the judiciary. Every major constitutional reform initiative over the past 30 years has included a voice for the provinces in Supreme Court appointments (McCormick 9), and there is no reason not to include this principle. At the very least, it would temper the perception of a federally biased Supreme Court, while allowing the provinces or regions to put forth the candidates who they feel would best represent them in what is, conventionally and in reality, a court of regional representation. The appointment system should call for the establishment of a committee in each region as vacancies arise, comprised of members of each party in provincial parliament, along with representatives of the provincial law society, provincial attorney general and the public at large. The committee would put out a call for nominations, rather than choosing them arbitrarily, and undertake an analysis of nominees within a reasonable time limit, in order to put forward a final short list to the Prime Minister, including background information and an outline of qualifications for each candidate. This compromise of power preserves the convention of prime ministerial appointment authority, while allowing for a more fulsome, less partisan-based canvassing and consideration of candidates. The Prime Minister would either appoint one of the candidates from the short list, or reject all of the candidates on the short list *with reasons for this rejection*. If the reasons were found satisfactory in Parliament, the committee would submit a further short list; otherwise the Prime Minister would be bound to choose from the original short list. In this way, the process would be protected from political grandstanding, ensuring that the Prime Minister would not be forced to choose from a list of deficient candidates, while eliminating the risk of the short list being rejected without ample justification.

The above noted proposal will strengthen judicial independence by taking the authority to make Supreme Court appointments out of the hands of one individual and spreading it among the many stakeholders. Taking the decision-making process out of the back rooms and into the public domain will serve to greatly enhance the confidence in the system and the perception of impartiality, thus upholding the principle of judicial independence. As a result, the state of democracy in Canada will be preserved and advanced in a vitally important way, because the Supreme Court of Canada, as the final court of appeal and authoritative body for interpretation of enormously significant legal concepts, must not be governed in accordance with anything but the will of the people.

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