APPOINTMENTS TO THE SUPREME COURT OF CANADA:

The Time is Ripe for Change



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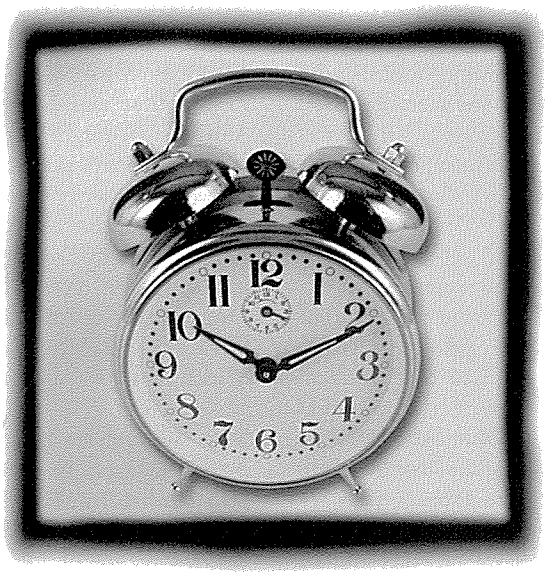
The disarmingly simple Canadian procedure has come under increasing criticism... because it lacks accountability and transparency.

Decisions of the Supreme Court of Canada over the past several years—particularly those dealing with the equality rights of gays and lesbians and the aboriginal rights of native Indians—have drawn the ire of right wing politicians. They have belatedly discovered the bite in the Supreme Court's powers as the final arbiter of the meaning and effect of Canada's constitution and especially of the Charter of Rights and Freedoms. Not surprisingly, controversy over the Supreme Court's rulings has also generated renewed debate over the present system for appointment members of that Court and whether it needs to be changed to reflect the formidable powers exercised by the Court.



Broadly speaking, democratic societies in the Western hemisphere adopt one of four methods (or a combination of the features of several of them) to select the members of their highest courts: (a) appointment by the Executive; (b) appointment by the legislature; (c) election by popular vote; and (d) nomination by the Executive followed by confirmation by the legislature.

Appointment by the Executive is the system in place in Canada with respect to the Supreme Court of Canada and is also used by the federal government for the appointment of judges to the lower courts. We inherited the system from England at the time of Confederation, though the system is subject to institutional and political constraints in England that are not followed in Canada. It is also important to appreciate that this system of appointment has its roots in the Middle Ages when most governmental powers resided in the Crown and concepts of accountability and participatory democracy were an oxymoron.

The system of appointment by the members of the legislature is used in Germany and several other continental European countries. The method of election by popular votes is or was followed in most of the U.S. states and is rooted in nineteenth century concepts of Jacksonian democracy. However, it has been diluted in many of the states by the adoption of the "Missouri Plan" entitling the governor of the state to fill vacancies in judicial posts arising between elections on the recommendation of a judicial nomination commission although renewal of the appointment requires confirmation by popular vote at the next regular election of state office holders.

The fourth method—nomination by the Executive followed by confirmation by a legislative chamber—is most closely associated with appointments to the U.S. Supreme Court, though the same procedure is used for all federal judicial appointments in the U.S. The confirmation procedure was consciously written into the US constitution as part of a system of checks and balances between the three arms of government to prevent abuse of powers by the Executive. Another justification for a confirmation procedure is to ensure that appointments to the highest judicial office enjoy widespread support. The effectiveness of the confirmation procedure in accomplishing these goals is seen by the fact by the fact that between 1789 and 1992, the US Senate refused to confirm 28 of the Supreme Court nominees, or nearly one out of five nominees, whose names were submitted by the President.

The disarmingly simple Canadian procedure has come under increasing criticism not only because it easily lends itself to abuse but more importantly because it lacks accountability and transparency. In practice, it means that the incumbent prime minister—Jean Chretien at the present time—is free to fill vacancies in the nine member Court as he sees fit subject only to honoring Quebec's statutory entitlement to three judges and to Ontario's entitlement to an equal number, though the latter convention is established by tradition and not by law. By conven-

tion, the Maritime and Prairie provinces, and British Columbia, are usually also each represented by one judge on the Court.

The Prime Minister, or the Minister of Justice on his behalf, may consult the provinces and with members of the legal profession but they are not obliged to. As late as the 1960s, it was common for Supreme Court judges to be appointed as much for their political affiliations and friendship with the Prime Minister or other senior cabinet minister as on the basis of their intrinsic merits as jurists. In the early history of the Court, there were even examples of federal ministers of justice promoting their own appointments to the Court!

This paternalistic and patronage-driven system was never compatible with Canada's democratic structure. It has become even less so since the adoption of the Canadian Charter in 1982. Critics argue that judges who have the power to strike down federal — — should be subject to public scrutiny or at least to a non-partisan selection system before their appointment and that the decision of whom to appoint should not rest with the prime minister alone.

Over the past 20 years, two vehicles in particular have been proposed to bring about this result. The first is the establishment of a nomination commission for appointments to the Supreme Court. The commission's members would be drawn from a wide spectrum of Canadian society and would include provincial nominees. The second proposed vehicle is a confirmation procedure similar to the American system for appointments to the U.S. Supreme Court.

There are strong precedents in Canada at the provincial level for the use of nomination or advisory committees for the selection of provincial court judges. The committees have proven their immense superiority over the old and thoroughly discredited patronage system that was in place before then. Nevertheless, successive federal governments refuse to adopt the advisory committee system at the federal level basically for two reasons. So far as appointments to the lower courts are concerned, the patronage plums for party loyalists (a very substantial salary, tenure until age 75, an excellent pension scheme, and considerable prestige) are perceived as too attractive to be surrendered lightly. Second, so far as appointments to the Supreme Court are concerned, the resistance arises because prime ministers like to think they can leave their own stamp on the Court.

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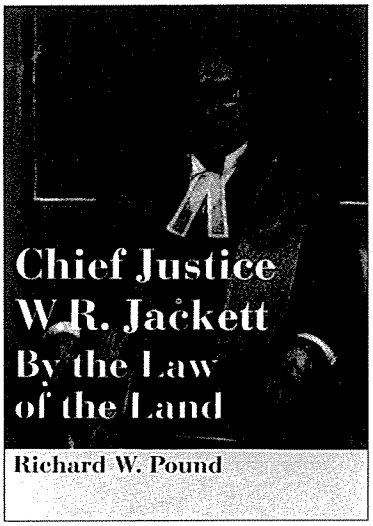
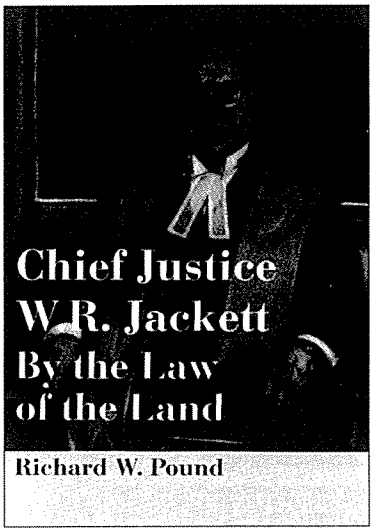


In his biography of Wilbur Roy Jackett, Dick Pound tells the story of a boy from small town Saskatchewan who went on to become the first chief justice of the Federal Court of Canada.



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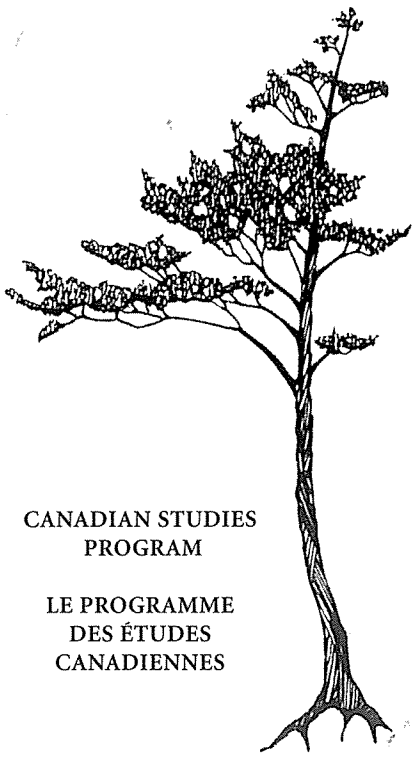
Nevertheless, there is widespread support within and outside the legal community for the establishment of a nomination commission for appointments to the Supreme Court. There is less support for a U.S. style confirmation procedure. Existing members of the Court, among others, have expressed their opposition because of what they have seen or heard about confirmation hearings before the US. Senate Judiciary Committee. I believe their fears are considerably exaggerated and are extrapolations from such exceptional cases as the Robert Bork and Clarence Thomas nomination hearings in the U.S. A confirmation procedure for appointments to the Supreme Court was enshrined in Bill C-60 introduced by then Justice Minister Jean Chretien in 1978 for the restructuring of the Senate, and also enjoys the support of many political scientists.

Given the long foot dragging by federal governments, my own view is that Canadians should not be satisfied now with anything less than an open confirmation procedure, one perhaps only involving members of the House of Commons until such time as the Senate becomes an elective body. This would not preclude the federal government from also establishing a nomination commission although some may think that this would make the appointment procedure too complex. What seems to me remarkable is the continuing Canadian tolerance for a system of appointments to the Supreme Court so obviously incompatible with the values of democracy, accountability, and transparency that the Court is called upon to interpret in the Charter and apply almost daily. ■

Note

* Those interested in a more detailed exposition of the issues discussed in this article will find it in a longer article by Prof. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada" in vol. 5, no.2, June 1999, of *Choices* published by the Institute of Research and Public Policy in Montreal.



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