

CURRENT PROPOSALS FOR REFORM OF THE SUPREME COURT OF CANADA

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I. Introduction.

Since its foundation in 1875, the Supreme Court of Canada has formed a vital part of our constitution. At least since 1949, when appeals to the Judicial Committee of the Privy Council were terminated, the Supreme Court has been our final and ultimate judicial appellate tribunal with comprehensive jurisdiction over the interpretation of the laws and the constitution of Canada as a whole, including the laws and constitutions of the several provinces. Needless to say, at this level, the power of judicial interpretation involves at times important choices and discretions that are virtually legislative in nature. So, when constitutional reform generally is in the air, inevitably the Supreme Court of Canada comes in for its share of attention.

This is true of the three sets of proposals for constitutional reform that will be considered here, for what they say about the Supreme Court. In order of appearance they are: The Constitutional Amendment Bill of the Trudeau Government, Bill C-60, in June of 1978;¹ the *Report* of the Committee on the Constitution of the Canadian Bar Association, entitled "*Towards a New Canada*", in August of 1978; and the *Report* of the Task Force on Canadian Unity entitled "*A Future Together*", in February of 1979. Hereafter I will refer to them as the Trudeau Amendment Bill, the Bar Committee *Report* and the Pepin-Robarts *Report*, respectively. In referring to the Trudeau Amendment Bill, I include a Trudeau Government White Paper of August, 1978, giving reasons for the Bill's proposals respecting the Supreme Court of Canada. On the whole, the Bill and the two reports are to a high degree concerned to maintain and justify the *status quo*, and in my view quite properly so. Nevertheless, in certain respects, they do indeed propose significant changes, with some of which I also agree. The Bar Committee's *Report* is the most conservative, the Pepin-Robarts *Report* goes furthest in proposing change, and the Trudeau Amendment Bill is in the middle position. In assessing the Supreme Court of Canada, all three sets of proposals

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¹ Also Constitutional Reform—The Supreme Court of Canada, by the Hon. Otto E. Lang, Minister of Justice, August, 1978.

address themselves to the topics of jurisdiction, size, regional quotas for membership, system for appointing judges to the court, and special constitutional status for the court. With this range, virtually every important issue that could be raised about the Supreme Court of Canada is raised one way or another. Let us proceed then to detailed consideration and analysis under these headings.

II. *Jurisdiction.*

The two reports and the Trudeau Amendment Bill propose to continue the present final and comprehensive appellate jurisdiction of the Supreme Court for the whole of Canada. They are indeed right about this, for reasons which they give only in part, but which I now wish to restate and develop further. It is essential in some respects, and at least very important and beneficial in others, that the Supreme Court of Canada should have this capacity to make final decisions that are binding precedents in all parts of Canada. Thus, in those vital respects, the court can bring consistency to the meaning and operation of the laws concerned for people in all parts of the country. And consistency in the sense of equal treatment by the law for all persons in essentially similar circumstances is a critical requirement of justice itself. What then are these matters of public and private law in our federal country respecting which this consistency is either necessary or highly desirable?

First and perhaps foremost in the "necessary" category is the positive constitutional division of primary legislative powers between the central Parliament on the one hand and the several provincial Parliaments on the other. These distributive provisions are specially entrenched, and are for the most part found in sections 91 and 92 of the British North America Act.² Also, a specially entrenched "Bill of Rights" may emerge from the present pressure for constitutional reform, and this also is a form of division of powers; technically a negative form, in defence of the positive human rights and freedoms specified for special protection. Such a "Bill of Rights" would protect certain basic human rights and freedoms across the whole country from undue impairment by ordinary statutes, either federal or provincial, even though the latter did satisfy the positive distribution rules for legislative powers. What amounts to undue impairment is essentially a judicial question, and a court would strike down an ordinary statute that it decided had such effect.

So, a central and final appellate court is necessary to referee the special constitutional issues just described, but this must not be taken to mean that the central court should be *just* a specialized constitutional court. In truth, the implication is the opposite, that

² 1867, 30 & 31 Vict., c. 3, as am. (U.K.).

these special constitutional decisions are best made by a final court of general jurisdiction. Such issues may and do arise in every department of the law and on virtually any subject. Moreover, before a court can decide on the constitutional validity of a challenged provincial or federal statute, it must first construe that statute for its ordinary meaning, if it were to be applied and enforced according to its terms. Only then can the further issue of constitutional validity be addressed. Accordingly, judicial findings of validity or invalidity are each based on a particular and prior authoritative interpretation of the statute in question, and obviously that interpretation must then hold for all purposes. For example, at times alternative interpretations of a challenged statute are plausible, one narrower and one broader. If the court finds the statute valid on the narrower meaning only, then the broader meaning is thereafter excluded.³ All this implies that judges making constitutional decisions should be generalists in the law, and not just experts in constitutional law. One can be assured of this if they have general jurisdiction as well as special constitutional jurisdiction. Fortunately, in Canada, our judicial system as a whole is for the most part designed to provide this single general jurisdiction, whether the issues arise under provincial laws or federal laws or (as is frequently the case) under both. This is true of the superior courts of original jurisdiction in the provinces and also of the provincial courts of appeal, the intermediate level of appeal. It is logical then that the Supreme Court of Canada should have the same single comprehensive power to settle all aspects of the case before it at the final level of appeal. Moreover, there are practical reasons, aside from the determination of special constitutional issues, for our unitary judicial system with its comprehensive jurisdiction, both original and appellate. Legal issues for ordinary citizens frequently come in single packages that involve matters arising under both federal and provincial laws. For example, bankruptcy under the federal statute may also involve issues under provincial property laws, and all the issues need to be settled if the citizen-litigant is to have justice. As indicated, our system provides for this to be done in one action before courts of general original and appellate jurisdiction in the provinces, so it makes sense that the Supreme Court of Canada should have the same powers.⁴

Moving on now from special constitutional issues, we find that there are other respects in which final judicial decisions with country-wide impact are essential or at least highly desirable. The case is obvious for such uniform and final interpretation of important issues arising from regular statutes of the central Parliament of Canada, for example the Criminal Code. At present about twenty-

³ *McKay v. The Queen*, [1965] S.C.R. 798.

⁴ *A.G. for Ontario v. A.G. for Canada*, [1947] A.C. 127, at p.151 (P.C.).

five per cent of appeals decided by the Supreme Court of Canada are criminal appeals. But what about provincial statutes on subjects assigned to the provincial legislatures, and the corresponding matters covered by the common law in the common law provinces and by the Civil Code in Quebec? One of the purposes of a federal constitution is to continue old diversities and to permit new ones, province by province, in *these* respects. Does it not follow then that the several provincial courts of appeal are the proper final tribunals for issues arising under valid provincial laws in their respective provinces? There is considerable force in this proposition up to a point, but only up to a point. Because many transactions and relations are inter-provincial, though based on provincial laws, relevant precedents from a final national appellate court are at least in the highly beneficial category.

Among other things, we are now touching upon problems of private international law (alternatively known as the conflict of laws). For example, contract is generally a provincial legislative subject, but in a private commercial transaction between a resident of Ontario and a resident of Quebec, is Ontario law to be applied or Quebec law, where the respective provincial contract laws differ critically in the result they would mandate for the two parties? The rules of conflict of laws have been developed, mainly by the courts, to resolve these complex and difficult problems. Thus, in the example given, if the transaction is more closely connected with Quebec than Ontario, Ontario courts as well as Quebec courts will apply Quebec contract law, and thus the results of action in court in either province would be the same. The converse proposition is true if the transaction were more closely connected with Ontario than with Quebec. But this beneficial reciprocity depends on a uniform definition in the conflict of laws rules of what constitutes "closer connection" for each province. To ensure this uniformity, interpretation needs in the end to be in the hands of a final national appellate court which can issue precedents binding for all the provinces in this respect.

We have just been speaking of an inter-provincial situation where the applicable provincial laws are different. But also there are other inter-provincial situations where the applicable provincial laws are the same. For example, in the areas of company law or insurance law, the statutes of different provinces frequently have common provisions. There are a great many inter-provincial relations and transactions between persons to which such uniform laws are relevant, and hence it is beneficial to those persons to have one consistent national interpretation of their meaning. In our system, the appropriate final appellate court for this is the Supreme Court of Canada.

Now we may look again at the proposition stated earlier that, up to a point, it is logical for the provincial court of appeal to be the final court for the province concerned on issues arising under provincial laws. Almost invariably this would seem to be proper when a given case raises issues *only* under provincial laws and the determination of them would have *no* wider significance beyond the boundaries of that province. To a large and growing extent, this is already the position, because such a case is most unlikely to be accepted for appeal by the Supreme Court of Canada. Since 1975, in most types of cases, a litigant must have the consent of the Supreme Court of Canada, or that of the provincial Court of Appeal involved, before being permitted an appeal to the Supreme Court of Canada. Usually this means the consent of the Supreme Court itself, after a brief hearing of the would-be appellant by three judges of the court. Unless the applicant for leave to appeal can show very quickly that some issue of genuine national importance is involved in his case, he is refused leave and the decision of the provincial Court of Appeal concerned stands as the final disposition of the case. So, referring to points made earlier, we find that leave to appeal is almost certain to be refused if (i) the issues in the case arise under the provincial law only, (ii) there is no basic constitutional question about the original validity of that law, and (iii) there are no inter-provincial dimensions to the case in terms either of private international law or uniformity with the provincial laws of other provinces. In such cases the provincial Court of Appeal concerned has increasingly, since 1975, become the final court of appeal for its own province. Speaking of Quebec, the Bar Committee's *Report* gives the figures for that province:⁵

In 1975 the [Supreme Court of Canada] heard 31 predominantly civil law cases; in 1976, 16; in 1977, only 6. In 1975, it heard 8 cases on other Quebec statutes; in 1976, 5; in 1977, none.

Finally, one must remember that the Supreme Court of Canada is one court of nine judges which is able to hear and decide about 160 cases a year at the most. Moreover, the Supreme Court of Canada is the second level of appeal—the typical would-be appellant has already had his day in court twice, once at the trial court level and once at the provincial Court of Appeal level. In addition to the elements of national significance already mentioned, for an appeal to the Supreme Court of Canada, there must also be an element of overriding public and national importance in the case that takes it well beyond the particular interests of the litigants directly concerned. Unless this is so, there is no reason for the Supreme Court of Canada to give leave to appeal. While the categories of “public national importance” are never closed, all the same it is obvious that

⁵ Towards a New Canada (1978), p.58.

the Supreme Court of Canada judges must be strict about granting leave. The vast majority of cases in the court system, including for example criminal cases and private international law cases, will be finally decided in the trial courts or in intermediate appellate courts in the respective provinces. Those who see the general jurisdiction of the Supreme Court of Canada as a threat to the autonomy of the provinces in judicial matters should remember this. The Supreme Court of Canada has the task of giving judicial leadership on the crucial matters indicated, but it can only do this by being highly selective about hearing cases on the merits that are necessary or suitable for this purpose.

Now we must consider whether the Supreme Court of Canada as at present constituted is as well designed as it may be or should be to accomplish the above-mentioned task. In doing this we look first at questions of size and regional quotas for membership, then at the system for appointing judges to the court, and finally at the question of full constitutional status for the court.

III. *Size of the Supreme Court of Canada and Regional Quotas for Membership.*

The starting point for consideration of these problems is the *status quo*. Briefly, it is as follows. The Supreme Court of Canada consists at present of nine justices, coming three from Quebec, one from the Atlantic Provinces, two from Ontario, and three from the Western Provinces. The Supreme Court Act⁶ requires that three of the judges must come from the Bar of Quebec, but the other regional quotas are customary, with apparently an option as to whether there should be three from the Western Provinces and two from Ontario, or vice versa. The judges are appointed to permanent tenure for life or until age seventy-five by the Governor General in Council, that is, by the Cabinet (the Federal Government of the day).

Respecting size and regional quotas, the three sets of reform proposals we are considering diverge somewhat. The Bar Association Committee proposes no change, though it has been ambiguous about customary regional quotas. The Pepin-Robarts *Report* proposes a court of eleven judges, six from the nine common law provinces and five from Quebec. It does not commit itself on the distribution of the six common law judges among the common law provinces. The Trudeau Amendment Bill also proposed a court of eleven judges, with four guaranteed to Quebec and seven coming from the other regions, at least one from each of the Atlantic Provinces, Ontario, the Prairie Provinces, and British Columbia. Note that under this proposal British Columbia would become a region separate from the Prairie Provinces for this purpose.

⁶ R.S.C., 1970, c. S-19, as am.

Clearly the matter of regional quotas is critical, and thus the reasons for them required careful analysis. The Bar Committee's *Report* shows the greatest distrust of them, though it does say ". . . we do agree that an effort must always be made to ensure that the court as a whole has a deep understanding of all the regions in Canada".⁷ This refers to the background knowledge which each of the several judges has of the major region of the country from which he comes, and so this statement does imply at least that no major region of the country should be without a judge on the Supreme Court. Thus the Bar Committee seems to agree that some attention in composing the court should be given to regional quotas. My expectation is that we will continue with the present customary quotas, that is, one from the Atlantic region, two from Ontario and three from the Western Provinces; or three from Ontario and two from the West. I find it difficult to believe that either Ontario or the West respectively would accept a Supreme Court with only one judge from Ontario or the West. Of course the Bar Committee would continue the quota for Quebec at three judges, as a matter of law. But the Committee does say that ". . . apart from Quebec, no province should have reason to expect representation at all times or by any particular number. What we should seek for the court are the best and most sensitive judicial minds the nation has to offer".⁸ The last sentence quoted has a nice ring to it, but it does not quite stand up to analysis. Of course one wants the appointing authority to do the best it can about merit, but pure merit is seldom if ever as obvious as the Bar Committee's statement implies. With the best will in the world, how does the appointing authority identify the one lawyer or judge in nine common law provinces who offers the best and most sensitive judicial mind for the single vacancy that has occurred? Perhaps I can make the point in this way. Take five cities where there are large concentrations of the legal profession—Halifax, Toronto, Winnipeg, Edmonton and Vancouver. Realistically, equivalent merit could be found among some eight to twelve or more lawyers and judges from these cities, at least one from each. But in my view that is as far as merit would take you. Rarely, if ever, could you deal in the superlative and say—Mr. X is *the best* of the lot. By all means let us emphasize merit, but this is not inconsistent with quotas for the major regions of the country. If the vacancy has occurred because the one judge from the Atlantic region has retired, then one of the several lawyers or judges from the Atlantic region who is the equal of the best of his counterparts in other regions should be appointed.

In my view then, regional quotas cannot be banished from the composition of the court, nor should they be. The country is

⁷ Towards a New Canada (1978), p.58

⁸ *Op. cit.*, *ibid.*

diversified into four or five major regions, and recognition of this in composing the Supreme Court of Canada does not threaten to turn the court into a board of arbitration rather than a judicial tribunal. Such recognition does mean that background knowledge of all major parts of Canada will be brought to the conference table in the Supreme Court building in Ottawa when the justices meet to consider their judgments. It is most important that this should be so. Moreover, the judges are independent and impartial for reasons that have nothing to do with regional quotas. Once appointed, they hold office permanently for life or until age seventy-five and can be removed earlier only by Parliament for very serious misconduct. This is what accounts for their independence, as Professor Robert MacGregor Dawson made clear many years ago.⁹

The judge must be made independent of most of the restraints, checks and punishments which are usually called into play against other public officials. . . . He is thus protected against some of the most potent weapons which a democracy has at its command: he receives almost complete protection against criticism; he is given civil and criminal immunity for acts committed in the discharge of his duties; he cannot be removed from office for any ordinary offence, but only for misbehaviour of a flagrant kind; and he can never be removed simply because his decisions happen to be disliked by the Cabinet, the Parliament, or the people. Such independence is unquestionably dangerous, and if this freedom and power were indiscriminately granted the results would certainly prove to be disastrous. The desired protection is found by picking with especial care the men who are to be entrusted with these responsibilities, and then paradoxically heaping more privileges upon them to stimulate their sense of moral responsibility, which is called in as a substitute for the political responsibility which has been removed. The judge is placed in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong; and there is therefore every reason to hope that his best efforts will be devoted to the conscientious performance of his duty.

So we find that the judges of the Supreme Court of Canada, once appointed, are not politically accountable to the regions from which they come. Also, for the same reasons, the judges are not accountable to any other branch of government, federal or provincial, for the manner in which they dispose of the cases that arise before them. They are accountable only to the law itself, including the law of the constitution. This is just as true of the judges from Quebec as it is of the judges from the other provinces. Regional quotas, including the mandatory quota from Quebec, have not up to now consistently produced patterns of regional uniformity of decision among the judges from a single region. So, as long as the constitutional principle of the independence of the judiciary holds, in my view the quotas will not have this effect, though no doubt the two or three judges from a single region will find themselves occasionally together and isolated on the same side of an issue. This does not happen very often. Furthermore, it should be noted that if the judges

⁹ The Government of Canada (2nd ed., 1954), p.486.

of the Supreme Court of Canada were not truly independent as just explained, then the mandatory quota for Quebec would alone be enough to turn the court into a board of arbitration staffed by accountable regional representatives. The difference between the Civil Code and the common law is certainly one of the reasons for a regional quota for Quebec, but not by any means the only reason. If Quebec were a province with the English common law, I would still argue for regional quotas, with Quebec one of the regions. These things having been said, of course every effort must be made within each of the major regions we are talking about to appoint one of the best persons available on the basis of merit, as vacancies occur in the respective regions. Quotas for the major regions of the country and appointment on the basis of merit are not inconsistent when it comes to composing the Supreme Court of Canada.

The Pepin-Robarts Task Force deals much more briefly with the composition of the Supreme Court of Canada than does the Bar Committee, and the Task Force makes quite a different proposal. They recommend that the court should be composed of eleven judges, six from the common law provinces and five from Quebec. This is one of the major respects in which the Task Force presses for recognition of the French-English duality in Canada. Though six to five is not quite literal duality, it certainly comes close. I do not think Quebecers should expect this much, but, if it became necessary politically to agree to this as part of the price to keep Quebec in the Canadian federal union, then I would accept it. The Quebec judges, once appointed, would be truly independent for the reasons I have just given, and would not behave merely as a block of politically accountable representatives from the Quebec region. The Pepin-Robarts Task Force did not address the problem of regional quotas respecting the six judges from the common law provinces, but, as I have also just indicated, I do not think there is any escape from legitimate constitutional expectations in this regard.

As for the over-all size of the court, we have seen that the Bar Committee favours the present membership of nine justices, whereas the other two sets of reform proposals suggest a court of eleven justices. I favour the higher number for some very simple reasons. The present Supreme Court is hard-pressed, and the additional judges would make it easier to carry the heavy work-load. Also, appropriate quotas for membership from the major regions of Canada would be easier to set if the membership of the court were larger than at present. Nine is not a magic number. Indeed, I believe the court could function well as a single and unitary tribunal if the membership were as high as fifteen, with nine as the minimum quorum requirement for any sitting of the court. In these circumstances, there would be an overlapping of at least three judges between any two

panels of nine. A higher quorum might be required for important constitutional cases.

What has been said to this point makes it clear that the system for appointing judges to the Supreme Court of Canada in the first place is of the highest importance. Does the present system on the whole do as well as can be done to select the best persons, or could it be improved? I emphasize that, in considering this question, I will be talking of systems and their implications. No disparagement of any Supreme Court justice past or present is intended. The Supreme Court of Canada has been and is a very distinguished judicial tribunal. The question is, could it be made even better and more effective by some well-calculated revisions in its constitution?

IV. *The System for Appointing Judges to the Supreme Court of Canada.*

The *status quo* concerning the selection of Supreme Court of Canada judges is unilateral appointment by the federal government of the day, after a process of assessment and selection that can be characterized as necessarily confidential (if you approve of it) or as unduly secretive (if you disapprove of it). In any event, the Bar Association Committee, the Pepin-Robarts Task Force and the Trudeau Government in their Amendment Bill all propose to end the present unilateralism one way or another.

The Bar Association Committee shows some sympathy for the Victoria Charter formula of 1971 concerning appointments to the Supreme Court, which gave a major role to the provincial Attorneys General, but, in the end, the Committee said that:¹⁰

The federal government should have the power under the Constitution to appoint judges to the Supreme Court with the consent of a Judiciary Committee of a reconstituted Upper House working in camera.

The Upper House the Committee proposes would be directly representative of provincial governments. The proposal of the Pepin-Robarts Task Force is the same, except that they would require the Federal Government to consult beforehand with the appropriate provincial Attorneys General. The Task Force contemplates the same kind of an Upper House as does the Bar Association Committee, but presumably the Task Force intends *public* proceedings for ratification before the appropriate committee of that House. The efficacy of both proposals thus depends on a total reform of the Senate, which is, to say the least, uncertain. In any event, neither the Committee nor the Task Force favours the present pure unilateralism.

¹⁰ Towards a New Canada (1978), p.55.

The proposal in the Trudeau Government's Constitutional Amendment Bill of June, 1978, is more complex than the other two, but also borrows much from the amendments suggested at Victoria in 1971. What the former government proposed in 1978 was that, while only the federal government could nominate a candidate or candidates for appointment to the Supreme Court, the agreement of the appropriate provincial Attorney General must be sought. If the latter does not agree, then the differences between the provincial Attorney General and his federal counterpart are to be arbitrated by a so-called "nominating council". I say "so-called", because the council is confined to choosing between nominees of the federal Attorney General. The candidate approved by a majority of the nominating council then requires to be confirmed by the new second chamber proposed in 1978 by the former federal government, the House of the Federation. This would be very different from the present Senate, being composed of elected members, half of them being elected by the respective provincial legislatures on a complex formula.

The provisions for arbitration by a nominating council in the Constitutional Amendment Bill of 1978 are as follows:¹¹

S. 106.

. . . (5) Within ten days of the day the Attorney General of Canada gives notice in writing to the Attorney General of the particular province that he proposes to convene a nominating council, the Attorney General of the particular province may inform the Attorney General of Canada by notice in writing that he selects either of the following types of nominating councils:

- (a) a nominating council consisting of the following members: the Attorney General of Canada or his nominee, and the Attorneys General of each of the provinces or their nominees;
- (b) a nominating council consisting of the following members: the Attorney General of Canada or his nominee, the Attorney General of the particular province or his nominee, and a chairman to be named by the two Attorneys General, and if within fourteen days from the expiration of the ten days herein referred to they cannot agree on a chairman, then the Chief Justice of the particular province or if he is unable to act, the next senior judge of his court, shall name a chairman;

and if the Attorney General of the particular province fails to make a selection under this subsection within the ten days herein referred to, the Attorney General of Canada may select the person to be nominated.

(6) Where a nominating council has been established under subsection (5), the Attorney General of Canada shall forthwith submit to it the names of not less than three persons qualified under this division to be appointed to fill the vacancy and about whom he has sought the agreement of the Attorney General of the particular province to their nomination for such appointment, and the nominating council shall not later than fourteen days after the submission to it of those names recommend therefrom a person for such nomination; a majority of the members of the council shall constitute a quorum thereof and a

¹¹ Bill C-60, June 1978.

recommendation of a majority of its members at a meeting convened for the purpose shall constitute a recommendation of the council.

It is noteworthy that when you are all through with this elaborate procedure, nevertheless only nominees of the federal government have been considered.

I have three major comments to make on the foregoing sets of proposals. First, it is clear that no one wants the present unilateral process to continue, even though no doubt it does at times involve informal consultation with provincial Attorneys General as an act of grace and favour by the federal government of the day. So we are looking for some sort of significant change in the system of appointment. But, secondly, the three sets of proposals just explained each come down heavily for ratification of a proposed appointee by the second chamber of the central Parliament. This is apparently seen as the best way to go to improve the system for appointment of Supreme Court judges. With respect, I doubt this, for the following reasons.

Everyone agrees that, in the words of the Bar Association Committee quoted earlier, “. . . we should seek for the court . . . the best and most sensitive judicial minds the nation has to offer”. But, by the time you reach the point of ratifying or rejecting a single nomination, the “seeking” of which the Bar Committee speaks is over, and the single nominee will be confirmed unless something really bad can be marked up against him. As a system, such ratification provides only for the avoidance of downright poor nominations; it does not provide for positively seeking out the best available nominees in the first place. There has been a long experience with this in the United States, where Senate ratification of presidential appointments to the federal court system is required, including appointments to the Supreme Court of the United States. Students of the results in recent years say that, in spite of the requirement for Senate ratification, nevertheless, when the President is a Republican over ninety per cent of the judicial appointees are members of the Republican party, and when the President is a Democrat over ninety per cent of them are members of the Democratic Party.¹² So, to this extent at least, loyalty to the political party in power is given priority over merit pure and simple, and Senate ratification does nothing really to remedy this.

One can safely say that the same sort of party bias exists in Canada in our present system for judicial appointments by the federal government (whether that government is Liberal or Conservative).¹³

¹² Glenn R. Winters: *American Appointments, Proposals and Problems* (1967), 1 *Can. Leg. Studies* 253.

¹³ A Symposium on the Appointment, Discipline and Removal of Judges

Second chamber ratification would not change this in Canada any more than it has done so in the United States. Of course there is nothing wrong with active members of political parties being among those who are appointed to the Bench. It is wrong though that appointees should be mainly supporters of the government party, for this bespeaks an undue emphasis on loyalty and service to a particular party in the criteria for appointment. Of course the major political parties can and do each provide some persons of great merit for judicial appointment from among their own supporters. For this reason, we have a judiciary of very good quality in Canada in spite of the undue element of political party patronage in the system of appointment. Nevertheless, the over-all quality would surely be better if all members of the Bar were in fact equally eligible to be considered for judicial appointment on the basis of merit, whether they were supporters of the government party, one of the opposition parties, or no party at all. While this article is primarily concerned with the Supreme Court of Canada, it is necessary to speak of judicial appointments generally, because the general system is relevant to the Supreme Court of Canada. What makes sense as a reform measure generally makes sense also for appointments to the Supreme Court of Canada, though no doubt it is true that successive federal governments have made some special efforts to emphasize merit when the court concerned was the Supreme Court of Canada.

This leads to my third major comment on this part of the three sets of reform proposals; they all neglect entirely the most promising measure that could be adopted to ensure appointment of the best qualified persons as judges. I refer to the use of appropriate official nominating commissions to provide short lists of the best qualified candidates for judicial office. The appointing authority is then obliged in law or virtually obliged in practice to appoint one of the persons listed. Such bodies function successfully in other countries, notably in the United States, where the so-called "Missouri Plan" is employed, at least to some extent, for the state court systems in almost half of the States. It is noteworthy that Chief Justice Bora Laskin has spoken with approval of this device. On August 23rd, 1977, speaking on judicial independence to the Meeting of Commonwealth Law Ministers in Winnipeg, he said:¹⁴

Given that judicial independence is the touchstone and that professional competence and good character are the sought-after qualities, the guidance or recommendation of a qualified commission would certainly be an appropriate mechanism. This is not the time to examine such a mechanism in any detail. Some countries of the Commonwealth use it, and its effectiveness must depend on its membership and on the scope of the authority entrusted to it.

(1973), 11 *Alta. L. Rev.* 279, remarks by G. M. Stirling, Q.C., at pp.285-287.

¹⁴ Multigraphed version.

I do not have much space for detail either, but certain points should be made, however briefly. (1) These nominating commissions should be standing federal-provincial bodies with effective secretariats and full rules of procedure. They would be permanently in the business of maintaining lists of good prospects for judicial appointment. (2) The commission members should be almost entirely elected members of the federal Parliament and of the provincial legislature concerned. They should be drawn from both government and opposition benches at both the federal and provincial levels, on the nomination of the respective party leaders. They should include some lay persons as well as lawyers. Commissions composed in this way would operate in the mainstream of the public politics of the established political parties of our country. This is a high public political function that is to be performed, and it should not in my view be entrusted to a commission of non-elected persons, however eminent. (3) A two-thirds majority in the commission should be enough to put a name on the short list for a given appointment, and the appointing authority should be required to appoint from the two or three names submitted. Perhaps a requirement that the appointing authority consult the commission would be enough, as the former would have a lot of explaining to do if failed to appoint one of the persons thus recommended. (4) The commission should observe a high degree of confidentiality in its operations, though perhaps the short list submitted to the appointing authority should be published when the appointment is made.

Many more features of such a plan would have to be settled to make it operational, but there is now extensive experience and much literature on the subject in other countries to draw upon for guidance.¹⁵ Finally, it should be obvious that federal-provincial appointing commissions such as those proposed are singularly appropriate to Canada's unitary judicial system under which judges possess general jurisdiction to try issues arising under federal laws or provincial laws or both. Moreover, with such commissions in place, the provinces would not be shut out from real influence on the choice of judges for the higher courts, including the Supreme Court of Canada.

V. The Constitutional Status of the Supreme Court of Canada.

Finally, we come to consider the rather anomalous fact that the essential structure and functions of the Supreme Court of Canada are not specially entrenched in the constitution, and so theoretically are

¹⁵ E.g.: A. Ashman and J. J. Alfini, *The Key to Judicial Merit Selection, The Nominating Process* (The American Judicature Society, August, 1974).

subject to change by ordinary statute of the federal Parliament alone. This is incongruous for a central institution of the federal union itself. It is of course true that our constitutional usages and traditions of judicial independence are so strong that Parliament has never intervened in any way that would impair the true independence of the court. Just the same, all three sets of reform proposals we are considering favour special entrenchment of the basics of the structure and functions of the Supreme Court of Canada, so that there will not even be the appearance of any shortfall respecting its independence in relation to the central Parliament and Government of Canada.

The Supreme Court of Canada has been and is a very distinguished judicial tribunal. Nevertheless, as with all human institutions, there is at times need for some change and room for some improvement. The present seems to be one of those times.
