Legitimacy on Trial:  
A Process for Appointing Justices to the Supreme Court of Canada

by Ian Peach

February, 2005
Public Policy Paper 30
$5.00; ISBN# 0-7731-0514-X
Legitimacy on Trial:
A Process for Appointing Justices to the Supreme Court of Canada

SIPP Public Policy Paper No. 30
February 2005

Ian Peach *

* The author would like to thank the Fellows and staff of the Saskatchewan Institute of Public Policy, in particular John D. Whyte, and the anonymous reviewer for their helpful comments. Any errors or omissions that remain are strictly the author’s. The author would also like to thank Patrick Fafard, a valued colleague and good friend, for asking the seemingly simple question that inspired this paper.
Introduction

The Prime Minister’s unfettered power to appoint Justices to the Supreme Court of Canada has long been a subject of controversy, and the recent federal election campaign raised the profile of the issue once again. Nonetheless, the Supreme Court of Canada is generally a well-respected institution and its Justices are seen as highly professional and highly skilled jurists. Thus, ideas for alternative appointment processes are themselves often subject to criticism for their potential to politicize the appointment process and cause the best candidates to exclude themselves from consideration.

Both sides of debate over appointment processes reflect deeper understandings about place of the judiciary within the Canadian political system and the qualities that secure the legitimacy of the judicial branch in a liberal democracy. The debate is rooted in one of the eternal conflicts of all liberal democracies: what is the right balance between democracy, and the authority that it gives to representatives of majority interests (be they Parliament or the national government in a federation), and liberalism, and the authority that it gives to representatives of minority interests (be they rights claimants or provincial governments). Tracing how the debate over Supreme Court of Canada appointments has changed in the last two decades also reveals an underlying change in our understanding of the most important tasks that the Court performs as final adjudicator of our Constitution. If one is to design an effective appointment process, one must be conscious of conflicting interests that have informed this debate over the years.
Changing Critiques, 1987-2004

One of the most dramatic changes over the last 20 years has been in the reasons for challenging the current process for making Supreme Court of Canada appointment. The 1987 Meech Lake constitutional accord would have fettered the Prime Minister’s power to appoint Supreme Court of Canada Justices by requiring the Prime Minister to appoint someone from a list of names provided by the provinces.¹ This was an attempt to bring to an end a long-standing controversy over the Supreme Court’s neutrality as an adjudicator of the federal division of powers in the Constitution. Several provinces, most notably Quebec, were concerned with a centralizing bias in the Supreme Court’s division of powers decisions, and connected that alleged bias to the fact that the Justices were appointed by the federal government. They insisted that provinces, too, must have a role in Supreme Court appointments if the Court was to fairly and neutrally judge questions of federalism. Thus, even five years after the entrenchment of the Canadian Charter of Rights and Freedoms, federalism remained the principal focus of our political leaders in seeking to improve the appointment process for Supreme Court of Canada Justices.

Now, however, the question of the role of provinces in Supreme Court appointments and the concern with ensuring fair, unbiased adjudication of questions of federalism has virtually disappeared from public and political debate about the appointment of Justices. Instead, in the wake of several controversial Charter of Rights decisions over the last 20 years, the debate about the role of the Supreme Court as adjudicator of our Constitution is almost entirely occupied with questions of “judicial activism” in interpreting the Charter and the appropriate balance between the courts and the legislatures in making politically-charged decisions for

society. Effectively, our political culture has changed from one primarily concerned with questions of federalism to one primarily concerned with questions of individual rights.

While the contrast between 1987 and 2005 is stark, the transformation of the terms of the debate, and the underlying political culture that framed the debate, evolved slowly over the course of the last eighteen years. As early as 1989, the Supreme Court’s groundbreaking interpretation of the meaning of equality in the case of *Andrews v. Law Society of British Columbia*² set the course for increasingly controversial Charter of Rights decisions. These decisions, in turn, raised questions about the appropriate limits on the courts’ freedom to over-ride legislative decisions in the name of protecting individual rights and the degree of deference the judiciary should show to the legislative process in democratic societies.

At the same time, the Ontario Law Reform Commission recognized that providing provinces with a role in Supreme Court of Canada appointments would not, itself, be adequate to ensure the appointment of neutral, competent individuals. All the Meech Lake Accord would do, without any other processes in place for the review of appointments, would be to replace the Prime Minister’s absolute discretion with that of Premiers. With the growing importance of conflicts between individual rights and government actions, and thus between the courts and legislatures, in setting the terms of Canadian political discourse, something more would be needed to place the appointment of judges beyond reproach. Thus, the Commission asked the Dean of the Faculty of Law at Queen’s University, John D. Whyte, to direct a research project to define a process and set of criteria that could assist the Government of Ontario in exercising the role that it was to have in Supreme Court of Canada appointments.

---

The introduction to the report of this project, *Appointing Judges: Philosophy, Politics and Practice*, noted that the *Charter* was probably the greatest impetus for the increase in attention that the public was paying to the judiciary and its membership, and that the public’s interest was “not only in the judicial function, but in the qualifications of the people who execute the office.”³ It went on to note that “respect for judicial independence has been enhanced, as it should be, but so has the demand that the process of selection itself enjoy independence from the vagaries of politics.”⁴ Thus, the papers in the report reflected not only on the Supreme Court of Canada’s role in federalism issues but also on the courts’ role in disputes over *Charter* issues, and considered the implications of these issues for the legitimacy of the processes by which people are appointed to all courts in Canada.

While the Meech Lake Accord never became law, and the initial impetus for the Ontario Law Reform Commission report faded, the 1992 Charlottetown Accord largely reproduced the federalism-focussed process contained in the Meech Lake Accord.⁵ This accord, too, was defeated in October of 1992; with this defeat came the end of any appetite for major constitutional reform, at least for the foreseeable future. The Charlottetown Accord’s demise also saw the debate about reforming the process for making appointments to the Supreme Court of Canada fade. Controversial *Charter of Rights* decisions from the Supreme Court did not, however, come to an end. Thus, the question of reforming the appointment process inevitably became a matter of public interest once again, especially among conservative academics and politicians, largely based in Western Canada.

⁴ Ibid.
⁵ Draft Legal Text, October 9, 1992, section 15.
In response, the Prime Minister committed, in the 2004 federal election campaign, to providing a role for Parliament in reviewing Supreme Court of Canada appointments.\textsuperscript{6} Last August, he created a temporary process by which Members of Parliament could review his most recent two appointments.\textsuperscript{7} While we do not know, as yet, what the Prime Minister’s intentions for a permanent review process are, one can assess the temporary process and can suggest what a permanent process for appointments to the Supreme Court ought to look like. One must recognize, however, that any process will reflect an underlying view of the role of courts in a liberal democracy. As such, all proposals are rightly topics for vigorous political debate about the underlying legitimating conditions of institutions in a liberal democratic society.

One must also realize that, while there is no formal process by which appointments to the Supreme Court of Canada are reviewed, an informal but extensive process of consultation and review of potential candidates has already developed in recent decades. Currently, when the federal Minister of Justice wishes to identify a short list of candidates to fill a vacancy, he or she consults with the Chief Justice of the Supreme Court of Canada (and sometimes the other Justices), the Chief Justice(s) of the court(s) from the region with the vacancy, the Attorney(s) General of the province(s) with the vacancy, and at least one senior member of the Canadian Bar Association and the Law Society or Societies of the province(s) with the vacancy.\textsuperscript{8} Based in part on the results of these consultations and in part on profiles of the candidates’ judicial record compiled by the Department of Justice, the Minister then assesses the professional capacity, personal characteristics and contribution to the diversity of the Court of candidates.\textsuperscript{9}

\textsuperscript{9} \textit{Ibid} pp. 3-4
The Minister and the Prime Minister then discuss the candidates and choose a preferred candidate, who is approved by Cabinet and appointed by Order-in-Council.

**A Comparative Perspective on Judicial Appointments**

Among developed countries, there is a wide variety of processes by which judges, especially judges of the highest court responsible for constitutional adjudication, are appointed. In most of these countries, the process is more formal and has a greater role for individuals or institutions beyond the appointing authority than is the case in Canada. Further, the United Kingdom, like Canada, is currently debating replacing its existing informal process with a more formal process that will seek broader input into judicial appointments.

The country we are most familiar with, of course, is the United States, where presidential nominees require confirmation by the Senate to be appointed. While this is a requirement of the United States constitution, the best known, and possibly infamous, element of this process, the confirmation hearing, is a relatively recent addition to the process, beginning with the nomination of Felix Frankfurter in 1939.\(^{10}\) This process is not unique to the United States, however; the 1979 Nigerian constitution also requires confirmation of Supreme Court appointees by the country’s Senate and appointments to the Dutch Supreme Court also require legislative approval.\(^{11}\) Often, however, legislative approval is *pro forma*, although the exceptions in the United States in the era of mass media loom large over any debate about judicial appointment processes.\(^{12}\)

Switzerland, Austria and Germany go so far as to nominate the members of their constitutional courts through votes of their national assemblies. In Germany this also allows for

\(^{10}\) Carl Baar, “Comparative Perspectives on Judicial Selection Processes” in Ontario Law Reform Commission, p. 148.

\(^{11}\) Ibid., at p. 146.

\(^{12}\) Ibid., at p. 147.
the participation of representatives of the sub-national units of the country (the *lander*) in the appointment process, as the members of the upper house (the Bundesrat) represent the *Land* governments.\(^{13}\) As Carl Baar notes, however,

Experiences in other federal systems thus do not impel Canada to the kind of provincial role in selection of Supreme Court justices that was embodied in draft provisions of the Meech Lake Accord. While the Accord provisions did not provide as widespread and continuing participation for the provinces as the provisions in West Germany’s Basic Law provide for its state governments, they did authorize a much more substantial provincial roles (both in its constitutional status and in the range of activities it involved) than is characteristic of any of the world’s other federal systems. And unlike the West German provisions, the Meech Lake Accord kept judicial selection completely outside parliament.\(^ {14}\)

The United Kingdom is currently considering quite extensive changes to the role of the Lord Chancellor and to the British judiciary. The *Constitutional Reform Bill*, having passed the House of Lords, was introduced into the House of Commons on December 20, 2004 and received second reading on January 17, 2005.\(^ {15}\) The most notable aspect of this bill is that it would create a Supreme Court of the United Kingdom, separate from Parliament, which would take over the roles of final court of appeal from the House of Lords and the Judicial Committee of the Privy Council. The bill would also create a selection committee, which would recommend a nominee to fill a vacancy in the Supreme Court to the Lord Chancellor. In making a recommendation, the selection committee is required to consult with senior judges, the Lord Chancellor, the First Minister in Scotland, the Assembly First Secretary in Wales, and the Secretary of State for Northern Ireland.\(^ {16}\) When he receives a report recommending a nominee from the selection committee, the Lord Chancellor must again consult with those the selection

---

\(^{13}\) Ibid., at p. 151.

\(^{14}\) Ibid., at p. 152-153.


\(^{16}\) *Constitutional Reform Bill* (Bill 18), section 24.
committee is required to consult, before deciding whether to accept the selection committee’s recommendation, reject it, or request the committee to reconsider its recommendation.\(^{17}\) Even under the *Constitutional Reform Bill*, the ultimate authority to recommend an appointment to the Queen rests with the Prime Minister; the bill would simply serve to create a formal process and established structure to provide input into that recommendation.

While international precedents suggest that there is a variety of options available to Canada in reforming the appointment process for Justices of the Supreme Court of Canada, one must be conscious of the fact that the different appointment processes have developed in the context of very different countries with very different political cultures. Any particular country’s appointment system must be sensitive to the political culture of that society if it is to secure the quality of appointments and the legitimacy of the judicial function. Canada is a parliamentary democracy and its judicial structure and legal traditions are taken from those of Great Britain. As well, the United Kingdom is increasingly taking on a quasi-federal character, as reflected in the consultative requirements for the proposed selection committee for Supreme Court appointments and for the Lord Chancellor. Thus, it seems logical for Canada to pay most attention to the judicial reforms being debated in the United Kingdom, rather than looking once again to the south for our political inspirations.

**Towards a New Appointment Process in Canada**

Returning to the Canadian situation, the temporary review process which the Prime Minister created last year for the appointments of Justices Rosalie Abella and Louise Charron is particularly intriguing in the way it insulated the nominees from the questioning of Members of

\(^{17}\) Ibid., sections 25, 26.
Parliament. An *ad hoc* committee, consisting of three Liberal M.P.s, two Conservative M.P.s, one M.P. from each of the Bloc Quebecois and the New Democratic Party, a member of the Law Society of Upper Canada, and a representative of the Canadian Judicial Council, was created to review these appointments.\(^{18}\) Rather than having the nominees appear directly before the committee so it could assess their fitness for appointment, however, the Minister of Justice appeared before the committee to explain the procedure by which the nominees were selected, including who was consulted and what investigations of the candidates were undertaken, and the qualification of the two nominees.\(^{19}\) The committee review also occurred after the nominations were made and, while the committee provided a report to the Prime Minister on the outcome of its review, it could not overrule the Prime Minister’s nominations.\(^{20}\) This is consistent with the recommendations of the May, 2004 report of the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness\(^{21}\) and respects the legal profession’s strong opposition to public questioning of nominees\(^{22}\), but it seems unlikely that this process alone would add much rigour to the decision-making process that is used to select nominees for the Supreme Court.

If the temporary review process is of limited benefit, what should a permanent process be designed to achieve and what should that process look like? The most important outcome of any appointment process is the appointment of individuals with the greatest ability and highest professional reputation as jurists. A further important outcome is to enhance the legitimacy of


\(^{19}\) Ibid.


the Supreme Court of Canada as the apolitical protector of our Constitution, while a third valuable outcome should be to create a Supreme Court of Canada that is more reflective of the diversity of our society, as this is likely to increase its legitimacy in the eyes of those minority communities that will be seeking its protection.

Any appointment process should seek to ensure that all three of these objectives are achieved. In particular, any process of Parliamentary scrutiny of candidates for appointment must serve to significantly increase the legitimacy of the Court without damaging the government’s ability to seek out the most capable jurists. The experience of the United States with Congressional ratification of Supreme Court nominees suggests that Parliamentary ratification runs a significant risk of actually damaging the legitimacy of the Supreme Court of Canada as an apolitical arbiter of constitutional disputes at the same time as it diminishes the interest of candidates of the highest quality in putting their names forward. Former Supreme Court Justice Claire L’Heureux-Dubé put it succinctly in her testimony before the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness when she stated, “The process as it is done in the United States does nothing to enhance either the quality of the candidate, or the institution.”

The process of making appointments to a court effectively has three stages, each of which would likely require a different process to ensure that appointments achieve the three objectives. The first stage is that of determining the pool of potential nominees. As the number of Supreme Court of Canada appointments that will need to be made in any year is small (as the court only has a total of nine members) and candidates will most likely be drawn from appellate courts in the provinces and, rarely, from among high-profile members of legal practice or legal

---

academia, it would seem unnecessary to create a formal application process to identify candidates. There is, however, a need for some process at this stage.

While the Supreme Court’s role in federalism is less prominent now than it was prior to the adoption of the *Charter of Rights*, the value to the legitimacy of the court of engaging provinces in the appointment process (the driving force behind the Meech Lake Accord proposals) ought not to be forgotten. Thus, it would seem appropriate for the federal Minister of Justice to invite provincial Attorneys General to submit names of candidates and to commit to forwarding the names submitted to the next stage of the process. As well, since the sitting Justices of the Supreme Court of Canada themselves have the most intimate knowledge of what skills and expertise are necessary in a new appointee to ensure the continued effectiveness of the court, the federal Minister of Justice should also consult with them to identify particularly important factors to take into account in assessing candidates.

With advice from these two sources, the federal Minister of Justice could construct a short-list of candidates (adding to those names submitted to him or her any names of interest to the federal government) and ask the candidates to submit *curricula vitae*, references, and any other material that would assist in making assessments of the candidates, the next stage of the process. Admittedly, this process for generating an initial short-list does not ensure the racial and ethnic diversity of the court. If diversity is an explicit consideration in the review of the short-list and representatives of minority groups are included on the reviewing body, however, governments should have an adequate incentive to ensure diversity in the names they submit.

The second stage, that of assessing the short-list of candidates, is likely the key to ensuring that candidates of the highest quality are appointed to the Supreme Court and that, in part as a consequence of appointing high-quality candidates, the legitimacy of the Court is
further enhanced. It is important to ensure that this assessment process does not become politicized as a battle of competing ideologies, but remains focused on the professional qualities of the candidates and their ability to fill the needs of the Court. The legal profession in this country, from which judges are drawn, has strongly and repeatedly voiced the concern that Parliamentary hearings would damage the independence of the judiciary and that high quality candidates would not be likely to subject themselves to a politicized process. This is not to say that an assessment process must be extra-Parliamentary or insulated from public scrutiny; indeed, the fact that the process would be assessing several candidates, rather than approving or refusing a single candidate nominated by the government, could reduce the politicization of a Parliamentary committee process. The risk of politicization of appointments will be greater, however, if a Parliamentary committee is involved, so one must approach the question of the appropriate role of Parliamentarians cautiously.

The key question in constructing an assessment body should be who will bring valuable knowledge and perspectives to an assessment of candidates. This question does encourage one to consider something other than a Parliamentary committee process. Obviously, members of the legal profession, both the bench and the bar, bring expertise and knowledge of the desirable characteristics of an appellate judge to any assessment, so an assessment body must include representatives of the legal community. The body, or panel, should not, however, be composed solely of members of the legal profession. The primary reason for this is that the legal community is too homogeneous, both demographically and intellectually (as a consequence of mainstream legal education), to ensure the necessary diversity of candidates. Other members of the public not from the legal profession, particularly individuals from racial and ethnic

---

24 See, for example, Canadian Bar Association, *Supreme Court of Canada Appointment Process* (Submission to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness), March 2004.
minorities, women and Aboriginal people, should also be included, as their perspectives on the necessary qualities of judges in liberal democracies would add value to any assessment of candidates. Parliamentarians could also be included, as they would bring the perspective of those directly engaged in the “dialogue” between legislators and judges that takes place in any liberal democracy. An ideal panel would be composed of equal numbers of representatives of these three groups, to ensure that no one set of interests is able to dominate the assessment; a practical size for such a panel, to allow it to function as a consensus body, would be 9 or, possibly, as large as 12.

Even with a balanced panel, additional protections would have to be built into the assessment process to ensure that it remains focussed on the professional skills and personal qualities of candidates and does not devolve into a partisan battle. This would be done by defining the panel’s mandate and process appropriately.

The panel’s process would need to be carefully designed if it is to be effective while still protecting the privacy of the candidates for appointment and leaving the actual appointment authority in the hands of the federal Cabinet. This last point is important, as it is the federal Cabinet which is responsible to Parliament and, ultimately, the public for the quality of its appointments; if the appointing power was given over to the panel, even by convention, democratic accountability would be in a worse position even than it is under the current appointment process. Thus, the panel’s tasks should be to assess the short-list of candidates given to them, by reference to both an established set of criteria of what makes an effective judge and a description of the particular needs of the Supreme Court at the time, and “grade” the candidates. The grading scheme could be as rough as “highly qualified”, “qualified”, and “inadequately qualified”.

13
To assist them in their assessment, the panel should be able both to review written material (a *curriculum vitae* and, for members of the bench, an analysis of their judgments) and interview the candidates and their references. While a public process, properly constrained by a set of rules, would be possible, it has the potential to damage reputations, especially for those who could be judged “inadequately qualified” not because they lack the necessary qualities to make a good judge but because they do not meet the particular needs of the Court at a particular moment in time. Lorraine Weinrib, in her testimony before the Parliamentary Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, was concerned that, “it would alter the pool [of candidates] tremendously if there were public hearings where people were asked questions…and some were successful in getting an appointment and some not.”

This concern tends to encourage one to consider an *in camera* process. To maintain the privacy of the candidates, the information provided, the interviews, and the eventual panel “grade” should be kept confidential, except possibly in the case of the eventual appointee. The third stage of the process, the actual appointment, should be governed by the convention that the federal Cabinet (in effect, the Prime Minister) only appoints someone from the short-list of candidates assessed by the panel as either “highly qualified” or “qualified”.

Obviously, the criteria for assessing what makes an effective judge would be extremely important in making a good selection. Several commentators on Supreme Court of Canada appointments over the years have identified similar sets of criteria. Jeremy Webber, Lorraine Weinrib, and Jennifer Smith, all of whom contributed to the 1991 report of the Ontario Law Reform Commission, identified several qualities to look for in prospective judges, including empathy, humility, responsiveness to argument, intellectual depth and breadth, integrity,

---

detachment, and impartiality, in addition to technical competence in the law. 26 Thirteen years later, in its brief to the Parliamentary Committee, the Canadian Bar Association reiterated its long-standing view that the essential qualities of potential appointees are high moral character; the human qualities of sympathy, generosity, charity and patience; experience in the law, intellectual and judgmental ability; good health and work habits; and bilingualism. 27

These criteria are, in fact, remarkably similar to those qualities that the government has identified as being important in considering a candidate. The government’s criteria are intellectual ability, writing skills, open-mindedness, decisiveness, diligence, ability to collaborate, awareness of racial, gender and other similar issues, bilingual capacity, specific expertise required for the court, and a series of personal characteristics – honesty, integrity, candour, patience, courtesy, tact, humility, fairness, and common sense. 28 The Standing Committee made no comments on the matter of criteria, so one can assume that there is a broad consensus that the government’s criteria would be the appropriate ones for a panel to apply in assessing candidates for Supreme Court appointment.

There likely is value in adding one more step to the process, however, by requiring the Minister of Justice to appear before a parliamentary committee, sitting in a public session, once the appointment is made, to explain the criteria that were used in reviewing candidates and the reasons the particular candidate was chosen. This appearance, which would effectively be the continuation of the “interim process” used to make the most recent appointments, would provide for more immediate and direct accountability of the executive branch of the government to

27 Canadian Bar Association, at p. 7.
Parliament for its appointments. It would also likely help to reinforce the non-partisan nature of appointments, by requiring the government to provide legitimate justifications for its appointment.

Why not go further, however, and require Parliamentary confirmation of the executive’s preferred candidate, including a public hearing with the nominee? There are several reasons, but the most powerful one is that Parliament would inevitably seek to determine the underlying ideological leanings of nominees. As Edward Ratushny noted in his testimony before the Parliamentary Committee on Justice and Human Rights (as the Parliamentary Committee on Justice, Human Rights, Public Safety and Emergency Preparedness was previously known):

The problem is not that parliamentarians are incapable of understanding the judicial role and conducting restrained, intelligent, and relevant questioning of candidates. … The problem is that there will be very little political interest in doing so. On the contrary, public expectations, interest group pressures, and political instincts will cause many to engage in political campaigns, often through the vehicle of judge bashing.29

By highlighting the political aspect of judicial decision-making, rather than its judicial aspect, Parliamentary confirmation hearings would lead to the acceptance of ideological pluralism, rather than independence of mind, as the best one can hope for in a court. This seems not merely an uninspiring conclusion, but a dangerous one. As Jennifer Smith notes, “Ideological pluralism is a poor standard for appointments to the highest court. Pluralism is not a sufficient antidote to ideology. It only means more of the same deficiency. … In political life, people strive to give effect to their prejudices. Members of the judiciary, aiming at impartiality, are expected to overcome them.”30 By undermining the importance placed on the independence of the individual, Parliamentary involvement in the appointment of judges would effectively undermine the important value of institutional independence of the court, replacing it with the

30 Smith, at p. 206.
idea that the courts are the creation of Parliament and subject to it (as one could argue has occurred in the United States). It seems unlikely that, even where sitting judges of lower courts were being considered, recourse to the claim of judicial independence would deflect questions of Parliamentarians about their ideological leanings and previous decisions; Parliamentarians will seek substantive answers to the questions they pose, even if those questions are inappropriate from the perspective of constitutional theory. Effectively undermining the doctrine of judicial independence through a politicized Parliamentary review process would be particularly dangerous in the era of the 

Charter of Rights, as the 

Charter imposes on courts the duty to uphold our country’s fundamental law, even when it conflicts with legislative decisions.

Beyond this, Parliamentary confirmation of an appointee of the executive branch of government is also inconsistent with Parliamentary tradition. The executive branch, by tradition, has the authority to make appointments and is accountable to Parliament and the people for the quality of its appointments. Parliamentary confirmation of candidates mischaracterizes this accountability relationship, by subjecting the appointee, rather than the appointer, to Parliamentary scrutiny. Further, the unseemliness of several of the Senate confirmation hearings in the United States would likely lead strong candidates to refuse to put their names forward. This, too, is a serious concern; as Jeremy Webber noted in his article for the Ontario Law Reform Commission, “The best judge is not necessarily the blandest judge.”

This consideration has led the legal profession to strongly oppose the idea of confirmation hearings in Canada.

31 Webber, at p. 27.
Conclusion

While we have experienced other moments in this country when proposals for reform of the appointment system for Supreme Court of Canada Justices seemed on the verge of becoming reality, we may now actually be at the point when years of debate culminate in a substantial reform to the appointment process. It is generally accepted that, while the people appointed as Supreme Court Justices have been individuals of high calibre for many decades, the highly informal appointment system is no longer appropriate for a mature liberal-democratic federation with a constitutionally entrenched Charter of Rights. On the other hand, U.S.-style confirmation hearings are too inconsistent with our political traditions and create too many risks of perverse results, for both individuals and the Court, to be worth implementing.

The best approach must achieve the objectives of appointing to the court individuals of exceptional ability and high professional reputation, enhancing the legitimacy of the Court as an independent, apolitical protector of our constitutional arrangements and the rule of law, and building a Court that reflects, to the extent possible in a nine-member court, the diversity of our country. The best way to achieve these objectives would be through a rigorous review of candidates, before an appointment is made, by a committee that reflects the key interests that have a legitimate claim to input in the appointment process. Reform needs to happen, but let it be reform that is appropriate for Canada’s political culture and that will serve the Supreme Court of Canada and our society well.
About the Author

Ian Peach has been with the Government of Saskatchewan for nine years, and has been Director of Constitutional Relations in the Department of Intergovernmental and Aboriginal Affairs and, for the five and one-half years before coming to SIPP, a Senior Policy Advisor in the Cabinet Planning Unit of Executive Council. In his fifteen years of government service, Mr. Peach has been involved in numerous intergovernmental negotiations, including the Charlottetown Accord, the Social Union Framework Agreement, First Nation self-government agreements, and the Canada-Saskatchewan Northern Development Accord. He has also been involved in developing Saskatchewan’s policies on a broad range of issues, including Saskatchewan’s argument before the Supreme Court of Canada in the Quebec Secession Reference and key cross-government strategies to address the socio-economic disparity of Aboriginal people in Saskatchewan and northern economic development. As of January 1, 2005, Mr. Peach is the Director of the Saskatchewan Institute of Public Policy.
SIPP Public Policy Papers

Through SIPP Public Policy Papers, the Institute aims to provide background information, encourage discussion and contribute to the debate on policy-related issues. The opinions and views expressed in the papers are those of the authors.

Other works in the SIPP Public Policy Papers series:

No. 29 This “New Europe”: Historic Policy Opportunities for Canada by Dr. Karl Henriques (January 2005).

No. 28 Rethinking the Jurisdictional Divide: The Marginalization of Urban Aboriginal Communities and Federal Policy Responses by Janice Stokes, Ian Peach and Raymond B. Blake (December 2004).


No. 26 The Death of Deference: National Policy-Making in the Aftermath of the Meech Lake and Charlottetown Accords by Ian Peach (September 2004).

No. 25 Standing on Guard Canadian Identity, Globalization and Continental Integration by Raymond B. Blake (June 2004).

No. 24 The Charter of Rights and Off-Reserve First Nations People: A Way to Fill the Public Policy Vacuum by Ian Peach (March 2004).

No. 23 Performance Measurement, Reporting and Accountability: Recent Trends and Future Directions by Dr. Paul G. Thomas (February 2004).

No. 22 Weathering the Political and Environmental Climate of the Kyoto Protocol by Raymond B. Blake, Polo Diaz, Joe Piwowar, Michael Polanyi, Reid Robinson, John D. Whyte, and Malcolm Wilson (January 2004).

No. 21 Righting Past Wrongs: The Case for a Federal Role in Decommissioning and Reclaiming Abandoned Uranium Mines in Northern Saskatchewan by Ian Peach and Don Hovdebo (December 2003).

No. 20 Youth Justice Policy and the Youth Criminal Justice Act by Ross Green (November 2003).

No. 19 Demographic Trends and Socio-Economic Sustainability in Saskatchewan: Some Policy Considerations by Janice Stokes (October 2003).

No. 18 Labour Issues in the Provision of Essential Services by Pavel Peykov (September 2003).

No. 17 Should Saskatchewan Adopt Retail Competition for Electricity? by Dr. Michael Rushton (June 2003).

No. 16 A Survey of the GM Industry in Saskatchewan and Western Canada by Dr. Cristine de Clercy, Dr. Louise Greenberg, Dr. Donald Gilchrist, Dr. Gregory Marchildon, and Dr. Alan McHughen (May 2003).

No. 15 Saskatchewan’s Universities – A Perception of History by Dr. Michael Hayden, Dr. James Pitsula, and Dr. Raymond Blake (May 2003).
