

**Canadian Association of Law Teachers  
Panel on Supreme Court Appointments  
June 2005**

**Executive Summary**

While the role and prominence of the Supreme Court has changed dramatically since the enactment of the *Constitution Act, 1982*, including the *Charter of Rights*, the method of appointing Supreme Court judges has remained unchanged as a matter of near absolute discretion for the government of the day. The legal backdrop to the appointment of Supreme Court justices in Canada is minimal. The *Supreme Court Act* provides that judges shall be chosen from present or former judges of a superior provincial court or from lawyers who have been at a province's bar for at least 10 years and at least three of the judges be chosen from the Quebec Court of Appeal or Superior Court, or from lawyers in the Province of Quebec. Against this minimal legal threshold is a complex constitutional backdrop. Foremost among the constitutional principles animating judicial appointments is judicial independence. The appointment process has to be assessed with respect to the requirements of judicial independence, particularly those recommending the depoliticization of the relationship between the executive and judicial powers.

In recent years there has been a growing demand for a more diverse judiciary at all levels – including the Supreme Court of Canada. These demands accept that courts are not, and should not be, representative institutions in the sense of being responsible to particular constituents, as this would clearly run counter to principles of judicial independence and the unique role of the courts in a democratic society. There is, however, a growing sense that Canada's courts and particularly the Supreme Court would enhance their legitimacy by better reflecting the diversity of Canadian society. It is the committee's position that greater diversity will complement rather than detract from the goal of a merit-based appointments process. The committee concludes that the creation of independent judicial appointment commissions would interject accountability, transparency, and representativeness into the present system.

In addition to this more legitimate and transparent nominating process, the committee also endorses a greater Aboriginal role in the appointment process. The idea of Aboriginal representation on the SCC was endorsed by The Royal Commission on Aboriginal Peoples stated in its 1996 final report, which recommended that, "...the Supreme Court of Canada should include at least one Aboriginal member". A constitutional amendment in accordance with s.41, which means provincial unanimity, is required for changes to the composition of the Supreme Court of Canada. In the absence of such an amendment stipulating that the Supreme Court must have at least one Aboriginal member of the Court, this should be achieved by appropriate constitutional convention. Furthermore, in designing a legitimate and democratic process of appointment, representatives of the Indigenous Bar Association and of the Aboriginal peoples should be consulted.

While the momentum toward aboriginal representation on the Supreme Court is relatively recent, the issue of gender representation on the Court is long-standing. Absolute male

privilege prevailed at the Court until 1982 when the first woman – Justice Bertha Wilson – was appointed. Currently, the Chief Justice and three of the eight puisne judges are women. If this were the norm, there would be no reason to seek a guarantee of gender representation on the Supreme Court of Canada. However the Court has a very long history of failing to include women on its bench. In light of the make-up of Canadian society and the Canadian bar, it is now appropriate to insist that from this time forward no new appointment can be made that would have the effect of reducing the current number of women on the Supreme Court of Canada bench.

## **Introduction**

On May 31, 2004, at its 53<sup>rd</sup> annual meeting, the Canadian Association of Law Teachers (CALT) approved a motion appointing a committee to inquire into the selection process for Supreme Court judges.<sup>1</sup>

It is hereby moved that a committee be appointed to study and make recommendations to the CALT membership regarding the question of what new procedures, if any, should be adopted regarding the selection of candidates for appointment to the Supreme Court of Canada. The committee is to consider both the way in which nominees are selected and the desirability of a more public process for the review of a candidate's suitability once he or she is nominated. It will take as a starting point the recommendations approved by the CALT annual general meeting in 1987, and consider whether there is a need to amend them. The committee will report by December 31 2004.

At the committee's request, the CALT Executive extended the time period for tabling the report until the annual meeting being held in Vancouver, June 22-24, 2005.

This report is divided into four sections. The first section provides an overview of the Supreme Court of Canada appointment issue and situates that issue against a backdrop of statutory and constitutional law requirements. The second section explores the extent to which the Supreme Court should reflect the diverse make-up of Canadian society and what structures might give institutional form to this aspiration. Specifically, the merits of an independent nominating commission for Supreme Court appointments are considered. The third section examines the argument for an Aboriginal role in the selection process and the goal of Aboriginal representation on the Court. [Fourth and finally, the issue of gender representation both in the selection process and on the Court is canvassed.]

### **1) Judicial Independence and the Appointment of Judges to the Supreme Court of Canada**

Appointment to the judiciary has until now been a topic belonging more to political science than to law in the strict sense. The appointment of judges to the Supreme Court has not escaped this rule. However, it is perhaps time to move forward and, in light of

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<sup>1</sup> CALT previously explored this issue in the late 1980s in its report, *Judicial Selection in Canada: Discussion Papers and Reports* (February 1987).

recent cases, think seriously about the constitutional framework and legal conditions surrounding judicial appointments to the Supreme Court of Canada. These comments could also be applied to the appointment of other judges by political powers to federal or provincial courts in accordance with the Constitution and relevant legislation.

Section 4(2) of the *Supreme Court Act*<sup>2</sup> provides that “judges shall be appointed by the Governor in Council by letters patent under the Great Seal”.<sup>3</sup> Section 5 states that the judges shall be chosen from present or former judges of a superior provincial court or from lawyers who have been at a province’s bar for at least 10 years. Section 6 requires that at least three of the judges be chosen from the Quebec Court of Appeal or Superior Court, or from lawyers in the Province of Quebec. These are the key features of the appointment of judges to the Supreme Court. These features are set out in legislation and can therefore, in theory, be amended by Parliament. However, Article 41(d) of the *Constitution Act, 1982* constitutionalizes the composition of the Supreme Court of Canada, though it still has to be specified what is meant by “composition of the Court”. Article 41 provides that this issue is subject to the constitutional amendment procedure, which requires the agreement of the federal authorities (House of Commons and Senate) *as well as* all of the provincial legislative assemblies. In other words, it requires unanimity. Section 42(d) of the *Constitution Act, 1982* also says that any change to the Supreme Court, aside from changes to its composition, has to comply with the procedure set out in Article 38. The amendment procedure in Article 38 does not require the unanimity of political bodies, unlike that set out in Article 41. Thus, it seems that the *Supreme Court Act* has been constitutionalized by Articles 41(d) and 42(d) of the *Constitution Act, 1982*. The exact nature of this constitutionalization remains unclear<sup>4</sup>. We can therefore wonder whether it applies to the appointment of judges to the Court. While the procedure for appointing judges is subject to political practices that probably are constitutional conventions,<sup>5</sup> and the Governor in Council still has the ultimate power to appoint, it seems there is nothing to prevent the federal government from amending the way that judges are appointed to the Supreme Court<sup>6</sup> to ensure that the process complies more fully with legal and political developments in modern constitutional states. The latest proposal by the Department of Justice Canada concerning the appointment of judges to the Supreme Court supports this possibility.<sup>7</sup>

The custom by which political powers appoint judges by choosing them from among lawyers dates back to the Middle Ages. Indeed, the practice can be traced back to the twelfth century, when the king selected judges from among the “royal clerks” of the

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<sup>2</sup> R.S. 1985, c. S-26.

<sup>3</sup> Federal judges are appointed by the Governor General in compliance with Article 96 of the *Constitution Act, 1867*.k

<sup>4</sup> W. R. Lederman, “Constitutional Procedure and the Reform of the Supreme Court of Canada”, (1985) 26 *C. de D.* 195.

<sup>5</sup> *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

<sup>6</sup> To the same effect, see R. Devlin, A. W. MacKay and N. Kim, “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards A ‘Triple P’ Judiciary”, (2000) 38 *Alberta L. Rev.* 734 at 815.

<sup>7</sup> Proposal by the Minister of Justice of Canada, April 7, 2005. See: <http://www.canada.justice.gc.ca/en/dept/pub/scc/index.html> (last visited on May 31, 2005).

time.<sup>8</sup> A drop in the quality of public servants soon forced the king to find judges elsewhere. Thus he turned to the legal profession composed of those known as “serjeants at law”.<sup>9</sup> This is the origin of the current system in common law countries, where judges are selected from among members of the Bar. The power to appoint belonged wholly to the king. It was a major feature of his prerogative, and this should not surprise us since the sovereign was the source of all law. Indeed, the king’s sovereignty seems to have pertained to law first and foremost. The king’s sacred power made him the great dispenser of justice. In Medieval thought, justice was “the purpose and the strength” of the nascent state. Thus, the king’s primary duty was to render good justice in the Christian tradition and according to the idea that each should be given his due.<sup>10</sup> It was through justice that the king maintained control over the kingdom. The king’s jurists strove to consecrate this royal power by sprinkling public discourse with maxims such as “the king is the fount of justice” and “all justice proceeds from the king”. This explains why constitutional and legislative texts gave the power to appoint judges to the king and, by constitutional convention, to the Minister of Justice or Prime Minister in the case of chief justices.

Canadian case law has not really ruled on this issue. However, there are a few thoughts on the topic in one of the first cases concerning the interpretation of Article 11(d) of the *Canadian Charter of Rights and Freedoms*, which gives every accused the right to be judged by an independent and impartial tribunal. Thus, in *Re. Currie and Niagara Escarpment Commission*, Ewaschuk J. wrote that the appointment procedure as it exists in Canada does not result in dependency on the government:

Accepting that political input is made in respect of judicial appointments in this country at all court levels, even in respect of the Supreme Court of Canada, a judge cannot be said to be dependent on the appointing government. At best he [sic] may after appointment be grateful, but not dependent<sup>11</sup>.

This point of view is not surprising since it is one of the first interpretations of judicial independence as set out in Article 11(d) of the *Canadian Charter of Rights and Freedoms*. A similar distinction seems to hold between the status of candidates for the judiciary (future appointments) and judges who have already been appointed. The latter clearly and indisputably have the attributes of judicial independence. In the case of potential judges, Ewaschuk J. implies that the field is purely political and a result of the enduring custom sketched above, and that any considerations relating to law should be

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<sup>8</sup> “In the late twelfth century and early thirteenth century, when the central royal courts were appearing, judges were drawn from the nascent civil service of the day”, William LEDERMAN, “The Independence of the Judiciary”, (1956) 34 *Can. Bar Rev.* 769 at 774.

<sup>9</sup> “We shall see that by 1316 the order of serjeants at law had been formed. This order consisted of the leading practitioners who were promoted to be members of the order by the crown; and, when the judges ceased to be chosen from the royal clerks, they naturally came to be chosen from this order of serjeants, and soon came to be chosen solely from its members”, William HOLDSWORTH, *A History of English Law* (3rd ed.), Vol. 1, London, Methuen & Co. Ltd. and Sweet and Maxwell, 1945 at 197.

<sup>10</sup> “Justicia est constans et perpetua voluntas jus suum cuique tribuendi”, i.e., “Justice is the constant, eternal will to give each his due”, Bernard GUENÉE, *L’Occident aux XIV<sup>e</sup> et XV<sup>e</sup> siècles. Les États*, 5<sup>th</sup> Ed., (Paris: P.U.F., 1993) at 104.

<sup>11</sup> *Re Currie and Niagara Escarpment Commission*, (1984) 13 C.C.C. (3d) 35, p.43 (Ont. H.C.).

removed. In short, the legal has to give way to the political because of the heavy weight of historical tradition, which, with other features, has established the founding principles of the state. We might be tempted to believe that history and political observations put an end to all discussion and completely eliminate all reflection of a legal nature. Yet nothing is less sure. Indeed, did not the king appoint judges only for as long as they pleased him (*durante bene placido*)? Was this power not a secular practice that was also dressed in the finery of an essential feature of executive prerogative? We know what has become of appointment “during the king’s good pleasure”. It is therefore perfectly plausible to think that the power to appoint could be called into question. Our political and legal frameworks are constantly changing, and institutions are still being refined.<sup>12</sup>

We know, and the courts have repeatedly affirmed, that the primary purpose of judicial independence is not to satisfy the desires of judges. Above all, the principle is intended to inspire public trust in legal institutions. It therefore has pedagogical and rhetorical virtues: it reassures the public that judges are impartial and independent, have integrity, and are incorruptible and objective. The principle of judicial independence thus helps to build and maintain an institution, namely the judiciary, in the more general structure of state power. Chief Justice Lamer developed this more institutional view of judicial independence at length in *Reference re. Remuneration*.<sup>13</sup> In particular, concerning the executive, legislative and judiciary, Lamer J. insists that it is necessary that “the relationship between the judiciary and the other branches of the government be depoliticized.”<sup>14</sup> We might be tempted to think that this important assertion applies only to judges who have already been appointed. Yet why would the imperative of depoliticization apply only to those who are already judges? What would be the logic of an argument according to which politicization could be a possible vector in the appointment process, but that it has to disappear once the process is complete? At the constitutional level, it seems that the distinction between the appointment process and the appointment itself does not hold. In *Therrien*, the Supreme Court asserted that facts existing prior to the appointment of a judge were relevant to the assessment and protection of judicial independence.<sup>15</sup> Indeed, it is impossible to claim that the principle of judicial independence is maintained if appearances say that the appointment process is tainted by political interference. The distinction therefore does not hold because it creates an artificial and implausible separation between two stages in a judge’s career, namely appointment and practice, while these two stages are intimately related in the eyes of the public. We can therefore continue the analysis and ask whether Chief Justice Lamer’s proposal in *Reference re. Remuneration* to create an independent commission in charge

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<sup>12</sup> The structure of the powers of a modern state, in the classic form of an executive, legislative and judiciary, is the result of a very long process of refinement of institutions. State functions were initially all carried out by the same institution, the *Curia regis*. Then, in the Middle Ages, that institution was gradually split. Separate institutions emerged, but their members did not always perform exclusive functions. Over time, the institutions became more refined and took their modern forms, and the functions became exclusive, in the shape of the current separation of powers (executive, legislative and judicial). This process is, of course, not over.

<sup>13</sup> *Reference re. Remuneration of the Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, para.125 (hereinafter: “*Reference re. Remuneration*”).

<sup>14</sup> *Ibid.*, para. 131.

<sup>15</sup> *Re Therrien*, [2001] 2 S.C.R. 3 paras 57, 58 and 149.

of recommending salaries for provincially appointed judges might not be a constitutional solution to the difficult problem of appointing judges to the Supreme Court. Naturally, we are not suggesting that the process has been stained recently by irregularities. The purpose is simply, and always in compliance with the perspective sketched out by the Supreme Court itself, to ensure the integrity of the legal institution in the eyes of Canadians. Consequently we are focussing on appearances, since, as we all know, “justice must not be done but also be seen to be done”. We could therefore imagine the establishment of an independent commission composed of autonomous and representative members and given the responsibility of studying candidacies and recommending candidates to the Governor in Council.

Some have already suggested, and this is an aspect of the Minister of Justice of Canada’s April 7, 2005 proposal,<sup>16</sup> that a parliamentary commission should be involved in the appointment process in some way. In particular, reference has been made to the American model. Others criticize this model and suggest, like the Minister of Justice of Canada, that parliamentarians be given a more modest role: participation in the consultative committee responsible for examining candidacies, and the Minister’s appearance before the parliamentary committee, after the judge’s appointment, to explain the reasons and motives for the appointment. This process would probably be an improvement on the current procedure. Moreover, it is clear that strong involvement of parliamentarians will not help to achieve the depoliticization recommended by the Supreme Court of Canada in *Reference re. Remuneration*. While the purpose of this review is not to pronounce specifically on the Minister of Justice’s proposal, it seems important to keep the depoliticization imperative in mind whenever there is a call for greater participation of politicians in the appointment of judges.

We can therefore conclude from this short overview of the conditions surrounding the appointment of judges to the Supreme Court of Canada that the appointment process should no longer be considered simply a topic for political science, but as an issue falling into the field of law, strictly speaking. Consequently, it should meet the imperatives of judicial independence. A modern constitutional state (*Rechtsstaat*) should take into account the conditions required for judicial independence at every stage in the career of a judge: from appointment, to practice, to retirement or removal. This is a continuum that should not be broken, for to do so could damage the integrity of the institutions with respect to appearances and public esteem. Thus, the appointment process has to be assessed with respect to the requirements of judicial independence, particularly those recommending the depoliticization of the relationship between the executive and judicial powers. On the constitutional level, this requirement could translate into the establishment of a truly independent commission mandated to examine candidacies and recommend candidates. Note that the recommendation of candidates should be binding on the Minister and not amount to a fig leaf designed to hide a status quo in which the government continues to exercise the power to appoint alone and without any real sharing. The specific nature and conditions of such a commission remain to be defined. For now it suffices to say that it has to be independent and endowed with real powers to assess and recommend.

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<sup>16</sup> See *supra* note 7.

## 2) **The Value of Diversity on the Bench and the Need for More Proportional Representation**

In recent years there has been a growing demand for a more diverse judiciary at all levels – including the Supreme Court of Canada. These demands accept that courts are not, and should not be, representative institutions in the sense of being responsible to particular constituents, as this would clearly run counter to principles of judicial independence and the unique role of the courts in a democratic society. There is, however, a growing sense that Canada’s courts and particularly the Supreme Court would enhance their legitimacy by better reflecting the diversity of Canadian society. The value of an increased diversity on the courts has often been assumed but there have also been opponents who suggest that too much focus on proportional representation could detract from the vital appointment criteria of merit.

It is our view that greater diversity can and would enhance merit (broadly defined) and not replace it as a vital criteria for appointment. The arguments on both sides of this debate are explored at length in Richard Devlin, Wayne MacKay and Natasha Kim’s 2000 Article, “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary or Towards a “Triple P” Judiciary”. After exploring the argument these authors conclude:

... it is apparent that we come down in favor of the increased diversity. But we have also been careful to point out that identity is not everything, and that there are a variety of goods to be pursued when contemplating the criteria for judicial office. Identity cannot be determinative; its historical devaluation should not be remedied by an essentialist over-evaluation.<sup>17</sup>

As apparent in our call for an Aboriginal appointment to the Supreme Court of Canada, this is based upon a representation of three distinct legal systems (common law, civil law and aboriginal) and not upon an argument for identity representation. Thus we do not push for representative appointments as a quota on the Supreme Court itself. Instead we adopt the approach taken by Devlin, MacKay and Kim that the principles of diversity and representation be advanced through the composition of the proposed independent Judicial Appointment Commission. We agree with both this approach to identify representation and the independent appointment commission as the best overall mechanism for judicial appointments. Indeed, we adopt the Devlin, MacKay and Kim proposal and with the consent of the authors, reproduce the selected portions from their

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<sup>17</sup> Devlin, MacKay and Kim supra note 6, at 811.

article, complete with their footnotes, renumbered to fit this text.<sup>18</sup> Devlin, MacKay and Kim emphasize that past reform proposals for appointment have been largely silent on the issue of diversity and identity representation.

These past proposals for reform did not, until very recently, even raise the issue of representation for women, visible minorities, and people with disabilities. This issue has only made it to the table of reform proposals in the late 1980s and early 1990s, after the arrival of the *Charter* and a growing awareness of the politics of identity at all levels of public life, including the judiciary.<sup>19</sup> These calls for reform did not move beyond academic writings to become specific reform proposals within the inner circles of politics. There has been a growing awareness of the need for a more open and accountable judicial appointment process and a concern about leaving judicial appointments to the unfettered discretion of the executive level of governments. It was in response to the growing demands for a more open and consultative process that the federal government and the provinces embarked on a process of advisory committees involved in screening and recommending appointments to the executive.<sup>20</sup> Ultimately, the decisions remain in the hands of the executive but, in practice, the recommendations of these advisory committees have increasing weight.

Under the *Supreme Court Act*,<sup>21</sup> there is a guaranteed quota of three justices from Quebec. This quota was also included in the failed 1992 *Charlottetown Accord* and the 1987 *Meech Lake Accord*. Had it passed, the quota would have become constitutionalized. There is also a practice or convention of regional representation on the Supreme Court of Canada that has rarely been breached.<sup>22</sup> By this convention there is one justice from Atlantic Canada, two from the West and three from Ontario. These informal regional quotas are also applied in respect to other s. 101 courts, such as the Federal Court and the Tax Court, either by way of convention or by statutory provisions.<sup>23</sup> At the provincial level, similar conventions and practices are sometimes applied to ensure that different regions of the province are represented on the bench. While regional representation has not been conveyed in terms of express quotas, the practice has achieved much the same results.<sup>24</sup>

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<sup>18</sup> The quoted portions from V. “From Theory to Institutional Design: Options for Judicial Appointment Process”, *ibid.*, at 812, 818-819, 822, 825, 827-829, 833-837.

<sup>19</sup> A.W. MacKay and R. Beauman, “The Supreme Court of Canada: Reform Implications for an emerging National Institution” in C. Brekton and A.W. MacKay eds. *The Courts and the Charter*. (Toronto University Press, 1985 and I. Grant and L. Smith, “Gender Representation in the Canadian Judiciary and E.P. Mendes, “Promoting Heterogeneity of the Judicial Mind: Minority and Gender Representation in the Canadian Judiciary” in Ontario Law Reform Commission. *Appointing Judges, Philosophy, Politics and Practices* (Toronto: Ontario Law Reform Commission, 1991) at 57 and 91.

<sup>20</sup> Canadian Department of Justice, *A New Judicial Appointment Process*. (Ottawa: Minister of Supply and Services, 1988 ...

<sup>21</sup> *Supreme Court Act*, *supra*, Note 2, s. 6.

<sup>22</sup> W.R. Lederman, “Thoughts on Reform of the Supreme Court of Canada” (1970) 8 Alta. L. Rev. 1 at 11, advocates regional quotas with increased representation for the Atlantic and Western provinces.

<sup>23</sup> See *Federal Court Act*, R.S.C. 1985, c. f-7, s.5 (6); *Tax Court of Canada Act*, R.S.C. 1985 c. T-2. s. 4(4). See also Appendix II, *infra*.

<sup>24</sup> In addition, a similar practice has developed in Germany and Switzerland. However the quotas are based on partisanship rather than region.

Once we move beyond regional or linguistic<sup>25</sup> representation to other matters of identity such as race, gender, or disability, the issue of quotas in any form becomes more controversial. It is useful to pause and consider why there is such resistance to recognizing the need for representation on the judiciary in respect to some aspects of identity and not others<sup>26</sup> At the heart of this resistance are assumptions about merit and impartiality in judging that influence which is considered a legitimate appointing process and what is not. We have responded to these issues above.<sup>27</sup>

### **Modified executive appointment**

This is basically the current system for the Canadian Supreme Court, where the government has broad discretion in appointment. Although aided by advisory bodies, the other federal and provincial appointments are still subject to executive discretion in varying degrees. Advisory committees have made the judicial appointment process more open and accountable, but the composition of these committees is still quite limited. Their membership is drawn largely from the professional ranks of lawyers and judges, and there is only limited input from the lay public. The representation of women, visible minorities, and people with disabilities within this lay membership is also limited. Thus, the accountability (such as it is) is still to a fairly select and elite group. Furthermore, the process is still one which is veiled in secrecy, and the existence and composition of these advisory committees is not readily available to the general public. As long as the ultimate decision rests with the executive, it is unlikely that the process of recommendation and advice will be open. In sum, we do not see much hope for significant reform in tinkering with the current, albeit improved, executive appointment process.<sup>28</sup> As will be argued later, what is required is an independent body that actually makes the decision.

Whereas the judicial elections option is usually rejected outright, the idea of confirmation hearings has been supported recently by Jacob Zeigel and retired Supreme Court Justice Gerard La Forest,<sup>29</sup> at least with regard to the Supreme Court.

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<sup>25</sup> By “linguistic” we of course, mean the official languages of French and English rather than other linguistic groups in Canada such as aboriginal.

<sup>26</sup> A partial explanation for why French representation is accepted unquestionably is the Canadian history surrounding bilingualism and biculturalism, and the constitutional guarantees in ss. 16-23 of the Charter. See *Mahe v. Alberta*, [1990] 1 S.C.R. 342, where French minority education rights under s. 23 were seen as an exception (or at least an acceptable deviation) to s. 15 equality rights and s. 27 recognition of multiculturalism. Further, the Supreme Court expressly advocated a constitutional right for proportional representation (although not threshold representation) of a French minority on school boards that governed schools including French language education. Beyond the limited guarantee in s. 35 of First Nations peoples' aboriginal and treaty rights, there is no similar protection for First Nations' language or culture.

<sup>27</sup> This analysis of the pros and cons of identity representation was discussed earlier in this report.

<sup>28</sup>J. Smith, "Executive Appointment of the Judiciary: A Reconsideration" in *Appointing Judges: Philosophy, Policy and Practices* (Toronto: Ontario Law Reform Commission, 1991) at 189 [hereinafter "Executive Appointment"] provides an example of small changes to the existing structure. M.L. Freidland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa, Canadian Judicial Council, 1995,) provides some examples of somewhat broader limits on executive discretion, as an extension of the current system.

<sup>29</sup>J. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada" (1999) 5:2 *Choices* I. See also Task Force on Canadian Unity, *A Future Together: Observations and*

In fact, support for such a reform came as early as 1969 from high-ranking political and academic commentators.<sup>30</sup> The allure of this model is that it provides greater transparency and provincial participation. Public confirmation hearings by the Upper House - the Senate as representative of the provinces - opens the process to the people, provides a check on executive power, and allows the provinces a voice in judicial appointments to the court that adjudicates intergovernmental disputes. However, leaving aside logistical problems regarding the need to reform the Senate, there are other drawbacks to a confirmation or ratification model of appointments.

While the need to check executive discretion is understood and advocated here, partisan politics are still likely to be the soft underbelly of the confirmation model.<sup>31</sup> If the same political party holds most of the seats in the Lower and Upper Houses, then patronage may still be a strong factor in appointments. On the other hand, even if that is not the case, the process may still be riddled with politics, e.g. if the Senate reacts to public opinion and the media about the appointee rather than to her or his qualifications.<sup>32</sup> Further, "ideological partisanship" may also occur; if it is thought that the nominee would unacceptably "shift the philosophical balance"<sup>33</sup> on the Court, then one's personal philosophy becomes a condition of appointment. This could backfire on the goal of representation; the status quo as the favoured norm might encourage greater homogeneity in the Court appointees, rather than diversity.

Third, the principles outlined in *Valente* on the distinguishing characteristics of the judiciary<sup>34</sup> may be violated since a candidate is often asked to indicate how she or he would decide on a specific issue. While some do not answer, if they do, they face the public perception of bias on their part (judicial impartiality), and, if they are appointed, the moral dilemma of whether they are required to conform to that opinion (judicial independence). It is for this reason that former Justice of the Supreme Court of Canada, Bertha Wilson, is opposed to confirmation hearings, drawing on the experience of Sandra Day O'Connor, who was interrogated at great length about her views on abortion in the United States.<sup>35</sup> Retired justice Peter Cory has expressed the same misgivings.<sup>36</sup>

Finally, the parade of American horrors, such as the Bork and Thomas debacles, has provided much ammunition against the idea of confirmation hearings. Irresponsible questioning or reporting could possibly destroy the credibility and reputation of a

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Recommendations (Quebec: Minister of Supply and Services Canada, 1979) (Co-chairs: J.L. Pepin & J.P. Roberts); The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal: Quebec Liberal Party, 1980); Bill C-60, *The Constitutional Amendment Act*, 1978.

<sup>30</sup> P.E. Trudeau, *The Constitution and the People of Canada* (Ottawa: Government of Canada, 1969); P.H. Russell, "Constitutional Reform of the Canadian Judiciary" (1969) 7 *Alta. L. Rev.* 103.

<sup>31</sup> G. Winterton, "Appointment of Federal Judges in Australia" (1987), 16 *Melbourne U.L. Rev.* 185, at 195.

<sup>32</sup> C. L'Heureux-Dubé, "Nomination of Supreme Court Judges: Some Issues for Canada" (1991) 20 *Man. L.J.* 600 at 615 [herein after "Nomination"].

<sup>33</sup> *Supra*, Note 29 (J. Zeigel)

<sup>34</sup> *Valente v. R.*, [1985] 2 *S.C.R.* 673.

<sup>35</sup> B. Wilson, "Methods of Appointment and Pluralism" in D. Magunsson, D. Soberman eds. *Canadian Constitutional Silemas Revised* (Kingston: Center for Public Policy, 1997), at 162.

<sup>36</sup> K. Makin, "Top-court Judge Defends Bench" *The Globe and Mail* (3 March 1999) A5.

candidate and discourage many from even considering judicial office.<sup>37</sup> A balance needs to be struck between government secrecy and media circus frenzy. We believe that this can be achieved through transparent and responsible appointment commissions, the model to which we now turn.<sup>38</sup>

### **Judicial appointment commissions**

This may be the option with the fewest drawbacks.<sup>39</sup> It is submitted that the creation of independent judicial appointment commissions would interject accountability, transparency, and representativeness into the present system, while keeping in step with the Canadian tradition that finds the idea of a "confirmation mess" somewhat repugnant.<sup>40</sup>

The origins of judicial appointment commissions are normally traced to the so-called "Missouri plan." The name of the committee process in the United States illustrates the fundamental value underlying the concept: it is a "merit commission." Appointments are to be based on merit and professionalism, rather than political or ideological partisanship. The result of an American study shows that politics does still play a role with nominating commissions, however, this is still less of a role than with pure executive discretion. Candidates are also ensured to be well qualified for appointment.<sup>41</sup> We believe the prevalence of traditional partisanship would further decrease by granting appointing power to the commission and further restricting the discretion of the executive appointing body. However, as advocated throughout this article, the concerns of proportional representation must also be addressed in formulating a responsible and democratic judicial appointment process.

Thus, the proposed Judicial Appointment Commission would be given appointing power and its procedures and structures would have significant public dimensions. Its existence should be as independent as possible from the government. Constitutional entrenchment, as there is in Israel, might be an option, although this may not be practical, as previous attempts to constitutionalize the Supreme Court and its

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<sup>37</sup>Canada, Minister of Justice, *Constitutional Reform -- The Supreme Court of Canada* by O.E. Lang (Ottawa: Canadian Unity Information Office, 1978) at 2.

<sup>38</sup>Note also that Ziegel uses the South African experience to justify his case for confirmation hearings, but the process used is actually a Judicial Services Commission which holds public interviews, a small yet crucial difference, and something upon which we will focus in the next section.

<sup>39</sup>While there is some support for appointment commissions among academics, D.M. Beatty, *Talking Heads and Supremes: The Canadian Production of Constitutional Review* (Agincourt, Ontario: Carewell, 1990) at 259, at 356 rejects this option as too professionally focused and too bureaucratic. As will become apparent, we have designed the commissions to minimize such dangers. To be clear, we are not suggesting that the powers of an organization like a judicial council be further expanded. We are advocating the creation of an innovative independent administrative agency that has one function only, to make appointments.

<sup>40</sup>W.R. Lederman, "Current proposals for Reform of the Supreme Court of Canada" (1979) 57 Can. Bar Rev. 687, at 699. Former Chief Justice Bora Laskin has also expressed his support for a system of judicial appointment commissions.

<sup>41</sup>C. Baar, "Judicial Appointments and the Quality of Adjudication: the American Experience in a Canadian Experience" (1986) 20 R.J.T. I at 10.

appointment procedures have failed. Constitutional amendment may be avoided by leaving the formal appointing power with the Governor in Council. In addition, the ideals of transparency, accountability, and representation are vital factors to be embedded in the process. The present system, as well as the various options considered above, lacks these democratic fundamentals. But these broad principles are only the tip of the iceberg; in truth, the devil is in the details. We do not claim to have refined every element of our proposal but we do provide enough detail about a workable option to open a constructive conversation about meaningful change in appointments processes. To concretize our proposal, we will structure our argument around four points: statutory status, composition of the commissions, the process, and criteria for appointment.

We see no reasons why, in a democracy, the various elements of the appointment process should not be statutorily defined.<sup>42</sup> This would cover the existence, composition, and procedures of the appointing commission, the criteria for judicial appointment, and the obligation to maintain statistics and to publish an annual report. Statutory codification would not only enhance certainty and openness; it would also symbolize the significance of the commitment to democratic processes.

#### **a) composition and representation**

On the issue of the composition of the Appointment Commission, this Committee is in broad agreement with the categories suggested in the Devlin, MacKay and Kim article but does not adopt the precise make-up of the commission as set out in that article. We do not feel that we can set out the precise balance of the political, professional and representational (identity) components on the commission, but should leave flexibility in the hands of the Government to set the details of this balance. Devlin, MacKay and Kim suggest that the exact composition should vary from court to court and suggest the following for the Supreme Court of Canada.

##### Supreme Court of Canada

- The Chief Justice or designate member of the Court;
- A representative from the Canadian Bar Association;
- A representative from the federal government;
- A representative from the federal opposition;
- A representative from the relevant provincial or regional government;
- A representative from the relevant provincial opposition;
- A dean of law or designate;
- Eight lay persons who encompass the diversity of Canadian society (including regional, cultural, linguistic, racial, and gender diversity,

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<sup>42</sup>See also U.K., Institute for Policy Research, *A Written Constitution for the United Kingdom* (London: Mansell, 1993) at 108-109, 261 [hereinafter IPPR Report]; B. Harris, "Appointments to the Bench – The Role of a Judicial Services Commission (1993) 15 *Adelaide Law Rev.* 191, 206; "Methods of Appointment," *supra*, Note 35 at 161-62.

especially, for example, in relation to Aboriginal peoples, bearing in mind not only proportional representation but threshold representation):

- Women would make up a minimum of 40 percent of the Commission
- Quebec representatives would make up a minimum of 35 percent of the Commission.<sup>43</sup>

Given the importance of expertise and credibility amongst one's peers, clearly, there must be representation from the judiciary and the bar. Canadian jurisdictions which already employ an advisory committee system provide for this, although in many American jurisdictions the number of judges is severely limited. Some commentators have suggested that the presence of the Chief Justice or Chief Judge on the committee could result in undue weight given to one individual's opinion.<sup>44</sup> However, the South African experience has proven that this fear is merely conjecture. Indeed, there have been a number of instances where the ultimate selection has not been in accordance with the views of the "head of the court."<sup>45</sup> Further, as the Chief Justice also acts as the administrator of the court, it is vital that her or his input is considered seriously. It should also be noted that we have not recommended that the Chief Justice or Judge necessarily chair the commission. Thus, we have given one seat to a judicial representative of the court to which the appointment is to be made.<sup>46</sup>

However, there must be more than simply representatives from the bench and bars for this would simply be a "self-selecting oligarchy."<sup>47</sup> Thus, we have given a seat to a dean of law or her or his designate.<sup>48</sup> This recommendation endeavors to address concerns of accountability. Although she or he has significant ties to the legal community, a dean of law can also play an important watchdog function. Moreover, as an academic, the decanal representative can ensure that the commission is informed of current research on appointment matters.

The presence of political and lay members is likely to be a debated issue. The idea of an independent commission, at first glance, seems at odds with allowing political representatives a voice on the commission. However, to ensure a balanced membership

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<sup>43</sup> *Supra*, Note 6, at 831.

<sup>44</sup> *Supra*, Note 29 at 11 (Ziegel)

<sup>45</sup> K. Mallenson, "Assessing the Performance of the Judicial Service Commission" (1999) 116 S.Afr. L.J. 36, at 38.

<sup>46</sup> In terms of the bench, Thomas has found that "the continued experience suggests that involving lower-ranking judges in the appointments process may encourage an increase in the appointment ... of women, minorities and those individuals from non-traditional educational backgrounds"; C. Thomas, "Judicial Appointments in Continental Europe" U.K. Lord Chancellor's Dept., Research Series 6/97 (London: 1997), at 7. While we have been tempted to suggest that representatives be nominated from the ranks of both senior and junior judiciary, due to the size of the commissions we have decided to recommend the nomination of only the Chief Justice/Judge or designate.

<sup>47</sup> R. Stevens, "The Independence of the Judiciary: The Case of England" (1999) 72 So. Cal. L. Rev. 597 at 622.

<sup>48</sup> We derive this idea from the South African example. See "Assessing the Performance," *supra*, Note 45.

and increased accountability, there must be some legislative representation. We have removed the discretionary power of cabinet, but we recognize that judicial office is a form of political office and, consequently, there must be some representation from democratically constituted bodies. Studies of European appointments commissions suggest that legislative representation may increase the "connection between political factions and judges."<sup>49</sup> However, this may be because legislative representation is given too prominent a role. Therefore, to prevent hostage-taking and to expand the conception of representation beyond traditional party-driven definitions, political representation too should be of a limited number. Government and opposition representatives are granted equal seats to allow for an adequate range of partisan political views. We acknowledge that there may be potential problems with political bartering between party representatives. This type of quid-pro-quo exchange has been illustrated by the German and Swiss experiences, where an understanding is present that appointees will be chosen in proportional numbers to legislative political representation. One method of overcoming this is to grant only a limited number of seats and to ensure that other voices are heard on the commission. Consequently, we have recommended that there be only one representative from each of the relevant governing and official opposition parties.<sup>50</sup>

Lay membership is sometimes seen as a significant move in improving the degree of public participation in the appointments process.<sup>51</sup> In contrast, one commentator contends that no one person can "represent the public," only her or his own views or that of the government if appointed by it.<sup>52</sup> All existing Canadian judicial appointment committees have rejected this counter-argument. We have attempted to further separate the present proposal from this objection by providing a relatively non-partisan method of appointment for lay members. Each would be appointed by an all-party committee of the relevant federal and/or provincial government and appointed by an order-in-council. This would allow a move away from strict partisan appointments to the commission, yet allow adequate screening of the abilities of the individuals. Lastly, the process of an all-party committee is more transparent than informal arrangements currently used and may provide a better mechanism to achieve the stated commitment of diverse representation on the commission.

However, we also acknowledge other options for ensuring the independence of lay members, which may be seen by some as questionable if appointed by any government body. For example, in the Yukon, it is at the discretion of the committee to appoint an additional lay person if the current make-up of the council does not sufficiently reflect the diversity of the community. By putting all lay appointments in the hands of the other committee members, worries about partisanship on the committee could be modified. Nevertheless, given our position on the fundamentally political and social role played by judges in Canadian society, we prefer the former method, as it merges all branches of

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<sup>49</sup> In South Africa, the political representatives constitute the majority of the committee. "Assessing the Performance," *ibid.* at 38.

<sup>50</sup> *Ibid.*

<sup>51</sup> Harris, *supra*, Note 42 at 205-206; I. Greene et al, *Final Appeal Decision-Making in Canadian Courts of Appeal*. Toronto: James Lorimer, 1998 at 196.

<sup>52</sup> J. Smith *supra*, Note 28 at 209.

government (the executive, legislative, and judicial) in a vital part of the appointments process.<sup>53</sup>

Just as important as bench, bar, and lay representation is identity-based representation.<sup>54</sup> For example, The American Judicature Society proposes that "all appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic, and racial diversity of the jurisdiction,"<sup>55</sup> we would also include express recognition of the need to include Aboriginal, persons with a disability, and a conceptually broad definition of cultural representation. Gender is relatively straightforward, a fair balance between the sexes<sup>56</sup> but the criteria for other historically marginalized groups are more difficult. In this respect, it may be helpful to consider Kymlicka's distinction between threshold and proportional representation.<sup>57</sup> The concern here is that proportionate representation for a small minority (e.g. Aboriginal peoples) will mean that, in reality, there will be very few representatives, so that ultimately their participation will be merely symbolic, rather than substantive. Consequently, what might be required is threshold representation, that is, numbers greater than a group's proportion to the population, but large enough to be effective as a presence.<sup>58</sup> While most easily achieved through the lay appointments, it is important that these concerns are also considered by nominators of legal and political representatives. Identity representation should not be confined by a "quota/de minimus mentality," but should inform the entire process of judicial appointments.

We suggest that the "professionalization" of the appointment process is an improvement over previous, more politically partisan processes. However, we have also indicated, some reservations. It is sometimes assumed by commentators that professionalization is synonymous with depoliticization and is, therefore, incontrovertibly good. This is a mistake. Professionalization does not necessarily displace political variables and values; rather professionalization adds a new set of values and, therefore, a new layer of politics to the appointment regime.<sup>59</sup> This is so because, as Foucault and the

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<sup>53</sup>Perhaps an even better method would be to have laypersons nominated by "constituent assemblies," i.e. non-conventional participatory for a designed to circumvent the vicissitudes of conventional partisan politics. For a discussion see A. Dobrowolsky, "Radically Rethinking Representation: Towards More Imaginative and Inclusive Institutions" (forthcoming). Moreover, this may be a good example of why it would not be desirable to constitutionalize the processes. If Canada were to transform its democratic institutions at some future point, statutory changes could more easily modify the appointments system.

<sup>54</sup> *IRPP Report supra*, Note 29 at 258.

<sup>55</sup> *Model Selection Provisions* (Chicago: AJS, 1994) Art. 2.

<sup>56</sup>W. Mackay & R. Bauman, suggested a majority of female members in 1985. However, for greater flexibility, we have chosen at least 40 percent as sufficient representation. This number approximates a midpoint between critical mass and actual proportional representation. (at 80)

<sup>57</sup> W. Kymlicka, "Group Representation in Canadian Politics" in F.L. Seide ed., *Equity and Community* (Montreal: IRPP, 1993).

<sup>58</sup> See also J. Vickers' discussion of N.A.C.'s adoption of deliberate "overrepresentation" of the most marginalized or disadvantaged women "Towards a Feminist Understanding of Representation" in J. Arscott and L. Trimble eds. *In the Presence of Women* (Toronto: Harcourt Brace and co., 1997), at 39. The representation of Quebec judges on the supreme court of Canada is an example of an already operational regime of threshold representation.

<sup>59</sup>Baar, *supra*, Note 41 at 10, 12-15.

sociologists of knowledge remind us, there are mutually constitutive relations between knowledge and power.<sup>60</sup> Our concern is that the values prioritized by professionalization may become hegemonic, thereby devaluing and excluding other positive variables that are worthy of respect and consideration in a pluralist democracy. Indeed, in a sense, the discourse of professionalization can even be more worrisome than traditional political partisanship because professionalism tends to occult its reliance on contestable value judgments.<sup>61</sup> It is for this reason that professionalism needs to be counter balanced by the democratic principle of proportional representation.

### **b) independent commission**

This Committee does not necessarily embrace the full details of the Devlin, MacKay and Kim proposal for an Independent Appointment Commission. For example, the committee feels the Indigenous Bar Association has an important role to play in a greater Aboriginal role in the appointments process although this body is not mentioned in the Devlin, MacKay and Kim proposal. There is general agreement, however, that the Commission model is the most appropriate option and the one that best fits the principles of judicial independence. It is also an effective vehicle for providing greater diversity on the Supreme Court, without sacrificing the important principle of merit. We have quoted at length from the relevant portions of the Devlin, MacKay and Kim article and refer the readers to it for the fully documented treatment of this topic. It should also be noted that the Appointment Commission model is relevant to lower court appointments as well (with modifications), as developed in the article. We reject the idea of confirmation hearings and opt for an independent commission as a more appropriate route to a transparent and accountable process of judicial appointments.

### **3) Aboriginal Representation on the Supreme Court of Canada**

The case for Aboriginal representation on the Supreme Court of Canada (SCC) is part of the broader case for Aboriginal participation in Canada's governmental and public institutions. The case rests upon principles that are already well established outside the context of determining the place of the Aboriginal peoples within our constitutional democracy. These principles are deeply rooted in Canada's history, constitution, law, and politics. These principles, when interpreted in light of recent political events and judicial decisions, are cutting a channel towards the creation of a new constitutional convention, or norm of expected political behaviour, to include the Aboriginal peoples' consent and participation as part of a legitimate Canadian constitutional order. The major recent

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<sup>60</sup>M. Foucault, *Discipline and Punish: the Birth of the Prison*, trans. A. Sheridan (New York: Pantheon Books, 1977) at 27; M. Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977); K.M. MacDonald, *The Sociology of the Professions* (London: Sage, 1995); D.W. Rossides, *Professions and Disciplines: Functional and Conflict Perspectives* (Upper Saddle River, New Jersey: Prentice Hall, 1998).

<sup>61</sup>As Burton Bledston has noted, the "culture of professionalism" seemed ... capable of transcending "the favoritism of politics, the corruption of personality, and the exclusiveness of partisanship," as cited by W.W. Pue, "Lawyering for a Fragmented World: Professionalism after God" (1998) *Int'l J. Leg. Prof.* 125 at 126.

landmark event is the constitutional affirmation and recognition of the rights of “the aboriginal peoples” in the Constitution Act 1982(CA82)<sup>62</sup> and the events surrounding it.

The case for Aboriginal representation on the SCC will be developed as follows. First, the legal status of Aboriginal persons as Canadian citizens will be reviewed, explaining the sphere within which the concepts of equal citizenship and affirmative action for persons of ‘racial ancestry’ operate. The case for representation on the SCC being made here does not rest on this basis, but it is important to debunk political arguments that are often mistakenly based on these considerations. That will be done following the analysis in the next section.

The next section will review the unique constitutional status of ‘the aboriginal peoples’ which are often described as ‘nations’ within Canada, and upon which the case for special representation is based. Here will be considered the norms behind the right of self-determination in international law and self-government in domestic law, and the constitutional framework within which individual rights are mediated with the collective rights of the ‘nations’. The differences between group ‘national’ identity and ‘racial’ identity will be clarified, and the foundations of legal pluralism reviewed. An analogy will be drawn between the provinces and aboriginal peoples as constitutional entities and actors whose participation in national institutions matter for constitutional legitimacy. This analysis will show how some common arguments against Aboriginal representation on the SCC are mistakenly based upon considerations relevant to Aboriginal persons *qua* citizens, but which are irrelevant to the case of Aboriginal ‘nations’.

The implications of this analysis for the judiciary and judicial appointments will then be addressed. Canada’s constitutional commitments to political and legal pluralism will show the significance of the judicial role in deciding questions intimately linked to the political and legal identity and rights of the Aboriginal peoples, and how this raises the issues of political legitimacy, judicial merit, and competence. The conclusion will identify recent views on the subject of Aboriginal representation on the SCC, and make specific recommendations.

### **a) Aboriginal persons as individual Canadian citizens**

Canadian Aboriginal persons are citizens, and as such they stand in the same legal position as all Canadians citizens. As a matter of law, the benefits and burdens of Canadian citizenship apply generally without regard to Aboriginal status. Aboriginal people, including Indians with special legislated status under the *Indian Act*<sup>63</sup> have all the

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<sup>62</sup> *Constitution Act, 1982* [being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11] S 35 provides:  
35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

<sup>63</sup> *RSC 1985, c.I-5*.

legal rights of citizens unless the rights are taken away by valid legislation.<sup>64</sup> This happened historically, for example, with the removal of the electoral franchise from status Indians,<sup>65</sup> but it is safe to presume that this would not now be constitutionally possible. As individual citizens, Aboriginal persons have no legal claim for special treatment by the general laws of Canada, or for special representation on any existing courts, unless such special treatment is mandated by the law of the constitution.

It happens that the law of the Constitution *does* provide, but outside the realm of special representation, for special treatment of certain groups within which Aboriginal persons may be included. It is necessary to briefly examine this special provision because it is central to the distinctions that need to be made for present purposes. The affirmative action provision of s.15 (2) of the *Charter of Rights and Freedoms* (the Charter)<sup>66</sup> a subject of intense political and theoretical contention, allows special discriminatory state action for the benefit of persons belonging to historically disadvantaged groups. The bases for such constitutionally legitimate action include several categories listed in s.15(2), including ‘race, ethnic or national origin,’ as well as a number of new categories created by the SCC. It seems clear that Aboriginal persons can belong to a number of these categories, and can therefore become the subject of remedial discretionary state actions and laws. This, however, does not serve to distinguish them from other citizens who also fall within the same categories.

The concept of equality among citizens applies to Aboriginal persons, as such, as it does to all Canadian citizens. This proposition is subject only to constitutional exceptions, exemplified by the affirmative action provisions in s.15 (2). A further exception operates in the case of the category of those among Aboriginal persons who enjoy the status of membership or citizenship in Aboriginal ‘nations’. This is addressed in the next section, which will show why the category of persons in s.15 must not be conflated with the category of persons comprising the ‘peoples’ recognized in s.35, which lies outside the *Charter* and outside the reach of arguments relevant to individual citizenship.

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<sup>64</sup> See *Sanderson v. Heap* (1909), 19 Man. R. 122., where, at p. 125, Mathers J. says: Unlike the Indians of the United States, who are aliens, the Indians of Canada are British subjects and entitled to all the rights and privileges of subjects, except in so far as these rights are restricted by statute. See also *Regina ex rel Gibb v White* (1870), 5 P.R. 315; 2 C.N.L.C. 565. It is beyond the scope of this paper to discuss the differences and similarities between the concepts of citizenship and subject, and their implications for a legitimate governing order. For a discussion, see, e.g. John Pocock, "The Ideal of Citizenship Since Classical Times" in *The Citizenship Debates*, Ed. Gershon Shafir, Minneapolis, University of Minnesota Press, 1998, pp. 31-42.

<sup>65</sup> John Leslie and Ron Maguire, ed. *The Historical Development of the Indian Act* (Ottawa: Indian Affairs and Northern Development, 1978)

<sup>66</sup> S.15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

## b) Aboriginal peoples as ‘nations’

S.35 of the CA82 recognizes and affirms the rights of ‘peoples’. The precise meaning of this term has not been established even in international law where ‘peoples’ enjoy recognized collective rights, including the right of self-determination.<sup>67</sup> It is well beyond the scope of the present project to deal comprehensively with the domestic constitutional meaning of the term in s.35. It is however, important to emphasize, as the RCAP concluded, that Aboriginal peoples constitute social and political communities descended from historic ‘nations’, rather than racial groups: “Aboriginal peoples are not racial groups; rather they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change their internal composition.”<sup>68</sup>

It was easy for the early colonists in North America to see that the ancestral communities of today’s Aboriginal peoples “were separate and distinct entities, both territorially and in terms of culture and political organization. They were regarded as political units...”<sup>69</sup>, and recognized as such in treaties and other arrangements. Today, the distinct Aboriginal societies encountered by the early British colonists have seen their societal institutions eroded and destroyed, and their descendants are, to many people, visible only as individuals within the general population. The distinct political character of first nations has remained elusive also because of the failure of the federal government to legislate a comprehensive recognition scheme to make the Constitutional recognition effective to protect the group rights of all the Aboriginal peoples that s.35 guarantees.<sup>70</sup> The only group usually perceived as politically distinct consists of the Aboriginal who

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<sup>67</sup> Canada has been criticized in three reports for failing to implement the right of self-determination of Aboriginal Peoples as recommended by the RCAP, and for other failures. See CERD CERD/C/61/CO/3, 23 August, 2002; CESCR Document E/C.12/1/Add 31, ‘Concluding Observations of the Committee: Canada 10/12/98; Human Rights Committee “Concluding Observations: Canada 07/04/99, Document CCPR/C/79/Add 105. For a discussion of Canadian obligations, see, e.g. Paul Joffe, “Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec” (200)45 McGill L.J. 155. For a series of essays on the right of self-determination, see Pekka Aikio and Martin Scheinin, ed. *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Abo, Finland, Institute for Human Rights, Abo Akedemi University, 2000).

<sup>68</sup> Canada, RCAP, Final Report of the Royal Commission: vol 2: Restructuring the Relationship c. 3, esp. at 177. See also the definition of a rights-bearing ‘nation’ at 276. For an argument typical of those who erroneously characterize First Nations as ‘races’, see Jim Prentice, National Post ‘A Bad Deal for Canada’ Thursday, 9 December, 2004, page A19 where the federal Conservative Party Aboriginal Affairs critic states: “...Ottawa is creating a Tlicho government that is founded explicitly upon race. This is the opposite of Nunavut, which will eventually achieve provincial status based upon governance structures in which all citizens are equal.”

<sup>69</sup> John Giokas, “Domestic Recognition in the United States and Canada” in Paul L.A.H. Chartrand, ed. *Who Are Canada’s Aboriginal Peoples: Recognition, Definition, and Jurisdiction* (Saskatoon, Purich Publishing Ltd, 2002) [Chartrand 2002], c.4, at 128.

<sup>70</sup> This point is developed in Chartrand, *ibid*, *passim*.

live on reserved lands and whose affairs there are still administered by the federal executive under the terms of *Indian Act* which dates back from the 19<sup>th</sup> century.<sup>71</sup>

Events in recent times, however, have started the long overdue process of recognizing that First Nations are entitled to determine for themselves what is their vision of the good society, or in other words, to decide the nature and scope of their national ‘public interest’, and to govern themselves accordingly within Canada. Current federal policy has, since 1995, recognized the political right of self-government of Aboriginal peoples, and modern treaties are shaping a new recognition scheme based on the recognition of inherent constitutional and political rights of Aboriginal ‘nations’. The unique political character of the Aboriginal peoples is implicit in the terms of s.35.1, which acknowledges a unique role for Aboriginal political representatives in the process of amending the Constitution of Canada, one similar to that of the other political units in the Canadian federation, the provinces.<sup>72</sup> The recognition of this unique political and constitutional role emerged from political action of the Aboriginal representatives prior to, during, and after, the ‘patriation’ of the Constitution in 1982.<sup>73</sup> In the 1980s, Aboriginal participation in the First Ministers’ Conferences on Aboriginal Constitutional Reform, which was based upon the now spent provisions of s.37 and s.37.1 of the CA82, gave rise to new political practices and conventions whereby Aboriginal representatives are now participants in national discussions with government leaders on a range of issues that affect the interests of the peoples they represent.<sup>74</sup> At the time of writing, the Prime Minister and other federal ministers are involved in Round Table discussions on policy-making with national Aboriginal leaders.<sup>75</sup> It is in the context of this emerging political norm or constitutional convention, one which mandates the participation of Aboriginal

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<sup>71</sup> R.S.C. 1985, c. I-5. Useful studies of Indian policy include: John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in J.R. Miller, ed. *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991; Leslie, John. "Assimilation, Interpretation or Termination? The Development of Canadian Indian Policy (1943-1963)." PhD Thesis, Carleton University, 1999; Taylor, John L. "The Development of an Indian Policy for the Canadian North-West." PhD Thesis, Queen's University, 1975.

<sup>72</sup> S 35.1 provides: ‘The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867", to section 25 of this Act or to this Part, (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

<sup>73</sup> *R v Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49, File No.: 20311. “It is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis...”

<sup>74</sup> See Norman K. Zlotkin, “The 1983 and 1984 Constitutional Conferences: Only the Beginning” (1984) 3 C.N.L.R. 3-29 for a discussion of conventions in this context. The RCAP has suggested that a constitutional convention requires Aboriginal participation in future constitutional conferences: Volume 5: Libraxus CD-ROM version.

<sup>75</sup> Information about the Aboriginal Round Table process is available on a government website: [http://www.aboriginalroundtable.ca/index\\_e.html](http://www.aboriginalroundtable.ca/index_e.html) Current information can also be obtained on the websites of the national Aboriginal representative organizations, which can be accessed via the Aboriginal Portal at <http://www.aboriginalcanada.gc.ca/acp/site.nsf/en-frames/index.html>

peoples in a legitimate governing order in Canada, that emerges the case for Aboriginal representation on the SCC.

The case for Aboriginal representation on the SCC does not depend, then, as is often asserted by opponents, on concepts of affirmative action, special treatment for ethnic minorities, nor on ‘race-based’ special treatment. It is shameful to rely on the discredited concept of biological determinism implied by ‘race’.<sup>76</sup> It is a constitutional error to conflate the groups in s.15 with the Aboriginal peoples in s.35, and to use concepts relating to individual rights to attack the historic group rights in s.35. Where Aboriginal persons are members of the nations or peoples in s.35, then, the relationship between the citizenship rights and other Charter rights of these Aboriginal persons are constitutionally balanced with the collective rights of the Aboriginal people or nation to which they belong, by the operation of s.25. It is the unique constitutional status of the Aboriginal peoples as historic nations that warrants special group accommodation, not their designation as ‘races’ or ‘ethnic groups’.

The Aboriginal peoples have a unique political and constitutional status in Canada. This status reflects the Canadian commitment to political and legal pluralism, which is also evident in the status and role of the provinces, and also in the status and role of the common law and civil law traditions. Federal concepts and structures change to accommodate this pluralism. The SCC has stated, in this regard, that; “In our constitutional tradition, legality and legitimacy are linked” and, Canada’s constitutional history “demonstrates that our governing institutions have adapted and changed to reflect changing social and political values.”<sup>77</sup>

Canadian political pluralism has always been reflected in the status and roles of the provinces. Provinces have differential rights of membership, vested in their residents, and differential laws that require accommodation and representation in legitimate decision-making. The new political pluralism recognizes the unique constitutional status and role of *all* constitutionally significant political entities: federal, provincial and territorial jurisdictions and polities, as well as those of Aboriginal peoples. This has significant implications for constitutional legitimacy. For example, the principle of consent that was discussed in the *Manitoba Language Reference* case<sup>78</sup> arguably means that the consent of the Aboriginal peoples must underpin constitutional legitimacy, while the principles

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<sup>76</sup> The pernicious connotations of ‘race’ are debunked in Ashley Montagu’s classic work: *Man’s Most Dangerous Myth: The Fallacy of Race*, 6th ed (Walnut Creek, CA: Altamira Press, 1997) A useful general commentary is: “[T]here is no distinctive biological reality called ‘race’ that can be determined by objective scientific procedures. The social, medical and physical sciences have demonstrated this fact... Human populations singled out as ‘races’ are simply groups with visible differences that Europeans and European Americans have decided to emphasize as important in their social, economic, and political relations”. Joe R. Feagin & C.B. Feagin, ‘Racial and Ethnic Relations’ in Juan F. Perea, et al, ed. *Race and Races: Cases and Materials for a Diverse America* (St.Paul, MN: West Group, American Case Book Series, 200) at 57.

<sup>77</sup> *Reference Re Secession of Québec*, [1998] 2 S.C.R. 217, at 240.

<sup>78</sup> *Reference Re Manitoba Language Rights* [1985] 1 S.C.R. 721, at 745, para 56.

elaborated in the *Quebec Secession Reference* case<sup>79</sup> arguably entitle Aboriginal peoples to call for negotiations on the constitutional terms to which *their* consent is to attach.<sup>80</sup>

Turning now to legal pluralism, the legislative authority of Aboriginal peoples has now been constitutionally and legislatively recognized in recent treaties, for example, with the Nisga'a nation. Aboriginal legislation now fits within the Canadian legal system. This point can be made without the need to rely on, although it would be augmented by, the view that there is an inherent legislative authority vested in Aboriginal societies.<sup>81</sup>

In addition to the treaty-based legislative powers that are being recognized now, the traditional laws of the Aboriginal people are part of the Canadian legal system. Colonial courts directly applied Aboriginal laws,<sup>82</sup> and the SCC returned Canadian law to the original imperial constitutional principles that governed the relationship between indigenous laws and legal cultures and those of the British colonists in decisions in the 1990s.<sup>83</sup>

The implications for the judiciary and judicial appointments of the emerging constitutional convention which requires accommodation of the Aboriginal peoples in Canadian political and legal pluralism will be considered next.

### **c) implications of s.35 of the *Constitution Act of 1982* for the judiciary and judicial appointments**

The enactment of s.35 was described earlier as the landmark event among others that have given rise to the new norm of political behaviour that includes Aboriginal peoples in national statecraft. Section 35 guarantees group rights the content of which is to be elaborated by the judiciary in its role of interpreting the law of the constitution.<sup>84</sup> The judicial role will be supplemented by, and will necessarily reflect the results of current

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<sup>79</sup> Note x.

<sup>80</sup> Furthermore, if the right of self-determination is a human right, then it is a principle that must inform the interpretation of the Constitution: see, *R v Demers* (2004) 2 S.C.R. 489; [2004]S.C.J. No 43 File #29234 QL. Per LeBel, J. at para 79ff.

<sup>81</sup> The view is stated, e.g., in the Supreme Court of B.C. in *Campbell v B.C. (Att.Gen)*, [200] B.C.J. No 1524.

<sup>82</sup> See e.g. *Connolly v. Woolrich*, (1867), 17 R.J.R.Q. 75; (1867), 11 L.C.Jur. 197 (C.S. Que.); upheld on appeal: *Johnstone v Connolly* (1869), 17 R.J. R.Q. 266; 1 R.L.O.S. 253, (Q.B.Q.), 1 CNLC 70, and the discussion of the case and its implications in Volume 1 of the final report of the RCAP, supra., note 68. See also the commentary by Paul L.A.H. Chartrand in 22 April 2005 issue of *Lawyer's Weekly*. See also *Campbell v. B.C. (Attorney General)*, [200] B.C.J. No 1524 (S.C.)

<sup>83</sup> See generally Russel L. Barsh, "Indigenous Rights and the Lex Loci in British Imperial Law" in Kerry Wilkins, ed. *Advancing Aboriginal Claims* (Saskatoon, Purich Publishing Ltd, 2004) For a recent case in which status derived from the laws of the Stellaquo people was given legal effect, see *Casimel v Insurance Corp of B.C.* [1993] B.C.J. No 1834 (C.A.); [1994] 2C.N.L.R. 22 [BCCA].

<sup>84</sup> In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at 745, the SCC said "The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails."

and future political action between Aboriginal peoples' representatives and Canadian governments' representatives,<sup>85</sup> as well as actions by the executive and legislative branches.<sup>86</sup> The judiciary stands at an important juncture in the work of national public institutions that will play an important role in determining what is to be the place of the Aboriginal peoples in Canada. In essence, the SCC will decide the balance between 'the public interest' of each Aboriginal people with the general 'public interest' of all Canadians.<sup>87</sup> In this context, it is unavoidable that Aboriginal peoples will have an interest in who sits on the SCC to make these decisions. The political legitimacy of the judicial role in this regard is inescapable. Support for the rule of law will suffer if the institutions that make decisions that affect the fundamental interests of the Aboriginal peoples do not attract their support and confidence.

Turning to the implications of legal pluralism, it has long been recognized that all of Canada's legal cultures must be represented on the SCC.<sup>88</sup> The distinct character of the Aboriginal legal cultures upon whose understanding and interpretation the decisions of the SCC on aboriginal rights depend has been described by the SCC: "... a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives' of the two vastly dissimilar legal cultures [emphasis added] of European and aboriginal societies. We apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal tradition"[some punctuation omitted]<sup>89</sup>

The case for Aboriginal representation on the SCC requires only the even, principled, application of a well-established concept, but to a much less politically influential group. The particular analogy with the province of Quebec, with its civil law tradition, serves to emphasize the implications of legal pluralism for the representation of distinct legal orders within Canada's legal system. To this it may be objected that in comparison to Quebec, the Aboriginal legal orders are inchoate and diverse, and can not all be represented. Several answers can be given in reply. Aboriginal representation on the SCC is an inadequate and conservative measure that improves a situation that would best be

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<sup>85</sup> Constitutional amendments resulted from the participation of Aboriginal peoples' representatives in First Ministers meetings in the 1980s. This history accords with the theory that basic rights emerge from a process of political action where particular interests are identified as deserving recognition and respect by the state. These interests may be recognized, once ascertained, as legally enforceable rights. Other interests may remain as politically enforceable claims.

<sup>86</sup> The Crown, symbol of executive power in Canada, has special constitutionally based relationship with the Aboriginal peoples. Legislation is essential for effective government Aboriginal policy. The outdated Indian Act is being supplemented by new legislation, and the SCC has begun to strike down past legislative action as unconstitutional: See John Giokas and Robert K. Groves, "Collective and Individual Recognition in Canada: The *Indian Act* regime" in Chartrand, *supra*, note 69, chapter two, 40, and especially the commentary on the *Corbiere* case at 69-73.

<sup>87</sup> In *R v Van der Peet* it was stated that "Courts will be asked... to balance and reconcile the conflicting interests of native people (sic: Aboriginal people) on the one hand, and of the rest of Canadian society, on the other." Per L'Heureux-Dube, at para 135. [1996] 2 S.C.R. 507.QL>

<sup>88</sup> S 6 of the *Supreme Court Act* R.S.C. 1985, c. S-26, provides: 'At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.'" *Report of the CBA Committee on the appointment of judges in Canada* (August 20, 1985), Rec. No 8: 'Appointments to the SCC must continue to be representative of the regions and legal systems of Canada...'

<sup>89</sup> *Van der Peet*, *supra*, note 87, at para 232 QL

served by developing distinct Aboriginal judicial systems and courts. There are significant commonalities among Aboriginal legal traditions. Moreover, Aboriginal peoples have similar structural relationships to governmental authority and the Canadian constitution.

Aboriginal representation not only augments the legitimacy of judicial appointments; it contributes to enhanced competence of the courts generally and the SCC in particular as a decision-making body which must understand and apply distinct legal traditions. Competence means an adequate knowledge of Aboriginal law and legal culture for the purpose of making judicial decisions that properly reflect them.<sup>90</sup>

The question of judicial competence does not conflict with the case for merit in making judicial appointments.<sup>91</sup> Indeed, it is proper to regard judicial competence as a component of merit, and there is not a shortage of competent Aboriginal judges in Canada.

## Conclusion

The idea of Aboriginal representation on the SCC has been gaining support and expression in recent times. The Royal Commission on Aboriginal Peoples stated in its 1996 final report, that, "...the Supreme Court of Canada should include at least one Aboriginal member", and that "...a requirement that one of the justices be Aboriginal should be the subject of a constitutional amendment."<sup>92</sup> The *Charlottetown Accord* called for "a reasonable process of consulting representatives of the Aboriginal peoples in the preparation of a list of candidates to fill vacancies on the Supreme Court."<sup>93</sup> Academic scholars suggested that, especially given the significance of Aboriginal law, that Aboriginal representation would enhance legitimacy of SCC decisions.<sup>94</sup> The Indigenous Bar Association of Canada, a body representing Aboriginal law graduates, continues to support Aboriginal appointments to the judiciary.<sup>95</sup> A paper prepared for the organization made eight recommendations on Aboriginal appointments to courts and other public institutions, including that an Aboriginal justice be appointed to the SCC, and that an advisory body be established to select a pool of possible appointments from which the selection would be made. One of the members of the body ought to be a member of the

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<sup>90</sup> For a brief discussion of the matter of judicial competence in relation to First Nation issues, see John Borrows, (2003-2004) 29 *Queen's L.J.* 103, at 123-124.

<sup>91</sup> See the *National Post* editorial "Let merit reign supreme" which, in an attack on Aboriginal appointments to the SCC, not only uses 'race' and 'ethnicity' interchangeably, but also characterizes Aboriginal appointments as affirmative action. *National Post*, Tuesday, 22 February, 2005, at A14

<sup>92</sup> RCAP, *supra* note 68, Vol 5, No 2.3 "Institutional Amendments". (*Libraxus* CD)

<sup>93</sup> S20, as cited in Peter Russell, "Towards a Tri-cultural Canadian Judiciary", notes for a joint conference of the CBA's National Aboriginal Law Section and the Indigenous Bar Association, Ottawa, Friday, 4 March, 2005. Unpublished document, in the committee's possession.

<sup>94</sup> Devlin, MacKay and Kim, *supra* note 6, at 843.

<sup>95</sup> See the information on the IBA website at [www.indigenousbar.ca](http://www.indigenousbar.ca) including a paper written for the IBA by James C. Hopkins and Albert C. Peeling, dated 6 April, 2004 entitled "Aboriginal Judicial Appointments to the Supreme Court of Canada".

IBA, and any plans to formalize the selection process should invite participation by Aboriginal people.

A constitutional amendment in accordance with s.41, which means provincial unanimity, is required for changes to the composition of the Supreme Court of Canada. In the absence of such an amendment, CALT, along with other leaders in the area of judicial appointments discourse, should fulfill its role by contributing to the creation of an appropriate constitutional convention that an Aboriginal justice be appointed to the SCC and that in designing a legitimate and democratic process of appointment, representatives of the Indigenous Bar Association and of the Aboriginal peoples should be consulted.

#### **4) Gender Representation on the Supreme Court of Canada**

Currently, the Chief Justice and three of the eight puisne judges are women. If this were the norm, there would be no reason to seek a guarantee of gender representation on the Supreme Court of Canada. However the Court has a very long history of failing to include women on its bench. From its origin in 1875 until 1982, only men – 57 men – sat on the Court. During this time there were cases where the legal controversies pitted one sex against the other. Men were in a position to rule, and did rule, in favour of their own sex. For instance, the men on the Supreme Court of Canada ruled women were not persons for the purposes of eligibility for appointment to the Canadian Senate in 1928; in their opinion only men were persons.<sup>96</sup> Similarly, in the 1970's the Court decided that the guarantee of equality before the law in the Canadian Bill of Rights did not protect aboriginal women and pregnant women from legislatively mandated sex discrimination.<sup>97</sup>

Absolute male privilege prevailed at the Court until 1982 when the first woman – Justice Bertha Wilson – was appointed, presumably prompted by the pending adoption of the Canadian Charter of Rights and Freedoms. Despite the evident wisdom she brought to the Court, no discernible pattern of commitment to appointing women has materialized over the intervening decades. Justice Wilson remained the sole woman on the Court for five years. Then Justice Claire L'Heureux-Dubé was appointed in 1987 and Justice (now Chief Justice) Beverley McLachlin, in 1989. These three women sat together for almost two years until Justice Wilson retired in 1991. However, she was succeeded by a man; and two more men were appointed during the next eight years. The next woman, Justice Louise Arbour, was not appointed until 1999. In contrast, when Justice L'Heureux-Dubé retired in 2002, Justice Marie Deschamps was appointed almost immediately. And after Justice Arbour resigned in 2004, two women – Justices Rosalie Abella and Louise Charron – were appointed. In sum, while the composition of the Court has consistently included at least one woman since 1982, nevertheless for 15 of these 23 years only one woman (1982-87) or at most two women (1987-89 and 1991-99) have occupied this

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<sup>96</sup> *In the Matter of a Reference as to the Meaning of the Word "Person" in Section 24 of the British North America Act, 1867* (1928), SCR 276; rev'd sub nom *Henrietta Muir Edwards et al. v. Attorney-General of Canada* (1930), A.C. 124 (JCPC)

<sup>97</sup> *Attorney-General of Canada v. Lavell; Isaac et al v. Bedard*, [1974] SCR 1349 (aboriginal women); *Bliss v. Attorney-General of Canada*, [1979] 1 SCR 183 (pregnant women).

bench. Put differently, Justice Wilson’s appointment was followed by the appointments of twice as many men as women.<sup>98</sup>

Two recent reports examine the issue of gender representation in the Canadian judiciary. One is the Canadian Bar Association’s Task Force Report on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability*, which stated: “Women are under-represented on almost every court in Canada, both in terms of the proportion of women in the population and the proportion of women in the legal profession.”<sup>99</sup> The other is the study by Devlin, MacKay and Kim relied upon above which reported that as of the summer of 1999, women constituted 20.5 per cent of federally appointed judges and 20.4 per cent of provincially appointed judges in Canada.<sup>100</sup> Although both of these reports examine the general process of judicial appointments, each has something distinctive to offer with respect to the issue of gender representation on the Supreme Court of Canada. *Touchstones* focused on selection criteria while the Devlin, MacKay and Kim study explored the reasons for a proportionally representative judiciary. What follows is a brief synopsis of the relevant features of each report and then our conclusion that the issue of gender representation on the Supreme Court of Canada cannot be left to happenstance.

**a) selection criteria: “merit and representativity”**

*Touchstones* began by adverting to the fourfold rationale that Isabel Grant and Lynn Smith had identified for trying to ensure adequate gender representation on the bench:

- (a) women who are bound by the justice system should be participants in it at all levels;
- (b) public confidence in the system would be enhanced by the participation of both sexes;
- (c) female judges are important role models; and
- (d) female judges can make a unique and important contribution to the adjudication process.<sup>101</sup>

This rationale was offered to sustain *Touchstones*’ contention for selection criteria that would meet “the twin criteria of merit and representativity.”<sup>102</sup>

More specifically, *Touchstones* described how some existing criteria that appear to measure merit in reality discriminate against women. For instance, to the extent that professional excellence is measured by having a high profile in the profession, it could

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<sup>98</sup> The 12 men appointed after Justice Wilson are Justices Le Dain (1984), La Forest (1985), Sopinka (1988), Gonthier (1989), Cory (1989), Stevenson (1990), Iacobucci (1991), Major (1992), Bastarache (1997), Binnie (1998), LeBel (2000), and Fish (2003).

<sup>99</sup> The Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993), 186.

<sup>100</sup> Devlin, MacKay, and Kim, *supra* note 6 at para. 79.

<sup>101</sup> *Touchstones*, *supra* note 99 at 185, citing I. Grant and L. Smith, “Gender Representation in the Canadian Judiciary”, in *Appointing Judges: Philosophy, Politics and Practice* (Report of the Ontario Law Reform Commission, 1991).

<sup>102</sup> *Ibid.*

have the effect of discriminating against women whose family responsibilities preclude active participation in professional organizations such as law societies and national and provincial bar associations.<sup>103</sup> Similarly, familial duties are likely to curtail the time that women candidates spend on extra-legal charitable activities which have served as traditional routes for men who wish to attain a public persona.<sup>104</sup> As *Touchstones* reported, women candidates who have combined career with family responsibilities are often less well-known, prompting appointments committee members to ask: “who is she? I never heard of her.”<sup>105</sup> Thus, *Touchstones* concluded: “High profile in the profession should be secondary to the intrinsic qualities of the candidate.”<sup>106</sup>

To the extent that assessments of professional excellence improve with years of legal experience, this criterion also “militates against women candidates who have entered the practice of law at a later stage in their lives than most men.”<sup>107</sup> *Touchstones* recommended that alternative life experiences should be taken into consideration, especially (but not only) in the cases of women of colour and aboriginal women who “have built up high profiles in their communities (and in some cases the country) for their dedicated public service to their people prior to their adoption of a legal career.”<sup>108</sup> In addition, *Touchstones* advocated the value of legal experience gained outside of private practice in contexts such “as corporate counsel, on law reform commissions, on human rights commissions, in legal education institutions” and on administrative tribunals.<sup>109</sup>

Given their identification of some of the discriminatory effects of conventional merit-based selection criteria, not surprisingly *Touchstones* did not shy away from making a recommendation about the adoption of “an affirmative action policy for the appointment of women and minority women.”<sup>110</sup> The need for diversity in the judiciary was a major theme of their report. This concern is as apposite to the Supreme Court of Canada as it is to lower courts. No visible minority, no aboriginal, no lesbian, and no differently abled women have ever been appointed to this Court. “Appropriate value should also be allocated”, *Touchstones* maintained, “to the special qualities of members of minority groups whose experience of exclusion, sexism, racism, heterosexism and discrimination on the basis of disability in our society has bred into them a sensitivity to, understanding of, and compassion towards the frailties of human nature denied to representatives of the majority group.”<sup>111</sup>

Finally, *Touchstones* was very clear that women and historically disadvantaged minorities are harmed by the failure to identify and publicize the selection criteria for judicial appointments. The “mystery” and “secrecy” that surrounds appointments to the Supreme Court of Canada is no less vulnerable to this criticism. Given the systemic

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<sup>103</sup> *Ibid.*, 197.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.* 190.

<sup>107</sup> *Ibid.*, 197.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, 189.

<sup>111</sup> *Ibid.*, 190.

discrimination inherent in traditionally male defined merit processes, transparency of criteria is essential to encouraging women to become candidates for lower courts and ultimately for Supreme Court of Canada appointments. Thus the first step that any independent commission must take is to develop, debate and publicize the selection criteria that will be relied upon to appoint justices to this Court – keeping in mind *Touchstones'* call for the twinning of merit and representativity.

## **b) arguments for gender representation**

After supporting the general claim that Canada has a “relatively closed and cloistered judicial fraternity”, the authors of the recent study of judicial appointments – Devlin, MacKay and Kim – “articulate and explore the arguments both for and against judicial diversification.”<sup>112</sup> While acknowledging the “important functional and institutional differences between judges and politicians,” they nevertheless maintain that judges “wield enormous political power over people’s lives”, making it important to examine the arguments for a more proportionately representative judiciary.<sup>113</sup> Since their arguments are as apposite to the members of the Supreme Court of Canada as to lower courts, we reproduce their themes without developing the details (which are obviously available to interested readers in the original study).

Devlin, MacKay and Kim identified eight arguments suggesting “a link between democracy and greater representation of historically marginalized groups in the judiciary.”<sup>114</sup> First, the Individual Rights/ Equality Argument maintains that since “there is no rational reason to assume that members of marginalized groups are not as talented as are members of dominant groups, there is something seriously askew when certain social groups dominate judicial appointments, while others are significantly under-represented.”<sup>115</sup> Second, the Efficiency Argument views historically marginalized groups as “a significant social resource,” and excluding them as “a waste of social talent.”<sup>116</sup> Third, the Democratic Argument finds it both undemocratic and imprudent to exclude citizens from participation in an institution that affects their lives.<sup>117</sup> Fourth, the Voice/Authenticity Argument makes explicit the epistemological presumption “that those who have been historically excluded might have something distinctive to contribute to the judicial process.”<sup>118</sup> Devlin, MacKay and Kim qualify this argument somewhat by suggesting that identity must not be “presumed to be proxy for truth or authenticity,” saying that “the real issue is proportional access to the channels of judicial decision-making so as to open up what has been an excessively constrained set of perspectives.”<sup>119</sup>

The fifth or Deliberative Argument posits the ideal “that a proportionately representative judiciary would provide an opportunity for the development of channels of

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<sup>112</sup> Devlin, MacKay and Kim, *supra* note 6 at paras. 159 and 161.

<sup>113</sup> *Ibid.*, para. 161.

<sup>114</sup> *Ibid.*, para. 162.

<sup>115</sup> *Ibid.*, para. 163.

<sup>116</sup> *Ibid.*, para. 166.

<sup>117</sup> *Ibid.*, paras. 168 and 169.

<sup>118</sup> *Ibid.*, para. 171.

<sup>119</sup> *Ibid.*, para. 174.

communication, openness, mediation, and mutual understanding.”<sup>120</sup> Again Devlin, MacKay and Kim caution that the “enlargement of mind”<sup>121</sup> this argument portends is not impervious to “other variables that have an impact on the judicial mentality, such as underlying jurisprudential predilections, ideology, interests, and material position.”<sup>122</sup> The next Trust/Confidence/Legitimacy Argument links trust in and legitimacy of the judicial system to public confidence which is more likely to be promoted if “the judiciary is more reflective of the communities that make up society.”<sup>123</sup> The seventh is the Symbolic/Educative Argument which asks why the particular fact of French culture is “symbolically acknowledged while other facts are ignored?”<sup>124</sup> According to Devlin, MacKay and Kim, appointing judges from historically disadvantaged communities would challenge negative stereotypes, educate “the larger public that diversity is a strength to be valued and respected and not a liability or a cause for disparagement,” and foster “attitudinal change.”<sup>125</sup> The eighth and final argument, the Moral Virtue Argument, is one that does not meet with the approval of Devlin, MacKay and Kim because they treat it as essentialist (suggesting it portrays one group as having a monopoly on virtue) rather than the result of socialization. Arguably their concern is further called into question if not controverted by the Charter equality and statutory anti-discrimination rights cases in which the Supreme Court of Canada has divided along strict gender lines – for example *Symes*, *Thibaudeau*, and *Gould*.<sup>126</sup>

When Devlin, MacKay and Kim adumbrate arguments against the idea of a proportionately representative judiciary, they include arguments against potential mechanisms that might be pursued in support of this idea, as well as teasing out the positive and negative aspects of each argument.<sup>127</sup> What follows here is a foreshortened version of this portion of their study, mainly because they ultimately conclude that the arguments in favour of proportionate representation trump those against.

First is the Individual Merit/Liberty Argument which opposes group identity selection criteria because it means “other more talented candidates will be penalized.”<sup>128</sup> Countering this argument, Devlin, MacKay and Kim contend that we do not currently have a “free market in judicial appointments” given our reliance on linguistic, regional and political criteria; we do not exclusively value individualism given entrenchment of various group rights in the Constitution; we do not all have equal “access to legal education, legal practice, and therefore the judiciary”; and we do not have objective and neutral criteria to define merit in the context of judicial appointments.<sup>129</sup> The second or

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<sup>120</sup> *Ibid.*, para. 178.

<sup>121</sup> *Ibid.*, citing Jennifer Nedelsky, “Embodied Diversity and The Challenges to Law” (1997), 42 McGill L.J. 91 at 107.

<sup>122</sup> *Ibid.*, para. 180.

<sup>123</sup> *Ibid.*, para. 182.

<sup>124</sup> *Ibid.*, para 189.

<sup>125</sup> *Ibid.*, para. 187.

<sup>126</sup> *Symes v. Canada*, [1993] 4 SCR 695; *Thibaudeau v. Canada*, [1995] 2 SCR 513; and *Gould v. Yukon Order of Pioneers*, [1996] 1 SCR 571.

<sup>127</sup> Devlin, MacKay and Kim, *supra* note 6 at para. 192.

<sup>128</sup> *Ibid.*, para. 193.

<sup>129</sup> *Ibid.*, paras. 194-203.

Essentialism Argument, and its converse the third or Empathy Argument, both oppose group identity selection criteria by attributing perspectives – commonality and fungibility respectively – that are too contingent and immaterial to be persuasive.<sup>130</sup> Fourth is the Independence Argument which portrays judges either as a-, or as supra-, political hence ignoring the important distinction between their roles as “advocates” and as “deliberators”.<sup>131</sup>

The fifth or Trust/Confidence Argument and the sixth or Stigmatization/Truth Argument suggest proportionate representation will impact negatively on public confidence and on individual members of historically marginalized communities respectively.<sup>132</sup> Both portray the concerns of the first or Individual Merit/Liberty Argument from different perspectives, albeit without minimizing their practical effect. The seventh is the Disinterest/Abandonment Argument which worries that the acquisition of privilege will obscure commitment to marginalized compatriots.<sup>133</sup> In feminist literature this is known as the Queen Bee problem. Irrespective of how it is expressed, however, it is paternalistic and speculative to lumber members of excluded marginalized communities with such negativity. The eighth or Responsibility Argument raises the specter of the free rider,<sup>134</sup> which seems better addressed by effective post-appointment, administrative procedures meted out by chief justices who are indifferent to whether the impugned judge is a minority or mainstream appointee. Ninth is the Ossification/Balkanization/Instability Argument expressing concerns about overemphasizing differences and underemphasizing our similarities,<sup>135</sup> which tends to feed into a “Pollyannaish” mentality about social relations that seems remote from our lived experiences, at least if we are not card-carrying members of the dominant white male professional elite.

The remaining two arguments pertain more directly to process concerns: with the tenth being the Proliferation Argument that asks how we implement group-sensitive appointments procedures;<sup>136</sup> and the eleventh being the Pool/Expertise Problem Argument that questions whether there are “a sufficient number of qualified applicants from the identified communities.”<sup>137</sup> Devlin, MacKay and Kim take the latter argument seriously on a practical level because they focus on judicial appointments across the federal and provincial spectrum. However there is no longer any reason to take it seriously at the level of Supreme Court of Canada appointments. Devlin, MacKay and Kim’s research shows that women now constitute at least 20 per cent of federal and provincially appointed judges. Moreover, this pool would be significantly enlarged if account were taken, as *Touchstones* recommended, of the numbers of women who serve in non-curial legal positions.

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<sup>130</sup> Ibid., paras. 204-211.

<sup>131</sup> Ibid., paras. 212-216, citing Anne Phillips, *The Politics of Presence* (Oxford: Clarendon Press, 1995) at 162.

<sup>132</sup> Ibid., paras. 217-220.

<sup>133</sup> Ibid., paras. 221-3.

<sup>134</sup> Ibid., paras. 224-5.

<sup>135</sup> Ibid., paras. 226-8.

<sup>136</sup> Ibid., para. 229.

<sup>137</sup> Ibid., para. 235.

The Proliferation Argument is more worrisome, albeit not necessarily for the reasons addressed by Devlin, MacKay and Kim. These authors refer to questions such as: “Which groups count? What are the criteria? What are the parameters of difference? Who gets to qualify as a member of a group and on what grounds? Who gets to decide?”<sup>138</sup> – all of which boil down to the issue of identity. Pragmatically speaking, governments, employers and universities now have some years of experience dealing with federal and the occasional provincial employment equity legislation which specify the four historically disadvantaged groups – women, visible minorities, aboriginal peoples, and persons with disabilities – that can claim to be historically disadvantaged. These laws, as well as census and vital statistics legislation, rely on self-identification as the appropriate mechanism for qualifying as a member of such historically marginalized groups. Finally, many contemporary collective agreements, particularly but not only those pertaining to universities, now include clauses that address whether and how to give priority when multiple and diverse group identity claimants seek positions. No one would claim it is easy to work these situations out, but the difficulties involved are no reason to reject the arguments for gender and minority group representation. Indeed Devlin, MacKay and Kim agree these problems are not intractable.

More troubling, and not addressed by these authors because ultimately theirs was not a study restricted to the Supreme Court of Canada, is the question of precisely how independent judicial appointments commissions might be held accountable for implementing gender and minority-group sensitive appointments procedures for the Court. This question arises in part at the stage of composing these independent commissions given that members would be sought from different constituencies and hence raising the question of who would oversee and ensure gender representation on these commissions. Partly however, the implementation problem arises subsequent to the staffing of these independent commissions, given the current proposal to vary their membership according to the province/region from which the appointment is to be drawn. Each independently struck appointments commission might take the view that gender representation could be implemented by some other commission and/or that an approach equivalent to the NIMBY phenomenon might prevail with respect to any particular appointment. The only way to prevent these attitudes from derailing gender representation is to insist that from this time forward no new appointment can be made that would have the effect of reducing the current number of women on the Supreme Court of Canada bench.

### **Summary of Recommendations**

- The appointment process has to be assessed with respect to the requirements of judicial independence, particularly those recommending the depoliticization of the relationship between the executive and judicial powers.

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<sup>138</sup> Ibid., para. 229.

- The appointment process should be transparent and accountable and should recognize diversity as one of the many aspects of merit in the appointment criteria.
- The appointment process should not include confirmation hearings involving Parliamentary review of Supreme Court candidates.
- An independent commission for the appointment of Supreme Court justices should be established.
- The Supreme Court should have at least one justice from an aboriginal background and the independent commission should have aboriginal representation.
- The Supreme Court should be composed of no fewer than four women.

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