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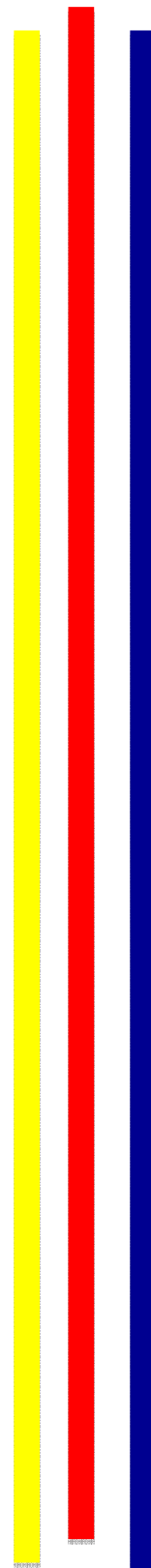
Intergovernmental Relations and the Supreme Court of Canada: The Changing Place of the Provinces in Judicial Selection Reform

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INTRODUCTION

“Canada is the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit on the country's highest court and interpret its binding constitution.”¹ Spoken by Peter Russell - one of Canada's preeminent constitutional scholars - this provocative statement helped set the tone for the study of the judicial appointment process of the Supreme Court of Canada [SCC] undertaken by the Committee on Justice, Human Rights, Public Safety and Emergency Preparedness' [JUST] in 2004. Indeed, by the time the JUST Committee began its study of judicial nominations, the federal government, opposition parties, provinces, legal community, and academics alike were overwhelmingly in agreement that reforms to the SCC appointment process were needed. And, in fact, Canada is hardly alone on this score. The growing importance of judicial selection and its relation to increasing judicial power have become recurrent topics in comparative judicial studies.² However, what is arguably most notable in the case of Canada is the changing role of the provinces.

Common law countries, Canada included, have historically been less open to acknowledging the inherently political nature of their courts.³ Consequently, liberal democracies with a common law system have traditionally designed judicial selection systems with processes outside the public eye. In Canada, other than a few formal guidelines set out in the *Supreme Court Act*,⁴ the discretion of the prime minister in selecting a judge for the SCC is practically unlimited and the selection process itself remained publicly undisclosed until 2004.⁵

Perhaps unsurprisingly then, proposals for the reform of the SCC have been part of virtually every contemporary effort at constitutional renewal, beginning with the Victoria Charter in 1971.⁶ However, while there has been a longstanding view that the process by

¹ Peter H. Russell, *A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada*, Brief to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, March 23, 2004, p. 1.

² As noted by Kate Malleson and Peter H. Russell, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto ; Buffalo: University of Toronto Press, 2006).

³ The obvious exception being the United States.

⁴ According to the *Supreme Court Act*, the person appointed must have been a judge of a superior court, or a lawyer of at least ten years standing in the bar of a province. Additionally, three of the judges must be from the bar of the province of Quebec. Although only Quebec's seats are formally guaranteed by the *Act*, by convention each region of the country is allocated a certain number of seats: three judges from Ontario, one from one of the four Atlantic provinces, and two from the four western provinces.

⁵ According to the Minister of Justice at the time, Irwin Cotler, the process involved informal consultations by the Minister of Justice with the Chief Justice of Canada, the Chief Justice(s) of the region in which there was a vacancy, the relevant provincial Attorneys-General, and senior members of the legal profession. See Irwin Cotler, "The Supreme Court Appointment Process: Chronology, Context and Reform.(Canada)," *University of New Brunswick Law Journal* 58(2008). While these consultations were understood as standard operating procedure, there was and continues to be no formal obligation on the prime minister to consult with any of these parties, or a duty to disclose to the public if and what consultations take place.

⁶ Proposals for constitutional reform of the SCC during this time, include: the Ontario Government's Advisory Committee on Confederation (1967); the 1978 Trudeau government's Constitutional Amendment Bill, Bill C-60; *Towards a New Canada*, the 1978 report of the Canadian Bar Association; the 1979 report of the Task Force on Canadian Unity (Pepin-Robarts Commission), *A Future Together*; and the 1985 Macdonald Royal SC Working Paper 2010 - 05

which justices of the SCC are selected is inadequate, this position underwent a notable shift following the defeat of the Charlottetown Accord in 1992. In less than two decades, the lens through which political actors approached reform of the SCC appeared to shift from federalism to the principles of accountability and transparency. This relative lull concerning provincial participation in appointments to the SCC is especially notable given that the provinces – in the form of the Council of the Federation – desired an appointments system designed to “ensure that provincial and territorial interests are adequately reflected and accommodated” as recently as 2004.⁷ Given that SCC justices are, in part, selected based on region, and that the court still decides several division-of-power cases each year, an important puzzle for understanding reforms to the SCC selection system is why the provinces have been relegated, apparently with only minor protest, to second tier status in the selection of SCC justices. What can help explain this shift from the province-focused reforms of the Victoria Charter, Meech Lake and Charlottetown Accords to those pursued under the governments of Paul Martin (2003-2006) and Stephen Harper (2006-)?

A move away from executive federalism and to the public review of judicial nominees (at least in the 2006 selection of Justice Marshall Rothstein) seems to indicate a significant shift in the perceived roles of Parliament and the Supreme Court has occurred. By tracing Canada’s reform efforts from 1949 to 2008, the paper will analyze this apparent change. Two time periods will be considered – 1949-1992 and 1993-2008. From this within-case analysis, I suggest that the shift from the province-focused proposals of the first time period to those implemented beginning in 2004 can be explained in large part by three developments: 1) the mega constitutional politics of the 1970s to the early 1990s allowed the provinces to secure judicial selection reform on the political agenda, an advantage that has not occurred since; 2) the introduction of the *Charter*, and consequent growth in judicial power, created additional factors that made judicial selection reform desirable for political actors; and 3) many of the reform proposals defended by this second wave complemented Liberal Prime Minister Paul Martin’s “democratic deficit” agenda; by contrast, increased provincial participation premised on the principle of executive federalism did not.

Judicial Selection and the Supreme Court of Canada

Period 1: 1949-1992

The SCC was not always the country’s final court of appeal – until 1949 this position was held by the Judicial Committee of the Privy Council [JCPC] in the United Kingdom. Consequently, the question of who was appointed to the SCC was less important given the opportunity to appeal the court’s decisions. Moreover, even after appeals to the JCPC were discontinued, the SCC was not immediately viewed as a particularly critical institution of

Commission on the Economic Union and Development Prospects for Canada. Reforms to the Supreme Court were also considered in the 1956 Tremblay Report in Quebec. For a review of these proposals see, Peter H. Russell, "Constitutional Reform of the Judicial Branch: Symbolic Vs. Operational Considerations," *Canadian Journal of Political Science/Revue canadienne de science politique* 17, no. 02 (1984).

⁷ Council of the Federation, "Report and Decisions,"

http://www.councilofthefederation.ca/newsroom/newsroom_2004.html.

Canadian society.⁸ By the time the SCC became Canada's final court of appeal, the federal and provincial governments were engaged in the rapid expansion of social programs and consequently relied heavily on intergovernmental negotiations to circumvent the complications of jurisdictional encroachment – making division of power cases less consequential.⁹

However, as political conflict between the provinces and the federal government became an increasingly familiar feature of intergovernmental relations, particularly in the 1970s and 1980s, breakdown of the informal processes of federal-provincial diplomacy ensued. Beginning in the late 1960s, the SCC accentuated this breakdown in a series of controversial cases that enhanced federal powers.¹⁰ At this moment of federal-provincial impasse, the role of the Court, by D.V. Smiley's account, "...came to play a more crucial and contentious role in the Canadian political system than at any other previous time."¹¹

While a clear sense of provincial frustration toward the SCC (and indeed the federal government) was present at this time,¹² Quebec's dissatisfaction during this period is particularly notable. After efforts by the Liberal government of Prime Minister Lester Person

⁸ James G. Snell and Frederick Vaughan, *The Supreme Court of Canada : History of the Institution* (Toronto; Buffalo: Published for the Osgoode Society by University of Toronto Press, 1985).

⁹ During this time period a succession of Canadian academics noted the declining significance of judicial intervention. See for example, J.A. Corry, "Constitutional Trends and Federalism," in *Evolving Canadian Federalism*, ed. Arthur Reginald Marsden Lower and F.R. Scott (Durham: Duke University Press, 1958); F.R. Scott, "Our Changing Constitution," in *The Courts and the Canadian Constitution : A Selection of Essays*, ed. William R. Lederman (Toronto: McClelland and Stewart, 1964); D. V. Smiley, "The Rowell-Sirois Report, Provincial Autonomy, and Post-War Canadian Federalism," *The Canadian Journal of Economics and Political Science / Revue canadienne d'Economie et de Science politique* 28, no. 1 (1962); Richard Simeon, *Federal-Provincial Diplomacy; the Making of Recent Policy in Canada*, Studies in the Structure of Power: Decision-Making in Canada, 5 (Toronto; Buffalo, N.Y: University of Toronto Press, 1972). Russell also notes that centralism was at its strongest point in Canada between 1930-1950. See, Peter H. Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?*, 3rd ed. (Toronto: University of Toronto Press, 2004), 62.

¹⁰ According to Russell, from 1950 to 1972, no federal law was judged invalid while twenty provincial laws were struck down. See, Peter H. Russell, "The Supreme Court since 1960," in *Politics Canada*, ed. Paul W. Fox (Toronto; New York: McGraw-Hill Ryerson, 1977). Russell concludes, however, that the Supreme Court's overall record shows an "uncanny balance" in considering division of powers cases. See, ———, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources," *Canadian Public Policy / Analyse de Politiques* 11, no. 2 (1985). For comprehensive analysis of the SCC's federalism jurisprudence see, Baier, *Courts and Federalism : Judicial Doctrine in the United States, Australia, and Canada*; John T. Saywell, *The Lawmakers : Judicial Power and the Shaping of Canadian Federalism*, Osgoode Society for Canadian Legal History Series (Toronto, Ont.; Buffalo: Published for The Osgoode Society for Canadian Legal History by University of Toronto Press, 2002).

¹¹ Donald V. Smiley, *Canada in Question : Federalism in the Eighties*, McGraw-Hill Ryerson Series in Canadian Politics (Toronto; New York: McGraw-Hill Ryerson, 1980), 40.

¹² For example, Saskatchewan Premier Allan Blakeney presented a brief to the First Ministers' Conference of October 30-November 1, 1978, reviewing the Court's constitutional decisions over the previous five years. The report concluded that "[r]ecent decisions of the Supreme Court of Canada reveal two striking features (i) absence of effective limits on federal powers, [and] (ii) serious erosion of provincial powers. They go a long way towards undermining the concept of a balanced federalism developed by the Privy Council." Premier Blakeney's criticism of the SCC during the Saskatchewan provincial election in October 1978 was so great, in fact, it was rumoured that the Court considered citing the premier with contempt. See, Roy J. Romanow, Howard A. Leeson, and John D. Whyte, *Canada-- Notwithstanding : The Making of the Constitution 1976-1982*, 25th anniversary ed. (Toronto: Thomson Carswell, 2007).

to patriate a constitutional amending formula were scuttled by Quebec in 1965, it became clear, as noted by Russell, that “Quebec’s price for supporting patriation would be nothing less than a restructuring of the Canadian federation to give sufficient scope for Quebec nationalism.”¹³ The importance of renewing the constitution was made all the more imperative when Quebec elected its first sovereigntist government in 1976.

Beginning in the late 1960s and lasting until the Charlottetown Accord’s defeat in 1992, Canada was immersed in an intensive series of constitutional negotiations, a process that Russell has termed “mega constitutional politics.”¹⁴ The impact of mega constitutional politics on reforms to the judicial selection system of the SCC was significant. Despite strong provincial desires to formalize their participation in the selection process of SCC justices, and moreover agreement to this by the federal government during every round of constitutional negotiations of this time period, reforms to the SCC were never the crux of these negotiations. As such, proposals that would have increased provincial participation in the judicial selection process, such as the Victoria Charter (1971), the Meech Lake Accord (1987-1990), and the Charlottetown Accord (1992), failed for reasons other than SCC reform; or in the case of the negotiations leading to the *Constitution Act of 1982*, judicial selection reforms were set aside, along with a number of items, so that a final deal could be brokered.

The Meech Lake Accord illustrates the complexities of implementing judicial selection reform within the context of mega constitutional politics. When the Liberal Party of Quebec adopted *Mastering Our Future*, a document articulating its constitutional positions in March 1985, one of its key demands was a provincial role in appointments to the SCC. When the party came into power soon after in December 1985, the conditions set out in this document became the basis for reopening constitutional negotiations with the federal government. The five conditions set out by Quebec were: (1) a full Quebec veto for constitutional changes; (2) the recognition of Quebec as a “distinct society”; (3) a provincial role in making appointments to the SCC; (4) a shift to the provinces in power over immigration; and (5) limits on the federal spending power. Though change in the selection process to the SCC was not the most important of Quebec’s demands, it was part of a core, non-negotiable list and so a necessary element of what was to become known as the Meech Lake Accord.¹⁵

The reasons for the Meech Lake Accord’s failure are numerous and debated. Nonetheless, it seems clear that a provincial role in nominations of SCC justices was one of the least controversial and most widely accepted of Quebec’s five constitutional demands. Given the SCC’s traditional role as umpire of division of power disputes, the participation of only one level of government appeared out of step with the principles of federalism and

¹³ Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?* , 74.

¹⁴ *Ibid.*, 75.

¹⁵ Under the Meech Lake Accord, while the power of appointment was to remain with the Governor General in Council (in practice the prime minister), it would be greatly constrained by the requirement that justices be appointed from names submitted by the government of a province. Thus, when a justice from Quebec resigned, the vacancy would have to be filled by a person acceptable to both the Government of Quebec and Government of Canada. In addition to giving the provinces a role in the selection of SCC justices, Meech Lake proposed to constitutionally entrench the Supreme Court, including the guarantee that at least three of the nine judges be appointed from the bench or bar of Quebec.

greater participation by the provinces had long been proposed as the appropriate remedy. For those who objected, concerns were not focused on the illegitimacy of enhanced provincial participation but that such participation did not include other interested members of the legal community, such as the Canadian Judicial Council and representatives of the various bar associations. While the Canadian Association of Law Teachers' submission to the special parliamentary committee on Meech Lake did note the new and more predominant role of the SCC since the enactment of the *Charter*,¹⁶ for the vast majority of key political actors, the SCC was still seen firstly as the overseer of the division of powers. If the elite-driven process that led to the creation of the Meech Lake Accord was in large part what led to its ultimate demise, this same principle residing at the heart of the proposed changes to the SCC selection process was seen as legitimate and for the most part sufficient. As will be seen in the next section, however, since the failure of the Charlottetown Accord, focus has moved away from provincial participation and towards concerns of accountability and transparency.

Period Two: 1993-2008

Following the failures of the Meech Lake and Charlottetown Accords, politicians and citizens alike experienced what might be aptly termed constitutional fatigue. In step with this mood, federal Liberal Party leader Jean Chrétien entered the 1993 election promising to set constitutional reform aside, and during his ten years as prime minister, did just that.¹⁷ However, while reforms to the SCC selection system were off the table, they were by no means out of mind: the media,¹⁸ politicians, and even SCC justices¹⁹ during this time began calling for greater transparency in the judicial selection process. The desirability of reforms was also expressed by an increasing number of academics – most often framing their recommendations in post-*Charter* terms.²⁰

¹⁶ Canadian Association of Law Teachers, "Democratizing Our Legal System: The Case for Judicial Nominating Councils," in *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord*, ed. Michael D. Behiels (Ottawa: University of Ottawa Press, 1989).

¹⁷ One exception, however, is arguably Chrétien's decision to refer questions to the SCC regarding Quebec's constitutional right to secession (*Reference re Secession of Quebec* [1998]) and the resulting *Clarity Act* [2000].

¹⁸ For editorial accounts see, for example, Malcolm Bernard, "Selection of Top-Court Judges Should Be More Open: Experts," *The Gazette*, 2 September 1997; Paul Schratz, "Public Should Have a Say in Judge Selection: The Bunch We've Got Now Is a Swell Lot and Well Intentioned. Trouble Is . . . They Seem to Think It's Their Job to Right All of Canada's Wrongs," *Calgary Herald*, 4 September 1997; Jeffrey Simpson, "Needed: A Better Way to Make Supreme Court Appointments," *Globe and Mail*, 29 August 1997; Rosemary Speirs, "Filling Supreme Court Vacancy Fraught with Peril," *The Toronto Star*, 11 September 1997; Editorial, "Nice Judge. Too Bad How He Got There," *Globe and Mail*, 3 October 1997; ———, "A Supreme Court for a New Age," *Globe and Mail*, 28 August 1997; ———, *Globe and Mail*, 5 March 1999; ———, "Supreme Chance for Ottawa," *The Gazette*, 31 August 1997.

¹⁹ After announcing his retirement from the SCC in 1997 Justice La Forest stated his preference for SCC nominees to be publicly vetted before appointment. See, Canadian Press, "La Forest Favours U.S.-Style Public Review for Supreme Court Judges," *Globe and Mail*, 3 September 1997.

²⁰ Peter Russell, "A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada," (Ottawa: Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 2004); Peter McCormick, "Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada," *The Journal of Appellate Practice and Process* 7, no. 1 (2005); Daniel Nadler, "An Opportune Moment: The Judicial Appointment Reforms and the Judicial Credentials Demanded by the Charter,"

It was the Reform Party (1989-2000), however, that was especially vocal on the issue of judicial selection reform. In contrast to the proponents of the Meech Lake and Charlottetown Accords, Reform Party Leader Preston Manning did not frame his reform interests in terms of the SCC's role in division of power cases, but rather argued that the policy-making role played by the SCC since the enactment of the *Charter* ran contrary to democracy where "policy must be made by persons who are elected by and accountable to the people."²¹ This view was carried through the Reform Party's transformation into the Canadian Alliance Party and finally its merger with the Progressive Conservative Party in 2003. Speaking in 2004, Conservative Party justice critic Vic Toews demonstrated this consistent stance: "this Liberal government has allowed judges to become the most powerful force in setting social policy in Canada. Whether it is by allowing convicted [murderers] to vote or by changing fundamental institutions like marriage, this government has substituted the supremacy of an elected Parliament with unelected judges."²² Speaking in 2007, Toews noted that the introduction of the *Charter* was the "primary if not the only reason" why changes to the judicial selection process were necessary. "Judges," he explained, "are more and more involved in policy decisions as opposed to straight legal decisions and therefore this process [judicial selection reform] was a natural outcome of this expanded role of the judiciary in policy or political matters."²³

The other federal opposition parties during this period also supported changes to the system of federal judicial appointment. For example, in 2003, Bloc Québécois justice critic Richard Marceau presented a motion to the House of Commons calling for the Justice Committee to study the process by which judges are appointed to Courts of Appeal and the SCC. Explaining why a study of judicial selection was warranted, Marceau stated:

Constitutional Forum 15(2006); Emmet Macfarlane, "Reforming the Supreme Court of Canada Appointments Process: Politics, Transparency, and Judicial Independence" (Queen's University, 2005); Jacob S. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada," in *Judicial Power and Canadian Democracy* ed. Paul Howe and Peter H. Russell (Montreal: McGill-Queen's University Press, 2001); F.L. Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, ed. Kate Malleson and Peter H. Russell (Toronto: University of Toronto Press, 2006); Rainer Knopff, "The Politics of Reforming Judicial Appointments. (Canada)," *University of New Brunswick Law Journal* 58(2008); Christopher P. Manfredi, "The Case for Vetting the Supremes," *National Post*, 3 July 2003; Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, ed. Canadian Judicial Council (Ottawa: Canada Communication Group-Pub., 1995); Patrick J. Monahan and Peter W. Hogg, "We Need an Open Parliamentary Review of Court Appointments," *National Post* 24 April 2004.

²¹ E. Preston Manning, "A "B" For Prof. Russell," *Policy Options*, April 1999, 16. The Reform Party included reform of the judicial selection process for the SCC as part of its New Canada Act (1998). Speaking in the House of Commons in June 1998, Reform Party MP Paul Forseth set out the party's preferences as: (a) supporting "more stringent and more public ratification procedures for Supreme Court Justices in light of the powers our legislators are handing the courts. We believe that an elected Senate should ratify all appointments to the Supreme Court of Canada and all Courts where the judges are appointed by the federal government; (b) supporting efforts to "secure adequate regional representation on the Supreme Court, and that nominations should be made by provincial legislatures, not provincial governments; and (c) supporting "the appointment of judges at the Supreme Court of Canada level for fixed, non-renewable terms of ten years." See Paul Forseth, House of Commons, *Debates (Hansard)* (8 February 1998, 36th Parliament, 1st Session): 7681-7682.

²² Vic Toews, House of Commons, *Debates (Hansard)* (23 February 2004, 37th Parliament, 3rd Session): 1450.

²³ Vic Toews, Personal Interview, 27 February 2007.

As the honourable members know, there is an old principle in English law, in the common law, that justice must not only be done, it must be seen to be done. The purpose of this principle, the very foundation of our justice system, is to maintain the highest possible level of public confidence in the judiciary. The current process of appointing judges, however, is in direct conflict with this principle, and clouds the image of justice. [Translated]²⁴

Parliamentary Secretary to the Minister of Justice, Paul Harold Macklin, responded to Marceau's call by declaring such a venture unnecessary, noting that "[t]he appointments process has been highly successful in producing judges of the greatest quality and distinction. Indeed, Canadians are envied around the world for the quality, commitment and independence of their judiciary."²⁵

The final push leading to reform eventually came with a change in Liberal leadership, seven months after this statement by Macklin, in the short-lived tenure of Prime Minister Paul Martin and his efforts to fix the "democratic deficit."²⁶ Upon being sworn into office in December 2003, Martin announced his government would respond to the call of opposition parties and consult the JUST Committee on how best to implement prior review of appointments of SCC justices.²⁷ Minister of Justice Irwin Cotler, who oversaw changes in the judicial selection process under the Martin government, has noted the importance that both the *Charter* and Martin himself played in creating the conditions for reform. His reflections are worth quoting at length:

The *Charter* increased the visibility and importance of the role of the courts, and rightly so in the sense that we moved from being a parliamentary democracy to a constitutional democracy. We moved from the sovereignty of Parliament to the sovereignty of the constitution. We moved from judges being the arbiters of legal federalism, which they still are, to judges being the guarantors of our rights under the *Charter* – because we, Parliament, gave that authority to judges not because they usurped it. And individuals and groups are no longer passive bystanders to a constitutional process; they are now rights holders and rights claimants. So clearly, the change in the constitutional framework and the advent of the *Charter* made the role of judges more public, more significant and therefore increased interest in the

²⁴ Richard Marceau, House of Commons, *Debates (Hansard)* (6 May 2003, 37th Parliament, 2nd Session): 5899.

²⁵ Paul Harold Macklin, House of Commons, *Debates (Hansard)* (6 May 2003, 37th Parliament, 2nd Session).

²⁶ The basis of Paul Martin's democratic deficit plan was originally presented in a 2002 speech at Osgoode Hall before he was Liberal Party Leader. See Paul Martin, ""The Democratic Deficit." Speech Given at Osgoode Hall, York University, Toronto, October 21, 2002," *Policy Options* (December 2002 – January 2003); Canada, "Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform," ed. Privy Council Office (Ottawa: Queen's Printer, 2004).

²⁷ Prime Minister, "Prime Minister Martin Announces New Government Will Be Guided by a New Approach," Office of the Prime Minister (Ottawa 12 December 2003). Within a few months of the committee's new mandate, Justices Louise Arbour and Frank Iacobucci announced their resignations from the Court leaving insufficient time to draft and implement a new long-term process. Instead, then Minister of Justice Irwin Cotler followed an interim procedure in which he appeared before an *ad hoc* committee to describe the process used to select incoming Justices Rosalie Silberman Abella and Louise Charron, including the consultations undertaken and the information reviewed.

appointments process because of the increased impact of the judiciary in a post-*Charter* universe. Having said that, the actual impetus for the reform was actually the former Prime Minister Paul Martin because he was the one who said he wanted to correct the democratic deficit and he gave as an example of the democratic deficit the absence of parliamentary and provincial participation in Supreme Court appointments process.²⁸

In April 2005, the Liberal government announced the details of its reformed selection process, which most notably included a committee mandated to review potential SCC nominees.²⁹ Before a replacement for the retiring Justice John Major could be made under this new system, however, the Liberals were defeated by the Conservative Party in the election of February 23, 2006. The new Conservative government, led by Prime Minister Stephen Harper, chose to adopt the work already completed by the Liberals, but made one further addition to the process – a public hearing of the recommended SCC nominee before a parliamentary committee – for which the party had advocated while in opposition.

Although changes were undertaken in 2006, no legislation reforming the appointment system has actually been put forward and the powers of the prime minister remain formally unaltered. It remains to be seen, then, whether this process will become the accepted mode of judicial selection;³⁰ a question made all the more pertinent since the December 22, 2008 appointment of Justice Thomas Cromwell who was selected using a modified advisory committee composed only of MPs and without public review by a parliamentary committee. While Prime Minister Harper cited the unusual situation of a recent federal election and the unforeseen proroguing of Parliament in November 2008 as the reasons for needing to fill the vacancy without public review,³¹ the event certainly indicates that the final shape of the SCC's selection system remains in flux.

Where did the provinces go?

During the review of Supreme Court appointments by the JUST committee and the consequent changes undertaken, there was notably little provincial participation. This limited role is particularly surprising given a number of provincial efforts demonstrating support of increased participation during this period.

²⁸ Irwin Cotler, Personal Interview, 20 February 2007.

²⁹ The process, as proposed by the Liberal Government, was as follows: the minister of justice would put forward a short list of five to eight candidates to an advisory committee composed of a Member of Parliament from each of the elected political parties, a nominee of the relevant provincial attorneys general, a nominee of the relevant provincial law societies, and two lay members chosen by the minister of justice. The committee would provide the minister with a short list of three to five names from which the final nominee would be chosen. Following the final selection, the minister of justice was to appear publicly before the House of Commons Justice Committee to explain the selection process and qualifications of the selected appointee.

³⁰ Though Peter Hogg has noted his belief that parliamentary review of judicial nominees is likely to continue in the future. See, Peter W. Hogg, "Appointment of Thomas A. Cromwell to the Supreme Court of Canada," in *Special Series on the Federal Dimensions of Reforming the Supreme Court of Canada*, ed. Jennifer Smith and Nadia Verrelli (Kingston: Institute of Intergovernmental Relations School of Policy Studies, Queen's University 2009).

³¹ Canada, "Prime Minister Harper Announces Appointment of Thomas Cromwell to Supreme Court of Canada," (Ottawa: Office of the Prime Minister, 22 December 2008).

In 1999, for example, the Ontario government of Mike Harris called for a provincial say in the appointment of Supreme Court justices.³² In a letter to federal Justice Minister Anne McLellan, Ontario Intergovernmental Affairs Minister Norm Sterling wrote that recent “decisions of the Supreme Court of Canada have increasingly shifted toward determining social and economic policy...[d]ecisions that have such effects are not in accordance with the public’s understanding of the respective roles of the legislators and the judiciary in our parliamentary and legal systems.”³³ This letter followed two particularly controversial decisions by the Court made that year: *M v. H*,³⁴ which ruled that family law must include same-sex couples; and *R. v. Marshall*,³⁵ which recognized certain fishing rights of Aboriginal peoples in Canada. The response by McLellan was simply to note that the provinces are already consulted during the selection process.³⁶

Additionally, the Quebec Liberal Party’s 2001 position paper, *A Project for Quebec – Affirmation, Autonomy and Leadership*, endorses the reforms essentially set out in the Meech Lake Accord. In fact, the principle of provincial participation was endorsed by all provinces in 2004 in the form of a commitment by the COF to form a committee of ministers to “develop new models for selecting individuals to serve in key national institutions such as the Senate of Canada and Supreme Court of Canada, to ensure that provincial and territorial interests are adequately reflected and accommodated.”³⁷ To date, however, the COF has not put forward a new model and issued no formal response to recent changes to Supreme Court appointments. How, then, can we account for this relatively truncated role for the provinces compared to the proposed constitutional reforms of the first time period presented here?

ANALYSIS

It is apparent that the context within which reforms were considered mattered a great deal in both periods. A series of controversial division of power decisions by the SCC beginning in the late 1960s in combination with disintegrating federal-provincial relations, contributed significantly to provincial interest in SCC reforms during this first time period. The rise of Quebec nationalism in the 1960s further solidified the importance of judicial selection reform. The entry into constitutional negotiations by the federal government and provinces initiated this series of reform attempts. By Quebec making reform of the SCC a non-negotiable demand of constitutional negotiation, the federal government had little choice but to concede a degree of its control over judicial selection in pursuit of the more important and pressing objective of a final constitutional package. The provinces’ influence in setting the constitutional agenda can also explain, at least in part, why the role of the *Charter* in judicial decision-making did not seriously enter into constitutional negotiations even ten years after its entrenchment.

³² Alberta, British Columbia, and Manitoba publicly noted their support of the letter sent by Minister Sterling.

³³ John Ibbitson and Steven Chase, "Ontario Joins Alberta: Rein in Top Court Give Provinces a Say in Picking Judges, Sterling Asks in Letter to McLellan," *The Globe and Mail*, 25 October 1999.

³⁴ *M. v. H.*, [1999] 2 S.C.R. 3.

³⁵ *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1999] 3 S.C.R. 533.

³⁶ Brian Laghi and Kim Lunman, "Justice Minister Defends Process of Nominating Supreme Court Judges Provinces' Advice Sought in Judicial Appointments, McLellan Says," *The Globe and Mail*, 26 October 1999.

³⁷ Council of the Federation, "Report and Decisions."

Following the failure of the Charlottetown Accord in 1992 is the second time period of interest. Under the leadership of Jean Chrétien, the Liberal Party dismissed all calls for judicial selection reform of the SCC. Considering the political conditions faced by Chrétien, in which his powers can be understood as reasonably secure, there was virtually no political incentive to concede authority over the selection process and moreover few political costs for declining to take action. This is in striking contrast to the political pressures faced by the federal government during the first time period. Despite the impasse imposed by the governing Liberals, interest in reform continued and was particularly taken up by federal opposition parties. However, unlike the first period, interest focused largely on the SCC's role in a post-*Charter* universe, rather than on federalism.

Sujit Choudry has framed the recent push for reforms in the SCC selection process within the larger scope of two competing institutional reform agendas – democratic renewal and intergovernmental relations.³⁸ With the intergovernmental relations agenda seeking to “perfect executive federalism” and that of democratic renewal attempting to “diminish executive power,” the two, he argues, are in deep tension with one another.³⁹ In the case of SCC appointments, he notes, elite provincial participation has been largely discarded over the last few decades in favour of democratic renewal. Choudry points to two reasons for the shift: first, the inefficiency of joint decision making by the COF as the primary institution for intergovernmental relations, and second, the SCC's expanded constitutional authority post-*Charter*.

Looking to Choudry's first point, certainly the COF's rule of decision-making by consensus does limit its effectiveness as an organization. As Nicole Bolleyer explains, by each government insisting on a veto to maintain its autonomy, conflicting issues do not get placed on the common agenda.⁴⁰ However, it is also worthwhile to note that in the case of SCC judicial selection reform there does appear to be consensus regarding the principle of provincial participation. How, then, can we best understand the provinces' failure to mobilize effectively?

Comparing the two time periods, political actors mobilized in both cases, at least in part, in reaction to a series of controversial SCC decisions. While the types of cases changed between these two periods, this should not have necessarily resulted in less interest concerning SCC appointments by the provinces. After all, when the *Charter* was enacted many critics, including the provinces, anticipated that it would prove to be a nationalizing instrument – homogenizing public policy and limiting federal diversity.⁴¹ The *Charter*, in short, was seen as a threat to provincial particularism and Canadian federalism.

³⁸ Sujit Choudry, "The Supreme Court Appointment Process: Improved Federal-Provincial Relations Vs. Democratic Renewal?," in *Democracy and Federalism Series* (Kingston: IIGR, School of Policy Studies, Queen's University, 2005).

³⁹ *Ibid.*, 3.

⁴⁰ Nicole Bolleyer, "Federal Dynamics in Canada, the United States, and Switzerland: How Substates' Internal Organization Affects Intergovernmental Relations," *Publius* 36, no. 4 (2006).

⁴¹ See for example, Alan Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal; Buffalo: McGill-Queen's University Press, 1992); Peter W. Hogg, "Federalism Fights the Charter," in *Federalism and Political Community: Essays in Honour of Donald Smiley*, ed. David P. Shugarman, Reginald Whitaker, and SC Working Paper 2010 - 05

Pushing against this centralization thesis, however, James Kelly has argued this view has been overstated and that the court has instead been sensitive to federalism in its *Charter* decisions – allowing space for policy variation.⁴² Thus, one possible explanation for the provinces' failure to successfully mobilize may be the SCC's own jurisprudence. That is, the court is not considered to be a major threat to the political and policy autonomy of the provinces. However, despite an overall trend toward provincial sensitivity, this point can only be carried so far, as demonstrated by the reaction of some provinces in 1999 to a number of particularly controversial decisions issued by the court.

With the provinces reacting to controversial decisions by the SCC in both time periods, the key difference, then, would appear to be that in this second time period these provincial calls for reform were marginalized. We return, then, to the importance of the constitutional negotiations that defined the first time period of this study. This series of constitutional attempts allowed the provinces to play a major role in agenda setting in a manner that has not been possible since. No longer capable of placing judicial selection reform on the political agenda, the provinces' preferences instead became part of the larger background noise, along with other interested actors including the media, academics, legal interest groups, and federal opposition parties. Importantly, the focus of these other actors largely centered on the Court's role in a post-*Charter* universe and the value of transparency and accountability in the selection process. With his interest in developing policy to fix the "democratic deficit", it was this later focus on judicial reform that was picked up by Martin and further followed on by Harper. While Choudry is undoubtedly correct in highlighting the competing roles of the democratic renewal and intergovernmental relations agendas, it is also important to note that under the conditions faced in this second time period the likelihood of the provinces – even with strong coordination – gaining powers comparable to those proposed in the Meech Lake Accord appears weak.

The shift from the province-focused proposals of the first time period to those implemented in 2005-2006 can be explained, then, in large part by three developments: 1) the mega constitutional politics of the 1970s to the early 1990s allowed the provinces to secure a place for judicial selection reform on the political agenda, an advantage they no longer hold; 2) the introduction of the *Charter* created additional factors, mainly increased judicial power, that made judicial selection reform politically desirable for additional actors; and 3) many of the reform proposals defended by this second wave complemented Liberal leader Paul Martin's "democratic deficit" agenda, while increased provincial participation premised on the principle of executive federalism did not.

CONCLUSION

Donald V. Smiley (Peterborough, Ont.: Broadview Press, 1989); Rainer Knopff and F. L. Morton, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000); Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal; Buffalo: McGill-Queen's University Press, 1995); Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal; Buffalo: McGill-Queen's University Press, 1996).

⁴² James B. Kelly, "Reconciling Rights and Federalism During Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999," *Canadian Journal of Political Science/Revue canadienne de science politique* 34, no. 02 (2001).

This paper began by asking why the provinces' recent role in reforms to the Supreme Court's selection process was diminished compared to efforts in the 1970s through to the early 1990s. By employing a processing tracing approach, two time periods were set out and compared – 1949-1992 and 1993-2008. It was found that in both time periods political actors' interests in reform stemmed, at least in part, from a set of SCC decisions – in the first period, decisions impacting the division of powers, and in the second, those related primarily to the *Charter*. One possible explanation for the comparative weakness of the provinces in this second time period has been put forward by Choudry, who highlights the ineffectiveness of the COF as an intergovernmental decision making body. This paper offers a qualification to Choudry's point by emphasizing the importance of constitutional negotiations in the first time period of the study. Moreover, it was only with a change in Liberal Party leadership that an opening for reform was created in the second time period, and only then within the specific framework of Martin's democratic deficit agenda. On this point, the introduction of the *Charter* facilitated the framing of judicial selection reform within the democratic renewal agenda: with the Supreme Court making important decisions affecting public policy, the question of who appoints its members gained particular attention.

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