

values cherished by all Canadians. Despite this obvious recuperation of Mr. Trudeau's language, from the federal proposals in September 1991 to the Charlottetown Accord in August 1992, the old pope remains adamant in his opposition.

#### THE TRUDEAU PHILOSOPHY

It is my contention that the Meech Lake Accord, if it had been ratified, would have left intact the preponderance of Mr. Trudeau's vision of the Canadian federation. The political culture of symmetrical treatment granted to individuals and provinces alike would have continued to penetrate deeper and deeper within the Canadian social fabric. Through the distinct society clause, the Accord would

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have opened some limited space for the dualistic vision held by Quebec nationalists, but not more than that.

Mr. Trudeau was not satisfied by such a victory. He did not want merely to triumph over his adversaries; rather, he desired their complete annihilation. There is something profoundly immoderate in such an ambition. I also think that such an attitude, coming from the most important politician in twentieth century Canada, is potentially very dangerous for our political system. Mr. Trudeau's article in *L'Actualité* and *Maclean's* is dominated by such an absence of moderation. In his own dictionary with regards to politics in

Canada and Quebec, the word "doubt" does not appear.

#### THE TRUDEAU LEGACY

It is hard to guess at this time what effect Mr. Trudeau will have on the referendum campaign of 1992. He will certainly make it more exciting, although the past two weeks have displayed their share of fascinating events. Whatever the results of the referendum, I would claim that Mr. Trudeau has provided us with a rare eruption of tragedy in our public affairs. When the history of tragedy in the twentieth century is written, Canada and Quebec will not be mentioned too frequently, but the historians of the future will most likely take a few pages to explain how the most gifted politician in Canada came out of his retirement, on two occasions, to pit the various national communities in his country one against the other, and all this in order to obtain a total victory against his ideological enemies.

As a critic of Mr. Trudeau who continues to respect and admire a number of his achievements, I must say I expected more from his years of freedom and lucidity in retirement. He had, and still possesses, the intellectual means to write books on such topics as nationalism in the twentieth century or, if he had wanted to liberate himself from this topic, on the cultivation of the self according to Seneca, or even on the seventeenth century French moralists such as La Rochefoucauld and La Bruyère. These ventures in the world of his youth would have been more edifying for future generations of Canadians and Quebecers than the negative pathos surrounding him in the months of our political discontent.

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## LEGAL REPORT

### APPOINTING SUPREME COURT OF CANADA JUDGES

**Would a more open process threaten or bolster the court's legitimacy?**

*by Jamie Cameron*

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#### THE EMPTY SEAT

On June 5, 1992, William Stevenson, puisne judge of the Supreme Court of Canada, retired after serving for less than two years. His resignation due to illness has revived concerns about the process of judicial appointment in Canada. Since 1977, at least nine judges on Canada's highest court have stepped down before mandatory retirement at age 75. And four months later, as the court prepares to commence another term of hearings, the federal government still has not filled the vacancy.

Delay has underlined the politics of choosing a successor in this case. By convention, the next appointee should be from a western province. Former Justice Stevenson's tenure was so brief that it is unclear which province is "entitled" to fill his position. Any appointment now, in the midst of a national referendum campaign, will unavoidably be political.

#### THE CHARLOTTETOWN ACCORD

The Charlottetown Accord would entrench the Supreme Court of Canada in the constitution, and guarantee its current composition of nine members, including three from the civil law bar of Quebec.

At present, there are no restrictions on the prime minister's power

to appoint Supreme Court of Canada judges. By requiring the federal government to name judges from lists submitted by the governments of the provinces and the territories, the Charlottetown Accord would place

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*"How significant is the Accord's reform of the appointment process? Surely it is modest — especially in comparison with the reform of other central institutions such as the Senate and House of Commons."*

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significant constraints on the prime minister's discretion. Moreover, the legal text will provide for the appointment of interim judges in cases of provincial failure to nominate or federal rejection of nominees forwarded by the provinces.

How significant is the Accord's reform of the appointment process? Surely it is modest — especially in comparison with the reform of other central institutions such as the Senate and House of Commons. Law professor David Beatty complains of the Accord's "glaring failure" even to "address the question of public participation" in the selection of judges.

#### JUDGING THE JUDGES

The Supreme Court of Canada is a powerful institution in our democracy and it should be subject to scrutiny, not only of its decisions and operations but also, some argue, of the process by which its members are nominated. Jacob Ziegel, a Toronto law professor, claims that "Canadians from coast to coast have a profound stake in the appointment of every member of the Supreme Court of Canada and should participate directly or indirectly."

Even without the Thomas-Hill confrontation in the U.S. Senate last fall, any attempt to open Canada's

appointment process would encounter resistance. J.J. Camp, past president of the Canadian Bar Association, maintains, "If it ain't broke, don't fix it." Professor Patrick Glenn, of McGill University, asks, "What is it you're going to derive from the process apart from the spectacle?"

Political scientist Peter Russell dismisses these objections as the predictable reaction of a legal establishment that is "stuffy." Those who resist public participation may well be seeking to protect a bygone code of professionalism that no longer corresponds to the court's role in national life.

Ziegel states that an open process will discourage executive abuse and ensure that "interested citizens have an opportunity to express their views." Gerald Gall, of the University of Alberta, suggests that the court should have "a mix of talents, ages, ethnicity and background," but that "the no.1 criterion should be merit." Clayton Ruby argues that the judiciary "must better reflect the multicultural nature of the country."

#### THE BEST PERSON FOR THE JOB

It is virtually impossible, in Canada today, to maintain that a closed system of executive consultation is more desirable than an open process of public participation. But what is the objective of an open process? Will appointments to the Supreme Court of Canada be more legitimate? Less political, or more political?

Prime Minister Mulroney has described each of his Supreme Court appointees as "the best person for the job." Beatty responds that the current process "does not favour people who are committed to the vigorous protection of human rights." How would a public process evaluate merit, and will merit inevitably be equated with ideology? And should other criteria, such as gender

and ethnicity, be considered? If Mr. Ruby is right, who should decide how different constituencies should be represented on the Court?

Although Newfoundland's proposal for Senate confirmation hearings was rejected, the Charlottetown Accord does not prevent the provinces from establishing their own nomination procedures. Some, like Ontario, have already established non-partisan nomination committees to open up the process of appointment to provincial courts. Nor does the Accord foreclose the introduction of Senate or other public hearings at the federal level. It fails only to require such hearings, as a matter of constitutional law.

The current process of appointment to the Supreme Court of Canada is based on a conception of the judi-

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ciary as neutral decision makers. It is doubtful whether that perception of the courts can be defended at this time. Far from threatening it, democratizing the selection process seeks to legitimize the membership of an institution that has undeniably been politicized in recent years.

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