Judicial Selection in Canada:

A Look at Patronage in Federal Appointments since 1988

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I. Introduction

A study of federal judicial appointments from 1984 to 1988 found that 48 percent of the government's appointees had a partisan political connection to the party in power (Russell and Ziegel 1991). That study concluded that patronage was "pervasive" in the federal judicial appointments process, and called for reforms to reduce it.

This issue is important as it has larger ramifications for the judicial system itself. A process of judicial appointments based on patronage raises concern about whether the best possible candidates are being chosen. It also calls into question the fairness and integrity of the process and, by extension, potentially undermines the credibility of the judicial system as a whole. Moreover, a system of judicial appointments based on partisan affiliation has implications for the relationship between government and the judiciary and governance in Canada more generally.

Although the Mulroney Progressive Conservatives were highly critical of Liberal patronage appointments during the 1984 election, the Progressive Conservatives did not introduce a new system for appointing s.96 judges (superior trial court and appellate court judges in the provinces) and s.101 Federal Court judges until 1988. Did the screening committee system introduced in 1988 (and described in more detail below) reduce the influence of patronage in the federal judicial appointment process? Media reports and anecdotal evidence suggest that the changes have not checked partisan favour as a factor in the process. One former provincial premier was quoted as saying, "It makes no difference what party… the long and

short of it is that within the judicial system below the Supreme Court of Canada there is constant jockeying for position by those in the lower judiciary, as well as prominent lawyers, in trying to gain favour and to gain acceptance by those who will ultimately have the power to appoint" (Brian Peckford as quoted in Schmitz 2005a). Accusations of judgeships being given out as a reward to party faithful have also been made in recent years. The most notorious were those made during the Gomery Inquiry where one witness (Benoit Corbeil) testified that a number of Quebec lawyers who had campaigned for the Liberal Party in the 2000 election were subsequently appointed to the bench. However, while we have media accounts of individual incidents and suggestions of widespread partisan appointments, there is a lack of long term, systematic analyses of the role of patronage in judicial appointments made since Prime Minister Mulroney's first term. There has been no follow up to the Russell-Ziegel study to determine the impact of the changes made in 1988 to federal judicial appointments.

The suggestions of blatant patronage made during the Gomery Inquiry were enough to provoke the House of Commons to establish a Subcommittee on the Process for Appointment to the Federal Judiciary in 2005. Constance Glube, former Chief of Nova Scotia's Court of Appeal, testified to this Committee that judicial appointments were based not on merit, but rather on political considerations. While this subcommittee did not have time to issue a final report prior to the election in January 2006, it did suggest that some changes could occur in the future, especially with the election of a new Conservative government that has been vocal in its criticism of judicial power and the selection process. This increases the importance of a careful analysis of available data. If we are to have an informed debate on the process of judicial selection in Canada more information is needed.

As part of a much larger research project, this paper takes the first small step in systematically testing the influence of patronage in the current selection system by assessing one potential form of jockeying for position: financial donations to political parties. In this analysis we examine how many judges appointed by the federal government to the s.96 courts and the Federal Court during Prime Minister Mulroney's second term (Mulroney II, 1988-1993), and during Prime Minister Chrétien's three terms (Chrétien I, 1993-1997; Chrétien II, 1997-2000 and Chrétien III 2000-2003) donated money to the party that appointed them, prior to their appointment. The paper also provides basic background data on judges appointed since the 1988 changes, including the gender balance of appointees. Has the process resulted in different types of judges?

The first part of the paper provides an historical overview of the appointment process in Canada. This is followed by a description of the current process of judicial selection to the federally-appointed courts. The third section of the paper examines studies of comparative approaches to judicial selection, focusing on the impact these different methods have on the influence of patronage and on the demographic makeup of the bench. The next section of the paper presents the empirical results and analyses of our data. It also briefly considers the larger analytical context surrounding the judicial selection issue, asking to what degree is it desirable or possible for an appointments system in an era of increasing judicial power to reconcile potentially competing demands for merit-based appointments, a representative judiciary, a transparent process, a desire to have some linkage between the courts and broader socio-political influences, and a respect for judicial independence? The paper concludes with an overview of the next stages of the project.

II. Background

a) Historical Background

The *Constitution Act, 1867* provides that s.96 judges shall be appointed by the Governor General though in practice this power is exercised by the minister of justice and, in the case of "chief justices," the prime minister. Section 101 of the *Constitution Act, 1867* gave the federal government the authority to establish a general court of appeal and other courts that it deemed necessary. The legislation that established the s.101 courts provides that judges shall be appointed by order-in-council; in reality, as with the section 96 courts, this power is exercised by the Minister of Justice and Prime Minister. Historically, governments used judicial appointments as rewards for political service. Prime Minister R.B. Bennett remarked in 1932 that "the test [of] whether a man is entitled to a seat on the Bench has seemed to be whether he has run an election and lost it" (quoted in Friedland 1995: 236). While the number of judicial appointees who had contested elections (successfully or not) started to drop around World War II, surveys of leading lawyers in the 1950s and 1960s showed that most appointees in all provinces were supporters of the party in power at the time (CBA 1985: 55-56).[1]

Some modifications to the appointments process were made in the late 1960s and early 1970s. In 1967 the Canadian Bar Association established the National Committee on the Judiciary. This committee screened the names of judicial candidates forwarded by the Minister of Justice who, in the early 1970s, began to use special advisors to accumulate information about prospective candidates from judges, members of the law profession, and provincial attorneys-general. Although these were improvements to the system, the likelihood that they would reduce

[1] The McElvey report noted that Schmitt in 1952 had found that 87% of Ontario appointees were government party supporters, 85% of Alberta and B.C. appointees were government party supporters and 70% of Quebec appointees were government party supporters. In the other provinces all the judicial appointees were government party supporters.

patronage was mitigated by the fact that the special advisers reported directly to the Minister of Justice (usually for short terms) and that regional ministers had a strong influence over judicial appointments (CBA 1985) .

Conflict between the Conservative government of Saskatchewan and the federal Liberal government over the appointment of Liberal party supporters to the s.96 courts in Saskatchewan in the early 1980s illustrated the weaknesses of the existing appointments system (Morton 2006: 66). Shortly thereafter the rash of patronage appointments at the end of the Trudeau/ Turner years generated outrage and brought the appointment process under greater scrutiny. The Canadian Bar Association (CBA) established the McElvey Committtee to investigate judicial appointments in Canada. Based on interviews with federal and provincial officials, judges and lawyers, the Committee concluded that partisan considerations played a predominant influence in s.96 appointments in the Atlantic provinces and Saskatchewan, and were significant in Alberta and Manitoba. Respondents in B.C., Ontario and Quebec provided a more mixed assessment of the role of patronage, which suggested that patronage was not a significant factor in appointments, though the importance of party affiliation varied to some degree depending on the federal Minister of Justice (CBA 1984, 37-40). As for the Federal Court, patronage was found to have been a "dominant" consideration with many appointees having been "active supporters of the party in power" (CBA 1984: 57).

The McElvey committee recommended significant changes be made to the appointments process. Around the same time the Canadian Association of Law Teachers (CALT) also argued for changes to the system of appointing federal judges. Although the specific details of the CBA and CALT recommendations differed, at the heart of both groups' recommendations were calls

for the establishment of nominating committees in each province made up of various representatives that would recruit and screen judicial candidates.

Despite criticizing the Liberal patronage appointments during the 1984 election, Prime Minister Mulroney and his government did not implement changes to the appointments process during its first term in office. In 1991, Peter Russell and Jacob Ziegel (1991) conducted a study of the Mulroney government's judicial appointments from 1984-1988, based on questionnaire responses from individuals in law, politics, academia or the media who might have been familiar with the appointees. The results indicated that 24.1% of appointees had "major" involvement with the Conservative party (running for elected office, party official, or active participation in election/leadership campaigns) and 23.2% had "minor" involvement with the Conservative party (minor constituency work, financial contributions, or close personal or professional associations with party leaders).[2] Involvement with an opposition party was ascribed to 7.1% of appointees (5.3% "major" and 1.8% "minor"). The data show that patronage remained an important factor in the appointments process, particularly in Saskatchewan, Manitoba, New Brunswick, Nova Scotia, and PEI (1991: 20). Indeed, a former minister of justice in the Mulroney government, John Crosbie, acknowledged in a recent media interview that he appointed Conservative activists to the bench during his tenure as Minister (Makin 2005).

Most of the Mulroney appointees (86.3%) were considered to be "good" judges or better by one or two evaluators enlisted by Russell and Ziegel. However, out of the 13 judges who were rated as only "fair" or "poor", 10 had major or minor Conservative affiliation (1991: 23-25). Such results suggest that a judicial appointments system in which patronage is a factor may

[2] There were a total of 228 appointments made in total to the s.96 courts, the Federal Court (trial and appeal division), the Tax Court and the Supreme Court. Elevations were counted in these data as were administrative promotions to Associate Chief Justice or Chief Justice.

not produce the highest quality bench possible. Anecdotal examples, such as the inquiry into the conduct of former Liberal cabinet member Justice Cosgrove, draw attention to this conclusion.[3]

b) Current Federal Judicial Appointments Process

Following the re-election of the Mulroney government in 1988, Justice Minister Ray Hnatyshyn introduced a new system for appointments to the s.96 courts and the Federal Court. The responsibilities of the Office of the Commissioner for Federal Judicial Affairs were expanded to include soliciting applications from those interested in a federal judicial position and, after checking to see if they met the technical qualifications for the post, referring those names to the advisory committees that would be established in each province and territory to screen the candidates. The Commissioner reports the assessments of the candidates back to the Minister so that appointments can be made from the list on an ongoing basis (the committees' assessments are valid for two years).[4]

Membership on the committees consists of one representative of the provincial or territorial Law Society; one representative of the provincial or territorial branch of the Canadian Bar Association; one representative of the Chief Justice of the province, or of the Senior Judge of the territory; one representative of the provincial Attorney General, or territorial Minister of Justice; three representatives of the federal Minister of Justice (two of whom must be non-lawyers) and an *ex officio* non-voting member from the Office of the Commissioner for Federal

[3] Justice Cosgrove, a former federal Liberal Cabinet member appointed to the bench in 1984 as part of a spate of patronage appointments at the end of the Trudeau/ Turner years, claimed that the police and Crown had committed over 150 constitutional violations and dismissed the charges against Julia Elliot who was accused of killing and dismembering her ex-lover. The Ontario Court of Appeal overturned Cosgrove's decision, stating that his conclusions were "unwarranted," and that he had used the Charter"to 'remedy' baseless and frivolous claims" (*R. v. Elliot* 2003 at para. 129). The Canadian Judicial Council (CJC) launched an investigation into Justice Cosgrove's behaviour as required by law after the Attorney-General of Ontario lodged a complaint. A constitutional challenge to the investigation was rejected by the CJC but was upheld by a Federal Court judge so the investigation—at least for now—has been suspended.

[4] Committee assessments were valid for three years until 1999, when it was reduced to two years.

Judicial Affairs.[5] Membership on a committee is a three-year term (raised from just two years in 1999) renewable for a single additional term.

Committees are asked to assess candidates based on a Personal Information form filled out by candidates, contact with references provided by the candidate, and consultations with others not mentioned by the candidate both inside and outside the legal community. The Commissioner notes that interviews with the candidates are often not possible because of the volume of applicants that must be screened, but encourages interviews if there are divisions on a committee. Candidates are evaluated by committees on their "professional competence and experience" (such as proficiency in the law, ability to exercise role conferred by the Charter, writing and communication skills); "personal characteristics" (ethical standards, fairness, tolerance), and "potential impediments to appointment" (drug or alcohol dependency, health, financial difficulties.).[6] The Commissioner's office also encourages committees to "respect diversity" and give "due consideration to all legal experience, including that outside a mainstream legal practice" (Commissioner for Federal Judicial Affairs 2006).

When the committee system was established originally, candidates were rated as "qualified" or "not qualified," but in 1991 this was changed to "highly recommended," "recommended," and "unable to recommend" and, at that time, committees were also asked to attach a précis about the candidate. Over the first ten years of the committee system, just over 5000 applications were received—1892 applications were "recommended" or "highly

[5] In 1994, the number of lay people appointed by the federal government to the committees was expanded from one to three. Also, in 1994, the single committee for Ontario was replaced by three regional committees (East and North Ontario, West and South Ontario, and Metro Toronto) and the single Quebec committee was replaced by two committees (one for Quebec West and one for Quebec East, which reflects the judicial district system in Quebec) (Millar 2000: 5).

[6] Up until at least 1999, committees were also asked to evaluate a candidate's "social awareness" (sensitivity to gender and racial equality, appreciation of social issues arising in litigation, etc) (Millar 2000: 27)

recommended" while 2477 applications were rated as "not qualified or unable to recommend" (Millar 2000: 7).

In the end, discretion over who gets appointed remains with the Minister of Justice and the Prime Minister. According to the Commissioner, the Minister can ask for a reassessment of a candidate and can make further inquiries about a candidate with members of the judiciary or the bar, his or her provincial counterparts, and the Chief Justice of the court to which an applicant is going to be appointed. Furthermore, the process is not legislatively entrenched and there is no prohibition against the Minister choosing a candidate who has not been recommended, though Ministers of Justice promised that only candidates rated as recommended or highly recommended will be appointed.[7] Until 1999, provincial or territorial judges who wanted to become federal judges were not reviewed by Committees, but thereafter non-binding comments were provided by the committees for such candidates (Millar 2000). Finally, evaluations from the trial court level to the appellate level are not reviewed and the Prime Minister has discretion over appointments to the senior administrative positions, such as Chief Justice.

c) Preliminary Looks at the New Appointment Process

How has the new appointment process worked in practice and what kinds of judges have been appointed? In particular, has the new appointment process helped to reduce the influence of patronage? Some limited anecdotal and empirical evidence suggests not. The CanWest News Service reviewed judicial appointments in Quebec, Ontario, Saskatchewan and Alberta and

[7] Russell and Ziegel report that, at least in the early stages of the new process, one of the advisory committees in "one of the smaller provinces" was reporting back to the Commissioner only the best candidates, thereby trying to ensure that the better candidates would be appointed (1991: 31, ftn. 35). However, Russell and Ziegel also speculated that applicants could force the release of their assessment, or, because the advisory committees have no statutory basis the Minister could simply appoint a new chair or disband the committee altogether (1991: 31, ftn 36).

reported that "more than 60 per cent of the 93 lawyers who received federal judicial appointments in Ontario, Alberta and Saskatchewan since 2000 donated exclusively to the Liberal party in the three to five years before securing their $220,000-per-annum posts" (Schmitz 2005b). The story also reported that 13 of the 34 appointees to the Quebec Superior Court had donated to the Liberal Party during that time, but that a separate check by the *Vancouver Sun* of appointments in BC since 2000 suggested that the process was relatively free of patronage (Schmitz 2005b). These figures were supplemented by interviews with members of the legal community and searches of newspaper databases. The analysis revealed that a number of appointees had more connection with the Liberals than political donations, such as John Gill who was co-chair of the Liberal election readiness campaign in Alberta in 2004 and then appointed to the Alberta Court of Queen's Bench in 2005 (Schmitz 2005a; Schmitz 2005c).

A similar study of 2003 federal judicial appointments by Forcese and Freeman found that 41% of appointees were "probable" supporters of the Liberal Party based on political donations records dating back to 1997. A "probable" supporter, as opposed to a "possible" supporter, had the same first name, last name and middle initial as a donor or the appointee had an "uncommon" name that was found in the donor records. Only two appointees were "probable" supporters of an opposition party (2005: 266-267).

Anecdotal evidence is also available to support the suggestion that patronage remains a factor in the process. The appointment of Justice Heather Robertson to the Nova Scotia Supreme Court in 1998, for example, caused considerable controversy when it was reported that she was a fundraiser for former Liberal Premier John Savage and that her friend and fellow Dalhousie law school graduate, then Liberal Justice Minister Anne McLellan, had asked the Nova Scotia appointment committee to reconsider the "unqualified" ranking that the committee originally

gave Robertson. One member of the committee, Justice Nancy Bateman, resigned following the incident (Meek 1998). More recently, as noted earlier, Benoit Corbeil's appearance before the Gomery Commission in May 2005, which included testimony that lawyers who volunteered for the Liberals in Quebec were rewarded with judicial appointments, fueled accusations that the current appointments process has not deterred patronage (Thompson 2005). Soon after, in June 2005, a sub-committee of the parliamentary Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness was convened to study the federal judicial appointment process. Although it was unable to finish its inquiry before the federal election was called in late 2005 (Interim Report 2005), the sub-committee heard testimony from former Chief Justice Constance Glube of the Nova Scotia Court of Appeal and others that patronage has remained influential in the federal judicial appointments process since 1988.[8]

Clearly there is a need for further research on the federal judicial appointments process. Studies conducted since the new appointments process was introduced in 1988 have a number of empirical limitations. The years studied are limited and, notably, do not include any data on appointees of the government that introduced the changes to the process in 1988. The data are limited to only political affiliation and do not include other characteristics, such as gender. Finally, the methodologies used to generate conclusions are ambiguous; as we discuss further below, even analyzing donations to political parties poses various challenges. Among other things, these limitations reduce their utility for expanding the empirical analysis to investigate the quality of appointees or how they decide cases. Moreover, with the partial exception of Forcese and Freeman, who focus predominately on the Supreme Court, these studies do not put their findings in a broader analytical context. This limits their value for thinking about the

[8] Chief Justice Glube would be very familiar with the appointment process as she was required to appoint a member to the Nova Scotia screening committee.

broader questions that surround the appointments process and in developing alternative proposals for reform.

This paper represents the initial stage of a larger project of wider and deeper empirical and analytical scope. In this early part of the project we focus on political donations by judicial appointees to determine the impact of the 1988 reforms. However, before analyzing the empirical results of this stage of the study we first examine some alternatives to the current system, based on comparative studies. Can political considerations be factored out of judicial selection or does party always play a role? Although patronage is our primary concern in this study we also briefly consider the impact of different selection methods on the diversity of the bench.

III. Comparative Context

Judicial appointments to various state courts in the US alone provide an ample range of methods of appointment and debates over those methods. Roughly half of the states use a system of merit appointment at some level of court, whereby judicial nominating or screening commissions composed of lawyers and lay people recommend a number of candidates (generally three to six) to the governor who then selects the judge from the list. Typically, after a period of service the judge would then run in an uncontested retention election. Other states use elections (either partisan or non-partisan) as their primary method of selection—judges selected in this manner normally serve for a fixed term and then face reelection. A handful of states have some state judges appointed by the governor (some needing approval of the state senate) and in two states judges are elected by the state legislature.[9] A number of states use different methods of selection for various courts.

[9] Retention elections remain a common feature in these systems after the initial appointment.

The political nature of judicial elections is self-evident. However, even the merit system which was designed to address concerns with the political nature of judicial elections is not immune to the influence of politics. Research into the merit selection systems used by many states reveals that political influences often are not removed from the process but instead are transferred to the screening or nominating commissions themselves. Studies have found that commissioners tend to be more politically active than the general population, partisanship affected the selection of both lawyer and lay commissioners, bar politics influenced the process, and that partisan considerations often entered into the deliberations of merit committees (especially those that were not required to be bi-partisan) (Reddick 2002; Tarr 2006: 68). Commissioners have also reported feeling pressure from governors to nominate their preferred candidate (Baum 2001: 118-119).

Other research into merit selection systems has focused on whether such systems increase or limit the demographic diversity of the bench. Up to the 1980s, both the commissions themselves and state judiciaries had few women or minorities, but this situation has changed appreciably over the last two decades. Some research suggests that merit commissions do lead to more women and minorities being appointed to the bench, especially if the commissions themselves feature demographic diversity, but more recent studies argue that there is no relationship between systems of selection and the demographic characteristics of appointees to the bench. Instead, the composition of state judiciaries, which now feature many more of women and minorities (but often not proportional relative to the general population) can be better explained by changes in the composition of the legal profession, the political influence of various minority groups, and regional factors (Reddick 2002; Tarr 2006: 68-71).

Finally, researchers have come to varying conclusions about whether there are any significant differences in decision-making between judges chosen by various methods of selection (Reddick 2002; Tarr 2006: 64-65; Baum 2001). While trying to ascertain the "quality" of judges produced by various systems is difficult, one study did find that merit systems helped to eliminate the appointment of "very poor" judges (Reddick 2002).

In contrast to the multitude of appointment systems at the state level, judges at the federal level in the US are appointed by the President with the advice and consent of the Senate. Despite the clarity of the constitutional text, the federal selection system varies "depending on the level of court, the importance the President attaches to judicial appointments, and whether a single party controls the presidency and the Senate" (Tarr 2006: 71). Unofficially, since the 1950s, the American Bar Association (ABA) has rated nominees from "exceptionally well-qualified" to "not qualified," but beginning in 2001, the Bush administration, believing that the assessments were coloured by political considerations, distanced itself from the practice by only submitting a nominee to the ABA after they had been named and presented to the Senate (Carp et al 2004:131).

As for the federal district courts, "Senatorial courtesy" is an important value that gives individual Senators significant influence over the appointment of judges. Many senators see appointments to the federal district courts as an opportunity to dole out patronage (Tarr 2006: 73). Not surprisingly, perhaps, Goldman et al (2003) report that federal district appointees from the Carter administration to the George W. Bush administration had political identifications that were overwhelmingly aligned with the party in power (from 83% for George W. Bush to 92% for Ronald Reagan appointees) and that over half of them had past party activism (from 50% for Bill Clinton to 64% for George H.W. Bush appointees). This does not mean, of course, that

these individuals are unqualified, as evidenced by the fact that very rarely are candidates rated as "not qualified" by the ABA appointed; however, not all appointees are considered "extremely well-qualified" or "well-qualified" (ranging from 51% for Jimmy Carter to 70% for George W. Bush) (Goldman et al 2003).

While Presidents can exert some influence on district court appointments, their tendency is to focus more on the federal courts of appeal. As with district court appointees, there are high levels of partisan identification amongst appeal court appointees (from 81% for George W. Bush to 96% for Ronald Reagan) and high rates of past party activism (from 54% for Bill Clinton to 75% for George W. Bush). In recent years, however, the motivating concern behind appointing judges on the basis of party affiliation appears to have moved from patronage to ideology, with Presidents nominating on the basis of judicial ideology and Senators supporting or opposing nominees on that basis (Baum 2001: 104-105). Studies have shown that judges appointed by recent Republican presidents (notably Reagan and H.W. Bush) on aggregate decide similar types of cases (such as criminal or civil rights cases) differently than judges appointed by recent Democratic presidents (Carter and Clinton). Nevertheless, appointees to the appeals court tend to be slightly better regarded by the ABA than appointees to the district court (the percentage of appeals court appointees who received an "extremely well-qualified" or "well-qualified" rating ranged from 59% for Ronald Reagan to 79% for Bill Clinton).

Demographically, appointees to both the district and appeals courts tend to be white males. Presidents Clinton and Carter made diversity an important criterion for appointment during their administrations, but only Clinton succeeded in appointing noticeable numbers of women and racial minorities to the federal bench. For federal courts over the time period studied by Goldman et al the male/female ratio ranged from 67/33% for Clinton's appellate appointees to

95/5% for Reagan's appellate appointees. The percentage of whites appointed compared to African-Americans ranged from 81/19% for W. Bush's appellate nominees to 97/1% for Reagan's appellate appointees.

As is the case with several other features of political life, the US is somewhat exceptional in the degree of overt political input and competition that goes into the judicial selection process. Jurisdictions with civil law systems provide a stark contrast to US selection systems as many have competitive exams for entry into the judiciary with promotions being significantly influenced by senior members of the judiciary. These systems encourage technical expertise and reduce (to varying degrees) political influences on appointment and promotion,[10] but such systems can place considerable power in the hands of the senior judiciary and insulate judiciary from accountability (such as is the case in Italy where reforms to make the court system more efficient have been stymied) (see Volcansek 2006).

However, in many civil law systems, courts that decide constitutional issues have unique appointment processes that give legislative and executive actors direct participation in the selection process. Landfried's (2006) study of the German Constitutional Court illustrates that such systems do not guarantee democratic input and transparency if committees of the legislative branch are responsible for appointments and if the rules of secrecy apply.

As distinct from civil law systems, the tradition in common law countries such as Britain, Australia, New Zealand and Canada was one in which courts did not have key powers of constitutional judicial review (save for federalism review in Australia and Canada) and the judicial appointment power was vested solely in the executive, which in reality meant that a

[10] For instance, Kommers (2001) notes that merit is a predominant consideration in the German system of appointment, but that political considerations, especially for senior posts at the federal level, can enter into the process and that judges promoted to leadership to some extent are likely to reflect the politics of the ministry or government that appoints them.

cabinet minister (and, in some cases, the Prime Minister) would select judges from pools of experienced lawyers (or barristers). While the formal appointing processes were similar among these common law countries, the factors that influenced who got appointed to the bench varied somewhat between them. For the purposes of this paper it is particularly noteworthy that the influence of political patronage seems to have been more prevalent or at least more enduring in the Canadian setting.[11]

Britain recently changed its appointment process and there are ongoing discussions in the other jurisdictions about changes to the appointments process. At the heart of the new appointments process for England is a fifteen-member commission comprised of lay members and legal members (five judges, a solicitor, a barrister and a tribunal member) that will recommend one name for an opening below the Supreme Court level (a separate, smaller commission will be called together as necessary for Supreme Court appointments). Malleson notes that legislation prohibits Members of Parliament from sitting on the Commission, but she questions the underlying assumption that responsibility for judicial appointments can only run through the executive and notes that having a number of MPs on the commission would be no greater threat (actually a lesser threat) than the discretion afforded the Secretary of State for Constitutional Affairs in selecting Supreme Court judges (2006: 49).

According to Malleson, one of the main reasons for setting up the commission was to modernize the system in recognition of the fact that England was evolving into a constitutional democracy. Other reasons included an attempt to prevent political patronage from reappearing as the power of the English judiciary grows, especially given how tempting it might be for the

[11] For example, Sir Robert Megarry reports that patronage had almost completely disappeared from the British appointment process by 1950. (See Megarry 2002: 141). Also, in Malleson and Russell's (2006) edited volume on judicial appointments in various countries, the article on Canada highlights the issue of patronage in appointments while it is hardly mentioned in the articles on Australia or New Zealand.

Secretary of State for Constitutional Affairs to examined the ideological views of candidates. Finally, the commission was an attempt to increase the diversity of the bench—a process that had started under previous Lord Chancellors but not by enough to satisfy critics of the old system (2006: 40-44).

It appears that while all of these systems are influenced by politics to a greater or lesser degree, most no longer have the same emphasis on patronage that has characterized Canadian appointments in the past. Have recent Canadian appointments followed a similar path in leaving patronage behind? Media opinion suggests that it has not. In the next section we examine the data to see if it supports popular perception. What do Canadian judges look like in the 1990s and early 2000s? Have Canadian judicial appointments changed dramatically in either their demographic makeup or their partisan ties?

IV. Data and Analysis

a) Overview of the Data

To begin exploring the workings of the appointments process since the screening committee system began operations in 1989, we asked the Office of the Commissioner for Federal Judicial Affairs for all communiqués announcing federal judicial appointments from 1989 to 2003. We then constructed a database that consists of appointments (including elevations from other courts) and administrative promotions to Associate Chief and Chief Justice for the s.96 trial courts in the provinces and territories, the s. 96 appeal courts in the provinces, the Tax Court of Canada, the Federal Court of Canada (changed from trial and appellate divisions to separate courts in 2003) and the Supreme Court of Canada.[12]

[12] Appointments to s. 96 county or district courts, which existed in B.C., Ontario and Nova Scotia until the early 1990s, are also included in the database as distinct entries, but for the purposes of the data analysis they are included

Information was entered in the database about each of the 978 appointments, including the judge's name, the court to which the appointment was being made (level, province versus federal), whether the appointment was an "elevation" from a lower court, and/or whether the appointment was an administrative promotion. We also entered any biographical information that may have been provided on the communiqués, such as the gender of the judge, where the judge went to law school, the year he or she was called to the bar, and area of legal specialization.

We are interested not only in how the appointments process has worked in general since changes were made in the late 1980s, but also in comparing Mulroney's appointments from 1989-1993 with his appointments from 1984-1988 (as reported by Russell and Ziegel) before the new appointment process was implemented. We are also interested in comparing Mulroney's appointments to Chrétien's appointments (and even comparing Chrétien's terms as Prime Minister as separated by elections in June 1997 and November 2000). Given these research goals, the data typically are presented in a way that breaks down the results between: Mulroney II (1988-1993); Chrétien I (1993-pre-June 1997); Chrétien II (post-June 1997-2000); and Chrétien III (2001-2003).[13]

Table 1 provides a basic summary of the appointments by each Prime Minister's term and by court of appointment. Tables A.1 to A.4 in the appendix present this data broken down by each province and territory. Table 1 shows that the Mulroney II government appointed almost fifty per cent more judges from 1989 to 1993 (n=324) than did the Mulroney I government from

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in the s.96 trial level data. Appointments to regional administrative posts (made in larger provinces like Ontario) and temporary judicial appointments to courts in the territories are not included in the database. Based on these criteria, our database contains a total of 977 entries.

[13] Chrétien did make two administrative promotions to the Alberta Court of Queen's Bench in December 2000 following the election in November and these are included in the Chrétien III totals.

1984-1988 (n=228). Likely owing to the shorter time between elections, the number of appointments made by the Chrétien governments ranged from 196 (Chrétien III) to 241 (Chrétien II). Tables A.1 to A.4 in the appendix show that, as expected, the number of judicial appointments to s.96 courts reflected the relative size of provincial populations.

Table 1—Federal Judicial Appointments by Prime Minister

	s.96 trial	s.96 appeal	Tax Court	Federal Court Trial Div.	Federal Court Appeal Div.	Federal Court	Supreme Court
N=total number of appointments, including elevations but excluding administrative promotions. (N)= sub-total of judges appointed from a different court (typically "elevations"). [N]= total of administrative promotions (as distinct from ordinary appointments or elevations).							
Mulroney II (Total=324)	233 (26) [6]	49 (37) [4]*	11 (1) [0]	8 (1) [0]	5 (3) [1]*	n/a	6 (6) [1]
Chrétien I (Total=217)	171 (17) [10]	28 (20) [2]	2 (0) [0]	3 (1) [0]	1 (1) [0]	n/a	0 (0) [0]
Chrétien II (Total=241)	173 (30) [7]	25 (21) [4]*	3 (0) [4]	11 (2) [2]	6 (4) [1]	n/a	4 (3) [1]
Chrétien III (Total=196)	133 (4) [7]	26 (20) [4]	7 (0) [0]	9 (0) [0]	2 (2) [0]	6 (0) [0]	2 (2) [0]
Totals	710 (77) [30]	128 (98) [14]	23 (1) [4]	31 (4) [2]	14 (10) [2]	6 (0) [0]	12 (11) [2]
* A combined elevation and administrative promotion was counted as "1" total appointment during this time period.							

Table 1 suggests that the promotional ladder to the appellate courts noted by Russell and Ziegel is even more pronounced in subsequent time periods. Roughly 70 per cent of appointments to the s.96 appeal level were elevations from the s.96 trial level. Over half of the appointments to the Federal Court Appeal division came from judges of the Federal Court trial division (and a few from the s.96 trial court level), and, the bulk of Supreme Court appointments came from provincial courts of appeal.

The proportion of s.92 provincial court judges appointed to s.96 trial courts is slightly higher than what Russell and Ziegel found (roughly 9.5 per cent to 8 per cent),[14] though this difference disappears if one considers that a number of s.92 provincial court judges were elevated automatically as a result of the amalgamation of family court systems at the s.96 level in certain provinces in the late 1990s. Russell and Ziegel found it "pleasantly surprising" that 13 provincial court judges were elevated between 1984-1988 (1991: 10); the fact that the proportion of such elevations from the provincial court has not changed might disappoint those who would note the continued improvements made to provincial selection processes in the 1990s and the increasing "seriousness" of criminal and other cases being heard by s.92 court judges.[15]

Commenting on the gender breakdown of appointments from 1984 to 1988, Russell and Ziegel suggested that the appointment of 17.5 per cent women represented a conscious effort to redress the gender imbalance on the bench given the proportion of female lawyers in the legal profession with the requisite ten years' experience for appointment (1991: 12). A breakdown of our data by gender reveals that the percentage of women who were appointed to the courts continued to rise from Mulroney I (17.5%) to Mulroney II (22.8%). The percentage of women appointed accelerated even more quickly during the Chrétien years (ranging from 31.6 to 37.3%). The trend likely reflects the increasing portion of female lawyers in the legal profession with at least ten years experience along with continued emphasis on improving gender diversity on the bench.

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[14] The Russell-Ziegel figure is arrived at by dividing the number of s.92 judges appointed (13) by the total number of appointments to the s.96 trial courts and district/county courts. Some of the non-s.92 "elevations" to the s.96 trial court during our time came from the county/district courts; other appointments to the trial court level were appeal court judges who received "promotions" to administer the trial court level as Associate Chief or Chief.

[15] Of course, this assumes that provincial court judges have a desire to be "elevated" to the s.96 court bench. Perhaps increased pay in many jurisdictions and opportunities to hear more "serious" cases mitigate against a desire to sit at the s.96 level for some s.92 judges.

Table 2—Gender of Federal Judicial Appointments by PM and Court

	s.96 trial	s.96 appeal	Tax Court	Federal Court Trial Div.	Federal Court Appeal Div.	Federal Court	Supreme Court	Total
Mulroney II (n=324)	M: 77.8% F: 22.2%	M: 67.9% F: 32.1%	M: 90.9% F: 9.1%	M: 75.0% F: 25.0%	M: 100% F: 0%	n/a	M: 85.7% F: 14.3%	M: 77.2% F: 22.8%
Chrétien I (N=217)	M: 64.1% F: 35.9%	M: 73.3% F: 26.7%	M: 100% F: 0%	M: 100% F: 0%	M: 100% F: 0%	n/a	M: 0% F: 0%	M: 66.4% F: 33.6%
Chrétien II (N=241)	M: 61.1% F: 38.9%	M: 60.0% F: 40.0%	M: 83.3% F: 16.7%	M: 69.2% F: 30.8%	M: 85.7% F: 14.3%	n/a	M: 60.0% F: 40.0%	M: 62.7% F: 37.3%
Chrétien III (N=196)	M: 67.1% F: 32.9%	M: 70.0% F: 30.0%	M: 71.4% F: 28.6%	M: 66.7% F: 33.3%	M: 100% F: 0%	M: 83.3% F: 16.7%	M: 50% F: 50%	M: 68.4% F: 31.6%

While there are noticeable differences between the percentage of women appointed between 1984-1988 and 1989-2003, the percentages concerning the professional position of appointees at the time of appointment and the law schools attended by appointees remained relatively similar. Working in a private law firm prior to appointment continued to be the profession of close to 60 per cent of appointees. Consistent with the trend towards more appointments to appellate courts being elevations described above, however, the proportion of appointees who were "judges" before their appointment has risen to 23%. The major law schools that produced significant numbers of appointees in the Russell-Ziegel time period, particularly UBC, Dalhousie and Osgoode Hall, continued to be well-represented (though the proportion of Dalhousie law graduates fell from 17 per cent to 10 per cent).

b) Collecting the Donor Data

In this paper we begin to systematically test the influence of patronage on judicial appointments. For this first step of our larger project we examine the political donations of

judicial appointees over six years – the five years prior to their appointment and their appointment year. All the judges appointed from 1989 (Mulroney II) to 2003 (Chrétien III) are included in the study with distinctions made between judges appointed for the first time and judges elevated to a new judicial position or given administrative promotions (these latter appointments and promotions are not included in the analyses that appear in Tables 3 to 5).[16]

Elections Canada data was used to identify judges who had donated to political parties in the six year period. A search was done for each judge's name in Elections Canada's "Contributions to Political Parties" data for each year and for each party (the data was provided in paper form until 1993 and provided online from 1993 to 2003 at www.elections.ca). For comparison purposes we used Forcese and Freeman's categories for donating appointees: probable (middle initial), probable (uncommon name) and possible (2005). Possible donors matched only the first and last name of the judge and were a common enough name to leave doubt as to whether the donor in Elections Canada was the same person as the appointed judge. The first probable designation is self-explanatory. To be counted as a probable donor, all three parts of the judge's name had to be represented (first, last and middle initial). However, a judicial appointee was also counted as a probable donor when only the first and last name appeared on the donor list if the name was uncommon. Unfortunately, Forcese and Freeman did not outline their coding rules for determining what they counted as an uncommon enough name to be worthy of this category. We elected to follow some strict guidelines of our own. To be counted as an uncommon name, and thus a probable donor, the judge's name could not appear in a nationwide "find a person" search engine (www.canada411.ca) more than twice. This included

[16] The Canadian Judicial Council discourages judges from donating to parties once on the bench. Therefore, including elevated judges (who were very unlikely to contribute) would skew our data on the percentage of appointees donating. However, some elevated and promoted judges are analyzed for political contributions because they are included in our database from when they were first appointed to a s.96 or s.101 court.

either the judge's complete first and last name or the judge's first initial and last name. Therefore if John Sproat appeared only once in the search engine but J. Sproat was listed 18 times, the name was not considered uncommon enough for us to be confident this donor was the judge of interest and the judge was coded as only a possible donor and not a probable one.

While coding probable and possible donors, we also recorded the parties receiving the donations. Did the appointee donate to the appointing party or to a different party (and which one)? Finally, donations were counted in the six year period to determine how many years an appointee donated, and how close to the appointment date the donations occurred.

c) Findings

Table 3 presents our findings for probable donors to political parties. Of the 723 judges that were appointed from 1989 to 2003 (excluding judges that were elevated to new courts from previous judicial positions) 221, or 30.6%, were probable donors to the party that appointed them, in the five years prior to their appointment or in their appointment year. Breaking this down by term of Prime Minister, 30.5% of judges appointed by Brian Mulroney in his second term of office had donated to the Progressive Conservative Party in the years preceding their appointment. As Table 2 illustrates this percentage was fairly comparable to the percentage of probable donors appointed to the bench by Prime Minister Chrétien during each of his three terms of office (32.3%, 33.7% and 25.5% respectively).

Table 3 also indicates that five percent of judges appointed from 1989 to 2003 (36 appointees) were probable donors to parties other than the government party making the appointment during the six year time period we examined. Prime Ministers Mulroney and Chrétien appointed these donors at a similar rate: 5.1% of Mulroney's appointments were

probable donors to other parties, while these donors made up from 3.2% to 7.8% of Chrétien's appointments over his three terms. Interestingly, however, 17 of the 36 appointees who donated to other parties were actually probable donors to both their appointing party and to some other party. Hence half of the opposition donors may still have had connections to the appointing party. Perhaps these judges were acting strategically and "hedging their bets" by donating to two different parties simultaneously. Alternatively, they may have been donating to their party of choice while still attempting to ingratiate themselves to the party in power. Or, it may simply reflect genuine changes in partisan allegiance, particularly given the massive shift in the larger federal party system in the early 1990s. For example, the collapse of the Progressive Conservative Party in 1993 may well have seen an exodus of donors to other parties, including the Liberals. Whatever the reason, the existence of multiple probables indicates that the Prime Ministers appointed donors to other parties much less than it originally appeared. Only 3.4% of Mulroney's appointments were probable donors to other parties exclusively, and while 3.6% of Chrétien's appointments in his first term donated exclusively to parties other than the Liberals, this percentage fell to only 1.2% in his second term.

Table 3 – Donations to Political Parties

	Probable Donors to Appointing Party	Probable Donors to Other Parties	Total # Judges Appointed (non-elevated or promoted)
Number % of all appts	221 30.6%	36 5%	723 100%
Mulroney II % of his appts	72 30.5%	12 5.1%	236
Chrétien I % of his appts	54 32.3%	13 7.8%	167
Chrétien II % of his appts	55 33.7%	6 3.7%	163
Chrétien III % of his appts	40 25.5	5 3.2%	157

The percentages found in Table 3 suggest that the 1988 changes in the federal judicial appointment process did not weed out partisan considerations just as critics of the system feared. At least at this low level of political commitment, a significant number of appointees may have some ties to the party that appointed them. Indeed, our findings suggest that there were a greater percentage of appointees (both overall and for Mulroney II) with "minor" political affiliation than Russell and Ziegel reported for Mulroney's appointments prior to the introduction of the screening committees (23% "minor" Conservative involvement for 1984 to 1988 appointees), but less than their overall rate of 47 per cent political affiliation ("major" and "minor" Conservative affiliation combined).[17] More research will be conducted for this project to determine whether appointees had greater political involvement beyond being donors or had political involvement that may not be captured by our initial methods.[18]

Although our data suggest that the screening committees had little or no effect on insulating the appointment process from partisan considerations, it is also noteworthy that the percentage of donors are lower than those being described in newspaper accounts of appointments. Recall that the Can West News Service report suggested that in "more than 60 per cent" of the 93 federal appointments they studied, the appointee had "donated exclusively" to the party that had appointed them in the three to five years prior to their appointment. Granted, our

[17] It is likely that some of the individuals in Russell and Ziegel's "major" affiliate category also made donations to the Conservatives, but because the data for donors is not reported it is not possible to make precise comparisons.

[18] We know that a number of appointees had prior political involvement with the party of appointment, including some who sat as MPs or as cabinet members in Parliament or in provincial legislatures. However, we believe it would be more prudent at this stage to focus on the political donations data and to present more comprehensive results at a later time rather than in piecemeal fashion.

definition of probable appointments is a very strict one.[19] However, even if we use a more inclusive measure of donors – both probable and possible donors – we still find fewer appointees donating than media reports have suggested. Indeed, even our least discriminating measure found at most 50% of appointees donating and this measure included possible matches for several names as common as Robert Smith where the likelihood of the donor actually being the appointee were very low. Our percentage of probable donors is also lower than that found by Forcese and Freeman in their study of 2003 appointees (2005: 266-267). This suggests that they characterized more names as "uncommon" than we felt comfortable doing.[20] However, without knowing their coding rules it is difficult to make a direct comparison between the findings. The differences that are apparent between our numbers and those of previous shorter term studies are important and reinforce the need to systematically measure the impact of partisanship on judicial appointments. In particular, studies need to be very transparent in the methods they use to determine judicial political donations. This is something lacking from most newspaper accounts of the issue.

Broken down by province our data are mostly consistent with past findings. With the exception of Nova Scotia, the provinces that Russell and Ziegel and others identified as having marked partisan influence remain the same in our study. New Brunswick and Manitoba featured the highest percentages of probable donors—52.4 and 48.3 per cent respectively—followed by

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[19] Our stringent requirements for the probable category make it less likely that we have overestimated donors. We can not rule it out entirely as a few appointee/donors may have common enough first and last names that even the initial may occur frequently and we could be counting a donor that is not actually our judge (hence the category is called probable rather than absolute). However, it is equally likely that we are underestimating probable donors because of our strict guidelines. In particular, we think it is possible that we are underestimating donors from Quebec since a higher proportion of that province's appointees had no middle initial and common first and last names.

[20] The authors also appear to have added data from other sources when they came across it. For example, they included one judge as a "probable" Liberal supporter because of news reports that he was a "veteran Liberal" and "friend" of the Justice Minister.

Saskatchewan at 46.7 per cent. As others have reported, the rate of partisan affiliation (as measured by political donors) is the lowest in B.C. (12 per cent).

Table 4 presents a closer look at the partisan activity of the probable donors. Most judicial appointees who were probable donors contributed in the years immediately prior to their appointment.[21] The highest percentage of donors, 36.7%, was still contributing the year before their appointment. Indeed, 25.8% of appointees who were probable donors contributed the year they were selected for the bench. Fewer than 5% of probable donors ceased contributions five years before their appointment. However, while probable donors were more likely to be recent contributors they were not usually annual donors. Only 5.9% of probable donors contributed in all six years we examined. Two-thirds of all probable donors donated in less than four of the years preceding their appointment, and the largest number, 24.9%, donated only once.

Table 4 – Probable Donations to Appointing Party

Proximity of Donation to Appointment	% of Probable Donors		# of Years Donated to Appointing Party	% of Probable Donors
Same year	25.8		1 year	24.9
1 Year Before	36.7		2 years	21.3
2 Years Before	18.6		3 years	21.3
3 Years Before	10.0		4 years	12.7
4 Years Before	4.5		5 years	13.6
5 Years Before	4.5		6 years	5.9

[21] Table 4 includes judicial appointees who qualified as probable donors in any of the years they donated. For some appointees there was a probable match in the donation data one year (first name, last name and initial) but only a possible match another year (the middle initial was not reported). Since there was at least one probable match in the six years these appointees are included in the analyses presented in Table 4. However, we also ran these analyses for all judicial appointees and for all types of donors (possible and probable together). The proximity and frequency of donations displayed similar patterns to those presented in Table 4.

Table 5 presents a breakdown of probable donors to the appointing party by gender and by the year the judge was called to the bar (information that can be used to approximate age differences or perhaps even experience). Judicial appointees who were probable donors to the party that appointed them were more often male than female (76.5% versus 23.5%). Given the uneven makeup of male and female judges this is hardly surprising. However, it is interesting that only 24.2% of females were donating (at least as we have coded probable donors) while 33.3% of men were donating. Why would there be a nearly 10% gap between the genders? Is it merely an artifact of a time when women have been traditionally less politically active in all forms of political activity and thus something likely to disappear in the future? Is the difference due to the lower number of female lawyers available for appointment to the bench? Perhaps women feel less pressure to actively pursue a judgeship by appealing to the appointing party – a factor that should also change as law school populations are now increasingly at least 50% female.

Table 5 – Characteristics of Probable Donors to Appointing Party

	Gender			**Year Called to the Bar**			
	Male	Female		1949-1959	1960-1969	1970-1979	1980-1991
# % of donors	169 76.5%	52 23.5%		16 7.5%	58 27.1%	111 51.9%	29 13.6%
% within gender	33.3%	24.2%					
% within exp				45.7%	35.4%	29.0%	24.2%

The differences between age cohorts of probable donors are also interesting. The majority of probable donors (51.9%) were called to the bar between 1970 and 1979. This should put the typical donor in his or her 50s (a figure very similar to the typical political donor in the general public). The youngest grouping of our donors (or at least those who passed the bar most recently) made up a much smaller percentage of probable donors (13.6%) and had the lowest

percentage of donors within their age cohort: only 24.2% of those called to the bar between 1980 and 1991 were probable donors to the appointing party. This contrasts with 45.7% of those called to the bar from 1949-1959 and 35.4% of those called to the bar between 1960 and 1969. Indeed, the percentage within an age cohort donating to the appointing party decreased with each decade.

The reasons behind these demographic correlations between party donors and judicial appointees are complex and are likely related in some way to overall demographic trends in the legal profession. However, the findings may also reinforce critiques that the current selection method with its intertwined legal and political elites is not the most effective system at promoting diversity. This, of course, is not the only concern of having a system of judicial appointments influenced by partisan affiliation. As noted in the introduction, a system of judicial appointments in which party affiliation plays a role, calls into question the fairness of the system and leads to questions about whether the "best" judges are being selected. The legitimacy of the judiciary could also be undermined by patronage in the appointment process. A mere four per cent of Canadians surveyed in the late 1990s approved of a judicial appointment process that favoured party loyalists (as reported in Greene et al 1998: 39).[22] Others have expressed concerns about how patronage could lead to an overly politicized judiciary or at least a judiciary that might have an overall bias towards certain political values.

Some individuals and organizations have advocated a more robust nominating committee system to reduce the influence of political affiliation on the judicial appointments process and to protect judicial independence (CBA 2005). Such proposals deserve careful consideration, but in

[22] A two-thirds majority of the other respondents favoured judicial selection through a non-partisan committee (Greene et al 1998: 39). Greene et al report the results obtained by Maureen Mancuso and her colleagues in *A Question of Ethics*.

a rigorous analytical framework. There needs to be careful thinking about what the evolving policy-making power of the courts means for the appointment process—does this make it more or less important that there be direct political input into the appointment process? Comparative research also suggests that politics can and does exist in most systems of appointment. The locus of such politics and the tradeoffs involved need to be carefully thought through as does the relationship between the appointment process and judicial independence. Specifically, there needs to be more clarity in distinguishing between threats to judicial independence in deciding individual cases and the potential for selection systems to shape judicial decision-making by tempting judges to decide cases in ways that will please those who have the power to promote them and/or by having appointees of a certain political orientation appointed to the bench. (The latter may be considered a "threat" to some but a "benefit" to others depending on one's take on the issue). Discussions about judicial appointment processes also need to consider how much emphasis should be placed on diversity and what kind of diversity; whether different appointment criteria and processes should be developed for different kinds of courts; and how much political activity should be considered evidence of meritorious community involvement or considered evidence of jockeying for a judicial position.

We leave these broader issues for the next step in our larger project where we adopt the neo-institutionalist approach to studying judicial politics. Such an approach places the courts in the context of the larger political system (Kritzer 2003; Clayton and Gillman 1999) and tries to balance focusing on institutional factors with broader historical and environmental contexts (Immergut 1998).

However, before the necessary analyses can be undertaken we need good data, especially about how the current appointment process works in Canada. As discussed a little more fully in

the conclusion this is the first stage of a larger research project that will attempt to both carefully gather data and offer an analysis based on such data.

V. Conclusions

There has been growing concern about the judicial appointment process in Canada. Virtually every major newspaper in the country has commented on the increased political influence of Canadian judges and criticized the secretive, in-house method of appointing them. The perception exists that federal judicial appointments are still a matter of patronage despite the changes made to the system in 1988. However, there has been no long-term systematic study to determine whether this perception is based on fact. With the current heightened interest in judicial selection and the intensified cries for and against reform, it has never been more important to determine how the present system actually works and, given those findings, what changes may be appropriate. Any inquiry into the selection process will be difficult without reliable social science evidence on recent trends.

This paper is a first step in a much larger project designed to provide such evidence. This step of the project was limited to examining judicial appointees from 1989 to 2003 to determine their ties to the party appointing them in terms of political donations. We discovered that despite the changes in 1988, some evidence of partisan ties between the appointing party and its appointees still exists. Even with a strict measure determining donations, nearly one-third of all appointees were found to have donated to the party appointing them within five years of their appointment – a much higher rate than the population in general. This pattern held true for both the PC and Liberal governments during our time period.

Our study's findings, however, suggested lower levels of political donations by appointees than some previous studies conducted on smaller numbers of appointees. We found comparison to these other studies difficult as they did not provide detailed descriptions of their methods for matching judicial appointees and donors. In particular, the newspaper articles that have raised concern about the partisan connections of appointees have higher numbers of matches than even our most inclusive (and least discriminating) measures and do not have their decision rules for coding clearly explained. We believe this emphasizes the importance of careful measurement and the need for further research.

Of course, this study is examining political ties using the lowest level of commitment by an appointee, a political donation. The larger project will investigate the effects of the 1988 changes to the appointment process more comprehensively than is possible here. Among other things, it will employ other quantitative and qualitative techniques, including questionnaires sent to local "experts," to determine whether patronage has continued to play a significant role in appointments by examining all aspects of political connections.

We also want to assess the "quality" of the appointees. Russell and Ziegel (1991) found that judges rated in the weakest categories by their anonymous reviewers were the most likely to have political connections. For comparison purposes we will first follow the approach of the Russell-Ziegel study and ask informed and anonymous evaluators (such as judges, lawyers, academics and journalists) about the legal reputation of the appointees. However, we will also follow the approach used by a number of U.S. states (such as Alaska, Tennessee and New Hampshire) for assessing judicial appointees. To that end we will send questionnaires to randomly selected individuals within groups who have familiarity and interest in the

performance of judges, such as: lawyers, Crown counsel, judges, legal academics and journalists focusing on the courts.

The study will also examine the institutional design of the changed committee system and probe the actual workings of the appointment process. How do the committees work in practice? Have the operations of the committee differed from government to government? Finally, the design and operation of the Canadian system will be compared more fully to other methods of selection based on comparative research. This comparative analysis will be used to help think more consciously about some of the analytical questions underlying the study itself: the relationships between judicial appointment, judicial independence and accountability, and judicial power and legitimacy. Placing the analysis in a new institutional framework should help give the study a broader theoretical relevance.

At the very least, we hope that the project of which this paper is a part will make for a more informed debate on the judicial selection process and the competing demands for accountability, independence, representativeness and transparency.

Appendix

Table 1.A: Mulroney II Appointments by Province by Court

		BC	AB	SK	MB	ON	QC	NB	NS	PE	NL	YK	NT	NV	Total
	s.96 trial level	35 (3)	20 (2)	6 (0)	15 (3)	88 (10)	40 (2)	4 (1)	13 (4)	2 (0)	7 (0)	1 (1)	1 (0)	1 (0)	**233 (26)**
	s.96 admin promotion	1	1	0		1	3	0	0	0	0	0	0	0	**6**
	s.96 appeal	12 (11)	6 (4)	2 (0)	3 (3)	8 (8)	11 (6)	1 (0)	4 (3)	1 (0)	2 (2)	n/a	n/a	n/a	**50 (37)**
	s. 96 appeal Admin. Prom.	0	0	0	1*	2	0	1	0	0	0	n/a	n/a	n/a	**3***
	Tax Court														**11 (1)**
	TC Admin Promotion														**0**
	Federal Court Trial														**8 (1)**
	FCT Admin Prom.														**0**
	Federal Court Appeal														**6 (3)**
	FCA Admin. Promotion														**1***
	Supreme Court														**6 (6)**
	SC Admin. Promotion														**1**

Table A.2—Chrétien I Appointments by Province and Court

		BC	AB	SK	MB	ON	QC	NB	NS	PE	NL	YK	NT	NV	Total
	s.96 trial level	30 (2)	25 (2)	11 (2)	5 (0)	54 (7)	34 (1)	3 (2)	5 (1)	1 (0)	2 (0)	0	1 (0)	0	**171 (17)**
	s.96 trial admin promotion	2	0	0	0	4	3	1	0	0		0	0	0	**10**
	s.96 appeal	8 (7)	6 (5)	0	1 (1)	6 (3)	3 (2)	1 (0)	2 (1)	0	1 (1)	n/a	n/a	n/a	**28 (20)**
	s. 96 appeal Admin. Prom.	0	0	0	0	0	1		0	0	1	n/a	n/a	n/a	**2**
	Tax Court														**2**
	TC Admin Promotion														**0**
	Federal Court Trial														**3 (1)**
	FCT Admin Prom.														**0**
	Federal Court Appeal														**1 (1)**
	FCA Admin. Promotion														**0**
	Supreme Court														**0**
	SC Admin. Promotion														**0**

Table A.3-- Chrétien II Appointments Province and Court

		BC	AB	SK	MB	ON	QC	NB	NS	PE	NL	YK	NT	NV	Total
	s.96 trial level	9 (2)	14 (0)	9 (0)	9 (1)	66 (16)	37 (0)	6 (0)	12 (8)	1 (0)	7 (2)	1 (0)	0	2 (1)	**173 (30)**
	s.96 trial admin promotion	1	0	1	0	0	0	1	3		1	0	0	0	**7**
	s.96 appeal	3 (3)	4 (3)	0	1 (1)	4 (3)	4 (4)	5 (3)	4 (3)	1 (1)	1 (0)	n/a	n/a	n/a	**27 (21)**
	s. 96 appeal Admin. Prom.	0	0	0	0	1	0	1*	1*	1	1	n/a	n/a	n/a	**2***
	Tax Court														**2 (0)**
	TC Admin Promotion														**4**
	Federal Court Trial														**11 (2)**
	FCT Admin Prom.														**2**
	Federal Court Appeal														**6 (4)**
	FCA Admin. Promotion														**1**
	Supreme Court														**4 (3)**
	SC Admin. Promotion														**1**

Table A.4—Chrétien III Appointments by Province and Court

		BC	AB	SK	MB	ON	QC	NB	NS	PE	NL	YK	NT	NV	Total
	s.96 trial level	23 (0)	13 (0)	5 (1)	6 (1)	37 (0)	25 (0)	6 (0)	9 (0)	2 (0)	5 (2)	1 (0)	0	1 (0)	**133 (4)**
	s.96 admin promotion	0	2	0	1	2	1		0	1	0	0	0	0	**7**
	s.96 appeal	5 (5)	2 (2)	0	2 (1)	4 (2)	6 (5)	1 (0)	2 (1)	1 (1)	3 (3)	n/a	n/a	n/a	**26 (20)**
	s. 96 appeal Admin. Prom.	1	0	0	0	1	1	1	0		0	n/a	n/a	n/a	**4**
	Tax Court														**7 (0)**
	TC Admin Promotion														**0**
	Federal Court Trial														**9 (0)**
	FCT Admin Prom.														**0**
	Federal Court Appeal														**2 (2)**
	FCA Admin. Promotion														**0**
	Federal Court														**6 (0)**
	Supreme Court														**2 (2)**
	SC Admin. Promotion														**0**

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