INTRODUCTION

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Guest Editor

Our judges are as honest as other men, and not more so. They have, with others, the same passion for party, for power, and for the privilege of their corps. Their maxim is *boni judicis est ampliare jurisdictionem*, and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to elective control.

— Thomas Jefferson

For this reason the state feels the importance of the selection of judges; for it knows it is entrusting to them the dangerous power which, when abused, makes injustice just, forces the majesty of the law to serve evil, and indelibly marks white-robed innocence with a bloody brand which makes her indistinguishable from guilt.

— Piero Calamandrei

Who knows how appointments are made? It was a very happy day — in a month I'll be sitting as a justice.

— Justice Andrea Moen[1]

For Canada's densely populated judicial branch,[2] these have been intoxicating times indeed. Our judges are paid more than any other group of Canadians,[3] and they have

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1 On her appointment to the Alberta Court of Queen's Bench. See M. Sadava, "Edmonton Inside & Out" *The Edmonton Journal* (29 December 1999) B2.

2 There are 1,942 judges in Canada. Of these, 1,006 are federally appointed and 936 are appointed by the provinces. I take these figures from Devlin, MacKay & Kim, "Reducing the Democratic Deficit: Representation, Diversity, and the Canadian Judiciary, or Towards a 'Triple P' Judiciary," (2000) 38 Alta. L. Rev. 734 at 760-62. This has not stopped our judges from complaining about overwork. See C. Schmitz, "Judge Complains Court Overloaded as Appointments Lag" *The Edmonton Journal* (4 April 2000) A6.

3 See T. Morton, "Judging the Judges: Highest-Paid Occupational Group Carves Out For Itself What Amounts to Special Constitutional Powers" *The Calgary Herald* (6 February 1999) I5; and Statistics Canada, *Courts: Resources, Expenditures, and Personnel* (March, 2000). But this economic position has not deterred our judges from demanding more. See Canadian Press, "Salaries of Judges Take Flight" *The Edmonton Journal* (27 March 1999) A13; G. Scotton, "Judges Seek Raise of $47,000 A Year" (1999) 19:35 *Lawyers Weekly* 1; L. Chwialkowska, "Judges Press for 26% Raise" *The National Post* (15 February 2000) A1 (which increase would provide superior judges with an annual salary of $225,000); N. Ayed, "Ottawa Battles Judges' Raise" *The Edmonton Journal* (15 February 2000) A10; J. Ziegel, "Guilty of Being Too Greedy: Law Professor Jacob Ziegel Warns That Judges Want To Hold the Canadian Taxpayer To Ransom Over Their Salary and Pension Goals" *The Globe and Mail* (16 February 2000) A17; "Committee Recommends Pay Raise for Federal Judges" *Canadian Press Newswire* (13 June 2000); K. Makin, "Ottawa Urged to Back Off on Salaries for Judges: Agency Overseeing Pay Needs More Autonomy, departing boss says" *The Globe and Mail* (29 August 2000) A8 (reporting on comments made by Guy Goulard on his resignation as Commissioner of Federal Judicial Affairs);

themselves constitutionalized the very question of their salaries and benefits.[4] In 1999, the Canadian edition of *Time* magazine named the Supreme Court of Canada "Newsmaker of the Year,"[5] and this past July, *Maclean's* magazine named Chief Justice Beverley McLachlin as one of seven "Great Canadians."[6] More recently, the national press has declared "Canadian legal wisdom a hot commodity abroad,"[7] and members of our Supreme Court have taken to international judicial missions.[8] So far as the citizenry is concerned, our judges appear to be enjoying substantial popular support. In April, 1999, an Institute for Research on Public Policy poll revealed that, nation-wide, fully 62 percent of Canadians supported judicial over parliamentary supremacy and that a remarkable 77 percent were favourably disposed to the Supreme Court of Canada.[9] And in February of this year, another national poll disclosed that 43 percent of Canadians support the power of the courts to make law and that a sizeable 31 percent think that the courts have been taking "too little power away from elected officials."[10]

Good times surely, yet there have been troubles as well. Unseemly judicial spats have bubbled to the surface of publicity in ways unthinkable not so very long ago.[11]

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and Canadian Press, "Alta Provincial Judges to Get $18,000 a Year Pay Raise Retroactive to April" *Canadian Press Newswire* (18 October 2000). For Judge Posner's view that "a higher judicial salary is likely to reduce the amount of work done by existing judges," see R.A. Posner, *Overcoming Law* (Cambridge, Mass.: Harvard University Press, 1995) at 137.

4 See J.S. Ziegel, "The Supreme Court Radicalizes Judicial Compensation" (1998) 9 Const. Forum 31; A. Geddes, "Appeal of Judges' Pay Raise Rejected" *The Edmonton Journal* (9 June 2000) A6; and J. Jaffey, "Appeal Court Finds Nfld. Judges' Pay Freeze Unconstitutional" (2000) 20:21 *Lawyers Weekly* 22.

5 See S. Handelman, "Canadian Supreme Court" *Time* (27 December 1999) at 110-11; and L. Chwialkowska, "Time Magazine Selects Supreme Court as Nation's Newsmaker of the Year" *The National Post* (21 December 1999) A13.

6 R. Sheppard, "An Elevated Existence: Beverley McLachlin" 113:27 *Maclean's* (1 July 2000) 28.

7 K. Makin, "Canadian Legal Wisdom a Hot Commodity Abroad" *The Globe and Mail* (28 August 2000) A1.

8 L. Chwialkowska, "A Judicial Mission to China" *The National Post* (3 August 2000) A3.

9 Notably, however, only 8 percent supported the manner in which judges are appointed to the Court. See J. Tibbetts, "Judges Should Have Final Say, Poll Suggests" *The Edmonton Journal* (14 April 1999) A3.

10 L. Chwialkowska, "Poll Shows Canadians Divided on Judges' Power to 'Make Law'" *The National Post* (18 February 2000) A4.

11 I refer to the McClung/L'Heureux-Dubé affair; to the resignation of B.C. Supreme Court Chief Justice Bryan Williams; and to the matter of the transfer of Alberta Provincial Court Judge John Reilly. For the first, see B. Laghi, "Alberta Judge Stirs Outrage in Sex Case" *The Globe and Mail* (21 February 1998) A1; R. Henderson, "Harsh Criticism for Alberta Judge Who Backed Acquittal" *The Edmonton Journal* (26 February 1999) B3; J. Tibbetts & S. Ohler, "Sex-assault Ruling Sparks Judicial War of Words" *The National Post* (26 February 1999) A1; K. Powell, "Harsh Letter Prompts Calls for Judge's Job; Attack on Supreme Court Justice Shocks, Angers Legal Community" *The Edmonton Journal* (27 February 1999) A1; A. Mitchell, J. Mahoney & S. Fine, "Legal Experts Outraged by Personal Attack on Supreme Court Judge" *The Globe and Mail* (27 February 1999) A1; K. Powell, "My Mistake, Apologetic Judge Says" *The Edmonton Journal* (2 March 1999) A1; Canadian Judicial Council — Media Releases and Advisories, "Panel Expresses Strong Disapproval of McClung Conduct" (21 May 1999), online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/english/news-releases.htm> (date accessed 1 November 2000); and J. Cudmore, "Ewanchuk Sentenced to Year in Jail" *The National Post* (21 October 2000) A8. For

And, though the courts enjoy popular support,[12] they have been the object of on-going and increasing attention and very often criticism by the chattering classes and by the media more generally.[13] Much of this debate has concerned the matter of judicial appointments, especially to the Supreme Court.[14] So persistent is this media concern that some observers have concluded that our "courts are under seige."[15]

The reactions of governments, the judiciary, and the legal academy to this largely unprecedented focus on our courts are instructive. Provincial governments, especially the governments of Alberta and Ontario, have apparently been tuned to this debate and, so far as judicial selection is concerned, have been keen at least to make matters appear

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the second, see P. Kennedy, "B.C. Supreme Court Chief Justice Expected to Resign" *The Globe and Mail* (7 February 2000) A3; I. Bailey, "B.C. Supreme Court Chief Justice Quits: Williams Cites Trouble Dealing with Other Judges" *The National Post* (8 February 2000) A4; and M. Hume, "Smear Campaign Forced Senior Judge From Office" *The National Post* (9 February 2000) A10. For the latter, see R. Remington, "Outspoken Judge Need Not Obey Transfer Order: Court" *The National Post* (6 September 2000) A3; B. Spencer, "Life of Reilly" (2000) 24:9 *Canadian Lawyer* 30.

12 Though more citizens than ever before have been lodging complaints against superior court judges with the Judicial Council. See M. Jimenez, "Number of Complaints Against Judges Increase" *The National Post* (4 August 1999) A5; and L. Chwialkowska, "Complaints of 'Anti-male' Judges Growing: Council" *The National Post* (2 November 2000) A4.

13 See for example K. Makin, "Binnie Draws Fire From Activists for Antigay Remark: Newest Supreme Court Judge's Fitness to Hear Equality-Rights Cases Questioned" *The Globe and Mail* (14 March 1998) A10; K. Makin, "Legal Experts Slam Top Court's Charter Decisions" *The Globe and Mail* (18 April 1998) A1; C. Schmitz, "Judges, CBA Lock Horns Over Code of Conduct" (1998) 18:12 *Lawyers Weekly* 1; Editorial, "Assaulting the Law" *The National Post* (1 March 1999) A19; B. Amiel, "Feminists, Fascists, and Other Radicals" *The National Post* (6 March 1999) B7; K. Selick, "The Supreme Cop-Out" *The National Post* (6 April 1999) A18; L. Chwialkowska, "Legal Minds at Odds Over Whether 'Supremes' Have Too Much Power" *The National Post* (19 April 1999) A9; N. Seeman, "Who Runs Canada?" *The National Post* (24 July 1999) B3; B. Wallace, "Activists in Black Robes" 112:36 *Maclean's* (6 September 1999) 14; Editorial, "Supreme Bias" *The National Post* (25 October 1999) A16; R. Fife, "High Court Accused of 'Distorting' History" *The National Post* (28 October 1999) A1; L. Chwialkowska, "Justice Bev Presiding" *The National Post* (8 January 2000) B4; J. Geddes, "Legal Eagles" 113:2 *Maclean's* (10 January 2000) 30; R. Knopff, "Judges Can't Stand the Political Heat" *The National Post* (2 March 2000) A18; "The Bench — Special Report: 125 Years of the Supreme Court" *The National Post* (6 April 2000) B1; Editorial, "Sending a Message to Canada's Judges" *The National Post* (22 August 2000) A17; and F.L. (Ted) Morton, "Rulings for the Many by the Few" *The National Post* (2 September 2000) B3.

14 See for example: B. Mah, "Report Urges More Public Input in Choosing Judges" *The Edmonton Journal* (20 June 1998) A1; A. Jeffs, "Judge-Selection Rules Rapped" *The Edmonton Journal* (26 September 1998) B4; C. Rusnell, "Critics Want Judges To Better Reflect Society" *The Edmonton Journal* (15 March 1999) B2; L. Chwialkowska, "Report Calls for Consultation on Top Court Picks" *The National Post* (6 July 1999) A1; R. Lewis, "Turning a Spotlight on the Judges" 112:30 *Maclean's* (26 July 1999) 2; F. Morales, "It's Time to Change the Judicial Appointment Process" (1999) 8:5 *National* 6; A. Geddes & N. Ovenden, "Debate Rises Over How to Pick High Court Judge" *The Edmonton Journal* (26 October 1999) A7; and I. Hunter, "Judicial Reform Overdue" *The National Post* (4 November 1999) A18.

15 See for example G. Sinclair, "The Courts Under Seige: How the New Charter Politics Are Affecting the Judiciary" (1999) 5 *Appeal* 6. The courts, led by the Supreme Court, appear to subscribe to an exaggerated version of this view. See *infra* note 21 and accompanying text.

more open and transparent.[16] Not so the federal government which continues to be intent on keeping safe its largely untrammelled power to appoint judges to the provincial superior courts, to the federal courts, and to the Supreme Court.[17] By and large,[18] provincial governments have not taken a position, at least publicly, on the wider debate about the proper place of the judiciary, though they have been advised by two stalwarts of Canadian politics to "curb judges' power" through a healthy use of the "notwithstanding clause."[19] In contrast, the federal state has rushed to defend the judiciary against what it seems to perceive as unwarranted attack.[20]

Judicial reaction has been more complex. As in most matters, here too everything turns on perception. In a speech to the 1997 Annual Meeting of the Canadian Bar Association, then Chief Justice Lamer gave a first inkling of the judiciary's perception. "These are," he advised, "difficult times in which to be a judge."[21] Then, in his 1998 CBA speech, his tone turned from tristesse to action: judges, he urged, must respond to their critics.[22] And in a February, 1999, interview with *The Globe and Mail*, he addressed head-on the whole matter of judicial criticism.[23] As put by Lamer:

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16 For an exhaustive inventory and analysis of provincial initiatives and procedures in this regard, see Devlin, MacKay, & Kim, "Reducing the Democratic Deficit: Representation, Diversity, and The Canadian Judiciary or Towards a 'Triple P' Judiciary" which appears in this issue.

17 See for example J. Tibbetts, "Chretien Keeps Control Over Choosing Judges" *The National Post* (19 January 1999) A4; J. Tibbetts, "Cory Leaving Supreme Court: PM rejects U.S.-style Public Hearings for High Court Candidates" *The Edmonton Journal* (19 January 1999) B6; J. Tibbetts, "PM Shows Little Interest in New Supreme Court Process" *The National Post* (3 May 1999) A7; L. Chwialkowska, "Liberals Won't Be Opening System of Appointed Judges" *The National Post* (7 July 1999) A7; J. Tibbetts, "Public 'Can Help Pick' New Top Judge" *The Ottawa Citizen* (25 August 1999) A1. See also C. Schmitz, "Judge Selection Process Slammed" (1998) 18:6 *Lawyers Weekly* 1; G. Galloway, "Wells Appointed Chief Justice of Newfoundland Court of Appeal" *The National Post* (12 January 1999) A5; and J. Tibbetts, "'Make my brother a judge,' Joe Clark urged PM" *The Edmonton Journal* (21 November 2000) A1.

18 Alberta is an exception: see E. Anderssen, "Judges Ponder How to Respond to Attacks: decisions on Gay and Native Rights Prompt Criticism from Politicians Who Say Courts Have Gone Too Far" *The Globe and Mail* (25 August 1998) A3.

19 See R. Fine, "Ex-premiers Call for Use of Charter's 'Safety Valve': Governments Must Curb Judges' Power — Lougheed, Blakeney" *The National Post* (1 March 1999) A1.

20 See Anderssen, *supra* note 18 (reporting in part on Federal Justice Minister Anne McLellan's comments to the 1998 CBA Annual Meetings); and "Notes for a Speech by the Honourable Anne McLellan ... to the Canadian Bar Association Annual Meeting, St. John's, Newfoundland, August 26, 1998" ("[A]t the present time, ... we are witnessing a heightened, and in some cases I think unprecedented, public criticism of our courts, in particular the Supreme Court of Canada. Much of this criticism is unspecified and undefined, and has been captured by the amorphous term 'judicial activism.'... In my view, this development raises the potential for serious harm to the credibility of the institution of the Canadian Courts and the public perception of our system of justice as a whole."); and R. Fife & S. Alberts, "PM Rejects Call for Review of Judicial Rulings: 'We Have A Good System'" *The National Post* (27 March 1999) A4.

21 Canadian Bar Association, *The 1997 Year Book: Seventy-Ninth Annual Meeting* (Ottawa, August 23-27, 1997) (Ottawa: Canadian Bar Association, 1997) at 99.

22 See R. Howard, "Should Judges Be Allowed to Speak Out? Commentators Mull Over the Chief Justice's Suggestion that Judges Respond to Their Critics" *The Globe and Mail* (28 August 1998) A17; and Anderssen, *supra* note 18.

23 K. Makin, "Lamer Worries About Public Backlash: Angry Reaction Could Affect Judges' Decisions, Chief Justice says" *The Globe and Mail* (6 February 1999) A1.

> One has to be careful when criticizing the system. I'm not saying not to criticize. God, yes, I welcome criticism. But it should never be unkind. It should be professional. We are not infallible. The kind of criticism I do not accept is when it is unfair. It is misleading to the public. It makes us look stupid.[24]

He went on to speculate that "virulent and harsh criticism" might lead judges to shy away from unpopular decisions — "the most popular thing to do might become the outcome."[25]

There is every indication that this sense of being somehow unfairly burdened by popular criticism remains the dominant perception of judges. Certainly, judges have continued to intone this message. Some months following the Lamer interview, Justice Cory lamented the media's coverage of Supreme Court of Canada decisions in an interview with *Lawyers Weekly*.[26] And last summer, at the CBA Annual Meeting in Halifax, Justice L'Heureux-Dubé condemned the media's singling out particular judges for criticism.[27] More importantly — and moved by Lamer's 1998 call for judges to respond to their critics[28] and perhaps also by his unprecedented 1999 letter to the editor of the *National Post*[29] — our judges have declared publicly their intention to take on their critics.[30] Despite the polls indicating the happy position that they enjoy in the political imaginations of most Canadians, our judges appear intent on recovering the ground that they think they have lost to their critics.

The Supreme Court has been especially active in this revanchist resolve to manage the news. The media initiatives undertaken by Justice McLachlin both before and immediately following her elevation as Chief Justice are particularly revealing and perhaps signal a final commitment in this regard. In her first press conference following

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24 *Ibid.* at A4. For a more welcoming view of popular criticism of judicial decisions, see P. McGuigan, "The Right of the People To Critique Judicial Rulings: Implications for Citizen Activism," (1997) 22 Oklahoma City U.L. Rev. 1223.

25 *Ibid.*

26 C. Schmitz, "Cory Decries Media's Court Coverage" (1999) 19:8 *Lawyers Weekly* 1.

27 J. Tibbetts, "Stop Singling Out Judges for Criticism: L'Heureux-Dubé" *The National Post* (22 August 2000) A5.

28 See *supra* note 22.

29 "Lamer replies" *The National Post* (28 July 1999) A15. In his letter, Lamer dissents from a reporter's redaction of an interview he had with another reporter. The intention to manage criticism was also signalled by Justice LaBel in a press interview shortly after his appointment to the Supreme Court. See J. Tibbetts, "Supreme Court Needs To Improve PR, LeBel Says" *The National Post* (29 December 1999) A4.

30 See K. Makin, "Judges Preparing to Answer Critics: Angry at what they see as unfair 'judge-bashing', they're about to hit back on several fronts" *The Globe and Mail* (7 February 2000) A3; and "Federal Judges Looking for Ways to Answer Their Critics" *The National Post* (25 February 2000) A4. The apotheosis of this initiative, so far at least, must be Ontario Court of Appeal Justice Abella's blistering attack on critics of post-*Charter* judicial decision-making, whom she termed "New Inhibitors" and characterized "as belonging to those whose psychological security and territorial hegemony were at risk from the *Charter*'s reach." See Rosalie Abella, "Democracy at Work: The Case for a Strong Court — The judiciary is accountable to the public interest, not public opinion, says Judge Rosalie Abella" *The Globe and Mail* (13 April 2000) A13 (adopted from her address to an Osgoode Hall Law School conference). For comment, see K. Makin, "Judge Decries Right Wing for Attacks on Charter" *The Globe and Mail* (8 April 2000) A7; and I. Hunter, "How Refreshing if Justice were Served" *The National Post* (26 April 2000) A17.

the federal government's announcement of her elevation, Justice McLachlin declared that judges must remain "thick-skinned" to criticism and that they must be cognizant of how their rulings "play out in the real world."[31] Indeed, all members of the Court now routinely deliver their views in speeches, in interviews, and in articles published in scholarly journals. For instance, in an interview following publication of a study regarding intervenors in cases before the Court,[32] Chief Justice McLachlin and Justices Bastarache and Major denied that the Court was being "hijacked by intervenors."[33] In a speech to law students, Justice Binnie criticized lawyers' fees as "astronomical" and a detriment to access to justice.[34] On any number of occasions, in speeches and in interviews, members of the Court have defended the striking down of legislation, often by blaming the legislatures themselves for ducking controversial issues.[35] Remarkably, one of our justices, on his retirement, even took on the defense of the process of appointing judges to the Supreme Court.[36]

Nor have matters ended there. In a curious and unprecedented effort to display its accessibility to Canadians, in April, 1999, the Supreme Court decamped Ottawa *en masse* for a three-day round of meetings and receptions in Winnipeg with luminaries

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31 S. Alberts, "'Real World' Crucial, McLachlin Says" *The National Post* (6 November 1999) A1. The second view is quickly becoming a mantra of her tenure as Chief Justice. See L. Chwialkowska, "High Court Will Be Pragmatic, McLachlin Says" *The National Post* (12 January 2000) A4; and "What was Said: Court Won't Resolve Issues in Isolation" *The Edmonton Journal* (18 January 2000) A12.

32 See L. Chwialkowska, "Third Parties Intervened in More Than Half of Recent High Court Cases" *The National Post* (5 April 2000) A5.

33 L. Chwialkowska, "Rein in Lobby Groups, Senior Judges Suggest" *The National Post* (6 April 2000) A1.

34 J. Tibbetts, "Lawyer Fees 'Astronomical'; Supreme Court Judge Says" *The National Post* (22 October 1999) A4.

35 See for example N. Ovenden, "Courts Right At Times To Overrule Elected Officials' Will, Judge says" *The Edmonton Journal* (25 March 1999) A3 (reporting on a lecture delivered by Justice Iacobucci to University of Ottawa law students); C. Schmitz, "McLachlin Traces Court 'Activism' to Lawmakers' 'Inactivism'" (1999) 18:48 *Lawyers Weekly* 3 (reporting a speech delivered by Justice McLachlin, as she then was, to an Ottawa conference on law and governance in the 21st century); J. Tibbetts, "Politicians Duck Divisive Issues, Chief Justice Says; 'Thank God We're Here'" *The National Post* (12 July 1999) A1 (reporting an interview with then Chief Justice Lamer); and J. Tibbetts, "Top Judge Defends Court's Role in Fishing Spat" *The National Post* (21 August 2000) A7 (reporting Chief Justice McLachlin's speech to the CBA Annual Meeting). For an echo at the provincial superior court level, see A. Lindgren, "Politicians Told to Appeal if They Don't Like Court Decisions: Don't Rail Against Judicial Activism, Leading Judge Says" *The National Post* (11 January 2000) A5 (reporting on a press conference with Chief Justice McMurtry of the Ontario Court of Appeal).

36 For former Justice Cory's views, see J. Tibbetts, "Judge Wants Merit To Be Criteria for Supreme Job" *The Edmonton Journal* (4 March 1999) A10; and R. Foot, "Retired High Court Judge Opposes Calls for Reform" *The National Post* (28 October 1999) A5. See also Chief Justice McLachlin's comments on appointments delivered in a speech to law students at the University of Ottawa contemporaneous with the federal government's search for a replacement for Justice Cory: "Justice Calls for Diversity on Bench" *The Edmonton Journal* (27 March 1999) A13. Chief Justice Lamer, as he then was, has also spoken out to support the appointment process: see *supra* note 23.

of the Manitoba legal community.[37] In September, the Court hosted a conference, "The Supreme Court: Its Legacy and Its Challenges," to celebrate the 125th anniversary of its establishment to which were invited representatives of final courts of appeal in other nations and members of the bar, bench and legal academy in every province and territory.[38] At the conference's commencement, the Court also launched *The Supreme Court of Canada and Its Justices, 1875-2000: A Commemorative Book.*[39] And in October, the Court renounced the use of the titles "My Lord" and "My Lady" in favour of (the supposedly less 'foreign' and less 'anachronistic') "Justice."[40] Most importantly, in a 1998 case,[41] the Court adopted the term 'dialogue' to characterize the proper relation between the Canadian judicial branch and the legislative and executive branches.[42] This unprecedented jurisprudential innovation makes the judicial branch a co-author with the political branches of the terms and conditions of Canadian political community. Whatever else might be said of it, as a matter of law at least, it elevates the judiciary from the cut and thrust of popular and political debate concerning its legitimacy.[43]

Though academics generally have played a significant role in this national debate about our judges,[44] with some exceptions,[45] academic lawyers have either remained silent or else have rushed to defend the *status quo*. It is difficult to know what to make either of this silence or of this boosterism. It may be that some academic lawyers feel compelled always to defend the courts because they suffer from what Jerome Frank long ago termed "The Cult of the Robe"[46] or because they are otherwise convinced

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37 See J. Tibbetts, "Supremes Hit the Road for the First Time: High Court Judges Travel En Masse Outside Ottawa" *The National Post* (29 April 1999) A5; Editorial, "Supremes on the Road" *The National Post* (30 April 1999) A19; and M. Jimenez, "A Supremely Imperial Tour: The Supreme Court Justices' Three-Day Field Trip to Winnipeg Really Only Exposes Them to a Select Few" *The National Post* (1 May 1999) A3. The Winnipeg trip was, so far, both the first and last initiative of this sort.

38 The conference was held in an Ottawa hotel, September 27th to 29th, 2000.

39 This glossy coffee-table book features, among other things, a brief history of the Court written by former Chief Justice Lamer and biographies (along with either paintings or photos) of all judges who have served on the Court. The book is co-published by Dundurn Press and the Supreme Court of Canada with the assistance of Public Works and Government Services Canada.

40 See C. Schmitz, "'The Supremes' are renouncing 'My Lord,' 'My Lady'" (2000) 20:22 *Lawyers Weekly* 3; and C. Schmitz, "Supreme Court Judges Eschew Fancy Titles: 'It is so foreign to be called 'my lord' at a hockey game'" *The National Post* (10 October 2000) A1.

41 *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385.

42 *Ibid.* at 565. The Court adopted the term from P.W. Hogg & A.A. Bushnell, "The *Charter* Dialogue Between Courts and Legislatures," (1997) 35 Osgoode Hall L.J. 75. For commentary, see F.C. DeCoste, "The Separation of Powers in Liberal Polity: *Vriend* v. *Alberta*," (1999) 44 McGill L.J. 231.

43 There is however some dissent from the 'dialogue' conception. See L. Chwialkowska, *supra* note 33 (reporting, *inter alia*, Justice Major's dissent with respect to the matter and Chief Justice McLachlin's and Justice Bastarache's endorsement). For an earlier public endorsement of the idea by Justice McLachlin (as she then was), see S. Alberts, *supra* note 31.

44 Political scientists especially among them.

45 University of Toronto law professor Jacob Ziegel comes immediately and especially to mind. See *supra* notes 3 & 4 and especially his widely reported "Merit Selection and Democratization of Appointments to the Supreme Court of Canada," (1999) 5:2 *Choices* 3.

46 J. Frank, "The Cult of the Robe" *Saturday Review* (13 October 1945) at 12-13, 80-81.

of Canadian exceptionalism in matters such as these.[47] And some may choose silence for fear of jeopardizing the judicial appointment for which they lust. Whatever the case, it can, I think, fairly be said that Canada's legal academy has not distinguished itself in the manner of its contribution to the continuing debate about the proper place of judges in Canadian polity.[48]

In any event, the foregoing sketches the political, legal, and cultural context in which this Special Issue on Judicial Appointments was conceived, planned, and executed and to which it hopes to contribute. The collection proceeds from the understanding that the judiciary is an institution fundamental to the constitution and character of free societies such as ours and that, in consequence, the selection of judges to staff that institution is a matter of overriding practical and theoretical importance. As editor, I was guided by three imperatives. I wished to include essays which describe, criticize, and prescribe, and I wanted to leaven the discussion with voices and perspectives both from abroad and from francophone Canada. I believe I have met these demands, though with what success I leave to others.

The collection contains seven essays, two of which (those by Ewing and Penner) were authored by academic lawyers resident in Britain; two book reviews (one of which was supplied by an American legal academic); and a case comment on the Alberta Court of Appeal's decision on the matter of the province's authority to set the salaries of provincial court judges. Of the essays, those by Millar and by Bilodeau and Roy are primarily descriptive (the former of the history, processes, and policies related to federal judicial appointments, and the latter of the processes and policies, especially as regards language, governing the appointment of provincial court judges in the province of New Brunswick); the essay by Barry is a case study in judicial biography which seeks to interrogate the life of a great judge, Justice Robert Jackson of the United States Supreme Court. The remaining essays criticize standing arrangements and prescribe alternatives. My own contribution alone among these essays confines itself to criticism, specifically of the procedures used to select federally appointed judges. Happily, the remainder are more ambitious and both criticize and prescribe.

In his essay, Professor Penner explores jurisprudential views of the grounds of judicial authority and on that basis formulates a series of suggestions with respect to

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47 Or it might be a matter of the culture of deference which some believe foundational to the course of Canadian political and social history. See A.A. Borovoy, *The New Anti-Liberals* (Toronto: Canadian Scholars' Press, 1999). But see N. Nevitte, *The Decline of Deference* (Peterborough, Ont.: Broadview Press, 1996).

48 Though to a lesser degree, much the same may be said of the scholarship of Canadian legal academics on matters related to popular debate. In comparison, academic lawyers in America are both prolific and fearless. For two recent works on the matter of judicial selection, see D.A. Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999); and T.J. Peretti, *In Defense of a Political Court* (Princeton: Princeton University Press, 1999). For commentary, see: J.C. Yoo, "Choosing Justices" Michigan L. Rev. (2000, forthcoming). But see Ziegel, *ibid.*; R.E Hawkins & R. Martin, "Democracy, Judging and Bertha Wilson," (1995) 41 McGill L. J. 1; and C.P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Oxford: Oxford University Press, 2000).

the proper manner of selecting judges to common law and constitutional courts. Professor Ewing takes a different tack. After examining the principle of judicial independence and the current movement for judicial reform in Britain, Ewing argues for a number of initiatives which he thinks would both increase the judiciary's representational character and its democratic accountability and preserve its independence. In their lengthy essay, Devlin, McKay, and Kim test present, provincial and federal procedures of judicial selection against democratic norms and conclude that the Canadian judiciary in all of its parts suffers from what they term a "democratic deficit." After an exhaustive analysis of past reform efforts and of arguments for and against a more democratically accountable judiciary, the authors submit their own proposal which, were it to be adopted, would change fundamentally the institutional character of the judiciary in Canada.

There are here then no bromides. The more descriptive essays perhaps aside, each of the contributors recognizes both the "terrible" power of judging[49] and the fearful possibilities of judging gone wrong to which Calamandrei alludes; and each therefore takes seriously the need always to call to account not only our judges but also the political structures and processes which place in them authority over us. In the latter regard, it is I think safe to say that the essays contained herein call for judges to be democratically accountable and for the political processes of their appointment to be both principled and transparent. This is a happy result. For, whatever the particulars of institutional design, the judiciary, as a branch of the liberal democratic state, must be subject to the norms of liberal democratic governance; chief among these, according to any account worth the name, are accountability and transparency.

As editor, I owe much thanks to the contributors for responding to my often urgent calls to participate in this scholarly way in the on-going debate, in Canada and elsewhere, about our collective fates under rule by judges; to the Honourable Anne McLellan, Minister of Justice and Attorney General of Canada, for contributing the Foreword; and to Anne Côté and Paul Eastwood, current Co-Editors-in-Chief of the *Alberta Law Review*, and to Larissa Katz-Lang and Marian Fluker, former Co-Editors-in-Chief of the *Alberta Law Review*, for their persistence and good cheer in bringing this special issue to what we all hope is its timely birth.

[49] I take this from Montesquieu. See A. Cohler, B. Miller & H. Stone, eds., *Montesquieu: The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989) at 158 ("the power of judging, so terrible among men").