

Exploring the Links Between Party and Appointment:
Canadian Federal Judicial Appointments from 1989 to 2003

Lori Hausegger, Boise State University

Matthew Hennigar, Brock University

Troy Riddell, University of Guelph

Draft: Please do not quote or distribute without permission of the authors

Paper presented to the 2008 meetings of the Canadian Political Science Association.
Vancouver.

Exploring the Links Between Party and Appointment: Canadian Federal Judicial Appointments from 1989 to 2003

In their study of federal judicial appointments in Canada from 1984-1988, Peter Russell and Jacob Ziegel indicated that one of the purposes of their study was to “establish the basis for a future comparison between the judicial appointments made before the introduction of the... judicial advisory committees and the appointments made after them” (1991, 8). Before the establishment of these screening committees, Russell and Ziegel found significant patronage existed in judicial appointments. Indeed, despite the Mulroney government’s election pledge to reduce patronage, nearly half of the federal judicial appointments made between 1984 and 1988 had some connection to the governing Progressive Conservative party. However, a full comparison of these pre-committee appointments to those made after the 1988 introduction of the screening committees has yet to be done. Did the screening committees reduce the relevance of political connections in the federal judicial appointments process? In a paper published recently in the *University of Toronto Law Journal* we began the process of systematically addressing this question by ascertaining if judicial appointees from 1989 to 2003—a time period that encompasses Mulroney’s second term as Prime Minister as well as ten years of Chretien’s time as Prime Minister— donated money to the party in power prior to their appointment. This paper builds on that study by probing more deeply into the political backgrounds of appointees from 1989 to 2003 and by getting the perspective of senior members of the legal community about how the appointment system works in practice and what this means for who gets appointed.

The next section of the paper describes briefly our previous findings and puts them in a larger historical and analytical context. The paper then outlines the research methods used for our current study before discussing our findings and their implications. We conclude that political connections continued to play an important role in who was selected for a judicial appointment after the introduction of the screening committees in 1988, though the new process may have worked to prevent (for the most part) the politically-motivated appointment of completely unqualified individuals. Our findings also suggest that the relevance of patronage varied by region and interacted with other “political” factors, such as group representation on the bench. The paper concludes with an overview of our plans for future research on this question.

BACKGROUND

Historical

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 (in consultation with the cabinet) and, in the case of ‘chief justices,’ by the Prime Minister. Section 101 of the *Constitution Act, 1867* gives the federal government the authority to establish a general court of appeal and other courts that it deems 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 the Prime Minister. Historically, patronage played a very significant role in federal judicial appointments. The Canadian Bar Association, in an effort to improve the appointment process, established the National Committee on the Judiciary in 1967 to

screen the names of judicial candidates forwarded by the Minister of Justice. In the early 1970s, Ministers of Justice began to use special advisors to accumulate information about prospective candidates from judges, members of the law profession, and provincial attorneys-general.

The system, however, still allowed for patronage to play a considerable role in the appointment process. This was amply demonstrated by a rash of patronage appointments at the end of the Trudeau/ Turner years that generated outrage and brought the appointment process under greater scrutiny, most notably by the Canadian Bar Association's McElvey Committee. 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 as significant a factor in appointments, though the importance of party affiliation varied to some degree depending on the federal Minister of Justice.¹ 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.'²

In 1991, Russell and Ziegel published their study of the Mulroney government's judicial appointments from 1984-1988, based on questionnaire responses from individuals in law, politics, academia and the media who might have been familiar with the appointees. The results indicated that 24.1% of appointees had 'major' involvement with the

¹ McElvey Report at 37-40.

² McElvey Report at 57.

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).³ 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 appointment process, particularly in Saskatchewan, Manitoba, New Brunswick, Nova Scotia, and PEI.⁴ Indeed, a former minister of justice in the Mulroney government, John Crosbie, acknowledged in a media interview that he appointed Conservative activists to the bench during his tenure as Minister.⁵

Screening Committee 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 established in each province and territory to screen the candidates. After a committee rates the candidates referred to it, the

³ 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.

⁴ Russell and Ziegel at 20

⁵ Kurt Makin, 'Appointment of Judges too Political Critics Say' *Globe and Mail* (16 May 2005)

Commissioner is responsible for reporting the assessments back to the Minister so that appointments can be made from the list on an ongoing basis.⁶

Until recent changes by the Conservative Harper government, membership on the committees consisted 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 Judicial Affairs.⁷ Membership on a committee is a three-year term (raised from just two years in 1999) renewable for a single additional term. In 2006, the Harper government added a police representative to the committee (a fourth appointment by the federal Minister of Justice) and made the judicial representative a non-voting chair of the committee.

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

⁶ Committee assessments were valid for three years until 1999, when it was reduced to two years.

⁷ 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) See Andre S. Millar, 'The "New" Federal Judicial Appointments Process: the First Ten Years.' (2000) 38 *Alberta Law Review* 616.

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 the 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).⁸

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 recommended’ while 2477 applications were rated as ‘not qualified or unable to recommend.’⁹ In 2006, the Harper Conservative government revised the ranking system back to a two-tiered system (“recommend” or “unable to recommend”).

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

⁸ 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). The Commissioner’s office also encouraged committees to ‘respect diversity’ and give ‘due consideration to all legal experience, including that outside a mainstream legal practice.’ Office of the Commissioner for Federal Judicial Affairs, ‘Judicial Advisory Committee Guidelines’ (2006) http://www.fja.gc.ca/jud_app/judAdvComGuideLines_e.html#Consultations (accessed May 2006), but that requirement seems to have been dropped <http://www.fja.gc.ca/fja-cmf/ja-am/com/gl-ld-eng.html> (Accessed May 2008).

⁹ Millar. Cumulative figures supplied by the Office of the Commissioner for Federal Judicial Affairs shows that the pattern of having nearly 40 per cent of candidates ranked as ‘recommend’ or ‘highly recommended’ continued up to the present (May 2006).

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.¹⁰ 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.¹¹ Finally, elevations 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.

Previous Assessments of the Screening Committee Process

Anecdotal evidence provided since 1988, suggests that political connections have continued to play a role in the appointments process after the introduction of the screening system. For example, in 1998 there was a story about a friend of then Justice Minister Anne McLellan being appointed in Nova Scotia after the screening committee was asked to reassess its initial finding of “not recommended”. Until now, more systematic examinations of the impact of the 1988 screening committees on appointments were confined mostly to tracing whether individuals had donated money to the party in power prior to their appointment by the federal government. One newspaper story about appointments from 2000 onward in select provinces (Quebec, Ontario, Saskatchewan and Alberta) claimed that 60 per cent of appointees had donated to the Liberal party prior to their appointment, but

¹⁰ 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 at 31, fn. 35. However, Russell and Ziegel speculated that applicants could force the release of their assessment in this situation. They also suggested that the committees’ lack of a statutory basis meant the Minister could simply appoint a new chair or disband the committee altogether at 31, fn 36.

¹¹ Millar

noted that a separate check by the *Vancouver Sun* of appointments in BC since 2000 suggested that the process was relatively free of patronage.¹² The methodology behind these studies was not well-explained, however, and possibly could have led to “false positives” if caution was not used, especially for individuals with common names. An academic study of judicial appointments in 2003 found that 41 per cent of appointees were ‘probable’ supporters of the Liberal Party based on political donations records dating back to 1997.¹³

Using an even more rigorous method of classifying appointees as “probable” donors we found that 30.6 per cent of appointees from 1989-2003 very likely had donated to the party in power in the five years prior to their appointment.¹⁴ New Brunswick and Manitoba featured the highest percentages of probable donors—52.4 and 48.3 per cent respectively—followed by Saskatchewan at 46.7 per cent. As others have reported, the rate of partisan affiliation (as measured by political donors) was the lowest in B.C. (12 per cent). The trends that we found were consistent between the Mulroney years (1989-1993) and the Chretien years (1993-2003).

¹² Schmitz (6 May 2005). These figures were supplemented by interviews with members of the legal community and searches of newspaper databases. However, it is not clear how many individuals went beyond donating to a party. Nor is it clear how many interviews were conducted.

¹³ 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. 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.

¹⁴ To be counted as a probable donor, all three parts of the judge’s name had to be represented (first, last and middle initial) or if the name was uncommon. 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 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.

In that study, we recognized various limitations of looking only at political donations as a proxy for political connections. Relying on such a measure potentially misses other important types of political involvement (from fundraising to running for office) that appointees may have had. The methodology also did not allow us to gain insight into how the federal judicial appointment process works in practice and the important implications this has for the s.96 and s.101 courts, including perceptions of their quality. Although we believed that it was telling that the governing party almost universally appointed individuals who had donated to them rather than individuals who had donated to an opposition party, not having additional data limited our ability to contend with the possibility that lawyers in general tend to be political creatures who donate to parties (as do law firms). Therefore, we could not say that a lawyer's political donations – the lowest level, and most common, connection to a party – definitively proved that politics was a significant factor in their appointment to the bench.

While the project is an ongoing one, this most current research provides greater insight into the backgrounds of appointees and how the system works. These are important issues given the increasingly influential role that courts play in the governing process and the relatively high reliance of courts, compared to other institutions, on public and elite support to undergird their authority. Recall that the screening committees were introduced after mounting criticisms about the role of patronage in federal judicial appointments. At an individual level the appointment process can be more or less fair to those applying to become a judge, and people and organizations can be impacted profoundly by the types of judges put on the bench – both in terms of how judges treat them and how they decide cases.

DATA COLLECTION

For our previous project we had collected the names and brief biographical details of judges appointed by the federal government, between 1989 and 2003, to the s.96 courts (trial and appeal) in the provinces, as well as to the Federal Court (trial and appeal) and the Tax Court. There were 689 individuals outside of Quebec who received such federal appointments (we are currently in the process of collecting data in Quebec and Nunavut).¹⁵ Of these judges, 241 were appointed under Prime Minister Mulroney and 448 were appointed under Prime Minister Chretien. (See Appendix A for a complete breakdown of the number of appointments made by province and by each Prime Minister.)

To ascertain the political connections (if any) of the appointees we enlisted the help of senior lawyers and law professors in each province to act as informants. Law professors were contacted if they had significant teaching and/or professional experience (approximately ten years). Senior lawyers who had a significant profile in the legal community were identified through various means, including electronic searches for lawyers who held positions in professional associations such as provincial law societies and the Canadian Bar Association, lawyers who had been designated Queen's Counsel (QC) and lawyers identified in media stories.

Email requests for participation were sent to potential informants in each province asking them to participate in a web-based survey. The web survey (reproduced in Appendix B) asked respondents to choose an appointee from their province from a drop-

¹⁵ Some individuals received more than one appointment. For the purposes of this study, we are only interested in their first appointment within the 1989 to 2003 time frame. For example, Joe Smith was appointed to the trial court in 1992 and was then elevated to the Court of Appeal in 2001, but for this project we are only interested in the 1992 appointment. It would be coded as an appointment by the Mulroney government to the s.96 trial court.

down menu. The date and court of appointment were included beside the appointee's name on the drop-down list.¹⁶ For each appointee, our informants were asked first to provide an assessment of their quality prior to their appointment. The informants were then asked whether the appointee had some association with a political party, including minor constituency work, fundraising, being a senior campaign activist, sitting as a party executive or running for office. Informants were also able to answer that they were "unsure" of an appointee's political background or that the appointee had "no political activity" prior to appointment. If one or more political activities were chosen (with a provincial party or a federal party), the informant was asked to specify with which the appointee had been associated and was given the opportunity to provide contextual commentary.

The survey then asked informants whether the appointee had any close social connections with a federal cabinet minister, Member of Parliament, executive member of the governing party or other social connections. The same question was asked about close professional connections. Opportunities were provided for informants to provide contextual commentary about an appointee's close social and professional connections or any such connections with opposition parties.

In addition to providing information about appointees with whom they were familiar, informants were encouraged to provide their general impressions about the judicial appointment process. They were asked to rank how important "political connections" and "social and professional connections" were in the federal appointment

¹⁶ Individuals appointed to the Federal Court or Tax Court were included in the list of appointees from the province in which they worked prior to their appointment.

process along a five-point scale from Unimportant (1) to Very Important (5). Respondents were then asked how the federal judicial appointments system worked in practice and a text box was available for responses. For the sake of potential comparisons with provincial appointment systems, these same questions were repeated with reference to s.92 court appointments.

The survey concluded by asking informants if they would be willing to participate in a confidential telephone conversation to talk about the appointment process in more depth. As described in Table A5 in Appendix A, a total of 158 individuals participated in the survey in nine provinces and we conducted 33 follow-up interviews. The interviews began with rather open-ended questions about the federal appointment system, which gave respondents the opportunity to talk about what they believed were the most important features of the system. Follow-up questions were asked about particular issues arising from this general discussion. We then asked interviewees to provide information about appointees with whom they were familiar but did not fill out surveys for online because of time constraints.

As discussed below, we classified individuals using two different classificatory schemes. First, in order to compare with Russell and Ziegel's findings, we classified appointees as having "major" or "minor" connections with the party of appointment (and with opposition parties). Following Russell and Ziegel, an appointee had "minor" political connections if he or she made a financial contribution to a party, undertook minor constituency work for a party, or had social or professional connections with party leaders. An appointee who raised funds, sat on the executive of a party, was actively involved in an

election or leadership campaign, or ran for office was considered to have “major” connections to a party.

Our second classification scheme was developed after we came to believe that the Russell and Ziegel coding did not capture adequately two important dimensions of the appointment process that we were alerted to by comments from web survey respondents and from respondents during interviews. One thing that the Russell and Ziegel scheme does not allow for is the possibility that an appointee was “non-political.” As noted below, our respondents would sometimes stress that an appointee was non-political prior to their appointment. Our informants also made it clear that social or professional relationships with an influential member (or members) of the governing party could play a very key role in securing a judicial appointment. Based on this feedback we came to believe that close relationships with party officials were not “minor” connections as suggested by the Russell-Ziegel (RZ) schema. Our findings show that it is not the norm to have only high profile connections with party officials without significant direct involvement with a party, but we believe that conceptually it is important to have a distinct category for these types of major “connections” (and more minor connections). Therefore, we developed the following classification scheme as described in Box 1 that we hope better highlights the importance of networking in judicial appointments.

Box 1: Hausegger, Hennigar and Riddell (HHR) Scheme

| | |
|--------------|---|
| No political | The appointee had no political activity or connections with party officials prior to appointment. [Note: this is different than “no known affiliation”—appointees were given this classification if respondents chose “no political” rather than “unsure” regarding an appointee’s background.] |
|--------------|---|

| | |
|--------------------------|---|
| Minor Connections | The appointee had social or professional associations with individuals who informants described as being connected to a political party. An appointee who had law partners that were “politically connected” in some unspecified way by an informant would fit into this category. |
| Minor Direct Involvement | The informant was a probable donor to a federal political party or was described as engaging in minor constituency work for a party (federal or provincial). |
| Major Connections | The appointee had a close social relationship (spouse/partner, immediate family ties, close friendships, former classmates) or close professional relationship (law/business partner, client, employee/employer) with a person who had major direct involvement with a party (fundraiser, campaign manager, executive member, cabinet minister and MP (or Senator)). [Note: we did not include former civil servants in this category even though they likely had developed relationships with government officials in the course of their work]. |
| Major Direct Involvement | The appointee engaged in fundraising, was an executive member, was a senior campaign organizer in elections/leadership contests, or ran for political office (provincial or federal). |

Before we outline the results according to both the RZ and HHR classification models, we begin with a brief discussion about the perceptions that our informants had about how much political activity and connections mattered in the federal judicial appointment process.

FINDINGS

General Perceptions

Table 1 presents the findings for our respondents’ general assessment of the importance of political, social and professional connections for judicial appointments to the bench. An average rating was calculated for each province based on responses scaled from 1 to 5, with 5 suggesting that the connection was “very important”. The table demonstrates

that in many provinces the perception exists that, despite changes to the federal selection process, politics still matters. Respondents from Prince Edward Island rated politics particularly strongly (4.83) followed closely by Newfoundland and Saskatchewan. British Columbia respondents felt political connections were the least important (2.33), suggesting in interviews that B.C. was “less political” and that “people of all political stripes are getting through federally.” However, in most other provinces respondents made comments (both on the survey and in interviews) suggesting that “politics plays a heavy role,” and that the process was still “highly politicized.” Some felt strongly enough to state that the system was “politically tainted,” while others suggested that the screening committees themselves were “highly politicized,” and that a “disturbingly large number of Federal appointments were based far more heavily on political connections than on merit.”

Table 1: Assessment of the Importance of Connections by Respondents

| | Politics (federal) | Social and Professional (federal) | Politics (provincial) | Social and professional (provincial) |
|----|--------------------|-----------------------------------|-----------------------|--------------------------------------|
| BC | 2.33 | 3.18 | 2.29 | 3.13 |
| AB | 4.00 | 4.13 | 3.93 | 3.86 |
| SK | 4.54 | 3.69 | 3.92 | 4.00 |
| MB | 4.47 | 4 | 3.79 | 3.92 |
| ON | 3.61 | 3.95 | 2.95 | 3.65 |
| NB | 4.36 | 3.72 | 4.12 | 3.82 |
| NS | 3.94 | 3.8 | 3.8 | 3.71 |
| PE | 4.83 | 3.67 | 4.80 | 3.40 |
| NF | 4.67 | 4.33 | 2.33 | 3.33 |

The ratings in Table 1 suggest that political connections play less of a role in provincial government appointments than at the federal level. This is suggested by the numbers in every province (PEI again suggests the highest level of political connection and British Columbia the lowest). Newfoundland is particularly interesting given the wide divide between its scores for the federal and provincial systems, moving from the second highest score for federal appointments to the second lowest for its provincial ones. The differences between the two appointments systems is something we hope to address more systematically in a future paper.

Table 1 also suggests that social and professional connections are important in all the provinces. Indeed, there is much less of a range of scores for these factors. While this measure does not provide the exact nature of this type of connection, it does suggest that the influences on judicial appointments may be quite complex. Direct political connections may matter, but so too might belonging to particular law firms or travelling in the “right” circles. One respondent in Saskatchewan suggested there were three ways to get to the bench in that province: one could be active in the Liberal party when there is a Liberal government in Ottawa; one could be active in the Conservative party when there is a Conservative government in Ottawa; or one could be a member of the MacPherson, Leslie and Tyerman (MLT) law firm.

Specific Findings, Replicating the RZ Model

The anecdotal evidence discussed earlier in the paper, and the general perceptions of our respondents, suggest that politics still matters in federal judicial appointments, despite the introduction of screening committees in 1989. In this step of our larger project

we attempted to trace actual connections between judges and the party that appointed them. Table 2 presents the results of that attempt using measures that mirror those used by Russell and Ziegel in their 1991 study. Comparing our results with the earlier study (see Table A2 in the Appendix) we find that for all provinces but one (PEI), the percent of judges with major connections being appointed is lower after the introduction of the screening committees. In some provinces the difference is quite impressive. Nova Scotia, for example, went from 41.5% with major political connections to only 18.8%, and Newfoundland dropped from 33.3% to 18.5% (Ontario also dropped a large amount but due to the province's large size we need to approach additional respondents before we have full confidence in that result). In total, we discover that 16.7% of judges appointed from 1989 to 2003 had major connections to the party that appointed them, a number much lower than the 24.1% found by Russell and Ziegel for appointments made between 1984 and 1988. Interestingly, the appointments Prime Minister Mulroney made in his second term, after the introduction of the screening committees (1989 to 1993), demonstrate fewer major political connections than those he made before the committees (see Table A3 in the Appendix). These findings suggest the possibility that the screening committees may indeed have had some impact on the process, at least at this high level of connection.

For a few of the provinces (see, for example, Alberta) the percentage of minor connections is higher than that found by Russell and Ziegel, and our total minor connection score is higher as well (27.6% versus 23.2%). However, we are reluctant to read too much into this result as we believe some of the higher results may be attributable to our earlier study of political donations (a component of the minor connections measure), which

uncovered probable donations from government records, rather than relying on reporting by respondents. Our measure should thus capture more political donations, and flag a higher number of minor connections as a result. In any case, adding major and minor connections together, Russell and Ziegel found that before the introduction of committees, 49.7% of judicial appointees (excluding Quebec and the territories) had some connection to the party that appointed them, while, using comparable measures, we find that 44.3% had connections after the establishment of committees.

**Table 2: Percent of Appointees Having Political Connections by Province
(Using RZ Measures), 1989-2003**

| | Party in Power Involvement | | No Known Affiliation | Opposition Involvement | |
|--------|----------------------------|------------------|----------------------|------------------------|----------------|
| | Major | Minor | | Major | Minor |
| BC | 4.1% (n=5) | 9.9% (n=12) | 76.0% (n=92) | 2.5% (n=3) | 7.4% (n=9) |
| AB | 17.1% (n=15) | 37.5% (n=33) | 37.5% (n=33) | 4.5% (n=4) | 3.4% (n=3) |
| SK | 42.1% (n=16) | 26.3% (n=10) | 28.9% (n=11) | 2.6% (n=1) | 0% (n=) |
| MB | 42.9% (n=18) | 28.6% (n=12) | 23.8% (n=10) | 2.4% (n=1) | 2.4% (n=1) |
| ON | 6.7% (n=19) | 33.7% (n=96) | 57.2% (n=163) | 0.7% (n=2) | 1.8% (n=5) |
| NB | 63.3% (n=19) | 30% (n=9) | 6.7% (n=2) | 0% (n=) | 0% (n=) |
| NS | 18.8% (n=9) | 27.1% (n=13) | 54.2% (n=26) | 0% (n=) | 0% (n=) |
| PE | 90% (n=9) | 0% (n=) | 10% (n=1) | 0% (n=) | 0% (n=) |
| NF | 18.5% (n=5) | 18.5% (n=5) | 48.1% (n=13) | 3.7% (n=1) | 11.1% (n=3) |
| Totals | 16.7% (n=115) | 27.6% (n=190) | 50.9% (n=351) | 1.7% (n=12) | 3.0% (n=21) |

Overall, the pattern of political connections across provinces is relatively similar in each time period. In both studies, some Maritime provinces, Saskatchewan and Manitoba tend to have the highest level of major political connections and the lowest level of “no known affiliation.” In our study, PEI demonstrates the highest level of major connections followed by New Brunswick, Manitoba and Saskatchewan, whereas in the Russell and Ziegel study Nova Scotia was in the top four and PEI was not. The general patterns we discover from 1989 to 2003 appear to be relatively constant between the Mulroney and Chretien governments as well (see Tables A3 and A4 in Appendix A).

Specific Findings using HHR Measures

Table 3 presents results using our different measures of political connection (described in the data collection section above). As mentioned above we not only made a distinction between major and minor connections, we also attempted to distinguish the type of those connections. Therefore, we have a category for major direct political activities (such as fundraising, running a candidate’s campaign or being a member of the party executive), and a category for major social or professional connections (such as being the spouse, roommate or law partner of a major political player, or even the Minister of Justice). While appointees falling in the first category definitely qualify as political, those falling in the latter category are not necessarily political themselves – and yet most observers would classify their appointment as a political one. By our measures, 22% of appointees from 1989 to 2003 had backgrounds that suggested major political activities,

major social or professional connections, or both.¹⁷ Of these, 5.7% had only major social or professional connections. However, as reported in the last column of Table 3, when we examined those appointees more closely we discovered that several had some minor politics in their background (usually donating to a political party). In the end, 3% of judges appointed between 1989 and 2003 could arguably be classified as a major political appointment without being political themselves.

The number of judicial appointees with major and minor connections varied, of course, by province. Prince Edward Island had the lowest number of judges appointed (10) during our time period, but 90% of those appointees had some major direct political activity in their background – the highest percentage of any province. New Brunswick was also very high with 80% of its federal judicial appointments having some kind of major activity or connection in their background. New Brunswick differed from PEI, however, in that 16.7% of its appointees had major social or professional connections without also having been involved in major political activity themselves (whereas PEI had none). Saskatchewan and Manitoba were the next highest provinces, each with over half of their appointees (52.6% and 52.4% respectively) having a history of major political activity, major social or professional connections, or both. British Columbia is the province with the lowest number of appointees falling in the major political categories. Only 5% of British Columbia appointees had these types of connections. Although we believe Table 3 allows for a more nuanced look at the type of connections between judges and the government appointing them, the overall provincial patterns mirror those using the Russell and Ziegel

¹⁷ This number comes closer to the Russell and Ziegel score for major connections (24.1%), but includes the social and professional connections that they regarded as only minor connections.

measures in terms of the provinces demonstrating the highest and lowest levels of major political associations.

Table 3: Province by Political Affiliation (HHR Measures) 1989-2003. (% of Appointees within Province Falling in Each Political Affiliation)

| | No Politics | Minor Connections | Minor Direct Activities | Major Connections and/or Major Direct Activities | Major Connections Only | Major Connections with Minor Direct Activities |
|-------------------|-----------------|-------------------|-------------------------|--|------------------------|--|
| BC (n=121) | 17.4% (n=21) | 0% | 9.9% (n=12) | 5.0% (n=6) | 0.8% (n=1) | 0.8% (n=1) |
| AB (n=88) | 10.2% (n=9) | 3.4% (n=3) | 31.8% (n=28) | 21.6% (n=19) | 4.5% (n=4) | 0% |
| SK (n=38) | 18.4% (n=7) | 5.3% (n=2) | 23.7% (n=9) | 52.6% (n=20) | 10.5% (n=4) | 7.9% (n=3) |
| MB (n=42) | 7.1% (n=3) | 4.8% (n=2) | 16.7% (n=7) | 52.4% (n=22) | 9.5% (n=4) | 2.4% (n=1) |
| ON (n=285) | 8.4% (n=24) | 1.4% (n=4) | 29.1% (n=83) | 10.9% (n=31) | 4.2% (n=12) | 2.1% (n=6) |
| NB (n=30) | 6.7% (n=2) | 3.3% (n=1) | 10.0% (n=3) | 80.0% (n=24) | 16.7% (n=5) | 13.3% (n=4) |
| NS (n=48) | 22.9% (n=11) | 12.5% (n=6) | 16.7% (n=8) | 29.2% (n=14) | 10.4% (n=5) | 4.2% (n=2) |
| PE (n=10) | 10% (n=1) | 0% (n=) | 0% | 90.0% (n=9) | 0% | 0% |
| NF (n=27) | 18.5% (n=5) | 7.4% (n=2) | 7.4% (n=2) | 33.3% (n=9) | 14.8% (n=4) | 3.7% (n=1) |
| Totals (n=689) | 12.0% (n=83) | 3.2% (n=22) | 22.1% (n=152) | 22.4% (n=154) | 5.7% (n=39) | 2.6% (n=18) |

Chi Square sig. = p <0.01 for all measures

The provincial patterns for minor direct political activities and minor connections demonstrate some differences from those of the major ones, and from the Russell and Ziegel measures. Alberta and Ontario have the highest levels of appointees with minor direct political activities in their background (perhaps reflecting the importance of political donations to the measure) while Newfoundland and PEI have the lowest (PEI had little room for this type of connection with 9 of its 10 appointees having major political activities in their background). Newfoundland, however, had the second highest level of appointees with minor indirect connections (for example, belonging to the “right” law firm), following only Nova Scotia in that category. The numbers in this category are not large (particularly since they count only those who do not also have a major social or professional connection), but they do suggest there may be other types of lobbying going on to get candidates to the bench.

More interesting, perhaps, is the “no politics” category. The numbers in this category are low as we only counted a judge as having no political background if it was definitively stated by respondents and not contradicted by any other respondent (we also did not put anyone in this category who provoked only an “unsure” from respondents). Despite our strict definition, Nova Scotia had 22.9% of its appointees fall in this category. More surprisingly, 18% of Saskatchewan judges appointed between 1989 and 2003 fell into this category. Thus, while Saskatchewan rates as the third highest province in terms of major connections and political activities, it also falls as the third highest province in terms of appointees with “no politics” in their background. We believe this may reflect the smaller size of the province (as with Nova Scotia and Newfoundland), which allows respondents to be more definitive in their answers. Thus Saskatchewan may not have

more appointees with no politics in their background, we just may have captured the measure better in that province. Regardless, Manitoba and New Brunswick present a more expected picture – scoring high in terms of major connections and low in terms of no politics.

Table 4 compares the findings of political affiliation for candidates put on the bench by Prime Minister Mulroney from 1989 to 1993, to those put on the bench by Prime Minister Chretien from 1993 to 2003. There are not significant differences between the two Prime Ministers. However, our data suggests that Prime Minister Chretien’s appointees were more likely to have major connections or major political activities in their background than those of Prime Minister Mulroney (at least in his second term). The two Prime Ministers were virtually identical, however, in the number of appointees with no politics in their background.

Table 4: Appointing Prime Minister by Appointees Political Affiliation 1989-2003. (% of PM’s Appointments in Each Political Affiliation)

| | No Political | Minor Connections | Minor Direct Activities | Major Connections and/or Major Direct Activities | Major Connections Only | Major Connections and Minor Direct Activities |
|---------------------|-----------------|-------------------|-------------------------|--|------------------------|---|
| Mulroney (n=241) | 12.0% (n=29) | 2.9% (n=7) | 21.2% (n=51) | 18.3% (n=44) | 4.1% (n=10) | 0.8% (n=2) |
| Chretien (n=448) | 12.1% (n=54) | 2.9% (n=13) | 25.7% (n=115) | 24.6% (n=110) | 6.5% (n=29) | 2.0% (n=9) |

Table 5 takes the next step and examines the quality of appointees chosen for the bench by the extent of their political affiliations (as mentioned above, respondents were

asked to rate the appointees before they became judges). Those with major direct political activities, or major social or professional connections, in their past were rated “outstanding” by respondents only 8.4% of the time – the lowest level of any category. This category also had a much higher number rated as only “fair” than either of the categories measuring minor political activities or minor social or professional connections. The “no politics” category is perhaps the most instructive, however. While 34.9% of these appointees were rated as outstanding (more than twice as many as any other category), none of these appointees were rated as “poor” or even “fair”.

Table 5: Quality of Appointment by Political Affiliation HHR 1989-2003 (% of each Political Affiliation Falling within Each Rating Category)

| | No Politics* | Minor Connections | Minor Direct Activities | Major Connections and/or Major Direct Activities* | Major Connections Only* | Major Connections and Minor Direct Activities* |
|-------------|--------------|-------------------|-------------------------|---|-------------------------|--|
| Outstanding | 34.9% | 10.0% (n=) | 16.9% | 8.4% | 12.8% (n=) | 0% (n=) |
| Very Good | 34.9% | 30.0% (n=) | 24.1% | 34.4% | 28.2% (n=) | 36.4% (n=) |
| Good | 13.3% | 30.0% (n=) | 13.9% | 30.5% | 30.8% (n=) | 36.4% (n=) |
| Fair | 0% | 5.0% (n=) | 1.8% | 14.3% | 7.7% (n=) | 18.2% (n=) |
| Poor | 0% | 5.0% (n=) | 0.6% | 3.9% | 2.6% (n=) | 0% (n=) |

*chi square sig.= p<0.01

Finally, Table 6 presents the quality of appointees by the Prime Minister appointing them. Again, the differences between Prime Minister Mulroney and Prime Minister

Chretien are not significant. Chretien appointed slightly more in the “outstanding” category, but slightly more in the “poor” category as well.

Table 6: Quality of Appointment by Prime Minister Appointing 1989-2003 (% of Prime Minister’s Appointments in each Rating Category)

| | Mulroney | Chretien |
|-------------|---------------|---------------|
| Outstanding | 14.9% (n=) | 15.2% (n=) |
| Very Good | 17.8% (n=) | 26.1% (n=) |
| Good | 15.4% (n=) | 13.2% (n=) |
| Fair | 3.7% (n=) | 4.5% (n=) |
| Poor | 1.2% (n=) | 1.6% (n=) |

DISCUSSION

Perceptions versus Reality

The perception exists in the media and amongst much of the legal community that politics plays a heavy, if not predominant, role in federal judicial appointments. This perception is fueled by stories like those of political “bagmen” making it onto the bench, or of a lawyer in Saskatchewan being appointed after representing the Prime Minister’s son in a criminal matter, or of a lawyer in the Maritimes being appointed as a “cushion” after her husband – the provincial Attorney General – had an affair and their marriage ended in divorce. In nearly every province, respondents suggested the appointment process was very political, involving much lobbying. It was a process not “for the faint of heart”. A New

Brunswick respondent argued that “anyone with judicial ambitions must develop connections with the governing party.” Another New Brunswick respondent suggested our asking about political connections was “like asking do you know if all Popes are Catholic.” According to this respondent “there is generally only one criteria for s.96 judges: does the party in power owe you?”

However, in undertaking this project, we wondered whether stories of obvious political patronage were reflective of the norm, or whether they were high profile outliers, colouring peoples’ view and confusing the issue. Our findings suggest the answer to this may depend on the province. The respondents from New Brunswick are probably in touch with the way their federal judicial appointments are done as 80% of its appointees do indeed have some major political connection to the governing party. However, in provinces like Nova Scotia, the perception seems to be out of step with the amount of political connections we actually discovered. Despite comments about a “weak appointment system that constantly panders to political connections,” Nova Scotia placed in the bottom half of provinces in terms of the number of its appointees’ that had major political connections. Indeed, of all the provinces, Nova Scotia has the highest number of appointees with “no politics” in their background. The distortion of perception versus reality was illustrated by one respondent who suggested that no judge was appointed solely on merit, and argued that for a lawyer to become a judge they had to “work it.” And yet, when asked about each individual appointed to the bench from 1989 to 2003, this same respondent consistently rated a large number of appointees as having “no politics”.

Nova Scotia illustrates nicely the importance of carefully measuring the factors influencing judicial appointments. From our numbers it appears that people may have

been thinking of high profile and controversial appointments (such as the appointment of the Justice Minister's law school friend to the Nova Scotia Supreme Court) when rating the importance of politics in the province. Careful examination of each individual judge suggests that the need to be politically active in order to secure an appointment may be exaggerated.

However, depending on the province, there may be a need for even those who are not directly active in politics to be championed (or at least not vetoed) by those who are connected to influential individuals in the governing party, or by "gate keepers." Gate keepers were identified by a number of respondents and included individuals and law firms (such as Stewart McElvery in the Maritimes) that seem to have significant influence in the appointment process. Respondents identified many avenues by which this political networking and lobbying takes place, though the importance of the regional minister was highlighted by respondents across the country. A story of one appointee in Alberta detailed that when the regional minister (Harvey Andre) blocked the appointment (believing the appointee was a supporter of the opposition party), the appointee appealed to an influential political friend. This friend had Progressive Conservative staffers go through membership lists until they found an old membership card of the appointee. This was then sent to the minister who promptly removed his objection, allowing the appointment to go through. We attempted to capture these kinds of connections in our "major connections" measure. As noted in the findings section of the paper, a significant number of appointees demonstrated these major social and professional connections in each province, and 3% displayed only this type of connection. Having indirect contact to regional ministers is a significant – and we believe major – connection, and one that needs to be considered in our

models of influences on appointments. While we did encourage respondents to tell us about such networking activity, we recognize that it is more difficult to capture such “behind the scenes” influence so we could be underestimating somewhat how influential this process is.

However, the data that we do have show that differences persist between provinces in the importance of the political backgrounds of those appointed to the bench. Despite the introduction of committees, New Brunswick, for example, still has a large number of appointees with major political connections (often through direct participation), as does Saskatchewan and Manitoba. The appointees in British Columbia, by contrast, demonstrate very few political connections – a low number that has become even smaller since the introduction of the committees. It may be that the small size of provinces such as New Brunswick and Saskatchewan allow political connections to flourish and continue to influence appointments. However, it is worth noting that even in provinces that do not display heavy major – or even minor – connections (see for example, Nova Scotia), very few candidates affiliated with opposition parties are placed on the bench, which may be an indicator of the influence that “networks” play in many provinces.

Implications

Interestingly, the perception that the appointments process is political provoked different feelings amongst our respondents. Some respondents did seem concerned that the “best” people applying were not being appointed due to the influence of politics, one going so far as to call the system “thoroughly corrupt.” Others suggested that the emphasis on political connections was causing young lawyers to sharpen up their political

connections, perhaps to the detriment of public service. One respondent fretted that people had become too intent on doing the “right political thing” since no one wanted to annoy people who had the power to appoint them. However, others suggested that while politics had not been removed by the committees, good people were still being appointed to the bench. Not surprisingly, respondents in B.C. seemed most sanguine about the process, but even in provinces where appointees had significant levels of political connections, several respondents stated that as long as the committees were ensuring candidates were qualified, they could not complain if politics came into the ultimate decision by the Minister of Justice. Some were even more pragmatic, arguing that it was impossible to remove politics from the process, that no party would give up the power to put their partisans on the bench.

Although the 1990s did see some egregious appointments, and reports from a few provinces suggested there were instances where committees were asked to reevaluate individuals by the political powers of the day, in general, the vast majority of respondents agreed that the new committee system screened out poor candidates. As one of our respondents stated: “no matter how good your political connections, if you are a crappy lawyer you will not get on the bench.” Several respondents suggested that the “real political animals” were now being shut out of the process. One respondent told us that a former political party leader was incredulous that, under the committee system, a well-connected party supporter was not going to be put on the bench. Indeed, some respondents suggested that the introduction of the committee system might be most beneficial to the Minister of Justice who, when faced with those lobbying him to put their campaign managers on the bench, could simply state, “there is nothing I can do, he did not

make it through the committee.” Our replication of the Russell and Ziegel model suggests that the appointment of judges with major political connections is indeed down, and the difference between Prime Minister Mulroney’s first and second terms (before and after the introduction of the committees) is particularly suggestive. Given that Russell and Ziegel’s data and our data suggest that those with strong political connections tended to be rated lower on average than those without major connections, the introduction of the screening committees may have generated at least incremental improvements to the quality of the s.96 bench.¹⁸

Group Representation

For judges appointed from 1989 to 2003, another consideration appears to have come to the forefront: group representation. Several respondents mentioned the importance of gender, ethnicity and language to the process, suggesting it was another “card that could be played” and one that could even “trump politics.” The Liberal government, in particular, appears to have actively sought out aboriginal lawyers in an effort to encourage them to apply for judicial vacancies.

Reaction to group representation was mixed with some respondents suggesting they felt such appointees were of lower quality. This statement was usually directed at female appointees who, in our time period, tended to be appointed at a younger age than

¹⁸ Russell and Ziegel asked about appointees’ performance on the bench. We asked about the quality of appointees prior to their appointment. In the next phases of our research we intend to look at the quality of appointees while on the bench. Some respondents who commented on the quality of appointees as judges noted that sometimes they ended up being better or worse than expected. Some respondents suggested that individuals who were very politically active prior to appointment had good people skills but they sometimes approached pre-trial conferences and trials as politicians trying to “broker a deal” rather than from a more judicial perspective of applying legal principles to a dispute.

their male colleagues. However, when we examined the numbers for gender, female appointees were not rated significantly lower than males. Indeed, a slightly higher number of females were in both the “outstanding” and the “very good” categories of our quality measure.

Interestingly, female appointees were slightly less likely to have major direct political activities in their background, but were slightly more likely to have major social or professional connections to the government appointing them.

CONCLUSIONS

Based on the data we have collected up to this point,¹⁹ we tentatively conclude that the introduction of the screening committees in 1988 had some modest impact on the types of individuals being appointed, but that in many provinces the process continues to be a highly political one. However, to borrow from Churchill, this is only the “end of the beginning” of this research project. In addition to finishing the data collection (which will also incorporate some of Harper’s appointments) we have started to pursue three major and interrelated inquiries. First, if the data show that politics matters but more so in some provinces than others, what explains these results? How does the process work “on the ground” both in the committees and after the recommendations are passed along? How much is this pattern influenced by different legal and political cultures in the provinces? Second, what are the “real-world” consequences of our federal judicial appointment system? What is the quality of judges who have been appointed under this system and does the quality in the courtroom vary according to level of previous political engagement?

¹⁹ We are continuing to collect information on Quebec appointees and are widening our data collection for Ontario.

How much, if any, might partisan connections (in addition to other factors, such as gender) influence the outcomes of decisions? Do controversial partisan appointments or appointments perhaps designed to curry favour with particular groups have much, if any, impact on public opinion?

Finally, what, -- if anything -- should be done with the current appointment system at the federal level? As noted above, some of our respondents thought that the system badly needed change, perhaps to something along the lines of some provincial appointing schemes. Others warned against a system that would give lawyers' associations or judges even more influence in how future judges are chosen. Some were generally happy with the way the system worked and thought that some partisan politics were inevitable in the system. A number of respondents, whether favouring reform or the status-quo, argued against selection processes in the US that feature more direct input by legislators or voters. The possibility of changing the selection system has stirred up considerable interest in the past few years. The current government has suggested that change is warranted, but widespread changes have yet to occur. As one respondent suggested "the only thing that has changed is that now it is Conservatives that are being appointed instead of Liberals." Our hope is that whatever changes take place will reflect the reality of appointment systems rather than just the perceptions of them.

APPENDIX A

Table A1: Number of appointees

| | Total | Mulroney (1989-1993) | Chretien (1993-2003) |
|--------|-------|-------------------------|-------------------------|
| BC | 121 | 49 | 72 |
| AB | 88 | 22 | 66 |
| SK | 38 | 8 | 30 |
| MB | 42 | 18 | 24 |
| ON | 285 | 107 | 178 |
| NB | 30 | 8 | 22 |
| NS | 48 | 18 | 30 |
| PE | 10 | 2 | 8 |
| NFLD | 27 | 9 | 18 |
| Totals | 689 | 241 | 448 |

Note: if an appointee was given a subsequent appointment (say to Chief Justice or from the s.96 court to the s.96 appeal court) only the first appointment from 1989 to 2003 was analyzed.

Table A2: Mulroney Appointments 1984-1988 (Russell and Ziegel data)

| | Party in Power Involvement | | No Known Affiliation | Opposition Involvement | |
|-----------------------|----------------------------|-----------------|----------------------|------------------------|----------------|
| | Major | Minor | | Major | Minor |
| BC | 12.5% (n=5) | 17.5% (n=7) | 52.5% (n=21) | 17.5% (n=7) | 0% |
| AB | 22.7% (n=5) | 13.6% (n=3) | 54.5% (n=12) | 4.5% (n=1) | 4.5% (n=1) |
| SK | 50.0% (n=5) | 30.0% (n=3) | 10.0% (n=1) | 0% | 10.0% (n=1) |
| MB | 50.0% (n=4) | 37.5% (n=3) | 12.5% (n=1) | 0% | 0% |
| ON | 19.0% (n=11) | 25.9% (n=15) | 53.4% (n=31) | 0% | 1.7% (n=1) |
| QC | 6.8% (n=3) | 29.5% (n=13) | 56.8% (n=25) | 6.8% (n=3) | 0% |
| NB | 78.6% (n=11) | 0% | 21.4% (n=3) | 0% | 0% |
| NS | 41.7% (n=5) | 33.3% (n=4) | 16.7% (n=2) | 8.3% (n=1) | 0% |
| PE | 28.6% (n=2) | 42.9% (n=3) | 14.3% (n=1) | 0% | 14.3% (n=1) |
| NF | 33.3% (n=4) | 16.7% (n=2) | 50.0% (n=6) | 0% | 0% |
| NWT | 0% | 100% (n=1) | 0% | 0% | 0% |
| Totals | 24.1% (n=55) | 23.2% (n=53) | 45.6% (n=104) | 5.3% (n=12) | 1.8% (n=4) |
| Totals (no QC or NWT) | 28.4% (n=52) | 21.3% (n=39) | 43.2% (n=79) | 4.9% (n=9) | 2.2% (n=4) |

Peter H. Russell and Jacob S. Ziegel. 1991. "Federal Judicial Appointments: An Empirical Test of the First Mulroney Governments Appointments and the New Judicial Advisory Committees." University Toronto Law Journal 41: 21 (Table 11)

Table A3: Mulroney Appointments 1989-1993 (RZ Model)

| | Party in Power Involvement | | No Known Affiliation | Opposition Involvement | |
|-------------------|----------------------------|-----------------|----------------------|------------------------|----------------|
| | Major | Minor | | Major | Minor |
| BC (n=49) | 2.0% (n=1) | 14.3% (n=7) | 69.4% (n=34) | 4.1% (n=2) | 10.2% (n=5) |
| AB (n=22) | 18.2% (n=4) | 45.5% (n=10) | 31.8% (n=7) | 4.5% (n=1) | 0% |
| SK (n=8) | 50.0% (n=4) | 12.5% (n=1) | 37.5% (n=3) | 0% | 0% |
| MB (n=18) | 44.4% (n=8) | 33.3% (n=6) | 16.7% (n=3) | 5.6% (n=1) | 0% |
| ON (n=107) | 4.7% (n=5) | 27.1% (n=29) | 65.4% (n=70) | 1.9% (n=2) | 0.9% (n=1) |
| NB (n=8) | 62.5% (n=5) | 25.0% (n=2) | 12.5% (n=1) | 0% | 0% |
| NS (n=18) | 27.8% (n=5) | 16.7% (n=3) | 55.6% (n=10) | 0% (n=) | 0% |
| PE (n=2) | 100% (n=2) | 0% | 0% | 0% | 0% (n=) |
| NF (n=9) | 0% | 11.1% (n=1) | 66.7% (n=6) | 0% | 22.2% (n=2) |
| | | | | | |
| Totals (n=241) | 14.1% (n=34) | 24.5% (n=59) | 55.6% (n=134) | 2.5% (n=6) | 3.3% (n=8) |

Table A4: Chretien Appointments 1993-2003 (RZ Model)

| | Party in Power Involvement | | No Known Affiliation | Opposition Involvement | |
|-------------------|----------------------------|------------------|----------------------|------------------------|----------------|
| | Major | Minor | | Major | Minor |
| BC (n=72) | 5.6% (n=4) | 6.9% (n=5) | 80.6% (n=58) | 1.4% (n=1) | 5.6% (n=4) |
| AB (n=66) | 16.7% (n=11) | 34.8% (n=23) | 39.4% (n=26) | 4.5% (n=3) | 4.5% (n=3) |
| SK (n=30) | 40.0% (n=12) | 30.0% (n=9) | 26.7% (n=8) | 3.3% (n=1) | 0% |
| MB (n=24) | 41.7% (n=10) | 25.0% (n=6) | 29.2% (n=7) | 0% | 4.2% (n=1) |
| ON (n=178) | 7.9% (n=14) | 37.6% (n=67) | 54.5% (n=97) | 0% | 2.2% (n=4) |
| NB (n=22) | 63.6% (n=14) | 31.8% (n=7) | 4.5% (n=1) | 0% | 0% |
| NS (n=30) | 13.3% (n=4) | 33.3% (n=10) | 53.3% (n=16) | 0% | 0% |
| PE (n=8) | 87.5% (n=7) | 0% | 12.5% (n=1) | 0% | 0% |
| NF (n=18) | 27.8% (n=5) | 22.2% (n=4) | 38.9% (n=7) | 5.6% (n=1) | 5.6% (n=1) |
| | | | | | |
| Totals (n=448) | 18.1% (n=81) | 29.2% (n=131) | 49.3% (n=221) | 1.3% (n=6) | 2.9% (n=13) |

Table A5: Number of respondents

| | Total Respondents | Interviews (subset of total respondents) |
|--------|-------------------|---|
| BC | 20 | 3 |
| AB | 20 | 5 |
| SK | 16 | 4 |
| MB | 19 | 3 |
| ON | 30 | 10 |
| NB | 24 | 2 |
| NS | 17 | 2 |
| PE | 9 | 3 |
| NFLD | 3 | 1 |
| Totals | 158 | 33 |

APPENDIX B—Survey Instrument

Part A: Choosing a judicial appointee

The menu below contains the names of judicial appointees from [province] who were appointed to s.96 or s.101 courts (excluding the Supreme Court of Canada) by the federal government from 1989-2003.

The appointees are organized alphabetically by surname along with the date of their appointment and the court to which they were appointed.

(We are aware that subsequently some of these judges have retired, stepped down, or been promoted, but we are interested in their first appointment within the 1989 to 2003 time frame).

Please complete a separate survey for each judge with whom you are familiar (or as many as your time permits-- all responses are appreciated). You will be given an opportunity to do another survey at the end of this survey and we encourage respondents to choose names from various places on the list.

(You can also complete more surveys at your convenience by clicking on the survey link in the email that you received inviting you to participate).

- 1) Please select one of the federal judicial appointees from B.C. from the drop-down menu below.
 - 2) If you are not familiar with any of the appointees or do not wish to provide information please select "No Appointee" at the very bottom of the list.
 - 3) After your selection, be sure to click "next" on the bottom of the page to proceed.
- Click on this drop- down menu for appointees
[list of appointees]

Part B: Perceptions of Appointees

These questions ask about your perception of the appointee prior to his or her appointment.

B.1. Notwithstanding the justice's performance on the bench to date, at the time of the appointment how would you have rated the candidate based on such criteria as "professional competence and experience" (proficiency in the law, reputation, communication skills and so on), "personal characteristics" (integrity, fairness, and so on) and "social awareness" (community service, appreciation of social issues, and so on)?

Please answer only if you have a strong, meaningful and objective recollection of the candidate's skills and reputation prior to appointment.

| | Poor | Fair | Good | Very Good | Outstanding |
|--------------------------|------|------|------|-----------|-------------|
| Professional Competence | | | | | |
| Personal Characteristics | | | | | |
| Social Awareness | | | | | |
| Overall | | | | | |

B.2. If you know that the appointee subsequently was given an administrative promotion (to Associate Chief or Chief Justice) and/or was promoted to the appellate level, how would you have rated their performance prior to their promotion based on such criteria as "professional competence and experience" (proficiency in the law, reputation, communication skills and so on), "personal characteristics" (integrity, fairness, and so on) and "social awareness" (community service, appreciation of social issues, and so on)?

Please answer only if you have a strong, meaningful and objective recollection of the candidate's skills and reputation prior to promotion.

| | Poor | Fair | Good | Very Good | Outstanding |
|--------------------------|------|------|------|-----------|-------------|
| Professional Competence | | | | | |
| Personal Characteristics | | | | | |
| Social Awareness | | | | | |
| Overall | | | | | |

Part C: Political Background

These questions ask about the appointee's political background prior to appointment.

C.1. Did the judicial appointee have political affiliations with a FEDERAL political party within approximately the 5 years prior to appointment? Please check all that apply.

Unsure

No political activity

Minor constituency work

Fundraising

Executive member (local, provincial or national level)

Senior election campaign and/or leadership campaign member

Ran for political office

C.1. a) If you checked any political activities in Question 1, please specify for which federal party.

(Note: if the appointee was active for more than one federal political party, please indicate this in Question 3-- General Comments).

Reform/ Alliance

PC

Liberal

NDP

Bloc Quebecois

C.2. Did the judicial appointee have any political affiliation with a PROVINCIAL political party within approximately the last 5 years prior to appointment? Please check all that apply.

Unsure

No political activity

Minor constituency work

Fundraising

Executive member at the local or provincial level

Senior election campaign and/or leadership campaign member

Ran for political office

C.2. a) If you selected any political activity in Question 2, please specify for which party:

(Note: if the appointee was active for more than one provincial party, please indicate this in Question 3-- General Comments).

PC

Liberal

NDP

Parti Quebecois

C.3. Contextual commentary about the candidate's political participation prior to appointment. (Optional)

Part D: Social and Professional Networks

These questions ask about the appointee's social and professional networks prior to appointment.

D.1. Did the judicial appointee have any family or close social relationships with party officials from the federal political party that appointed them? Please check all that apply.

(Note: social connections would include things like close personal friendships or being former classmates of each other in school).

Unsure

No family or close social relationship

Family or close social connections with federal cabinet minister

Family or close social connections with local Member of Parliament (if MP from party of appointment)

Family or close social connections with executive member at local, provincial or national level of federal party of appointment

Other social connections or additional information (optional)

D.2. Did the appointee have any close business or professional relationships with party officials from the federal party that appointed them? Please check all that apply.

(Note: professional connections would include working closely in the same firm or professional organization, or being business partners or clients of one another.)

No professional connections

Close professional relationship with federal cabinet minister

Close professional relationship with local Member of Parliament (if MP from party of appointment)

Close professional relationship with federal party executive member at the local, provincial or national levels of party of appointment.

Other professional connections or additional information (optional)

D.3. If you are aware of any close family, social or professional relationships that the appointee had with senior party officials from one of the federal opposition parties at the time of appointment please describe briefly.

Part E: Additional Information

These questions ask generally about how the judicial appointment process works in practice.

If you have previously answered this part after completing a survey about another appointee please click "exit this survey" on the top right of your screen.

You will then be taken to the beginning of the survey for an opportunity to enter information about another appointee.

E.1. Based on any personal experiences that you may have had with the judicial appointment system (such as being a candidate or a reference) or based on your knowledge of the legal community and the appointment process, how important are political connections to being given a judicial appointment by the federal government?

Political Connections: Unimportant (1) (2) (3) (4) (5) Very Important

E.2. Based on any personal experiences that you may have had with the judicial appointment system (such as being a candidate or a reference) or based on your knowledge of the legal community and the appointment process, how important are social or professional connections to being given a judicial appointment by the federal government?

Social and professional connections: Unimportant (1) (2) (3) (4) (5) Very Important

E.3. Please provide any information that may help illuminate how the federal judicial appointment system works in practice.

*E.4. To help us compare the federal appointment system with the appointment system in your province for s.92 (provincial) court judges, please indicate how important political connections are to being appointed a provincial court judge.
Political connections (provincial court appointees):*

Unimportant (1) (2) (3) (4) (5) Very Important

*E.5. To help us compare the federal appointment system with the appointment system in your province for s.92 (provincial) court judges, please indicate how important social or professional connections are to being appointed a provincial court judge.
Social or professional connections (provincial court appointees):*

Unimportant (1) (2) (3) (4) (5) Very Important

E.6. Please provide commentary on how the provincial appointment system works in practice (feel free to compare to the federal appointment system if you wish).

[Note: we are aware of the formal rules of the appointment processes, so we are particularly interested in how the system works "on the ground"]