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Appointment of Thomas A. Cromwell to the Supreme Court of Canada^{*}

Peter W. Hogg^{**}

I. INTRODUCTION

When I was asked to prepare a paper on the process for the appointment to the Supreme Court of Canada of Justice Thomas Cromwell, it was assumed that the process would include a public hearing by a parliamentary committee in which the nominee would appear publicly before the committee, would make a statement to the committee and would respond to questions by members of the committee. This was the big innovation in the process of appointing Justice Marshall Rothstein to the Court in 2006.¹ What happened, however, was that the projected parliamentary hearing for the Cromwell appointment was delayed by the dissolution of Parliament, an election and a prorogation of Parliament; and eventually the government decided to appoint Justice Cromwell without holding the parliamentary hearing. However, it is still the policy of the Conservative government of Prime Minister Stephen Harper — and it is a policy that is likely to be followed by successor governments — to hold a parliamentary hearing on future nominations to the Court. Therefore, it still seems worthwhile to reflect on the process of appointment, including the usefulness of the parliamentary hearing, as well as describing the process that was actually followed for the Cromwell appointment. That is what this paper attempts to do.

^{*} I disclose that I was retained by the Commissioner for Federal Judicial Affairs to provide advice and assistance in the process of appointment as needed, and to participate in the hearing before the parliamentary committee. Since no hearing took place, there was little call for my services. This paper was written long after the retainer ended, and, to the extent that the paper goes beyond the recitation of facts, it represents only my personal views and not those of the Commissioner or anyone else in the Government of Canada.

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¹ See P.W. Hogg, “Appointment of Justice Marshall Rothstein to the Supreme Court of Canada” (2006) 44 Osgoode Hall L.J. 527. Some of the points made in that article are repeated in this one.

II. THE POWER OF APPOINTMENT

The appointment of judges to the Supreme Court of Canada is provided for in the *Supreme Court Act*.² It is not provided for in the *Constitution Act, 1867*,³ section 96 of which provides only for the federal appointment of judges to the provincial superior, district and county courts. That is because no Supreme Court was established in 1867. The framers were content for the Privy Council to continue to serve as the final court of appeal for Canada. However, by section 101 of the *Constitution Act, 1867*, they did provide a power for the Parliament of Canada to establish a “general court of appeal for Canada”. That was done in 1875, when the original *Supreme Court Act* was enacted, establishing the Supreme Court of Canada.⁴ The Court originally had only six judges; a seventh was added in 1927 and two more were added in 1949 to bring the Court up to the current complement of nine.⁵

All that the *Supreme Court Act* says about the appointment of judges is that the appointments are to be made by “the Governor in Council”.⁶ That term normally means the cabinet. In the case of judges of the superior courts of the provinces, section 96 of the *Constitution Act, 1867* gives the appointing power to “the Governor General” and the convention that has developed is that Chief Justice appointments are made on the recommendation of the Prime Minister and puisne judge appointments are made on the recommendation of the Minister of Justice. In the case of the Supreme Court of Canada, however, it seems likely that the Prime Minister is normally involved in the appointments of the puisne judges as well as the Chief Justice. In the case of the appointment of Justice Rothstein, Prime Minister Harper made clear that the final decision was going to be made by him, and (after the public hearing) it was made by him. In the case of the appointment of Mr Justice Cromwell, the announcement of his nomination was made in a joint statement by Prime Minister Harper and Justice Minister Rob Nicholson⁷ and the announcement

² R.S.C. 1985, c. S-26, s. 4.

³ 30 & 31 Vict. (U.K.), c. 3.

⁴ *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11.

⁵ The history is related in P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Carswell, 2007, annually supplemented), ch. 8.

⁶ *Supra*, note 2, s. 4.

⁷ Press Release, Office of the Prime Minister (September 5, 2008).

of his appointment (including the reason for not holding a public hearing) was made by Prime Minister Harper alone.⁸

III. THE PROCESS OF APPOINTMENT BEFORE 2004

The *Supreme Court Act* makes no provision for ratification of appointments by the Senate or House of Commons or by a legislative committee. And, until 2004, no aspect of the appointment process was public. It was understood that the Minister of Justice would consult with the Chief Justice of Canada and with the Attorneys General and Chief Justices of the provinces from which the appointment was to be made,⁹ and with leading members of the legal profession, but this was all informal and confidential.

This informal process seems to have been very effective in winnowing out unsuitable appointees, and successive Canadian governments, regardless of party, have consistently made appointments to the Court of people that were regarded by the legal profession as fully worthy of the appointment. In particular, successive governments have not seen appointments to the Court as an opportunity to reward faithful supporters of the party in power or as an opportunity to pack the Court with judges who will render decisions pleasing to the party in power. Obviously, governments have welcomed the praise that their Supreme Court appointments have attracted. It has been good politics to make good appointments.

IV. THE APPOINTMENT OF JUSTICES CHARRON AND ABELLA IN 2004

In 2004, Irwin Cotler, who was the Minister of Justice in the Liberal government of Paul Martin, introduced a more transparent process to find the replacements for Justices Louise Arbour and Frank Iacobucci (both from Ontario), who retired in that year. He appeared before the Standing Committee on Justice of the House of Commons and presented the names of his nominees for the replacements, who were Justices Louise Charron and Rosalie Abella of the Court of Appeal of Ontario, and he answered questions posed to him by the Committee about the

⁸ Kirk Makin, "Top-court appointment bypasses review process", *The Globe and Mail* (December 22, 2008) [hereinafter "Makin"].

⁹ The practice is for three judges to be appointed from Quebec (a requirement of the *Supreme Court Act*), three from Ontario, two from the Western provinces and one from the Atlantic provinces. When a judge retires or dies, a replacement is found from the region that the former judge came from.

search process that had been gone through and about the qualifications of the nominees. The nominees themselves did not appear before the Committee. After the Minister's appearance, the two nominees were appointed.

V. THE APPOINTMENT OF JUSTICE ROTHSTEIN IN 2006

Justice John Major (from Alberta) retired from the Supreme Court in 2005, and the Minister of Justice (still Mr. Cotler) announced a new and more elaborate process that would be used to fill the vacancy. The new process would start with the Minister's normal informal consultations with the Attorneys General, Chief Justices and leading members of the legal profession. The Minister would then submit a short list of five to eight candidates to an Advisory Committee composed of a Member of Parliament (or Senator) from each recognized party in the House of Commons, a nominee of the provincial Attorneys General, a nominee of the provincial law societies and two prominent Canadians who were neither lawyers nor judges. They would review the files of the candidates, and provide the Minister with a short list of three names from which the appointment would be made. All of this would take place on a confidential basis. However, the final step would be public. That would be the appearance by the Minister of Justice (but not the appointee) before the Standing Committee on Justice to explain the selection process and the qualifications of the person selected.

This process was duly commenced to fill the Major vacancy. The Minister appointed an Advisory Committee and submitted six names to the Committee. The Committee reviewed the names and came back with a short list of three names. But, on November 29, 2005, before the government had made the final selection, it was defeated in the House of Commons and Parliament was dissolved for the election that took place on January 23, 2006. In that election, the Liberal government of Paul Martin was defeated, and the Conservative government of Stephen Harper was installed. One of the policies of the new government was a public, parliamentary interview process to review nominations to the Supreme Court of Canada.

The new Conservative Minister of Justice, Vic Toews, was left with the unfinished business of finding a successor to Justice Major. Instead of starting the entire process anew, the Minister decided to work from the short list provided by the Advisory Committee appointed by the previous

government. The Prime Minister, no doubt in consultation with the Minister of Justice, chose one candidate from that list. That candidate then had to submit to the new public interview process. The government, with the agreement of all the party leaders, established an “Ad Hoc Committee to review a Nominee for the Supreme Court of Canada”. The Committee consisted of 12 MPs drawn from each party in proportion to their standings in the House of Commons (five Conservative, four Liberal, two Bloc Québécois, one NDP). The Minister of Justice, who was one of the Conservative members, was the chair of the Committee. His predecessor, Mr. Cotler, was one of the Liberal members.

The Committee held a three-hour televised hearing in the Reading Room, Centre Block, Parliament Buildings, on Monday, February 27, 2006. The name of the nominee, Justice Marshall Rothstein of the Federal Court of Appeal, had been made public the previous Wednesday, and members of the Committee had been supplied with a dossier which included his curriculum vitae, a list of all of his decisions, four sample opinions in full, a list of his publications and four sample publications in full. The hearing took from 1:00 p.m. to 4:30 p.m. It opened with a short introduction of the nominee and the process by the chair (the Minister), then with opening remarks by me (legal counsel to the Committee), then with opening remarks by Justice Rothstein, then with questions from the members of the Committee, then with a closing statement by me and a closing statement by the chair. During the question period, Justice Rothstein was asked approximately 60 questions in two rounds of questioning (three per member on the first round, two per member on the second round); and the Committee elected not to continue for a third round.

The Committee did not prepare a written report. The proceedings were watched on television by the Prime Minister, and no doubt the Minister of Justice reported to him. As well, at the conclusion of the hearing, the Minister invited the members of the Committee to communicate their views directly to the Prime Minister. The result was a foregone conclusion in that the nominee’s credentials, his statement to the Committee and his answers to questions left no doubt as to his suitability for appointment, and the reaction of the Committee members left no doubt that they would advise the Prime Minister to proceed with the appointment.

The Prime Minister had announced that he would make his decision the following Wednesday, March 1, two days after the hearing. And on that day he announced in a written statement that he had selected the

nominee and would recommend him for appointment by the Governor in Council. Justice Rothstein was duly appointed, and was sworn in as a justice of the Supreme Court of Canada on March 6, 2006.

VI. THE APPOINTMENT OF JUSTICE CROMWELL IN 2009

Justice Michel Bastarache (from New Brunswick) retired from the Supreme Court in 2008, and, after the announcement of the retirement, in May 2008 Justice Minister Rob Nicholson announced that he would carry out the normal consultations in the Atlantic provinces, compile a list of names and submit it to a selection panel comprised of five members of Parliament — two from the government caucus and one from each of the three opposition parties. The panel would provide a confidential list of three names to the Prime Minister. The person chosen by the Prime Minister would then appear before a parliamentary committee for questioning by members of Parliament.¹⁰ However, on September 5, 2008, Prime Minister Harper and Justice Minister Nicholson jointly announced that the work of the selection panel was “suspended” (terminated would have been more accurate) “because of Opposition objection to the panel’s composition”, and they announced that Justice Thomas A. Cromwell, a judge of the Court of Appeal of Nova Scotia, would be the government’s nominee for the appointment.¹¹ However, the Prime Minister said that “an appointment will not be made until Mr Justice Cromwell has an opportunity to answer questions from an ad hoc all-party committee of the House of Commons”.¹²

Two days later, Prime Minister Harper called an election and Parliament was dissolved. The election was held on October 14, 2008, and Prime Minister Harper was re-elected, although still with a minority government. On November 18, Parliament opened, but, on December 4, Parliament was prorogued until January 26, 2009. During the period of prorogation (on December 21, 2008), the Prime Minister announced that Justice Cromwell would be appointed immediately without the scrutiny of a parliamentary committee. By this time, the Supreme Court had been

¹⁰ The process leading to the appointment of Cromwell J. is described in Philip Slayton, “Ottawa’s Best-kept Secret?”, *Maclean’s* (January 20, 2009), at 20 [hereinafter “Slayton”].

¹¹ Press Release, Office of the Prime Minister (September 5, 2008). According to Slayton, *id.*, the opposition members of the panel objected to the fact that the Government members of the panel were Cabinet ministers who, it was claimed, would not approach their task with the independence of regular members of Parliament.

¹² Press Release, *id.*

without its full complement for six months, which is a problem for a nine-judge court that usually sits as a full panel of nine. The Prime Minister explained the immediate appointment by saying that “the Court must have its full complement of nine judges in order to execute its vital constitutional mandate effectively”. He also explained that this appointment was an exception, and that future Supreme Court nominees would undergo parliamentary scrutiny.¹³ Justice Cromwell was duly appointed and was sworn in as a justice of the Supreme Court on January 5, 2009.

VII. THE PARLIAMENTARY HEARING

1. Should It Continue?

Although no parliamentary hearing was held on the Cromwell nomination, that omission was caused by the special difficulties of the minority Parliament in 2008, and, as I have related, the Prime Minister said that future Supreme Court nominees would undergo parliamentary scrutiny. So it is clear that, for the Conservative government, parliamentary hearings will continue to be part of the Supreme Court appointment process. If the government were to change before the next Supreme Court vacancy, it is likely that a Liberal government would also hold hearings. As explained, the Liberal government had moved a long distance in that direction before it lost office, and the Liberal opposition had participated fully and constructively in the Rothstein hearing. It would be politically difficult for a federal government to revert to a more confidential process, and I think it would be a mistake to do so.

I will discuss the Rothstein hearing in more detail later in this paper, but it certainly established that Canadian parliamentarians can conduct a civil hearing that poses no danger of politicizing the judiciary or of embarrassing the nominee. It is true that in 2006 the stars were particularly well aligned for a peaceful hearing since the nominee had been drawn by a Conservative government from a short list prepared by a committee set up by a Liberal government and on which all parties were represented. But the political parties in Canada, unlike the Republican and Democratic parties in the United States, have not defined themselves primarily by reference to issues that have been decided by their courts, such as abortion, same-sex marriage, religion in schools and due process

¹³ Makin, *supra*, note 8.

protections for persons charged with crime. Nor have Canadian Prime Ministers, unlike the American Presidents (who at least on the Republican side, are perfectly open about their intentions),¹⁴ ever made any effort to pack the highest court with their supporters. Americans would no doubt be surprised to learn that the Canadian judges do not display the ideological voting patterns of the judges of the American Supreme Court, and that the political party of the appointing Prime Minister has little or no correlation with the voting patterns of the Canadian judges.¹⁵ In the case of Justice Cromwell, for example, he had been appointed to the Court of Appeal of Nova Scotia by the federal Liberal government. The fact that he was then appointed to the Supreme Court by a Conservative government surprised no one and occasioned no public comment. Canadian politicians may be no more virtuous than American politicians, but when strong candidates are proposed for appointment there is simply no reason for the Canadian hearings to take on the partisan and rancorous atmosphere of American confirmation hearings.

Canadian hearings are advisory only, because neither the *Supreme Court Act* nor the *Constitution* provides any formal role for Parliament. This lowers the temperature in Canada, because in the end the Government has the power, if it chooses, to insist on the appointment of its nominee. In the United States, by contrast, the Constitution requires the appointment of a Supreme Court justice to be made by the President only with the advice and consent of the Senate.¹⁶ The Senate can block the appointment, and, for the reasons already given, the Senators who do not belong to the President's party often perceive that they have a political incentive to strive mightily to do so. Moreover, in the United States, unlike Canada, there does not seem to be an institutionalized process of consultation administered within the federal government to ensure that nominations are always of high quality, so that in some cases

¹⁴ The original court-packing plan was devised by a Democrat, President Franklin D. Roosevelt, to overcome the destruction of his New Deal at the hands of an ultra-conservative Supreme Court, which believed that measures such as minimum wages or limitations on hours of work, let alone the New Deal programs to combat the Depression of the 1930s, were contrary to the Bill of Rights. After the swing judge on the nine-man Court changed his mind in 1937, the so-called Lochner era ended without the implementation of the expansion of the Court that had been proposed by the President. A period of judicial restraint ensued, but decisions in the 1960s and 1970s on issues such as abortion, contraception, pornography, desecration of the flag, religion in the schools and rights of criminal defendants raised the ire of conservatives, introducing a new round of hostility to the Court and open demands for the appointment of more conservative judges.

¹⁵ B. Alarie & A. Green, "Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada" (2009) 47 S.C.L.R. (2d) 475.

¹⁶ *Constitution of the United States*, Art. II, s. 2(2).

there is legitimate concern about the quality of a Presidential nominee. When this occurs, Senatorial opposition becomes more bipartisan, and this can lead to the defeat or (more usually) the withdrawal of the nomination.

The prospect of a public hearing operates as a deterrent to a government that is considering making a partisan appointment of a poorly qualified person. This has not been necessary in Canada in the recent past, where the diligence of the Government of Canada's routine informal process of consultation has yielded consistently strong appointments. It is to be hoped that Canadian governments will continue to believe that it is good politics to make good appointments. Presumably, as well, governments will not care so intensely about the decisions of the Court that they will want to influence future decisions through the appointment process. I have already made the point that the "wedge issues" in Canadian political debate tend not to be decisions of the Supreme Court of Canada. As well, we have a weaker form of judicial review in Canada under the *Canadian Charter of Rights and Freedoms*¹⁷ than the strong form of judicial review in the United States. Judicial decisions striking down laws on Charter grounds usually leave room for a legislative response and usually get a legislative response that accomplishes the objective of the law that was struck down.¹⁸ Court packing and court bashing are not as necessary in Canada as they are perceived to be by American politicians.

If the impulse to hold public hearings to interview Supreme Court nominees does not stem from any concerns about the quality of the people nominated or the suspicion of court-packing motives on the part of government, what is the basis for it? I think it is really the democratic notion that important decisions should be transparent. Decisions that are taken in secret, based on confidential consultations, will inevitably be less acceptable than those that are more open. Based on comments in the press and many comments made to me personally after the hearing for Justice Rothstein, lay people as well as lawyers were interested to receive some real information about the work that Supreme Court judges do,

¹⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

¹⁸ The Charter explicitly permits legislatures to enact limits on Charter rights (s. 1) and even to use a notwithstanding clause to override Charter rights (s. 33). The common phenomenon of Charter decisions being followed by legislative sequels is the subject of a considerable literature focusing on the idea of "dialogue" between courts and legislatures. For a recent contribution, see P.W. Hogg, A.A. Bushell Thornton and W.K. Wright, "Charter Dialogue Revisited — Or Much Ado About Metaphors" (2007) 45 *Osgoode Hall L.J.* 1.

including the way in which cases come to the Court, the materials that have to be studied for each case, the hearing at which all parties' arguments are heard and tested, and the way in which judges try to reach decisions that are faithful to the law and the facts. It was also interesting to see a judge answer questions about his career and his work, which sent a reassuring message about the industry, ability and integrity of the person who was about to join the Court.¹⁹

People are interested in appointments to the Court. This is demonstrated by the experience of the existing judges, each of whom on appointment was bombarded with questions and requests for interviews by the media. There is much to be said for getting this over in the form of a structured public hearing before appointment. The hearing, which is broadcast on television and reported on by the print media, is inevitably more thorough and informative than the story that any one journalist can realistically expect to obtain on his or her own.

In summary, I think that future public hearings will undoubtedly carry significant benefits in helping Canadians to understand the appointment process and the judicial function and to learn about the qualifications of the person nominated for appointment. And, although nominations to the Canadian Court have in the past been of well-qualified people, I do not dismiss the value of the hearing as a deterrent to the nomination of someone who is not well qualified. The retention of counsel for the committee, the development of informal guidelines as to what can and cannot be answered by the nominee, and the willingness of committee members to respect the guidelines, as well as the dignity and privacy of the nominee, are features of the 2006 process that should be able to be repeated in future. With these understandings in place, judicial independence is not threatened by public hearings.

2. What Form Should the Hearing Take?

I have already briefly described the form that the Rothstein hearing took. It was by no means all questions and answers, since the Chair (the

¹⁹ It is possible to exaggerate the transparency of a process that culminates in a public hearing. The candidate does not know, and the hearing will not disclose, what considerations moved the government to choose the candidate over other well qualified persons. However, each appointment will have unique elements, and considerations of practicality and confidentiality probably make it unrealistic for public information to go beyond information about the role of judges on the Court, the search process and the qualifications of the particular candidate. And these, I suggest, are the truly important matters.

Minister of Justice) made brief opening and closing statements, I made an opening statement and a short closing statement. Justice Rothstein made an opening statement. However, the bulk of the time was occupied by questions from the committee members and answers by Justice Rothstein.

The protocol followed by the Ad Hoc Committee was that the members of the Committee were free to *ask* any questions they wanted. My role was to provide guidance to the Committee as to the kinds of questions that could or could not be *answered* by the nominee. At the hearing, I made an opening statement to the Committee explaining what their role was and what were the appropriate limits of judicial speech. I then remained with the nominee at the hearing in case any questions arose that I could help with. (In fact, I was asked two questions by members of the Committee, one on practices in other Commonwealth countries, the other on the wisdom of a special constitutional court.)

The questions at the hearing ranged far and wide, but were always civil and respectful, and Justice Rothstein's courtesy and good humour kept it all very pleasant. He was adept at handling the questions. He was asked what he thought about expanding the Supreme Court to 11 members to allow more representation from the West. He replied that he would be in favour of it if he did not make it this time! Although the Committee members understood the limits of judicial speech, they could not resist asking some questions on top-of-mind policy issues, like crime in the cities, gun control and the elimination of poverty. And each time, Justice Rothstein said something about the validity of the concern and concluded by saying something like "that's your issue, not mine." I observed that, without exception, the questioner seemed perfectly happy with this response.

VIII. GUIDELINES FOR QUESTIONS AND ANSWERS

In my opening statement to the Rothstein parliamentary committee,²⁰ I attempted to describe the work that the Supreme Court does and the role of judges on the Court. Among other things, I pointed out that "In the appeals that reach the Supreme Court of Canada, there is the further complication that the law itself is usually unclear." In that case, "the judges have to decide what the law is, as well as how it applies to the

²⁰ The full text is to be found as an appendix to Hogg, *supra*, note 1.

facts of the case”. I suggested some guidelines about questions that the nominee could or could not answer.

One category of questions that I said the nominee could not be expected to answer were these:

He cannot express views on cases or issues that could come before the Court. He cannot tell you how he would decide a hypothetical case. He might eventually be faced with that case. For the same reason, he cannot tell you what his views are on controversial issues, such as abortion, same-sex marriage or secession. Those issues could come to the Court for decision in some factual context or other. Any public statements about the issues might give the false impression that he had a settled view on how to decide those cases — without knowing what the facts were, without reviewing all the legal materials, and without listening to and weighing the arguments on both sides.²¹

Phillip Slayton, who described me as “lecturing the committee about what it should and should not do”, criticized this particular restriction on the basis that: “These questions [about cases or issues that could come before the Court] were, of course, the very ones that most people wanted answered.”²² I doubt that “most people” wanted answers to questions that might ultimately come before the Court, since it is rather obvious that a judge must not give the impression of having predetermined the answer to questions that might come to him or her later for decision. As John Whyte commented,²³ the answer to such questions “might lead to the inference that the nominee was making decision commitments in exchange for approval, which would be a stark abridgement of the rule of law”. It would also be an abridgement of judicial independence if a judge was not free to approach every case coming before him or her with an open mind and listen attentively to the arguments on both sides of the case. It may be that Mr. Slayton did not intend his criticism to be taken seriously; in any event, it should not be taken seriously.

No one on the committee asked Justice Rothstein a question about a hypothetical case or issue that might come before him on the Court.

The only other category of question that I said could not be answered is the question of why he had, in his previous life as a judge, decided a particular case in a particular way. I explained that a judge is limited to his or her written reasons for judgment in explaining a decision that he or

²¹ *Id.*

²² Slayton, *supra*, note 10, at 21.

²³ J.D. Whyte, “The Supreme Court from the Outside” (2006) 13 Policy Dialogue (Sask. Institute of Public Policy) (Fall 2006), at 14 [hereinafter “Whyte”].

she has reached; a judge cannot supplement the written record with oral explanations. No one on the committee asked this category of question either.

On the positive side, I suggested that the committee “might want to explore” the nominee’s personal qualities of wisdom, fairness, compassion, diligence, open-mindedness and courtesy. Professor Whyte²⁴ interpreted my remarks as excluding the exploration of other issues than these personal qualities. But in fact there were no restrictions of any kind on *questioning*, and, in the realm of *answering*, I had no intention of excluding other matters, and no one on the Committee interpreted my remarks in that fashion. Virtually none of the 60 questions directly addressed any of the personal qualities that I had listed, although no doubt Committee members drew some conclusions about those personal qualities from the way in which Justice Rothstein answered questions on other topics. As explained earlier, the questions ranged over a broad range of topics. These included a number of questions about his judicial philosophy and his ideas of legitimate legal reasoning, for example, his attitude to criticism of the activism of the current Supreme Court. And all of these questions were courteously and carefully answered by the nominee. The only questions he did not answer — and he did this very graciously and to the evident satisfaction of each questioner — were questions about appropriate public policies on crime, gun control and poverty, which were clearly matters for the legislature, not for judges.

Michael Plaxton²⁵ made a similar criticism to Professor Whyte. He also interpreted my remarks as intending to limit the questioning to the list of personal qualities that I claimed a judge should possess, which he described as “a politically and morally thin conception of the sort of person the committee should seek out”.²⁶ However, Professor Plaxton implicitly acknowledged that no one on the Committee had recognized any limitation on the questioning, because he went on to quote from the questions posed by the committee that he thought were intended to draw out the “political and moral values” that Justice Rothstein would bring to his decision-making on the Supreme Court. He then moved on to criticize the answers offered by Justice Rothstein, who implicitly denied that his personal philosophy would influence his decision-making and expressly denied “that judges should be advancing the law with a social

²⁴ *Id.*

²⁵ M. Plaxton, “The Neutrality Thesis and the Rothstein Hearing” (2007) 58 U.N.B.L.J. 92.

²⁶ *Id.*, at 96.

agenda in mind”.²⁷ According to Professor Plaxton, the members of the Committee were also at fault in that “they simply chose not to require anything more than superficial answers” to their questions about judicial method.²⁸ By taking this approach, “the Committee quietly endorsed the neutrality thesis, acting as though the judge’s political stances self-evidently have no bearing on adjudication, even in constitutional cases”; the result was a “flawed process” that “positively misled Canadians about the nature of the judicial function”.²⁹

In somewhat similar vein, Professor Whyte was disappointed that there was no discussion at the Rothstein hearing of “the constitutional philosophy or the moral authority that will lie behind his judicial development of constitutional meaning”, “questioning that might have illuminated constitutional philosophy”, “what values Justice Rothstein saw the constitution bringing to Canadian political society”, “explorations of judicial philosophy and constitutional values” and “theories of interpretation with respect to a national constitution”.³⁰ I have already made the point that there was nothing in the proceedings to restrict such questions, and in fact a number of questions dealt with his approach to deciding cases. In thinking about why these kinds of questions were not properly explored, we have to remember that a parliamentary committee is composed of people of various backgrounds and interests, many of them without a sophisticated understanding of constitutional law, and it would not necessarily occur to them that these questions were a valuable way of assessing credentials for a Supreme Court appointment.³¹ As well, it is worth remembering that the majority of the Court’s case load is non-constitutional law: criminal law, administrative law, civil procedure, remedies, contract, tort, property, tax, and so on. These cases may not be as important to the public policy of the country as constitutional cases, but the parliamentary committee is aware that the judges have to decide the non-constitutional cases wisely too. That is why, when you come right down to it, it is the personal qualities of wisdom, fairness, compassion, diligence, open-mindedness and courtesy that are the most

²⁷ *Id.*, at 101.

²⁸ *Id.*, at 103.

²⁹ *Id.*

³⁰ Whyte, *supra*, note 23, saying that “Professor Hogg set tight restrictions on any questions that might have illuminated constitutional philosophy”, rendering the hearing an “empty process”.

³¹ Irwin Cotler, M.P. was on the committee and he is a former professor of constitutional law at Osgoode Hall Law School and McGill University (as well as a former Minister of Justice). But he was only entitled to one-twelfth of the questions, and he did not ask any of the questions Professor Whyte was looking for.

important things which, on top of a distinguished legal career, qualify a person for the Supreme Court of Canada.

The criticisms of the hearing process by Professors Whyte and Plaxton, although strongly worded, were not, I am sure, intended to drive the country away from holding public hearings. They just wished that the questions and answers had been more penetrating and frank in acknowledging that judges make new law when they interpret an instrument as open-ended as a charter of rights, and that in hard cases a judge's moral and political views are bound to have an influence on decision-making. These points, however commonplace they have become to lawyers (and especially to academic lawyers), are subtle ones that are not easy to bring out in a public, parliamentary hearing without giving the false impression that the Court is just another branch of government where policy is the driving influence. Stephen L. Carter, a professor of law at Yale University, commenting on the American nomination hearings, has suggested that: "Every time we claim to be focusing the nation's attention on crucial questions of constitutional philosophy, what we really do is reinforce the notion that the justices are somehow there to do 'our' bidding, to reflect 'our' values in their votes."³² Justice Rothstein's insistence that he, like his fellow judges, felt constrained by legal texts, precedents and the established principles of the legal system was also articulating an important point about the judicial function. Judges are not supposed to decide cases according to their reading of public opinion, or their own personal predilections, and they must do their best to keep an open mind on each case that comes before them. That understanding may be unsophisticated, even "superficial", but it is surely a useful part of a public assessment of the qualities that should be possessed by a judge of the Supreme Court.

IX. CONCLUSION

The insertion of open parliamentary scrutiny at the end of what is a careful, but confidential, process of finding people to serve as judges of the Supreme Court of Canada is likely to continue for future appointments, despite its suspension for the appointment of Justice Cromwell. The process gives the public some insight into the work of the Court and the role of the judges, and introduces the nominee to the public. It is a

³² Stephen L. Carter, "Let the Nominee Stay Home", *New York Times* (May 10, 2009), at WK9.

safeguard against the nomination of a poorly qualified person, although past experience suggests that this is less likely to occur here than it is in the United States. Nor is the partisan rancour that now characterizes nomination hearings in the United States likely to disfigure Canadian hearings, because the issues that divide Canada's political parties do not include the decisions of the Supreme Court, and partisan squabbles can safely be set aside for nomination hearings in Canada. I believe that the civility and courtesy that marked the hearing for the nomination of Justice Rothstein would also have characterized a hearing for Justice Cromwell had one been held.