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## *Commentary*

# A NEW ERA IN THE SELECTION OF SUPREME COURT JUDGES?©

BY JACOB ZIEGEL\*

It was an adroit move on Prime Minister Stephen Harper's part to set up an ad hoc House of Commons committee to interview Justice Marshall Rothstein before confirmation of his appointment to the Supreme Court of Canada by the newly elected Conservative government. The selection procedure for appointments to the Supreme Court was not an issue during the federal election campaign; nevertheless, the Liberals and the Conservatives knew that an early decision would have to be made about Justice John Major's successor in the Supreme Court.

Justice Minister Irwin Cotler had paved the way in the summer of 2005 by establishing an advisory committee of nine members and asking the committee to cull a shortlist of three names from a list of eight potential candidates handed to them by the minister. The committee submitted its shortlist just before the election was called on 28 November 2005. After forming a government, Prime Minister Harper could have struck a new advisory committee to show that a new broom sweeps clean; he could also have introduced an entirely new selection procedure. Wisely, he decided there was insufficient time for a fresh start. According to newspaper reports, he accepted the shortlist prepared by the advisory committee established by Cotler, and selected as his first choice Justice Marshall Rothstein, a member of the Federal Court of Canada.

Harper's masterful stroke was the decision to ask an all-party committee of the House of Commons to publicly interview the candidate before the government confirmed his appointment.

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Previously, the Conservative members of the House of Commons Justice Committee had supported a system of parliamentary scrutiny of Supreme Court nominees, but this was premised on a different set of circumstances. It did not envisage a separate role for an advisory committee, which included a representative from each of the House of Commons' political parties, to compile a shortlist of candidates. Harper's decision to proceed with a public hearing gave him the best of both worlds. By convening a public hearing, he honoured his party's commitment to transparency and earned plaudits from the media. By selecting a candidate from the advisory committee's shortlist he made sure that he was ideologically comfortable with the candidate and that the Liberals could not oppose the candidate since he was produced by a selection procedure they had themselves initiated. Justice Rothstein's well-known conservative legal philosophy nicely mirrored Harper's conception of the Supreme Court as an interpreter of the law and not as a social reformer. It did no harm either that the bar held Justice Rothstein in very high regard, not only for his competence and conscientiousness but also for his civility to counsel appearing before him.

Harper's announcement galvanized the Canadian media, who were familiar with the intensive grilling that nominees to the U.S. Supreme Court are subjected to in hearings before the U.S. Senate Judiciary Committee.<sup>1</sup> Knowing, too, how hostile Conservative members of the House of Commons were to activist judges, the media may have anticipated some lively exchanges before the ad hoc committee. They were also aware that Chief Justice Beverley McLachlin was on record as strongly opposing public hearings of nominees to the Supreme Court of Canada, as were former members of the Supreme Court, both the present and earlier presidents of the Canadian Bar Association, and other senior members of the bar. These critics warned repeatedly that public hearings would politicize the Supreme Court and compromise its independence.

Happily, these misgivings turned out to be unfounded. There were no verbal fireworks to feed the media's appetite for confrontations

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<sup>1</sup> The hearings involving Justice Samuel Alito's nomination to the U.S. Supreme Court in the fall of 2005 will have refreshed their memories about just how intrusive those hearings could be.

and no angry exchanges.<sup>2</sup> The Rothstein hearing was a model of decorum and sobriety. The rules of procedure were laid out carefully at the beginning, and there was no grandstanding or self-promotion by individual members of the committee. Few of the questions asked could be construed as likely to compromise Justice Rothstein's role as a future member of the Supreme Court, and he deftly turned aside those that might have done so without rancour or ill feeling. The judge was in fact the star of the hearing. He charmed the members of the committee and the large television audience with his informality, self-deprecating sense of humour, and willingness to explain his judicial philosophy in simple terms which were readily comprehensible even to non-lawyers. His performance showed that future candidates for appointment to the Supreme Court have nothing to fear from a public hearing and that the Court itself can only benefit from a better appreciation by Canadians of its role as the final adjudicator of Canada's public and private law values.

#### I. EARLIER HISTORY OF SUPREME COURT APPOINTMENTS

However, my sentiments may not satisfy the skeptics who are convinced that Canada has embarked on a course of action that can only harm the Supreme Court's independence and impeccable reputation. It is necessary therefore to recapitulate the sequence of events that led to the Rothstein hearing and to explain why the critics' concerns are ill founded.

Democratic countries in the Western hemisphere have adopted a variety of methods for selecting the members of their highest constitutional court or final appellate courts in civil and criminal appeals. Broadly speaking, these methods fall under one of the following heads: (1) appointment by the executive or constitutional head of government without recommendation from another agency (United Kingdom model before adoption of the *Constitutional Reform Act*

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<sup>2</sup> The whole hearing, which ran for some three hours, was televised live on the Cable Public Affairs Channel (CPAC) but, so far as I know, no official transcript has been made available for public distribution. Robert Blackwell, legal reporter for *The Globe and Mail*, kindly loaned me his videotape of about the first two hours of the hearing and I was able to persuade a former student, Carlin McGoogan (JD, University of Toronto 2005) to prepare what turned out to be a more than ample and very comprehensive summary.

2005); (2) appointment by the executive or constitutional head of government based on nomination by another agency (United Kingdom model after adoption of *Constitutional Reform Act 2005*, South Africa, and Israel); (3) nomination by the executive and confirmation by the legislature (U.S. Supreme Court model); (4) election by legislative bodies or by popular vote (German model with respect to the Federal Constitutional Court and widely adopted U.S. state model with respect to election of members of state supreme courts).

Canada's system of appointments to the Supreme Court falls into the first category and is inherited from the United Kingdom. Just as important, appointments to the Supreme Court are not formally enshrined in the *Constitution Act, 1982* but are governed by an ordinary act of Parliament, the *Supreme Court Act*, which was first adopted in 1875.<sup>3</sup> The *Supreme Court Act* provides that appointments shall be made by the Governor-in-Council. By convention, this has been interpreted to mean that appointments are made on the recommendation of the incumbent prime minister. There is no formal requirement that the prime minister must consult anyone before making a recommendation, and the prime minister is free to ignore whatever advice is given. There is little doubt that the prime minister's untrammelled power of appointment and the partisanship with which it was exercised was an important factor—perhaps the key factor—in explaining the generally low esteem in which the Supreme Court was held prior to the abolition of appeals from Canadian courts to the Privy Council in London in 1949.<sup>4</sup>

The quality of appointments has undoubtedly improved greatly since then, and the Court has rightly been lauded for its stellar performance since 1982 in interpreting the *Canadian Charter of Rights*

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<sup>3</sup> See now R.S.C. 1985, c. S-26 am. *Supreme Court Act*. There is however an unresolved difference of opinion among constitutional scholars whether ss. 41(d) and 42 of the *Constitution Act, 1982* have entrenched all or part of the *Supreme Court Act*. For details see Jacob S. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada" *IRPP Choices* 5:2 (June 1999) 3 at 18-19, online: Institute for Research on Public Policy <<http://www.irpp.org/fastrack/index.htm>> Given the importance of the question, it is surprising that the uncertainty is still not resolved.

<sup>4</sup> In Peter Russell's trenchant description, the Supreme Court before 1949 was "a thoroughly second rate institution and treated as such by the federal government." P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill, 1987) at 387.

and Freedoms.<sup>5</sup> Nevertheless, it would be misleading to suggest that all the appointments in the post-*Charter* era have been of top quality and have not been diluted by the personal predilections and political biases of prime ministers and their advisors.

## II. IMPACT OF THE CANADIAN CHARTER

This lack of accountability and transparency in the appointment process to the nation's highest court was bad enough before 1982, but in the eyes of many observers, it became totally unacceptable in the post-*Charter* era. The Supreme Court had become one of the most powerful courts in the Western hemisphere—more powerful, for example, in the scope of its jurisdiction than the U.S. Supreme Court. The Canadian Supreme Court has the final say on all aspects of Canada's constitutional life and maintains its ultimate adjudicative role in the criminal law sphere as well as in matters of private law, whether of federal or provincial origin. Though Canadian politicians and legal commentators were slow to appreciate the fact, it is now abundantly clear that the open-ended norms of the *Charter* require members of the Supreme Court to make critical policy decisions on questions affecting the conduct of Canada's political, economic, and social affairs. This means that selecting members of the Supreme Court involves finding candidates with the right intellectual and personal qualities, and then considering their constitutional philosophies in relation to the broad spectrum of issues likely to come before the Court.

Efforts to broaden the selection procedure for appointments to the Supreme Court had long preceded the adoption of the Canadian *Charter* as part of the package of constitutional amendments considered in the 1960s and 1970s. None of them bore fruit, however, and the challenge was taken up again in the early 1980s by committees of the Canadian Bar Association (CBA) and the Canadian Association of Law Teachers (CALT). Their concern was more about the merit of judicial appointees than about greater political accountability. Both organizations issued important reports in 1986.<sup>6</sup> Both reports contained

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<sup>5</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>6</sup> For details see Jacob S. Ziegel, "Federal Judicial Appointments in Canada: The Time is Ripe for Change" (1987) 36 U.T.L.J. 1.

substantially similar recommendations for the establishment of advisory committees to advise the federal government on appointments to the provincial superior courts, the Federal Court of Canada, and the Supreme Court.

The Mulroney administration partially implemented the recommendations involving judicial appointments below the Supreme Court level. However, neither Mulroney in the 1980s nor Chrétien in the 1990s showed any interest in diluting their appointive powers with respect to the Supreme Court. Nevertheless, the pressures continued to mount. Newspaper commentators and editorialists were especially vociferous in articulating the case for a more transparent and accountable system of appointments to the Supreme Court.

### III. THE MARTIN ERA INITIATIVES

Even before succeeding Jean Chrétien as prime minister in November 2003, Paul Martin publicly committed himself to curing the democratic deficit in the existing system of Supreme Court appointments, though he never made it clear how far he was willing to go. He invited the House of Commons Justice Committee in February 2004 to provide him expeditiously with the committee's own recommendations. Though the committee produced a slim report in record time in May of that year,<sup>7</sup> there was little consensus among the political parties about the desirable reforms. The Liberals, and seemingly the New Democrats, favoured some type of advisory committee but were opposed to public hearings for nominees. The Bloc Québécois favoured much stronger input from the provinces and a participatory role for the justice committee. The Conservative members emphasized the need for public hearings and parliamentary ratification.

Justice Minister Irwin Cotler and the Liberal members of the Justice Committee were hostile to any suggestion of public confirmation hearings. The minister confirmed his opposition when he unveiled the government's response to the committee's report in April 2005 and

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<sup>7</sup> See Canada, The Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Appointments Process* (Ottawa: The Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 2004) (Chair: Derek Lee), online: <[http://cmte.parl.gc.ca/cmte/committee\\_publication.aspx?com=8795&lang=1&sourceid=84157](http://cmte.parl.gc.ca/cmte/committee_publication.aspx?com=8795&lang=1&sourceid=84157)>.

again during that same year.<sup>8</sup> Though the government accepted the appropriateness of some kind of an advisory committee, even here the minister was determined to ensure that the committee's mandate was carefully circumscribed. The committee, as appointed, had nine members: a nominee from each of the recognized political parties in the House of Commons, a retired judge, a nominee of the provincial attorneys general from one of whose jurisdictions the new member of the Supreme Court was to be appointed, a nominee of the provincial law societies of the same provinces, and two distinguished laypersons who were neither judges nor lawyers. Significantly, the committee was not left free to compile its own list of potential candidates. Instead, the justice minister provided the committee with a list of eight candidates from which the committee was asked to select three for submission to the federal government. The minister's rationale for these restrictions was that the committee lacked the resources and the expertise to locate suitable candidates within a reasonable time frame. The committee was duly appointed with these terms of reference and presented the federal government with its list of three nominees shortly before the election was called on 28 November 2005.

#### IV. A UNIQUELY CANADIAN SOLUTION?

The question that now needs to be addressed is whether Harper, no doubt greatly to his own surprise, has found the perfect formula for combining the broad and long-standing public support for an advisory committee with the Conservative party's commitment to public hearings. We may not learn the answer until we know which government holds the reins of power when the next vacancy arises in the Supreme Court. This may not be until 2012, the mandatory retirement date of the oldest member of the current Supreme Court.

It is possible, of course, that an intervening administration will reject Harper's ingenious solution and adopt a new appointive system of its own or revert to the Liberals' penchant for an advisory committee sans public hearing. I doubt, however, that a future administration will want to invest the political capital necessary to reinvent this peculiarly

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<sup>8</sup> See Department of Justice, News Release, *Government of Canada Moves to Reform Supreme Court of Canada Appointments Process*, (7 April 2005); Department of Justice, and News Release, *New Supreme Court of Canada Appointments Process Launched*, (8 August 2005).



Canadian wheel—a wheel not symmetrically circular, to be sure, but mobile nonetheless and capable of reaching its appointed destination. The critics will no doubt complain that the two-step process adopted by the Conservatives is a sham, as indeed would have been the Liberals' preferred one-step advisory committee procedure. The hybrid Harper approach, it will be argued, is a sham in two respects: first, because the powers of the advisory committee established by the Liberals were so circumscribed that they were more form than substance, and second, because of restrictions on the types of questions the parliamentary committee members were allowed to put to the nominee at the public hearing. Other critics may object that the belt and suspender approach adopted by Harper, while explicable in its particular context, should not be endorsed on a long-term basis because it is duplicative and wasteful. Canada, it will be argued, should embrace either one or the other approach to ensure high quality appointments to the Supreme Court, but not both.

I concede there is substance to these criticisms. But on balance, they do not undermine the case for combining the role of an advisory committee with the function of a public hearing. My reasons are outlined below.

As perceived in the earlier reports addressing the need for an advisory committee, the role of the committee was to ensure that the nominee was preeminently qualified, intellectually and otherwise, for membership of the Court and to avoid partisan appointments of less qualified candidates by the federal government. As a member of the CALT committee that reported in 1986, I can attest to the fact that the ideology of candidates for appointment to the Court did not figure prominently in the committee's deliberations. Perhaps somewhat naively, we assumed that if a candidate had the right intellectual and personal qualities, he or she would also make broadly acceptable policy decisions on the *Charter* and other sensitive branches of public law. Those were the early days when the Court's expansive normative options in interpreting *Charter* provisions were not as obvious as they are today. The advantages of the advisory committee model over the confirmation model is that it requires the committee to be proactive and not reactive, as is true of the confirmation model. A confirmation hearing can only approve or reject, and may lack the power to reject altogether if the executive holds majority representation on the committee. This disabling feature of the confirmation model is illustrated by the confirmation last year of Judge Samuel Alito, who was

appointed to the U.S. Supreme Court despite strong opposition by the minority Democratic senators in the Senate.

## V. CHANGING POLITICAL ENVIRONMENT

Had the federal government accepted the CBA and CALT recommendations in the 1980s in favour of an advisory committee structure, the pressure for a confirmation process might never have arisen.<sup>9</sup> However, the Mulroney and Chrétien governments missed the opportunity, and the political environment has changed significantly since then. The Canadian public today is more conscious of the powers of the Supreme Court and much more suspicious of critical appointive decisions made behind closed doors. Marshall Rothstein's hearing has also confirmed that there is great public interest in the personalities of the members of the Supreme Court and a desire for better understanding of the Court's work. Hearings therefore serve an important educational function, for the members of the Court as well as for the members of the Justice Committee and the public at large. It may well be true that if the selection committee has done its work well, the nominee will sail through the hearing with flying colours. This does not mean that useful questions cannot be asked by the members of the Justice Committee. The Rothstein hearing was an innovation and one should not be too critical of the lack of sophistication in the committee members' questions.<sup>10</sup> There are many aspects of the Court's work that can be intelligently canvassed in nomination hearings without compromising the candidate's role as a future member of the Supreme Court, and members of the committee should be encouraged to ask them.<sup>11</sup>

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<sup>9</sup> Neither the CBA nor the CALT reports recommended public confirmation hearings. The author was a member of the CALT committee.

<sup>10</sup> This would be my response to the comment attributed to Justice Major that he thought some of the committee members' questions at the hearings were "inane."

<sup>11</sup> To give some examples: (1) How realistic is it to expect every member of the Supreme Court to read conscientiously all the materials on each of the hundred or so cases in which leave to appeal is granted by the Supreme Court and if it is not realistic should the Court reduce the number of cases it is willing to hear? (2) Is the impression correct that the common law members of the Supreme Court do not involve themselves deeply in civil law appeals coming from Quebec but defer to the expertise of the civilian colleagues on the Court, and if it is correct, is this something we should worry about? (3) How significant is the role of law clerks in the preparation of Supreme Court judgments and should their role receive greater public recognition?

