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Abstract

Peter Hogg, a constitutional law scholar, was retained by the Commissioner for Federal Judicial Affairs to provide advice to the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada as to its procedures. His account of the public hearing provides an insider's viewpoint of the historic process undertaken for the appointment of Justice Rothstein. His opening remarks to the committee, appended to this commentary, set out the parameters of questioning for the hearing, but raise additional questions with regard to the appropriate limits of judicial speech.

Keywords

Canada. Supreme Court; Judges--Selection and appointment; Canada

Commentary

APPOINTMENT OF JUSTICE MARSHALL ROTHSTEIN TO THE SUPREME COURT OF CANADA[©]

PETER W. HOGG*

Peter Hogg, a constitutional law scholar, was retained by the Commissioner for Federal Judicial Affairs to provide advice to the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada as to its procedures. His account of the public hearing provides an insider's viewpoint of the historic process undertaken for the appointment of Justice Rothstein. His opening remarks to the committee, appended to this commentary, set out the parameters of questioning for the hearing, but raise additional questions with regard to the appropriate limits of judicial speech.

Peter Hogg, spécialiste en droit constitutionnel, a été choisi par le commissaire de la Magistrature fédérale pour conseiller la Commission ad hoc au sujet de ses procédures. Son compte rendu de l'audience publique expose le point de vue d'un initié sur l'évolution au cours des temps de la procédure appliquée pour la nomination du juge Rothstein. Les remarques d'introduction au comité, annexées aux présentes observations, décrivent les paramètres des questions posées durant l'audience, mais soulèvent des questions supplémentaires concernant les limites appropriées des exposés juridiques.

I. INTRODUCTION

The process for the appointment of Justice Marshall Rothstein to the Supreme Court of Canada in 2006 included the innovation of a public hearing by an “Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada.” This committee of parliamentarians interviewed the nominee before his appointment. At the invitation of the committee, I addressed the committee on the limits of judicial

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speech. What follows is a description of the background to the appointment of Justice Rothstein, and a suggestion as to how the process might be adjusted for future appointments. My remarks to the committee are appended to this commentary.

II. THE POWER AND PROCESS OF APPOINTMENT

The appointment of judges to the Supreme Court of Canada is provided for in the *Supreme Court Act*.¹ The convention that has developed for judicial appointments generally 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 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 it clear that, after the public hearing, he was going to make the final decision, and he did in fact make the final decision.

Until 2004, no part of the appointment process was public. It was understood that the minister of justice would consult with the Chief Justice of Canada, with the attorneys general and chief justices of the provinces from which the appointment was to be made, and with leading members of the legal profession, but this was all informal and confidential.

In 2004, the Honourable Irwin Cotler, who was minister of justice in the Liberal government of Paul Martin, introduced a more transparent process to find replacements for retiring Justices Louise Arbour and Frank Iacobucci. He presented the names of his nominees for the replacements (Justices Louise Charron and Rosalie Abella) to the Standing Committee on Justice of the House of Commons, and he answered questions posed to him by the committee about the search process and the qualifications of the nominees. After that appearance, the two nominees were appointed. The nominees themselves did not appear before the committee.

When the retirement of Justice John Major was announced in 2005, Minister Cotler announced a new and more elaborate process that

¹ R.S.C. 1985, c. S-26, s. 4 provides that appointments are to be made by "the Governor in Council."

would be used to fill the vacancy. After the usual informal consultations with the attorneys general, chief justices, and leading members of the legal profession, the minister would 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. The committee would 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: the minister of justice (but not the appointee) would appear 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 vacancy left by Justice Major. An appointed advisory committee provided the minister with a short list of three names. However, on 29 November 2005, before the final selection was made, the government was defeated in the House of Commons and Parliament was dissolved for the election that took place on 23 January 2006. One of the policies of the newly elected Conservative government was a public, parliamentary interview process for proposed appointees to the Supreme Court of Canada.

The new Conservative minister of justice, the Honourable Vic Toews, 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. With the agreement of all the party leaders, the government established the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada. The committee consisted of twelve MPs drawn from each party in proportion to their standings in the House of Commons. The minister of justice, who was one of the Conservative members, was the chair of the committee. His predecessor, Irwin Cotler, was one of the Liberal members.

The committee held a televised hearing on Monday, 27 February 2006. The name of the nominee, Justice Marshall Rothstein of the Federal Court of Appeal, had been made public the previous

Wednesday,² 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 place 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 continued with opening remarks by me, 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 sixty questions in two rounds of questioning.³

The committee did not prepare a written report. The prime minister watched the proceedings on television, 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.

Two days after the hearing, the prime minister 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 6 March 2006.

III. CONDUCTING THE PUBLIC HEARING

I was retained by the Commissioner for Federal Judicial Affairs, whose office administers the processes of federal judicial appointments, to provide advice to the ad hoc committee as to its procedures. My initial thought was that I would prepare a protocol that would limit the kinds of questions that committee members could ask the nominee, and

² There was an unfortunate leak, duly reported in the media, of the names of the other short-listed, but unsuccessful, candidates. I discuss this later in this commentary.

³ Three questions were asked per member on the first round, and two per member on the second round. The Committee elected not to continue for a third round.

that the protocol would be enforced by the committee chair. However, what emerged from deliberations within the government was the view that a binding protocol was not the way to go, and that the MPs on the committee should be free to ask any questions they wanted. This view was adopted by the committee, which decided that the chair would not attempt to impose limits on the questions that could be asked. My role became one of giving 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 its role was and what the appropriate limits of judicial speech were. I then remained with the nominee at the hearing in case any questions arose with which I could assist.⁴

In retrospect, it was the right decision not to impose any limit on questioning by members of the committee. A protocol enforced by the chair would have given the impression of a tightly controlled hearing; this would have annoyed the MPs to say nothing of the audience; and I think the committee would not have obtained as full a picture of the nominee. As it was, the questions at the hearing 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. Although the committee members understood the limits of judicial speech, they could not resist asking some questions on top-of-mind policy issues such as crime in the cities, gun control, and the elimination of poverty. Each time, Justice Rothstein acknowledged the validity of the concern and responded by saying something such as "that's your issue, not mine," reminding everyone of the boundaries of questioning. I observed that, without exception, the questioners seemed perfectly happy with this response.

IV. . . FUTURE HEARINGS

For the future, it would be politically difficult for a federal government to revert to a wholly confidential process, and I think it would be a mistake to do so. Certainly, the hearing established that Canadian parliamentarians can conduct a civil hearing that poses no danger of politicizing the judiciary or of embarrassing the nominee. It is

⁴ 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.

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. Senate confirmation hearings in the United States are typically focused on issues like abortion, and inevitably take on a partisan and rancorous atmosphere.⁵ 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 the highest court, such as abortion. Nor have Canadian prime ministers, unlike American presidents, ever made any effort to pack the highest court with their supporters.⁶ Canadian hearings are never likely to become like the American confirmation hearings.

Canadian hearings are advisory only, since 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 will be able 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, with the advice and consent of the Senate.⁷ The Senate can block the appointment, and senators who do not belong to the president's party 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 to ensure that appointments are always of high quality, so that in some cases there really is legitimate concern about the quality of a presidential nominee. When this occurs,

⁵ Even so, one observes that strongly qualified nominees are prepared to come forward, and they handle the difficult proceedings with aplomb.

⁶ 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, and rights of criminal defendants raised the ire of conservatives, prompting a new round of hostility to the Court and open demands for the appointment of more conservative judges.

⁷ U.S. Const. art. II, § 2(2).

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 does not seem to be necessary in Canada, where the diligence of the Government of Canada's routine informal process of consultation, which has yielded consistently strong appointments in the past, will undoubtedly continue to yield strong nominations. Presumably, Canadian federal 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 *Charter of Rights and Freedoms* 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.⁸ Court packing and court bashing are not as necessary in Canada as American politicians perceive them to be in America.

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. Based on comments in the press and many comments made to me personally after the hearing, lay people as well as lawyers were eager to receive some real information about the work that Supreme Court judges do. People were curious about the way in which cases come to the Court, the materials that have to be studied for each case, the

⁸ The Canadian *Charter of Rights and Freedoms* 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 considerable literature focusing on the idea of "dialogue" between courts and legislatures. For a recent contribution, see P.W. Hogg, A.A. Bushell Thornton & W.K. Wright, "Charter Dialogue Revisited—Or Much Ado About Metaphors" (2007) 45 *Osgoode Hall L.J.* [forthcoming].

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. The public interview of Justice Rothstein was surely a useful antidote to the vague charges of judicial activism that float around after unpopular decisions. 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.⁹

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 dealing with this media interest 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 alone.

In summary, I am in favour of a public hearing by a parliamentary committee as part of the process of appointing judges to the Supreme Court of Canada. I think that public hearings will significantly benefit Canadians by helping them to understand the appointment process and the judicial function and to learn about the qualifications of the person nominated for appointment. The retention of counsel, the development of guidelines as to what can and cannot be answered by the nominee, and the willingness of committee members to respect the guidelines are features of the 2006 process that should be repeated. With these features in place, judicial independence will not be threatened by public hearings.

V. SCREENING BY AN ADVISORY COMMITTEE

I would make one suggestion for future appointments, and that is to eliminate the screening of potential appointees to the Supreme

⁹ 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.

Court of Canada by an advisory committee. In my view, there are two objections to the advisory committee process. The first is that it compromises what I regard as the desirable principle of executive appointment. For a single, occasional, high-profile appointment, I do not think the government should be restricted to a short list developed by an advisory committee. (Considerations are different for appointments to courts that have to be made frequently, and are not going to attract much public notice.) My concern is that the dynamics of deliberation in a diverse committee may eliminate candidates against whom some objection can be made. The tendency, I would fear, is that only the safest and least controversial persons would achieve consensus in the committee. Such persons are often excellent judges, but may not always be the best person for the Court at that particular time. Consider the precedent of Bora Laskin, who was appointed to the Court in 1970 and elevated to chief justice in 1973. His appointment was controversial because he was the first Jew to be appointed and the first full-time academic to be appointed. He would probably have been regarded as an "unsound" candidate by an advisory committee in 1970. And yet, as Prime Minister Trudeau anticipated at the time, and as is now generally recognized, he made a more important contribution to the Court than a person with more conventional credentials might have done. The 1982 appointment of Bertha Wilson, who was the first woman appointed to the Court, provides another example. My point is that the minister of justice and prime minister are better able, after informal consultations, to assess the nature and force of opposition to a candidate and how that candidate would contribute to the Court, than would a diverse committee which is seeking consensus.¹⁰

A less important objection to the advisory committee screening process is that too many people are engaged in the selection process, leading to the risk of leaks that could be embarrassing to the persons under consideration. This time, the three names that the advisory committee submitted to the minister of justice were apparently¹¹ leaked to the media. When the name of the nominee was officially announced, it was obvious who had been rejected. To be sure, it is no disgrace to fail

¹⁰ If it were determined to keep the advisory committee at the beginning of the process, its list should not be binding on government, so that an unusual appointment would not be precluded.

¹¹ Neither the minister of justice nor anyone else who was privy to the deliberations of the committee ever publicly acknowledged that the leaked names were in fact the ones on the short list.

to receive a Supreme Court appointment, but it is preferable for the names of the unsuccessful candidates to be kept secret. That is hard to do if the names and their files have been moved outside the professional civil service and distributed to an advisory committee that may include members who are not accustomed to the constraints of confidentiality in the face of intense media interest.

If there is some force in these two objections to the advisory committee process, then it makes little sense to retain the process when the final nominee is going to be subjected to a public interview process by a parliamentary committee. Surely, that by itself is a sufficient guarantee against a poorly qualified or partisan appointment. It seems to me that executive selection of the candidate (after the normal informal consultations), followed by a parliamentary interview, followed by a final executive decision, is the ideal process for those occasional appointments that have to be made to the Supreme Court of Canada.¹²

¹² For other courts, where a steady stream of appointments has to be made, and where there is little media scrutiny of the appointments, different considerations apply.

APPENDIX

JUDICIAL INTERVIEW PROCESS

Notes for opening remarks to
Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada
By Peter W. Hogg
Reading Room, Centre Block, Parliament Buildings
February 27, 2006

INTRODUCTION

This is an historic moment. It is the first time that a Government nominee for appointment to the Supreme Court of Canada has been interviewed in public by a committee composed of Members of Parliament. The purpose of this new process is to make appointments to the Court more open, and to promote public knowledge of the judges of the Court.

The process is not without controversy. Everyone would agree in principle that important public decisions be open and public. But there are those—many of them in the legal profession—who fear that a parliamentary review of judicial appointments carries more risk than benefit. The critics argue that an open process will tend to politicize the judiciary, and publicly embarrass the distinguished people who are nominated for appointment. This Committee, today, has the opportunity to show the critics that they are wrong. This Committee has the opportunity to demonstrate that the Canadian virtues of civility and moderation can make an open and public process work.

ROLE OF COMMITTEE

The authority to make appointments to the Supreme Court of Canada is possessed by the Governor in Council. That is prescribed in the *Supreme Court Act*, and that has not been changed. So this appointment will have to be made by the Governor in Council, which will act on the advice of the Prime Minister. This Committee is charged with providing advice to the Prime Minister. He has undertaken to take into account the deliberations and views of the Committee in deciding whether or not to proceed with the appointment of Mr. Justice Rothstein.

This Committee has the task of interviewing Mr. Justice Rothstein to determine whether he is well qualified to serve on the Court. It really is a job interview, and like any other job interview the questions to the candidate should respect both his dignity and his privacy. As well, any questions put to the candidate should proceed from an understanding of the role that is played by a judge of the Supreme Court of Canada. I want to say something about that role.

ROLE OF JUDGES

Judges decide cases by finding the facts that are relevant and applying the law to those facts. In the appeals that reach the Supreme Court of Canada, there is the further complication that the law itself is usually unclear. That is usually why the case has gone all the way to the highest court. In that case, the judges have to decide what the law is, as well as how it applies to the facts of the case.

Before each appeal is heard the judges are required to read and digest a massive amount of material. They read the decisions of the lower courts that are being appealed, they read at least some of the transcript of the evidence at trial, they read the decided cases that are arguably precedents for the case, they read the articles by law professors that bear on the issue, and they read the factums—the briefs of argument—that are filed by counsel on both sides of the case. And then, when the appeal is heard, the judges listen to the oral arguments of counsel on both sides, and they test those arguments by asking questions. Only after carefully considering all of this material, and weighing the arguments on both sides, are the judges able to reach a decision.

The Supreme Court of Canada decides about a hundred appeals every year. Each one of them involves the reading and research that I have just described. And of course the Court has to reach a decision on each appeal, and then write an opinion. The Court of nine judges is usually unanimous, but in a minority of cases the Court is divided and one or more dissenting opinions have to be written. So it is a heavy workload that we require of our Supreme Court judges.

LIMITS ON QUESTIONS

When you think about the role that Mr. Justice Rothstein will be called upon to play if his nomination is confirmed, it becomes obvious that there are some questions that he cannot be expected to answer.

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.

Another kind of question that is inappropriate for a judge to answer is the question of why he decided a particular case in a particular way. Because Justice Rothstein is a sitting judge, he has written many opinions. These are listed in the dossier that members of the Committee have been given. Several of the opinions have been included in full as samples. His reasons for decision in each of those cases are set out in writing. While he can talk in general terms about his work as a judge, and even about the issues in particular cases, he cannot give an oral explanation of why he decided a particular case. He has done that in his written opinion. That opinion is a precedent that lawyers and other judges will rely upon. They should be able to rely on the written opinion, and not have to hunt down oral explanations by the judges as well. Written opinions are available to all. Oral explanations are limited to those who hear them.

QUALITIES OF THE NOMINEE

What the members of the Committee can and should do is to satisfy yourselves that this person has the right stuff to be a judge of the Supreme Court of Canada. Does he have the professional and personal qualities that will enable him to serve with distinction as a judge on our highest court? Let me suggest six qualities that you might want to explore in your questioning.

1. He must be able to resolve difficult legal issues, not just by virtue of technical legal skills, but also with wisdom, fairness, and compassion;
2. He must have the energy and discipline to diligently study the materials that are filed in every appeal;
3. He must be able to maintain an open mind on every appeal until he has read all the pertinent material and heard from counsel on both sides;
4. He must always treat the counsel and the litigants who appear before him with patience and courtesy;
5. He must be able to write opinions that are well written and well reasoned; and
6. He must be able to work cooperatively with his eight colleagues to help produce agreement on unanimous or majority decisions, and to do his share of the writing.

Ladies and gentlemen of the Committee: If today you find the person with those qualities, the nation will thank you, and the Prime Minister will have an easy choice ahead of him. That concludes my remarks.