CHOICES AND CONTROVERSY: JUDICIAL APPOINTMENTS IN CANADA

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PART I

What do judges do? As an empirical matter, judges settle disputes. They act as a check on both the executive and legislative branches. They vindicate human rights and civil liberties. They arbitrate jurisdictional conflicts. They disagree. They bicker. They change their minds.

In a normative sense, what judges "do" depends very much on one's views of judging. If one thinks that judging is properly confined to the law's "four corners", then judges act as neutral, passive recipients of opinions and arguments about that law.[1] They consider arguments, examine text, and render decisions that best honour the law that has been made. If judging *also* involves analysis of a society's core (if implicit) political agreements—and the degree to which state laws or actions honour those agreements—then judges are critical players in the mechanisms through which such agreement is tested. In post-war Canada, the judiciary clearly has taken on the second role as well as the first. Year after year, judges are drawn into disputes over the very values of our society, a trend that shows no signs of abating.[2]

In view of judges' continuing power, and the lack of political appetite to increase control over them (at least in Canada), it is natural that attention has turned to the process by which persons are nominated and ultimately appointed to the bench. Such attention is enhanced by the significant degree of turnover on the Supreme Court (a frequent subject of discussion) over the last few years.[3] The power to shape our courts determines Canada's legal landscape for years to come. Yet that power is subject to relatively few constitutional constraints. Section 96 of the

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[1] *R. v. Morgentaler* [1993] 3 S.C.R. 463.

[2] This is most evident in constitutional cases, where the choices between federal and regional (*Reference re Employment Insurance Act (Can.), ss. 22 & 23*, 2005 SCC 56, [2005] 2 S.C.R. 669); state and individual (*Chaoulli c. Québec (Attorney General)*, [2005] 1 S.C.R. 791); and national and international (*R. v. Hape*, 2007 SCC 26, [2007] S.C.J. No. 26, 280 D.L.R. (4th) 385) interests are particularly stark. But fundamental values also pervade other areas of public and private law. See e.g. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339; and *Bruker v. Marcovitz*, 2007 SCC 54, [2007] SCJ No. 54.

[3] The Court has experienced the following departures/deaths in the past eleven years: Sopinka (1997), Cory (1999), Lamer (2000), L'Heureux-Dubé (2002), Gonthier (2003), Arbour (2004), Iacobucci (2004), Major (2005); and appointments: Bastarache (1997), Arbour (1999), LeBel (2000), Deschamps (2002), Fish (2003), Abella (2004), Charron (2004) and Rothstein (2006).

Constitution Act, 1867 states that "The Governor General shall appoint the Judges of the Superior, District, and County Courts [in each Province]."[4] The appointment power for these courts is followed by sparse criteria for selection, and some basic guarantees of security of tenure.[5] Provincial courts are not mentioned. While there is a provision for Parliament to create a "General Court of Appeal for Canada", the power to appoint to such a court is not specified.[6] Even for those courts where an appointment power is included, the process is marked by an exceptionally narrow corridor. Subject to a few exceptions, a blank slate is provided to the Governor-in-Council (in essence, the Prime Minister and the Minister of Justice). Canada is operating a 21st-century judiciary bound by 19th-century rules concerning judge-making.[7]

In response to the dearth of structural constraints, a number of reforms drawing from different jurisdictions, including the United Kingdom, Germany, and the United States, have been proposed. The reforms generally begin with the argument that the nomination and appointment process must be more open and transparent, often focussing on the prospect of legislative branch involvement such as a Parliamentary hearing. Inevitably, objections are raised, some of which merit serious consideration and some of which are overstated. In the main, I believe that the debate has been distorted by the sense that the only choice is between introducing judicial hearings and maintaining the status quo.[8]

We need to think carefully about what we want judicial hearings to achieve, and whether they can achieve those ends. I am willing to be persuaded about hearings because I think we have only just begun to analyze them.[9] That said,

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[4] *Constitution Act, 1867* (U.K), 20 & 31, c.3, s. 96, reprinted in R.S.C. 1985, App. II, No. 5. Provincial control over courts of purely provincial jurisdiction is found in s.92(14), which grants jurisdiction over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts".

[5] *Constitution Act, 1867* (U.K), 20 & 31, c.3, ss. 97, 98, 99, 100 reprinted in R.S.C. 1985, App. II, No. 5.

[6] *Constitution Act, 1867* (U.K), 20 & 31, c.3, s. 100, reprinted in R.S.C. 1985, App. II, No. 5. The appointment power for the Supreme Court is vested in the Executive in s. 4 of the *Supreme Court Act*, R.S.C. 1985.

[7] For example, the appointing power is vested in the Governor-in-Council while Parliament retains jurisdiction over "salaries, allowances and pensions".

[8] During Minister Cotler's appearance before the *Ad Hoc* Committee in August, 2004, he could not provide real alternatives to the prospect of greater legislative involvement in the process. *Infra*, note 48.

[9] At his hearing, Justice Rothstein was more artful:

> You're asking me whether I think this is a good process. The question reminds me of a story. They say that shortly after the Communist revolution in 1949 one of the Chinese leaders was asked whether he thought the French Revolution was a success. His answer was that it was too early to tell. Perhaps I have to say it's too early to tell.
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> Parliament of Canada, *Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada* (27 February 2006), online: <http://www.justice.gc.ca/en/news/sp/2006/doc_31772_1.html> at 1430 [Rothstein Hearing].

judicial hearings that are a sham or farce—in that they cannot possibly reveal useful insights about the candidates or have any real impact on the subsequent appointment—are probably worse than no hearings at all.

While people almost invariably focus on the Supreme Court, the judiciary is more than that. Many important cases are settled in other courts.[10] In addition, the majority of Supreme Court justices are selected from among lower courts, for which the appointment process can be equally opaque (though some jurisdictions have made good progress).[11] Since the two most recent debates involve the Supreme Court (the appointments of, respectively, Justices Abella and Charron in 2004 and Justice Marshall Rothstein in 2006) this paper will focus on lessons learned there, but the reader should keep the broader context in mind.

PART II

As others have ably demonstrated, the bald patronage and lack of rigour surrounding federal judgeships have been contentious for a good part of our history.[12] In 1989, former Prime Minister Brian Mulroney instituted a series of judicial advisory committees (JACs) in each province to function as a screening device for appointees to s. 96 courts.[13] The committees comprised seven members: three representatives chosen by the federal government and one by the provincial government; a designate of the provincial Chief Justice; and representatives of the provincial law society and the provincial branch of the Canadian Bar Association.

Until recently, the JACs ranked candidates as "recommended"; "highly recommended"; and "unable to recommend".[14] The JACs ordinarily did not interview candidates, but consulted widely to become informed as to someone's standing in the legal and broader community. Nor did the JACs appoint candidates—that power remained with the Minister of Justice (for s. 96 courts) or the Prime

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[10] See e.g. *Ferrell v. Ontario (Attorney General)*, [1998] 168 D.L.R. (4th) 1, 42 O.R. (3d) 97 (C.A.); *Masse v. Ontario (Ministry of Community & Social Services)*, [1996], 134 D.L.R. (4th) 20, 89 O.A.C. 81, 35 C.R.R. (2d) 44; *Schafer v. Ontario*, [1997] 149 D.L.R. (4th) 705, 35 O.R. (3d) 1, 102 O.A.C. 321; *R. v. Buzzanga and Durocher*, [1979] 101 D.L.R. (3d) 488, 49 C.C.C. (2d) 369, 25 O.R. (2d) 705 (C.A.).

[11] Among the current justices, only Ian Binnie had not previously been a judge; and only one other, Marshall Rothstein, did not come from a provincial court of appeal.

[12] John Willis, "Methods of Appointing Judges—An Introduction" (1967) 4 Can. Legal Stud. 216; William H. Angus, "Judicial Selection in Canada—The Historical Perspective" (1967) 4 Can. Legal Stud. 220; Canadian Bar Association, *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 2005) [*CBA, 2005*]. It is reasonable to assume that similar concerns have characterized provincial nominations, but they are not the focus here.

[13] Slightly different arrangements were made for Ontario and Quebec because of their respective sizes.

[14] Canadian Judicial Council, Press Release, "Judicial Appointments: Perspective from the Canadian Judicial Council" (20 February 2007), online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca>. In 2006 the federal Conservative government made several changes to the JACs, which are canvassed in Part II.

Minister (for the Supreme Court).[15]

Under the new system, it is difficult to say whether patronage or political considerations diminished. Studies over the 1980s and 1990s revealed continued patterns of party affiliation or support among a significant per centage of appointees.[16] At the Supreme Court, while nominations and appointments have always had political aspects, outright lobbying was rare.[17] That appeared to change with the sudden death of Justice John Sopinka in November 1997, which was followed by blatant jockeying in favour of two Ontario Court of Appeal justices: John Laskin and Rosalie Abella.[18] The struggle was unseemly (and, it should be noted, engineered by their supporters rather than the judges themselves). Prime Minister Chrétien eventually appointed Ian Binnie, a renowned advocate and senior partner at a national law firm. Like Sopinka, Binnie proceeded from the private bar to the Court.

The Court continued to experience turnover. In the early 2000s, Louise Arbour replaced Peter Cory, and Louis LeBel replaced Antonio Lamer. Marie Deschamps and Morris Fish replaced, respectively, Claire L'Heureux-Dubé and Charles

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[15] Successive Ministers of Justice have insisted that the appointment power conferred in s. 96 and implicitly in s. 100 cannot constitutionally be delegated outside of the Governor in Council. However as noted, *supra* note 6 and surrounding text, the appointment power for the Supreme Court is found in federal not constitutional law, and s. 100 does not mention the Executive at all. The argument, therefore, is not very strong where the constitution does not assign an exclusive *appointment* power as opposed to a power to do other things, and it appears unsupportable where the *Constitutional* text does not even refer to "the Executive" as the means by which federal power is exercised.

[16] Peter H. Russell & J. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committee" (1991) 41 U.T.L.J. 4.

[17] For example, it is sometimes argued that Pierre Trudeau elevated Bora Laskin to the position of Chief Justice to promote a particular view of federalism. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1994) c.1. See also Peter McCormick's statements to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, 37th Parl., 3d sess., No. 9 (1 April 2004) at 1110:

> Earlier witnesses have told you that there is a hypothetical danger of a prime minister stacking the Supreme Court, but, of course, this has never actually happened. Well, I beg to differ and my reference is to Trudeau's transformation of the Supreme Court in the 1970s. Most legal academics would regard those changes as a good thing, but good stacking is still stacking and this is dangerous stuff.

Later in the hearing McCormick modified his earlier comments (1235):

> [Since] I accused Pierre Trudeau of stacking the court, I'd now like to back off, in one respect. I think Trudeau reconstructed the court, and that involved a kind of stacking.
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> In another sense, what I always appreciated about Trudeau was it wasn't just a click, click, click of appointments, there was diversity in the appointments. So you would get a Bora Laskin, but you also got de Grandpré appointed by the same Prime Minister. In the same context, on the one hand you got Wilson, but on the other hand you had MacIntyre. It seemed to me that created dialogue on the court that I thought was quite exciting and quite valuable.

[18] Alec Scott, "The Supremes" *Saturday Night* 120:3 (April 2005) 44.

Gonthier. Then, in 2004, came the unexpected departures of Frank Iacobucci and Louise Arbour. Both were highly regarded, both were from Ontario, and both were progressive regarding *Charter* issues.[19] Strong justices, their exits represented a loss for the Court.

While the Court always faces controversial cases, 2004 was particularly volatile because of the debate over same-sex marriage. Beginning in 2003, several cases launched in provincial courts challenged as discriminatory the opposite-sex definition of marriage. By March 2004, three provincial courts of appeal had agreed.[20] The federal government, declining to seek leave to appeal any of these decisions, directed the Supreme Court to hear a reference concerning draft legislation entrenching a new definition of marriage.[21]

It is safe to say that the courts' redefinition of marriage was a lightning rod for those opposed to so-called "judicial activism".[22] For persons already suspicious of the idea that abstract concepts of rights can mandate the re-ordering of long-standing social mores and arrangements, nothing could be more threatening than a change to the institution of marriage. Given the lower courts' near-unanimous conclusion that the common law definition of marriage violated the *Charter*, the Supreme Court's conclusion was largely expected but no less controversial for that.[23] The tension was exacerbated because the federal reference rendered moot the work of a Parliamentary Committee conducting hearings on the issue. The Executive seemed to grab the issue out of Parliament's hands.[24]

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[19] *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*]. Iacobucci J co-authored (with Cory J) the path-breaking decision in *Vriend v. Alberta,* [1998] 1 S.C.R. 493 and rendered strong dissents in cases like *Little Sisters and Art Emporium v. Canada,* [2000] 2 S.C.R. 1120 and *R. v. Hall,* 2002 SCC 64, 3 S.C.R. 309, 217 D.L.R. (4th) 536 where majorities had upheld legislation. However, he also enjoyed the ability to command a majority, and a reputation for rendering sober, well-reasoned decisions. Arbour, a criminal law expert with an international reputation, was perceived as more "radical", particularly in light of her dissents in such cases as *Gosselin v. Quebec,* 2005 SCC 15, 1 S.C.R. 238, 250 D.L.R. (4th) 483, 331 N.R. 337 and *Foundation for Children, Youth and the Law v. Canada,* 2004 SCC 4, 1 S.C.R. 76.

[20] *Halpern v. Toronto (City)* (2003), 65 O.R. (3d) 151 (C.A.) (held the definition to be invalid and ruled that same-sex marriage licenses immediately be granted); *EGALE Canada v. Canada (A.G.),* 2003 BCCA 251, 13 B.C.L.R. (4th) 1 (C.A.) (found the common law definition unconstitutional and issued a two-year delay before effect); *Hendricks c. Québec (P.G.),* [2004] R.J.Q. 851 (C.A) (affirmed lower court ruling of unconstitutionality, and struck a two-year delay ordered in that court).

[21] *Reference re Same-Sex Marriage,* [2004] 3 S.C.R. 698. Initially, the reference concerned only the constitutionality of the draft legislation; in other words, it asked whether the federal government *could* expand the definition of marriage but not whether such a definition was constitutionally *required.* Eventually, a fourth question was referred to the Court, more or less replicating the issue that had already been argued in various provincial courts.

[22] It should be noted that there is considerable debate over the meaning of "judicial activism". In this paper, I use it to describe critiques of the Supreme Court that focus on that Court's alleged inclination to engage in "law-making" to advance a social agenda that is overly concerned with vindicating the rights of "interest groups" such as women, gays and lesbians, and Aboriginal persons.

[23] *EGALE Canada Inc v. Canada (Attorney General),* 2001 BCSC 1365, 11 W.W.R. 685, 95 B.C.L.R. (3d) 122.

[24] C. Mathen, "Developments in Constitutional Law—The 2004-2005 Term: A Court in Transition"

The culmination of the 2004 appointment process was the appearance by the Minister of Justice before the House Standing Committee on Justice to answer questions about the search and qualifications of his two chosen nominees.

The events leading to the Minister's appearance bear mention. Earlier in the year the Standing Committee had begun to take submissions on Supreme Court appointments. The Prime Minister (Paul Martin) had declared himself committed to re-examining the process as part of his larger concern with a "democratic deficit" in Canadian politics. While the existing process was described as "secretive" and therefore suspicious, in March 2004 the Minister of Justice insisted otherwise:

> ...I think this point needs to be underscored, that the process is not so much secretive as it is unknown....[I]n the interests of both transparency and accountability [I would like to] describe to you the [Supreme Court] consultative process or protocol of consultation.
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> I cannot claim [that this process has been followed in every particular case]. I can only undertake to follow it as a protocol by which I will be governed as Minister of Justice. I might add that this is the first time that this protocol or appointments protocol is being released.[25]

According to the Minister, the appointment process had two steps. First, candidates from the region of the vacancy were identified from a pool comprising judges, practitioners, and academics. In preparing what is, essentially, a short list, the Minister consulted with various individuals including the chief justices of Canada and of the particular region, Attorneys-General, and senior practitioners. Other groups or individuals might also be consulted. Once a list of candidates was compiled, the candidates were assessed on the basis of professional capacity, personal characteristics, and diversity.

As outlined, the process was not exactly revealing. The Minister essentially offered assurances that Supreme Court appointments were not random. They did not involve the equivalent of the Prime Minister picking a name from a legal directory, or appointing his favourite bridge partner. Instead, the Prime Minister's Office (through the Minister of Justice) talked with some people about other people, gathered some names, looked over anything those people may have written, and eventually made a decision.[26] The candidates were not even interviewed:

(2005) 50 *Sup. Ct. L. Rev.* 89 at 137 [Mathen, "2004-2005 Term"].

[25] The Honourable Irwin Cotler, Minister of Justice appearing before Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, 37th Parl. 3d sess., No. 9 (30 March 2004) at 1105, online: Bora Laskin Law Library <http://www.law-lib.utoronto.ca/conferences/judiciary/ background.htm> [Cotler, March 2004].

[26] In his August appearance, Cotler did state that some people—he mentioned then Ontario Attorney-General Michael Bryant—were contacted numerous times in respect of various candidates.

> **L'hon. Stéphane Dion (Saint-Laurent—Cartierville, Lib.)**...Ma deuxième et dernière question, on pousse le caractère informel et confidentiel très loin, puisse que si je comprends bien, actuellement, on ne travaille pas par interview. On n'interview pas des candidats potentiels. On ne le fait pas non plus pour les cours inférieures, si je comprends bien. Est-ce qu'il y a une raison à cela? Quelle est la justification pour travailler sur dossier, sur consultation, mais non pas sur interview?...
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> ...
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> **L'hon. Irwin Cotler:** Je vais demander à Marc Giroux [a Justice official], parce qu'il a plus d'expériences à l'égard des hauts niveaux des nominations judiciaires. Peut-être qu'il pourrait partager son expérience. [*This was followed by responses to other aspects of the process highlighted by Mr. Dion.*] ...
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> **Hon. Stéphane Dion:** I just want an answer to my question.
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> **The Chair:** Let's wrap up with a final question from Mr. Dion.
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> [*Français*]
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> **M. Marc Giroux:** Très rapidement, la façon dont fonctionnent les comités maintenant, les entrevues ne sont pas exclues sauf que de façon pratique il est difficile d'en arriver à des entrevues compte tenu d'une part du nombre de gens qui se portent candidats à la magistrature, d'autre part du temps limité que l'on a pour les évaluer de la façon dont on les évalue. Et pour cela, je me souviens que le commissaire à la magistrature avait comparu devant un comité, si je ne me trompe pas, et à ce moment-là avait donné les chiffres à propos du nombre de gens qui se portent candidats à la magistrature par année. Je pense que je me limiterais à répondre à ça comme cela.
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> **L'hon. Stéphane Dion:** On peut faire une petite liste, et interviewer la short list, c'est déjà ce qu'on fait.[27]

As is plain, the very reasonable question of why Supreme Court nominees were not interviewed before being offered the job was not afforded a satisfactory answer. The Committee was told that interviews would be impractical due to the number of candidates considered, but not why members of the short list could not be interviewed.

By March 2004, judicial appointments had begun to attract serious attention and outright politicking. The level of serious discussion was evident in the various submissions to the Committee by academics, the legal profession, and former Supreme Court justices.[28] The views expressed ranged from extreme caution at the

[27] Cotler, March 2004, *supra* note 25 at 1215 [emphasis in original].

[28] For example, Professors Peter Russell, Jacob Ziegel, Lorraine Weinrib, and the Canadian Bar Association. The Hon. Madame Justice Claire L'Heureux-Dubé appearing before the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (Parliament of Canada), *Evidence*, 37th Parl. 3d sess., No. 8 (30 March, 2004), online: <http://www.law-

thought of "opening up the process", to radical notions (for Canada at least) of instituting a separate "Constitutional Court" (similar to Germany's) and imposing term limits.

The politicking emerged in earnest once the Minister of Justice announced his nominees. Perhaps to be expected, at least some critics focused on their gender, assuming that only political correctness or some sort of quota could explain such a result. In addition, because Justices Abella and Charron were immediately denounced as "activist", their nominations were seen by some to be in line with a "Liberal conspiracy" to ensure that the Court remained committed to a particular political agenda.[29] The accusation was directly tied to the *Marriage Reference* itself—critics speculated that the government had sought specifically to appoint two justices who would approve the government's draft legislation.[30]

In the generally sober atmosphere of Canadian judicial appointments, these accusations may seem bizarre. It should be noted that, as I have argued elsewhere, the government's decision to reframe the marriage cases as a reference was curious.[31] The constitutionality of the draft legislation was not seriously in doubt. The government initially did not even seek to put the constitutionality of the common law definition of marriage before the Court, bending only in the face of considerable public pressure. Certainly the government was vulnerable to the criticism that it had used the Court as insurance against the political ramifications of enacting a broader definition of marriage.

Even so, it strains credulity to think that the *Marriage Reference* was such an overriding consideration for the government that obtaining a particular result could determine its Supreme Court nominees. The government already knew that the jurisprudence overwhelmingly favoured the conclusion that the common law definition of marriage did not reflect *Charter* values. While the Supreme Court's refusal to answer the fourth question ultimately left some room for doubt, by 2004 it was fairly clear that same-sex marriage was required as a matter of *Charter* law.[32] As well, purveyors of the conspiracy theory did not explain why a government that overwhelmingly supported a 1999 motion affirming the opposite-sex nature of marriage would be so eager in 2004 to have that definition struck down—so eager,

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lib.utoronto.ca/conferences/ judiciary/background.htm>.

[29] This claim was perhaps more to be expected vis-à-vis Abella than Charron, as Abella has been identified with progressive legalism for decades. For example, she is credited with devising the term "employment equity" as a Canadian counterpart to "affirmative action". Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report*, Royal Commission on Equality in Employment, (Minister of Supply and Service Canada, 1984).

[30] Mathen, "2004-2005 Term", *supra* note 24 at 90.

[31] C. Mathen, "Mutability and Method in the Marriage Reference" (2005) 54 U.N.B.L.J 43 ["Mutability and Method"].

[32] *Ibid.* at 54-55.

indeed, that it would engineer an appointment process around that goal.[33] What the critics failed to realize is that a government can accept the outcome of a judicial decision even if it does not agree with the decision's content. The government may nonetheless abide by the decision because of its commitment to constitutionalism and the rule of law.

More striking than the accusation's validity (or lack thereof) was its blatant construal of the Court as a political weapon. While such suspicions have been voiced in the past they took on a particularly aggressive tone as seen in the following quote from Stephen Harper:[34]

> I think it's a typical hidden agenda of the Liberal party...They had the courts do it for them [change the definition of marriage], they put the judges in they wanted, then they failed to appeal—failed to fight the case in court....I think the federal government deliberately lost this case in court and got the change to the law done through the back door.[35]

These accusations were disturbing—they revealed a mindset among at least some Canadians that there is a "cabal" at work at the highest levels of adjudication and decision-making in the country. This extremely cynical view of the relationship between the judiciary and other branches represents an overt politicization of the judicial process. Such an atmosphere, if unchecked, could encourage openly partisan judicial appointments.

The next Supreme Court vacancy was occasioned by the mandatory retirement of Justice Major in December 2005. Earlier in the year, the Minister of Justice announced a new appointment process designed to ensure "greater transparency and increased public confidence".[36] The process empowered an arms-length advisory group to produce a shortlist of three candidates. Except in extraordinary circumstances, the Minister of Justice and Prime Minister would recommend a candidate from the shortlist. Candidates, however, would not be subject to questioning, and the advisory group would sign confidentiality agreements promising not to divulge the candidates' names.[37]

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[33] The motion affirmed "that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps to preserve this definition of marriage in Canada." *House of Commons Debates*, No. 240 (8 June 1999) at 1560, online: <http://www2.parl.gc.ca/housechamberbusiness/chambersittings.aspx?View=J&Parl=36&Ses=1&Language=E&Mode=1>.

[34] *Supra,* note 17. See for example the accusations about Trudeau's reshaping of the Court in the 1970s.

[35] Alexander Panetta, "Harper accuses Liberals of setting up court losses on gay marriage" *Canadian Press* (4 September 2003) (ProQuest). While Harper was speaking specifically about Liberal appointments to provincial superior and appellate courts, the argument certainly would extend to the Supreme Court as well.

[36] Kristen McMahon, "Committee to examine SCC candidates" *Law Times* (11 April 2005) 1.

[37] The Honourable Irwin Cotler, "Proposal for the Reform of the Supreme Court of Canada Appointments Process" online: Department of Justice Canada <http://www.justice.gc.ca/en/news/sp/2005/doc_31432.html>.

In January 2006, a new Conservative minority government was elected. Prime Minister Stephen Harper chose to stick with the existing shortlist developed to replace Justice Major. He then instituted a dramatic change by requiring his chosen nominee—Justice Marshall Rothstein of the Federal Court of Appeal—to appear personally before a Parliamentary Committee. In addition, the names of all the short-listed candidates were released.[38]

The latest chapter in the story involves not the Supreme Court, but the Judicial Appointment Committee operating with respect to s. 96 courts. In 2006, the Conservative government instituted three important changes. First, the JACs would no longer use the traditional ranking system ("highly recommend", "recommend", and "unable to recommend"), but simply mark candidates as "qualified" and "not qualified". Second, a fourth government representative was added in the person of a member of the law enforcement community. Third, the government gave itself a working majority on the Committee by denying a vote to the judicial chairperson except in the event of a tie.

The above-noted changes ensure that the government has greater room to select candidates who will uphold the government's agenda. Perhaps the most stunning decision was to bring law enforcement personnel to the table. Calling police "a very important part of the justice system", then Minister of Justice Vic Toews said that they were "underrepresented".[39] The Prime Minister went even further:

> We want to make sure we're bringing forward the laws to make sure we crack down on crime, that we make our streets and communities safer....We want to make sure our selection of judges is in correspondence with those objectives.[40]

The implication is that judges should support the government's agenda, period. If the agenda includes law and order issues, the police who are assumed to be onside with the government have a necessary role in screening candidates. Leaving aside the reality that the majority of criminal cases arise in provincial courts not governed under s. 96 at all, it is telling that the government favoured police as opposed to, say, Crown attorneys. The current federal government apparently assumes that a legitimate factor in any judicial appointment is whether the appointment furthers the government's policies, in this case "law and order".

PART III

[38] The Rothstein hearing is canvassed more thoroughly in Part III.

[39] Paul Samyn, "Police will get input into judicial appointments, Toews says", *CanWest News* (8 November 2006) 1.

[40] *House of Commons Debates*, No. 110 (14 February 2007) at 1400, online: Parliament of Canada <http://www.parl.gc.ca/housechamberbusiness/ChamberSittings.aspx?View=H&Language=E&Parl=39&Ses=1>.

If comments such as Prime Minister Harper's inform the political context of debates over judicial appointments, it is incumbent upon all involved to ensure that the processes in place do not further inflame the situation. It is therefore instructive to evaluate more closely the two hearings that have been conducted around Supreme Court appointments.

As mentioned in Part II, the first of these hearings involved an appearance by the Minister of Justice, Irwin Cotler, before the "*Ad Hoc Committee* on Supreme Court of Canada Appointments" in August 2004. The nominees themselves did not appear. Instead the Minister of Justice agreed to discuss the process and the nominees, a sort of interrogation by proxy. Committee members were given one day's notice of who the nominees were. The Minister read a prepared statement and took questions.[41]

Parliamentarians complained, reasonably, I think, that the process was simply not good enough to meet any of the broader criticisms around appointments. The hearing clearly was not designed to facilitate greater involvement by the legislative branch. The one-day notice period strains any contrary conclusion. As well, it was obvious that Committee members would have no influence on the ultimate decision, as the Minister of Justice insisted that constitutional constraints gave the Committee a strictly advisory role.[42] The *pro forma* nature of the hearing gave it relatively low value. Though the Minister stressed that the two women were just "nominees", the conclusion was foregone—following the hearing the Minister would submit the women's names to the Prime Minister, who would appoint them.[43] Indeed, in response to a question about what kind of "advice" the Committee could possibly give to make the Minister change his mind, Cotler said that any such information would have to be of such a nature as to "disqualify" the candidates:

> I would have to say that the compelling expert evidence that we have after compelling deliberation—would have to say that the candidates' credentials speak for themselves....And in this instance I cannot foresee [circumstances where their qualifications could possibly be challenged].[44]

Additionally, the content of the hearing was thin.[45] The Minister outlined the candidates' qualifications and the process in very general terms, declining to describe how the two candidates were chosen from what was obviously a large and

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[41] *Report of the Interim Ad Hoc Committee on the Appointment of Supreme Court* (Ottawa: *Ad Hoc* Committee on the Appointment of Supreme Court Judges, 2004), online: Department of Justice Canada <http://www.justice.gc.ca /en/dept/pub/scc_courtsup/> [*Interim Report* (2004)].

[42] *Supra,* note 15. As already noted, the argument positing a constitutional as opposed to statutory restraint does not seem to be correct.

[43] This is obvious since there clearly were more than two suitable candidates, yet only two names were disclosed.

[44] To be sure, the Committee Chair intervened to assure the Committee that it could, if it so chose, reach a different conclusion about the candidates.

[45] Proceedings of the Interim *Ad Hoc* Committee on the Appointment of Supreme Court Judges (August 25, 2004), video recording on file ["*Ad Hoc* Committee"].

meritorious pool.[46] His discussion of qualifications was limited to a conventional listing of the two women's (impressive) careers, and a brief recitation of a couple of important decisions each had written.[47] The Committee seemed loath to venture too deeply into a discussion of either candidate, notwithstanding the previous attacks on the Government by the Opposition and the multi-partisan composition of the

[46] Cotler did not specify how many candidates were considered, but noted the "embarrassment of riches" in terms of suitable Ontario candidates. He said that this made the choice "very difficult", but did not say how he ultimately resolved the difficulty.

[47] With respect to Justice Abella, Cotler said this:

> During her long tenure on the Bench, she has demonstrated an expertise in diverse areas of both public and private law, including constitutional, administration and family law as exemplified in the following seminal decisions. In the area of family law, for example, Justice Abella, writing for a unanimous panel of the Court of Appeal in *Miglin v. Miglin*, is credited for striking a judicious and compassionate balance between privity of contract and the objective that spouses share equitably in the distribution of the resources upon family breakdown. In *Francis v. Baker*, Justice Abella's unanimous judgment and pioneering approach to child support was upheld by the Supreme Court of Canada, as was the judgment in *Miglin*.
>
> Her body of constitutional and equality decisions have been characterized as "making an enormous contribution to the development of a rich and substantive—and in many ways uniquely Canadian—approach to equality" such as her decisions in the *Essex County Board of Education* case in the matter of minority language educational rights and the protection of the French language; and the *Rosenberg* case, where her unanimous opinion has been upheld in every major Charter decision since, including those rendered by the Supreme Court of Canada.

He referred to Justice Charron's jurisprudence as follows:

> Even as a trial judge, she authored a series of influential judgments. For example, in a case called *R. v. Fringe Product*, she delivered reasons upholding the obscenity provisions of the *Criminal Code* that were later quoted and relied on by the Supreme Court in the famous case of *R. v. Butler*. In a case called *R. v. Olscamp*, she wrote on an accused's access to expert witnesses.
>
> Her reasoning in that case demonstrated a clear appreciation of the nature of the criminal process, and the effect her decision might have on that process. The compelling nature of her reasoning has been recognized by other courts, including appellate courts in other jurisdictions as well as the Supreme Court of Canada.
>
> As a judge on the Ontario Court of Appeal, her influence has continued to grow as she has authored decisions on some of the most difficult evidentiary issues facing criminal courts including expert evidence (*R. v. K.*); similar fact evidence (*R. v. Handy*); hearsay evidence (*R. v. Perciballi*); and wiretap evidence (*R. v. Shayesteh*). These are the sort of issues that determine, *inter alia*, whether an accused has received a fair trial. She has demonstrated time and again that she has a keen appreciation of what is necessary to ensure the integrity and fairness of the criminal process and the right to a fair trial.
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> The Honourable Irwin Cotler, "Speaking Notes for Irwin Cotler, Minister of Justice and Attorney General of Canada on the Occasion of a Presentation to the *Ad Hoc* Committee on the Supreme Court of Canada" online: Department of Justice Canada <http://www.justice.gc.ca/en/news/sp/2004/doc_31212.html>.

Committee.[48]

Perhaps the government did all it could under the circumstances. Several experts had urged that hasty changes would be far worse than the status quo.[49] The Supreme Court vacancies were unanticipated. Requiring the Court to operate for any length of time with only seven justices was unacceptable.

Still, one is hard-pressed to describe the August 2004 hearing as a success. For those opposed to radical changes, the release of the candidates' names was risky in light of the extremely negative comments floating about in regard to a Liberal plan to stack the Court for the upcoming marriage reference. Permitting MPs to question the Minister about the candidates' qualifications raised the risk that improper questions might be posed. The mere asking of such questions, it was argued, could cause unacceptable damage to the process and to the candidates.[50] At the same time, the process was unsatisfactory for those wishing to make substantive changes. Conservative Party members called the proceedings a sham because the nominations were understood to be a done deal.[51] This could explain why even those members who (it can be safely assumed) opposed the particular candidates largely left them alone and targeted their frustrations on the Minister. All that being said, perhaps we have too quickly dismissed the core idea behind the August 2004 hearing and the process may merit further consideration.

The question of what goals are served by a judicial hearing crystallized during the Rothstein nomination in early 2006. As described in Part II, above, Justice Rothstein was selected by Prime Minister Harper from a list developed in accordance with a novel Supreme Court appointment procedure. Harper's distinctive contribution was to require Rothstein to appear before a Parliamentary committee.

Michael Plaxton describes Justice Rothstein's hearing as long on style but short on substance.[52] Due, perhaps, to the unusual sequence of one government choosing a candidate from a list largely compiled by a former government, and the awareness that they were engaged in a precedent-setting exercise, Parliamentarians were restrained in their questioning. Whether they sacrificed obtaining additional and more fruitful information is a point on which people may legitimately disagree.

I have a more favourable impression of the Rothstein hearing. Justice Rothstein entertained questions on a wide variety of subjects, including Aboriginal rights and

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[48] There were references throughout the hearing to the fact that the candidates' qualifications were beyond question, and that the *Ad Hoc* Committee accepted them as suitable. These references were not challenged by any member.

[49] This point was made by several of the experts appearing before the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness in late March and early April.

[50] Julian Porter, a bencher of the Law Society of Upper Canada who was invited to the August hearing, stressed this point.

[51] *Ad Hoc* Committee, *supra* note 45 (interventions by Peter McKay and Vic Toews).

[52] Michael Plaxton, "The Neutrality Thesis and the Rothstein Hearing" (2008) 58 U.N.B.L.J. 92.

their relationship to the *Charter*; the appropriate treatment of lower courts by appellate ones; the importance of precedent; the increasing role played by non-legal experts in complex litigation; the wisdom of relying on foreign judgments and international law; and the role of personal experience and biases in judging.[53] One thing that became especially clear was Rothstein's preference for judicial restraint and his comfort in deferring to Parliament's judgment:

> [T]he important thing is that judges, when applying the [*Charter*], have to have recognition that the statute they're dealing with was passed by a democratically elected legislature, that it's unlikely the legislature intended to violate the *Charter*. Sometimes it happens. But they have to be aware of that, and therefore they have to approach the matter with some restraint. But the most important thing is that they apply a rigorous and thorough analysis, and if they do that, then I would say they are doing their job. If they depart from that, it might be a different matter.[54]

The most frustrating aspect of the hearing was that the candidate's answers were confined by the time limits imposed on individual members of the Committee. The Chair cut off both questioners and the respondent numerous times, no doubt in the interest of fairness but sometimes at the expense of a substantive dialogue.[55] It seems to me that time concerns are the weakest reason for limiting questions or answers.[56] If future candidates are to be interviewed in a public forum, it would be better for questions to be submitted and vetted in advance, perhaps even circulated to the candidate. The candidate should be permitted as much time as required to develop his or her answers. In addition, questioners should have some leeway to press the candidate in the event they feel that an issue has not been fully addressed.

PART IV

Returning to the issue posed at the beginning of this article: how does what judges do influence our choice of a rational appointment model? Despite the variety of opinions on that point, there have been some lines that (until very recently) all seem to agree ought not to be crossed. Most significantly, an appointment process that required a judge to promise to decide a specific case in a particular way would not be acceptable. Such pronouncements from a candidate would utterly distort the judicial function. If the judicial role means anything, it must mean a willingness to hear argument about an issue before reaching a conclusion. If another branch of government has pre-judged the issue and determined the *only* appropriate (i.e. constitutionally consistent) position, then it should be prepared to defend that position regardless of what the judiciary says. If the standard of appointment is a candidate's predilection for deciding future cases, it is unclear why we should care

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[53] *Rothstein Hearing*, *supra* note 9 at 1400, 1505, 1435, 1535, 1555 and 1600.

[54] *Ibid.* at 1420.

[55] Plaxton, *supra* note 52.

[56] Indeed, MPs agreed to end the questioning after the second round.

about the Court's decisions at all.

The logical end point of the "judicial activism" criticism is that the judiciary should no longer have the final word with respect to whether particular laws and policies respect the *Constitution*. But that would corrupt the concept of separate and distinct branch functions that is essential to our constitutional order. That recognition may partially explain why all MPs at hearings thus far have appeared to accept the notion that it is inappropriate to ask a candidate about her likely vote on an issue which might come before her. That recognition is also why Harper's blatant avowal of "law and order" as a defining factor in future judicial appointments is so disturbing.

If judicial candidates cannot be assessed according to what their future decisions might be, what bases of evaluation remain? Two issues arise. First, what materials should be considered? Second, what mechanisms should be employed? Under the current scheme, candidates for appointments to s. 96 courts and to the Supreme Court are not interviewed—why? And, finally, what have we learned about holding public hearings?

With regard to the first issue, judicial candidates' legal opinions and writing should absolutely be subject to substantive review prior to appointment. The quality of someone's legal reasoning is an essential predictor of success in the judicial function. In addition, a candidate should be assessed on his or her understanding of the relationship between the courts and the other branches of government in light of the obligations imposed by the *Constitution* of Canada. That is to say, one must be satisfied that a candidate is willing to review legislation and strike it down if necessary. The willingness to perform constitutional review has been obscured in all the froth and fury over judicial activism. Too often, activism arguments are distorted by their dependence on substantive opposition to particular decisions. A candidate's perspective on the *Constitution* is important, but the real issue is different from how activism critics tend to frame it. Far from appointing judges who are reluctant to overrule legislation, we must appoint judges who possess the willingness and sense of duty to uphold the *Constitution even if* that means occasionally disrupting the expressed wishes of a legislative majority.

How is such information to be ascertained? Since so many candidates have prior judicial experience, their opinions and writings frequently provide a good basis for assessment. However, not all candidates have had the opportunity to write treatises on judicial method or constitutional theory. As well, there is a long-standing tradition in Canada of appointing prominent members of the bar to all levels of court. For these candidates, reliance on previously written work is less useful. The appointment process must account and correct for such deficiencies.

While the U.S. model is frequently held up as a prime example of what to avoid, I believe that in at least one respect it might prove instructive. Prior to a hearing before the Senate Judiciary Committee, the President's nominee completes an extensive questionnaire which is a cross between a *curriculum vitae* and an examination paper on constitutional theory. This questionnaire is made public and

forms a basis for at least some of the Committee's questions. The questionnaire came into particular focus in 2006, during the aborted nomination of Harriet Miers, whose answers to the questionnaire were generally agreed to be below the level expected for a Supreme Court justice. Importantly, the document supported concerns that the President had based his decision on the candidate's personal qualities rather than professional qualifications.[57] Those concerns became difficult to rebut once the questionnaire was disseminated.

It is a simple matter to ask judicial candidates to provide some sort of written account of their perceptions of the judicial role; of the constitutional theory they would employ; how to achieve a balance between *stare decisis* and legal rules requiring change; or any number of other matters. Questions can be formulated in a crisper, more direct way than will arise in a case, and can provide entry-points for those without judicial experience. As well, given the importance for judges of *written* expression and reflection, it seems better all-around to have candidates provide a written response to questions. It seems likely to provide more thoughtful responses than an oral interview.

As straightforward as such a step may appear, it is a radical one in a system where candidates are not even interviewed. That brings us to the second issue: the appropriate method of determining a candidate's suitability for a high judicial position. Traditionally, assessments are made at some distance from the candidates: review of work-product that is already available (opinions, articles), and "reference checks" with a variety of persons in a position to have formed an opinion. As a matter of protocol, the decision appears to be made without anyone actually talking to the candidate. In 2004, former Supreme Court Justice Claire L'Heureux-Dubé told the Parliamentary Committee that she did not *know* that she was being considered (though she harboured suspicions) until Prime Minister Mulroney called to offer her the job.[58]

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[57] Miers was a long-time associate and close personal friend. She had never been a judge.

[58] Federal Parliament, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, 37th Parl., 3d sess., No. 8 (30 March 2004) at 1620:

> **Mr. Chuck Cadman:** Thank you, Mr. Chair.
>
> This is a personal question, but it's not very often I get to question a judge. In your own personal case, would you mind letting us know at what point in the process you became aware that you were being considered as a candidate? When you were appointed, how were you informed of that, and who did it?
>
> **Hon. Claire L'Heureux-Dubé:** I'll tell you very frankly. Everybody knows. Rumours were circulating at the court. I was at the court of appeal, and the judges used to lunch together. Somebody said, "Tonight is the night someone will be called." I didn't know anything about that. My name had been circulated, with others. So I said, "Oh, I don't want to go so I'm going to hide in my office"—which I did.
>
> I stayed in my office until about 11 o'clock. I was so happy I didn't get the call—and then I got the call from Mr. Mulroney. That was it. That was all I knew.

Such a strategy may be intended to depoliticize the process as much as possible by keeping the candidates out of the mix. But it also appears that people are simply unused to the idea of direct discussions with candidates. The reluctance is likely rooted in a particular view of the judiciary. The subtext is that it is unseemly for candidates for judicial appointment to "compete" for a position: judges, and potential judges, should be untainted by ambitions for higher office. There is great discomfort with the idea of forcing a candidate to declare an actual interest in the job at a stage when several persons are being considered. A related concern is that it is simply too embarrassing for a candidate to be publicly identified as such, and then rejected. On the other hand, it appears that people generally know who the candidates are even if such knowledge is confined to rumours.[59]

We are not yet in a position to predict with confidence whether good candidates would be frightened off by a more transparent process. It seems reasonable, though, that the process should involve *some* kind of personal interaction. In the latest round of Supreme Court appointments the three names on the final short list were made public.[60] There was no indication that the mere mention of one's name on such a list was sufficient to make other candidates bow out of the process. Certainly, Justice Rothstein was willing to appear before the committee although it was not his personal preference to do so.[61]

The reluctance to interact personally with candidates is difficult to justify except on an outmoded understanding of the judiciary. Interaction can include interviews as well other means such as written submissions on relevant topics, but in my view it is no longer possible to defend a process that takes place largely without the participation of the candidates. Reference checks cannot always provide an adequate substitute for face-to-face discussion. Such methods also leave sensitive information to the contingencies of the particular third parties invited (or motivated enough) to participate. An additional concern is whether a reliance upon third-party opinions disadvantages candidates from groups traditionally under-represented in society.

What about hearings? It is here that one encounters the most strenuous objections, some of which have already been mentioned but which bear repeating: that any sort of public hearing for a judicial candidate unacceptably risks violating the independence of the judiciary; that politicians will be unable to resist partisan posturing in their participation in such a process; that hearings cannot provide any real information, because candidates may not properly answer substantive legal questions; that hearings provide no real control in any event, because a savvy

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[59] *Ibid.*

[60] The two candidates in addition to Justice Rothstein were Justice Constance Hunt and Professor Peter McCormick.

[61] Rothstein Hearing, *supra* note 9 at 1435. Former Justice L'Heureux-Dubé has also said that she would have been prepared to at least submit to an interview prior to being offered the job. Other judges have indicated that they would not have been willing to submit to questions.

candidate will be able to construct palatable answers that have no bearing on her real inclinations; that the best candidates simply will not submit to a hearing; and that the prospect of a candidate being publicly rejected is simply unacceptable.

A number of these concerns have already been discussed. The convention against asking substantive questions has, thus far, been respected. At the Rothstein hearing, an admonition against such questions was set out and explained by Professor Peter Hogg and Parliamentarians generally stayed well within bounds. For example, Justice Rothstein easily deflected the following question about the gun registry:

> [Translation]
>
> **Mr. Réal Ménard:** ...The Supreme Court is often called upon to rule on Criminal Code or criminal law questions. In my opinion, courses in this field are among the most interesting of those that make up the curriculum in law school, after courses in constitutional law, of course.
> Do you believe the existence of a public gun registry promotes the sound administration of justice?
>
> [*English*]
>
> **Hon. Marshall E. Rothstein:** Monsieur Ménard, I know the question of the gun registry is a controversial one, and I must say that I think it's really a political question, a question of policy. If I can revert to what Ms. Barnes asked me earlier....Please, I don't mind the question. It's just that you must understand that it's not my area; it's your area to determine those policies. If disputes are brought to a court, that's when we get involved, but at the policy-making level we respect that it's the legislative branch.[62]

Later on, the Chair intervened, quite appropriately in my view, when another member asked Justice Rothstein whether the Notwithstanding Clause "is a positive element in Canadian democracy".[63]

However, there is a broader worry that the tone of such hearings could degenerate. This is a fair concern. We must be careful not to assume that the generally positive tone of the Rothstein hearing would necessarily be replicated in future proceedings. Justice Rothstein's name was advanced in unusual circumstances: vetted by one government, selected by another. It is not unfair to notice that he is in the mainstream in terms of his background, gender, and race. He hailed from the Federal Court of Appeal, where he did not often have cause to issue especially controversial decisions.[64] To state the issue more bluntly: would someone like Justice Abella have been afforded the same respect and courtesy? The overall

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[62] *Rothstein Hearing*, *supra* note 9 at 1400.

[63] *Charter*, s. 33 (notwithstanding clause); Rothstein Hearing, *supra* note 9 at 1545.

[64] But see *Harvard College v. Canada (Commissioner of Patents)*, [2000] 4 F.C. 528, 189 D.L.R. (4th) 385 overturned, 2002 SCC 76, 4 S.C.R. 45 (patentability of higher life forms).

tenor of the Ad Hoc Committee in 2006 was collegial, but that has not been the trend in Parliament. Parliamentarians conducted themselves appropriately vis-à-vis the one candidate they have been able to question, but the jury is still out on the risks of expecting judicial nominees to submit to public questioning by Parliamentarians.

With respect to whether hearings can provide useful information, I think that the Rothstein hearing provided significant educational benefit to those who are not familiar with appellate court decision-making, which incidentally would include many lawyers. Did it, though, provide sufficient additional information to assist anyone in evaluating the suitability of Justice Rothstein himself? I would have to say, probably not. Justice Rothstein was a prolific judge prior to his appointment to the Supreme Court.[65] He did not address any question in greater detail than one would expect to find in his written opinions. The one exception was his repeated and expressed approval for judicial restraint in constitutional review. However, even if one accepts my suggested criterion of willingness to perform constitutional review, that factor would not have been enough to halt his nomination. It might, though, be a factor of which a committee or decision-maker could take cognizance at the stage where several candidates are being considered.

The justification for hearings must be the value of a public discussion of judicial candidates that focuses on the particular qualities they will bring to the substantive task of interpreting and applying the law. This requires review and evaluation of the candidates' approach to the central question of any court of review: the development of legal principles. Given current political interests, interpretative questions focus inevitably on the *Charter*, but this is undoubtedly a mistake—the inquiry should encompass other areas.

A more difficult question is the degree to which hearings should influence the ultimate decision. The answer will depend on the primary purpose of a hearing: to enlarge the scope of influence into the appointment process itself; to educate the public about the judicial function; or to "introduce" a particular candidate to the public. The first purpose has as its underlying principle the idea that judicial nominees should be subject to *real* review by the legislative branch, meaning that a particular nomination can be ultimately abandoned because of legislators' views. This, it seems, is one of the biggest fault lines running through the entire debate, as it raises the spectre of "American-style" hearings, where the stakes are particularly high because of the possibility of rejection. If public review is not meant to "winnow out" certain candidates (if there are more candidates than positions) or actually reject them (if there is only one candidate), its point must be something other than enlarging the process by which appointments occur. It is in this context that the second and third possible goals become more prominent.

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[65] *Rothstein Hearing*, *supra*, note 9 at 1410. Joe Comartin set out Justice Rothstein's judicial history:

> My notes show that during the seven years you were on the Federal Court, you wrote 578 decisions, and when you were on the Federal Court of Appeal, you wrote 324 decisions. In addition to that, you've written decisions on the military side of it. My addition shows that you're getting close to a thousand decisions in your history.

I said at the beginning of this article that I am willing to be persuaded that public hearings of judicial nominees may be a good thing. If the 2006 hearing was explicitly tied to a role for Parliament in influencing the Prime Minister's ultimate decision, it would have constituted a rational step by the government.[66] The single most important criterion for legislative decision-making is that it be open and transparent. Reserving a particular role for *Parliament* should, therefore, involve a public process. Of course, that does not mean that the hearing itself was particularly well-suited to permitting Parliamentarians to exercise such influence or that such influence is desirable.

If public hearings are *not* grounded on an explicit link to greater Parliamentary input, the possible educative and public relations benefits of hearings may not be significant enough to justify holding them. In particular, it is not at all evident that these goals require *potential* candidates for the Supreme Court to submit to questioning in a public forum. The educational value of Justice Rothstein's comments did not derive from the dynamics of his appointment hearing, but from their scope and content. There may be ways to achieve these goals without using judicial nominees as the instrument. For example, in the ensuing debate over the Rothstein hearing, it is regrettable that the intermediary step attempted in August, 2004 (where the Justice Minister reported to Parliament) appears to have faded away. Notwithstanding the particular deficiencies in 2004, such a hearing could prove useful *if* sufficient information was circulated to the Committee within a reasonable period of time *and* if the Executive was prepared to address more clearly *why* one person was selected from among many.[67] If we conclude that the risks of a personal appearance by the candidate are too high, the prospect of a different kind of hearing such as the one preceding the Abella/Charron nominations merits further consideration.

To conclude, the road ahead is mined with controversy, but we must traverse it to reach a more cogent system of judicial appointments. I have pointed out defects with the current system, chiefly the reluctance to engage directly with candidates, the obscurity surrounding the reasons why *particular* candidates are chosen and the possibility that some candidates may not have an adequate record on which to evaluate their suitability for the key appellate role: the articulation of legal principles. However, such engagement need not be in the harsh glare of public scrutiny—scrutiny is most easily justified and accommodated in the context of a prior decision to bring the legislative branch to the table. There have been moves in this direction in the recent past, but they are clouded by the current federal government's suspicion of, and hostility to, the judicial role itself in a system marked by constitutional norms and parliamentary limits. The lack of clarity around the most important criteria for our highest judges is unacceptable and demands sustained and serious thought. Hasty

[66] However, the Prime Minister never indicated that this was the case. The *Ad Hoc* Committee produced no (accessible) report on the Rothstein hearing, and it did not have a veto.

[67] See Part III, above, for a discussion of the deficiencies in 2004.

and ill-conceived changes may prove impossible to reverse in the event that they make the current situation worse, not better.